

Chapter CLIX.¹

TIME, PLACES, AND MANNER OF ELECTION.

1. Provisions of Constitution and statutes. Sections 66-71.
 2. The Federal corrupt practices act. Sections 72-78.
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66. A Federal law fixes the time of election of United States Senators.

The act of June 4, 1914,² makes the following provision as to time of election of Senators:

At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the fourth day of March next thereafter.

67. A Federal law requires sworn statements by candidates for Congress of contributions received, amounts expended, and promises made for the purpose of influencing the result of elections.

The amount of money which may be expended by a candidate for Congress in his campaign for election is limited by law.

No Member of Congress or candidate for Congress may solicit or receive political contributions from Government employees.

The act of February 28, 1925,³ known as the Federal corrupt practices act, 1925, provides:

Every candidate for Senator shall file with the Secretary and every candidate for Representative, Delegate, or Resident Commissioner shall file with the Clerk not less than ten nor more than fifteen days before, and also within thirty days after, the date on which an election is to be held, a statement containing, complete as of the day next preceding the date of filing—

(1) A correct and itemized account of each contribution received by him or by any person for him with his knowledge or consent, from any source, in aid or support of his candidacy for election, or for the purpose of influencing the result of the election, together with the name of the person who has made such contribution;

(2) A correct and itemized account of each expenditure made by him or by any person for him with his knowledge or consent, in aid or support of his candidacy for election, or for the purpose of influencing the result of the election, together with the name of the person to whom such expenditure was made; except that only the total sum of expenditures for items specified in subdivision (c) of section 309 need be stated;

¹ Supplementary to Chapter XVII.

² U. S. C. 1.

³ U. S. C. 2 et seq.

(3) A statement of every promise or pledge made by him or by any person for him with his consent, prior to the closing of the polls on the day of the election, relative to the appointment or recommendation for appointment of any person to any public or private position or employment for the purpose of procuring support in his candidacy, and the name, address, and occupation of every person to whom any such promise or pledge has been made, together with the description of any such position. If no such promise or pledge has been made, that fact shall be specifically stated.

The Federal corrupt practices act, 1925, also limits the amount of campaign expenditures which may be made, as follows:

Unless the laws of his State prescribe a less amount as the maximum limit of campaign expenditures, a candidate may make expenditures up to—

(1) The sum of \$10,000 if a candidate for Senator, or the sum of \$2,500 if a candidate for Representative, Delegate, or Resident Commissioner; or

(2) An amount equal to the amount obtained by multiplying three cents by the total number of votes cast at the last general election for all candidates for the office which the candidate seeks, but in no event exceeding \$25,000 if a candidate for Senator or \$5,000 if a candidate for Representative, Delegate, or Resident Commissioner.

Money expended by a candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or expended for his necessary personal, traveling, or subsistence expense, or for stationery, postage, writing, or printing (other than for use on bill boards or in newspapers), for distributing letters, circulars, or posters, or for telegraph or telephone service, shall not be included in determining whether his expenditures have exceeded the sum fixed by paragraph (1) or (2) as the limit of campaign expenses of a candidate.

It is unlawful for any candidate to directly or indirectly promise or pledge the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support in his candidacy.

The act further provides:

It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected, as Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

68. Decision of the Supreme Court that the corrupt practices act prohibiting Members of Congress from accepting certain contributions from Federal employees is constitutional.

The phrase “any political purpose” in the Federal corrupt practices act is construed to include a primary election.

On February 24, 1930,¹ the Supreme Court of the United States handed down an opinion in the case of the United States *v.* Wurzbach. Mr. Justice Oliver Wendell Holmes delivered the opinion of the court, in which all justices concurred.

Mr. Harry M. Wurzbach, a Representative in Congress from the fourteenth congressional district of the State of Texas, was charged with accepting contributions from Federal officeholders during his primary campaign. Mr. Wurzbach defended the suit on the ground that the contributions were voluntarily made and that the Supreme Court in the case of the United States *v.* Newberry,² had ruled that Congress could not regulate the conduct of primaries.

¹Vol. 280 U. S., P. 396.

²See sec. 7400 of this work.

The opinion is as follows:

The respondent was indicted under the Federal corrupt practices act, 1925; act of February 28, 1925, chapter 368, section 312; 43 Stat. 1053, 1073 (U. S. Code, title 18, sec. 208); on charges that being a Representative in Congress he received and was concerned in receiving specified sums of money from named officers and employees of the United States for the political purpose of promoting his nomination as Republican candidate for Representative at certain Republican primaries. Upon motion of the defendant the district court quashed the indictment on the ground that the statute should not be construed to include the political purpose alleged, and, construed to include it, probably would be unconstitutional. The United States appealed.

The section of the statute is as follows:

"It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned, in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person."

This language is perfectly intelligible and clearly embraces the acts charged. Therefore, there is no warrant for seeking refined arguments to show that the statute does not mean what it says unless there is some reasonable doubt whether so construed it would be constitutional—the doubt that was felt by the court below.

The court construes the statute to extend to State primaries and to include party elections. The opinion continues:

The doubt of the district court seems to have come from the assumption that the source of power is to be found in Article I, section 4, of the Constitution concerning the time, place, and manner of holding elections, etc.; and from the decision that the control of party primaries is purely a State affair. (*Newberry v. United States*, 256 U. S. 232). But the power of Congress over the conduct of officers and employees of the Government no more depends upon authority over the ultimate purposes of that conduct than its power to punish a use of the mails for a fraudulent purpose is limited by its inability to punish the intended fraud. (*Badders v. United States*, 240 U. S. 391.)

It hardly needs argument to show that Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment. If argument and illustration are needed they will be found in *Ex parte Curtis* (106 U. S. 371, s. c. 12 Fed. 824). See *United States v. Thayer* (209 U. S. 39, 42). Neither the Constitution nor the nature of the abuse to be checked requires us to confine the all-embracing words of the act to political purposes within the control of the United States.

It is argued at some length that the statute, if extended beyond the political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include Representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by some one whom it concerns.

As to the interpretation of the phrase "political purposes" the court further holds:

The other objection is to the meaning of "political purpose." This would be open even if we accepted the limitations that would make the law satisfactory to the respondent's counsel. But we imagine that no one not in search of trouble would feel any. Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does

so it is familiar to the criminal law to make him take the risk. (*Nash v. United States*, 229 U. S. 373.)

It is said to be uncertain which of several sections imposes the penalty, and therefore uncertain what the punishment is. That question can be raised when a punishment is to be applied. The elaborate argument against the constitutionality of the act if interpreted as we read it, in accordance with its obvious meaning, does not need an elaborate answer. The validity of the act seems to us free from doubt.

Judgment reversed.

69. The Supreme Court invalidated, as unconstitutional, a Federal statute requiring sworn statements of receipts and expenditures and limiting the amount of money which might be used in procuring nomination as candidate for Representative or Senator.

The law of June 25, 1910, as amended by the act of August 19, 1911,¹ and commonly known as the corrupt practices act, provided:

No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides: *Provided*, That no candidate for Representative in Congress shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding five thousand dollars in any campaign for his nomination and election; and no candidate for Senator of the United States shall give, contribute, expend, use, or promise any sum, in the aggregate exceeding ten thousand dollars in any campaign for his nomination and election:

Provided further, That money expended by any such candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or for his necessary personal expenses, incurred for himself alone, for travel and subsistence, stationery and postage, writing or printing (other than in newspapers), and distributing letters, circulars, and posters, and for telegraph and telephone service, shall not be regarded as an expenditure within the meaning of this section, and shall not be considered any part of the sum herein fixed as the limit of expenses and need not be shown in the statements herein required to be filed.

The act further required sworn statements by candidates of expenditures incurred both in primary and in general elections as follows:

Every person who shall be a candidate for nomination at any primary election or nominating convention, or for election at any general or special election, as Representative in the Congress of the United States, shall, not less than ten nor more than fifteen days before the day for holding such primary election or nominating convention, and not less than ten nor more than fifteen days before the day of the general or special election at which candidates for Representatives are to be elected, file with the Clerk of the House of Representatives at Washington, District of Columbia, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made, for the purpose of procuring his nomination or election.

Similar statements are also required after the election.

¹2 U. S. C. 241 et seq.

In passing upon the constitutionality of this act, the Supreme Court of the United States, in an opinion rendered May 2, 1921,¹ in the case of *Newberry*² *v.* The United States, held:

We can not conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the State and infringe upon liberties reserved to the people.

On February 24, 1923,³ in the House of Representatives Mr. C. W. Ramseyer, of Iowa, in discussing this decision, quoted the following:

The law committee of the national Republican congressional committee had submitted to it the following question: "Under existing Federal law is a candidate for Representative in Congress at a primary election required to file sworn statements of his primary campaign expenditures with the Clerk of the House of Representatives?"

The Federal corrupt practices act⁴ limits the amount of money that may be given, contributed, expended, used, or promised, or caused to be given, contributed, expended, used, or promised by a candidate for Representative in Congress or for Senator of the United States in procuring his nomination and election to a sum not in excess of the amount he may lawfully give, contribute, expend, or promise under the laws of the State of his residence, with a proviso that in the case of a candidate for Representative the amount shall not exceed \$5,000, and in the case of a candidate for Senator, shall not exceed \$10,000 in any campaign for nomination and election. The Federal corrupt practices act, as amended, further requires the filing of sworn statements by a candidate for Representative in Congress or for Senator of the United States of expenditures incurred both in the primary election and in the general election.

If Congress has the power to enact such legislation, it is based on the following constitutional provisions:

"ARTICLE I. SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

"SECTION 2. The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors of each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. * * *"

"Section 3 is superseded by the seventeenth amendment, which provides. * * *"

"ARTICLE XVII. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, * * * The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the state legislature. * * *"

"SECTION 4. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators. * * *"

"SECTION 5. Each House shall be the judge of the election, returns and qualifications of its own Members. * * *"

The power of Congress to enact legislation regulating primary elections was never decided by the Supreme Court until in the case of *Truman H. Newberry et al., plaintiffs in error, v. the United States of America*. This case was decided by the Supreme Court May 2, 1921.

In the *Newberry* case the plaintiffs in error were found guilty of conspiracy to violate section 8 of the act of June 25, 1910, as amended by the act of August 19, 1911, in the Federal district court of Michigan.

¹ 256 U. S. 232.

² See sections 7396-7400 of this work.

³ Fourth session Sixty-seventh Congress, Record, p. 4567.

⁴ Act of June 25, 1910, Stat. 822 as amended by act of August 19, 1911, 37 Stat. 25, 28.

This case was reversed by the Supreme Court of the United States on the 2d day of May, 1921, On the ground that the grant of power on Congress to regulate the "manner of holding elections" under Article I, section 4, of the Constitution did not bestow on Congress the authority to control party primaries or conventions for designating candidates. That is, the majority of the court seem to hold that the power to regulate the "manner of holding elections" is limited to general elections and that there is no power to regulate the manner of holding primary elections or party conventions.

If there were nothing to consider in this case, except the conclusion of the majority of the court, we would have no hesitancy in answering in the negative the question submitted to us. This is a five-to-four decision. Mr. Justice McReynolds wrote the opinion of the majority. In this opinion Mr. Justice McKenna concurred with a reservation as follows: "Mr. Justice McKenna concurs in this opinion as applied to the statute under consideration, which was enacted prior to the seventeenth amendment; but he reserves the question of the power of Congress under that amendment."

What would have been Mr. Justice McKenna's conclusion if the seventeenth amendment had been adopted prior to the enactment of the corrupt practices act and amendments thereto? Furthermore, the plaintiff in error—Newberry—was a candidate for the Senate and the seventeenth amendment applies only to Senators, and Mr. Justice McKenna "concurs in this opinion as applied to the statute under consideration, which was enacted prior to the seventeenth amendment."

As the seventeenth amendment applies to the Senate, so Article. I, section 2, of the Constitution applies to the House of Representatives. Article I, section 2, was a part of the Constitution prior to the enactment of the corrupt practices act in question. If the plaintiff in error had been a candidate for the House of Representatives there would have been no excuse for Mr. Justice McKenna's qualified concurrence and reservation; and then, instead of having a court divided five to four against the constitutionality of the act, the result might have been five to four in favor of the constitutionality of the act. The qualified concurrence and reservation of Mr. Justice McKenna make this decision of the Supreme Court at best a fifty-fifty proposition when applied to a candidate for Representative in Congress at a primary election.

Therefore, we conclude, and wisdom and prudence dictate, that a candidate for Representative in Congress at a primary election should file sworn statements of his campaign expenditures with the Clerk of the House of Representatives as required by the act of June 25, 1910, as ended by the act of August 19, 1911.

Respectfully submitted this 21st day of March, 1922.

C. W. RAMSEYER,
WM. WILLIAMSON,
E. O. LEATHERWOOD,

Law Committee.

In conformity with this theory, candidates for Congress continued to file such statements until the repeal¹ by the Federal corrupt practices act, 1925, of the act of June 25, 1910 and enactment amendatory thereto.

70. The application of provisions of the corrupt practices act to party primaries.

The power of Congress to enact legislation relative to campaign receipts and expenditures in primary and general elections affirmed.

On February 24, 1930,² the Supreme Court rendered a decision sustaining provisions of the corrupt practices act involving the power of Congress to enact legislation relative to the collection and disbursement of money for political purposes, and holding that neither the Constitution nor the nature of the abuse to be checked re

¹ 43 Stat. L., p. 1070.

² U. S. v. Wurzbach, 280 U.S. 306.

quire that the words of the act be confined to political purposes within the control of the United States.

In this case, the respondent was indicted under the Federal corrupt practices act of 1925, on charges that being a Representative in Congress he received, and was concerned in receiving, specified sum of money from named officers and employees of the United States for the political purpose of promoting his nomination as candidate for Representative. Upon motion of the defendant the District Court quashed the indictment on the ground that the statute should not be construed to include the political purpose alleged. The Supreme Court held that a Representative in Congress who receives or is concerned in receiving money from officers and employees of the United States for the political purpose of promoting his nomination at a party primary, as a candidate for reelection, is guilty of the offense as defined by the Federal corrupt practices act.¹

71. The law requiring statements by candidates of expenses incidental to election to House or Senate does not provide for their publication.

On April 17, 1913,² when the Speaker laid before the House the reports of various officers of the House, Mr. Victor Murdock, of Kansas, moved that the Clerk of the House be directed to include in his printed report statements by Members and national political committees relating to campaign contributions and expenditures.

Thereupon Mr. Thomas W. Hardwick, of Georgia made a question of order against the motion.

The Speaker³ sustained the point of order.

72. The Senate election case of Ford v. Newberry, from Michigan, in the Sixty-seventh Congress.

Instance of a contest inaugurated in the Senate by petition, and form of petition.

Investigation of the right to a seat in the Senate can only be made by the Senate to which the person whose title is attacked has been elected.

On December 14, 1918,⁴ in the Senate, Mr. Charles E. Townsend, of Michigan, presented the credentials of Truman H. Newberry as Senator from Michigan for the term of six years commencing March 4, 1919.

Mr. Atlee Pomerene, of Ohio, moved that the credentials be referred to the Committee on Privileges and Elections, when Mr. Henry Cabot Lodge, of Massachusetts, submitted that the presentation was for filing only as it related to a seat in the next Senate, and the Senate was at that time without jurisdiction to take action thereon.

Thereupon Mr. Townsend, by unanimous consent, withdrew the credentials.

¹ U. S. Code, title 18, sections 211, 212.

² First session Sixty-third Congress, Record, p. 222.

³ Champ Clark, of Missouri, Speaker.

⁴ Third session Sixty-fifth Congress, Record, p. 437.

At the beginning of the next Congress Mr. Newberry was sworn in, and on May 20, 1919,¹ the following petition was presented to the Senate and referred to the Committee on Privileges and Elections:

To the Senate of the United States of America of the Sixty-sixth Congress:

I, Henry Ford, of Dearborn, Michigan, the petitioner, do hereby give notice of my intention to contest and do hereby enter and file a contest of the election of Mr. Truman H. Newberry as Senator from Michigan to succeed the Honorable William Alden Smith; and I request and petition for a recount of the ballots cast at the election held in Michigan November 5, 1918, and an investigation of the unlawful uses by said Truman H. Newberry, and in his behalf by his agents and representatives, of large sums of money to influence the primary and election, and also of cases of undue influence and intimidation of voters at the election.

I beg to represent to your honorable body:

(1) That an election was held by the voters of Michigan on the 5th day of November, 1918 to elect a United States Senator from Michigan for the term beginning March 4, 1919. That Truman H. Newberry was the candidate on the Republican ticket, Henry Ford on the Democratic ticket, Edward O. Foss on the Socialist ticket, and William J. Faull on the Prohibition ticket.

(2) That the official canvass made by the State canvassing board showed 220,054 votes cast for said Newberry, 212,487 votes cast for said Henry Ford, 4,763 votes cast for said Foss, and 1,133 votes cast for said Faull, and that in pursuance of such canvass said board announced the result of the election to be that the above-mentioned number of votes were cast for each of the said candidates as stated above.

(3) That a certificate of election as such Senator has heretofore been issued to said Truman H. Newberry and he claims to have been duly elected such Senator, and he has heretofore caused his credentials as such to be offered to the United States Senate, namely, on or about the 14th day of December, 1918.

(4) That the primary election to select candidates by the respective parties for the office of such United States Senator was held on August 27, 1918; that in the primaries Mr. Truman H. Newberry was a candidate for the Republican nomination, your petitioner was candidate for the Republican nomination, also for the Democratic nomination, and he was nominated on the Democratic ticket, and said Truman H. Newberry was nominated on the Republican ticket. That large sums of money were unlawfully used and expended by and on behalf of said Newberry at said primary election and previous thereto to effect such election and to bring about his nomination and to purchase and procure the support and efforts of divers large numbers of persons and newspapers and periodicals. It was admitted by the committee, composed of a large number of men who acted in behalf of the nomination of Mr. Newberry, that said committee expended \$176,568.08 and a sworn report to that effect was made under the State law by Mr. Frank W. Blair, the treasurer of said committee, and said report was filed with the county clerk of Wayne County, Michigan, where said Blair resided. And petitioner states upon information and belief that it can and will be proved that said Truman H. Newberry procured the appointment and selection of said committee and its members and was directly responsible for all its acts and that he was in constant communication with said committee and its members and knew of and approved its large expenditures of moneys and participated in its work. Upon information and belief petitioner says that large sums of money, aggregating many thousands of dollars, were expended by or on behalf of said Newberry's nomination, entirely outside of said \$176,568.08 above mentioned as having been admitted, in the hiring of workers and other legitimate expenses and contrary to the laws of the United States and the State of Michigan in that behalf. That a memorial with respect to the above matters was filed with the Senate Committee on Privileges and Elections in the month of November last by Mr. Elbert H. Fowler, a lawyer and reputable citizen of the city of Detroit, Michigan, who had acted as secretary of the nonpartisan Ford-for-Senator Club, in connection with the election, a copy of which memorial or statement is hereto attached and made a part hereof, and upon information and belief petitioner avers the statements thereof to be true.

¹First session Sixty-sixth Congress, Record, p. 33.

(5) He further shows that the large sums of money expended by and in behalf of the nomination of Mr. Truman H. Newberry as hereinbefore stated, unlawfully enlisted the aid and support of large numbers of persons, papers, and periodicals throughout the State, and the results and influence of which extended down to and affected the election materially in favor of the said Truman H. Newberry, and that said great sums of money were expended in violation of the statutes of the United States and of the State of Michigan in such cases provided.

(6) The petitioner shows on information and belief that said Truman H. Newberry was not truly or lawfully elected to said office of the United States Senator and is not entitled to said office, and that your petitioner was elected and is entitled to said seat, and he specifies:

(a) That there are about 2,200 election precincts or districts in Michigan, and that nearly all of the election boards were composed wholly of Republicans, and great numbers of them were wholly composed of intense partisans of Mr. Newberry, and that only in a comparatively few of them were there at the said election any challengers or others acting in behalf of the Democratic candidates, and that every opportunity existed for election officials who were so inclined to miscount the ballots in favor of Mr. Newberry.

(b) That a large number of ballots were unlawfully counted for said Newberry, which, in fact in truth, were cast for Henry Ford, namely, at least ten thousand.

(c) That large numbers of ballots lawfully cast for petitioner were not counted for him, but were unlawfully rejected by the various precinct election boards when making the counts, and they were not returned for petitioner as in truth they ought to have been, namely, at least ten thousand.

(d) That in many election precincts or districts the count by the election officers and boards was illegal, in favor of Newberry, false and fraudulent, and in violation of the election laws governing the count.

(e) Many of the ballots marked and cast for petitioner were counted and returned for the said Truman H. Newberry.

(f) In many precincts (particularly in the Upper Peninsula of Michigan) the provisions of law enacted to protect the sanctity and secrecy of the ballots and to promote a true and honest vote and count were flagrantly violated and many important and vital irregularities and departures from such provision occurred, thus vitiating: under the law the vote of such precincts. As, for instance, the marking of ballots for voters by unauthorized third person, the exposure of ballots by the voters, the overseeing of the voting by mine bosses and superintendents and the like; all of which were conducted in the interests of said Truman H. Newberry, and the votes of such precincts should be rejected and thrown out.

(g) That many ballots in many precincts duly marked and cast for petitioner were rejected by the respective election boards and not counted at all.

(h) That many ballots bearing unlawful distinguishing marks were illegally and unlawfully counted for the said Truman H. Newberry.

(i) Many ballots duly marked and cast for your petitioner were wholly rejected and thrown out by many election boards on the unlawful and fraudulent pretext that they were not duly and properly marked for the petitioner, whereas in fact they were so marked and cast.

(j) Many ballots duly and properly marked and cast for the petitioner were rejected and thrown out by many election boards on the unlawful and fraudulent pretext that they bore distinguishing marks, whereas in fact they did not bear any unlawful distinguishing marks and ought to have been counted for your petitioner.

(k) Many ballots duly and lawfully marked and cast for petitioner were erroneously thrown out and not counted for petitioner by many of the said election boards under erroneous interpretations of their duties.

(l) Many ballots for said Truman H. Newberry were corruptly and unlawfully procured to be cast and counted for him by the unlawful use of money on his behalf.

(m) Large sums of money were unlawfully expended by and in behalf of said Truman H. Newberry to influence said election and cause votes to be cast for him that otherwise would not have been so cast.

(n) Large numbers of lawful voters were intimidated and prevented from voting at the said election by partisans and supports of said Newberry who otherwise would have voted at the election and cast their votes for the petitioner, to wit, five thousand of such votes.

(o) Large numbers of lawful voters, employees of certain large corporations, were intimidated and unlawfully coerced by employers and their representatives into voting for said Newberry against their wills and preferences who otherwise would have cast their ballots for the petitioner.

(p) In a number of the counties the respective boards of county canvassers made and reported their canvasses without having or examining the poll books and tally sheets nor in any way verifying the number of original votes as cast or the number of voters voting at the respective precincts.

(q) That careful investigation by petitioner's directions has been made by reliable men since the election to ascertain as far as may be the detailed facts pertaining to the above statements and as to the conduct of counting in said election and from such investigations and from other information reaching the petitioner and his representatives he avers the foregoing statements to be true and he particularly specifies the following counties and election districts therein as the counties and districts where such irregularities, miscounting, and frauds were more flagrantly committed, namely: Kent, Bay, Kalamazoo, Wayne, Saginaw, Allegan, Antrim, Baraga, Barry Benzie, Berrien, Calhoun, Cass, Charlevoix, Chippewa, Clare, Dickingson, Eaton, Emmet, Genesee, Gladwin, Gogebic, Gratiot, Hillsdale, Houghton, Huron, Ingham, Ionia, Iosco, Iron, Isabella, Jackson, Kalkaska, Keweenaw, Lapeer, Lenawee, Macomb, Marquette, Mason, Mecosta, Midland, Monroe, Montcalm, Montmorency, Muskegon, Newaygo, Oakland, Oceana, Osceola, Ottawa, Sanilac, St. Clair, St. Joseph, Tuscola, Van Buren, Washtenaw, Wexford; and that such irregularities and miscounts occurred in a more modified degree in nearly all the other counties of the State and that mistakes unfavorable to petitioner and in favor of the said Truman H. Newberry occurred in all of the counties.

(r) That upon a fair and lawful recount of the ballots cast at said election your petitioner would be decided to be duly and lawfully elected Senator from Michigan.

(s) That upon such a fair and lawful recount, and due allowances being made for such frauds, intimidations, and prevention of votes, petitioner would be decided and declared by your honorable body to have been duly and lawfully elected Senator from Michigan.

(7) Your petitioner shows that the ballots cast for the said office of United States Senator at said election have generally been preserved intact, with the exception of those cast in the cities of Saginaw, Marquette, and possibly one or two smaller localities, together with the poll books and tally sheets relating thereto, under the provisions of the several orders of court in that behalf in the two suits in equity brought by your petitioner for that purpose in the United States district court for each the eastern and western districts of Michigan, comprising the whole of said State, that as your petitioner is advised the ballots, poll books, and tally sheets, with the exceptions mentioned, are now generally held in the custody and possession of the officers designated by the law of the State of Michigan for such purposes awaiting action hereon by this Senate.

(8) And the petitioner further shows that he is advised that under the laws of Michigan there is no body or tribunal which has control of a recount except the United States Senate, and that his only adequate relief to preserve and recount the ballots lies in suitable action to that end by your honorable body.

(9) That petitioner has caused notice of his intention to contest the alleged election of said Truman H. Newberry to the United States Senate to be duly served upon the said Truman H. Newberry, viz, on the 2d day of January, 1919, and May 17, 1919.

(10) The petitioner hereby prays and requests the Senate to entertain his said contest; to provide for a recount of the said ballots and the due preservation of said ballots for the purpose of the recount and of evidence in the contest; and for a prompt investigation of said election and primary and of the matters hereinbefore set forth, and that said Truman H. Newberry be declared not elected, and also disqualified and not entitled to a seat because of the aforesaid violations of law; and that petitioner may be declared elected and entitled to said seat, and that he may have such further action of the Senate and its duly appointed committees and agents and such other relief as shall be conformable to justice, and as the premises shall warrant; and he will ever petition, etc.

HENRY FORD.

While this petition was pending in the Senate, Mr. Newberry with others was indicted and convicted in the Federal court of the United States at Grand Rapids, Mich., on a charge of violation of the Federal corrupt-practices act.¹

On appeal to the Supreme Court of the United States the conviction was set aside and the case reversed on the ground that Congress had no authority to control party primaries and the act was to that extent unconstitutional.

Following the filing of the petition, the Senate agreed to the following resolution:

Whereas charges and countercharges of excessive and illegal expenditures of money and of unlawful practices have been made in connection with the primary nomination and election of a Senator from the State of Michigan, which election was held on the 5th day of November, 1918: Therefore be it

Resolved, That the Committee on Privileges and Elections, or any subcommittee thereof, be, and it is hereby, authorized and directed to investigate the said charges and countercharges of excessive and illegal expenditures of money and of unlawful practices in connection with the said election of a Senator from the State of Michigan, including the proceedings for the nomination of candidates at the primary theretofore held, and to take possession of the ballots, poll books, tally sheets, and all other documents and records relating to the said primary nomination and election; and the Sergeant at Arms of the Senate, and his deputies and assistants, be, and they are hereby, instructed to carry out the directions of the said Committee on Privileges and Elections, or any subcommittee thereof, in that behalf; and that the said Committee on Privileges and Elections, or any subcommittee thereof, be, and it is hereby, directed to proceed with all convenient speed to take all necessary steps for the preservation of the said ballots, poll books, tally sheets, and other documents, and to recount the said ballots, and to take and preserve all evidence as to the various matters alleged in the said charges and countercharges and any answers hereafter filed, and of any alleged fraud, irregularity, and excessive or illegal expenditures of money, and of any unlawful practices in the said election and primary, and as to the intimidation of voters, or other facts affecting the result of said election.

Resolved further, That the Committee on Privileges and Elections, or any subcommittee thereof, be authorized to sit during the sessions of the Senate and during any recess of the Senate, or of the Congress, and to hold its sessions at such place or places as it shall deem most convenient for the purposes of the investigation; and to have full power to subpoena parties and witnesses, and to require the production of all papers, books, and documents, and other evidence relating to the said investigation; and to employ clerks and other necessary assistants, and stenographers, at a cost not to exceed \$1 per printed page, to take and make a record of all evidence taken and received by the committee; and to keep a record of its proceedings; and to have such evidence, records, and other matter required by the committee printed.

Resolved further, That the Sergeant at Arms of the Senate and his deputies and assistants are hereby required to attend the said Committee on Privileges and Elections, or any subcommittee thereof, and to execute its directions; that the chairman or any member of the committee be, and is hereby, empowered to administer oaths; that each of the parties to the said contest be entitled to representatives and attorneys at the recount and the taking of evidence; that all disputed ballots and records be preserved so that final action may be had thereon by the full committee and the Senate; that the committee may appoint subcommittees of one or more members to represent the committee at the various places in the making of the recount and the taking of evidence, and the committee may appoint such supervisors of the recount as it may deem best; and that the committee may adopt and enforce such rules and regulations for the conduct of the recount and the taking of evidence as it may deem wise, not inconsistent with this resolution; and that the committee shall report to the Senate as early as may be, and from time to time, if it deems best, submit all the testimony and the result of the recount and of the investigation.

¹U. S. Code, title 2, section 244 et seq.

Resolved further, That the expenses incurred in the carrying out of these resolutions shall be paid from the contingent fund of the Senate upon vouchers ordered by the committee, or any subcommittee thereof, and approved by the chairman of the committee.

73. The Senate election case of Ford v. Newberry, continued.

On a recount of ballots the official returns in precincts where the ballots had been destroyed were accepted as correct by agreement of counsel.

Expenditure of large sums of money in the primary condemned, but where not shown to have been illegal or improper, held not to affect the title of the sitting Member to his seat.

Expenditures for newspaper advertisement and the circulation of form letters held not to constitute improper use of money.

Solicitation or disbursement of excessive sums in primary and general elections not to be considered when made without candidate's knowledge or consent.

On the legislative day of September 26, 1921¹ (calendar day of September 29), Mr. Selden P. Spencer, of Missouri, presented the report of the majority of the committee, reciting that in compliance with the resolution of the Senate the committee had—

caused the ballots cast at the said general election (with the exception of a few precincts where the ballots had been destroyed, in all of which cases by agreement of counsel the State official count was accepted as correct) to be gathered together and brought to Washington where they were recounted in accordance with the rules agreed upon by counsel.

The official returns gave the contestant 212,487 votes and the contestee 220,054, a plurality for the latter of 7,567 votes. The recount under the direction of the committee gave the contestant 212,751 votes and the contestee 217,085 votes, a plurality of 4,334 votes for the sitting Member.

The majority therefore find:

The result of the recount shows conclusively that Truman H. Newberry was legally elected United States Senator, and there is no evidence to sustain any of the charges of the contestant with regard to the general election, as hereinbefore set out.

As to charges of corruption in the primary, the majority say:

The amount of money spent at the primary was large—too large—but there was no concealment whatever with regard to it, and it was spent entirely for legal and proper purposes. On September 6, and within the time prescribed by the laws of the State of Michigan, a full report, so far as it was then known, of the contributions and expenditures was filed and made public. It showed contributions of \$178,856, and expenditures, \$176,568.08.

Later on some bills, which had been delayed in presentation, mainly for advertising, amounting to between ten and fifteen thousand dollars, were presented and were paid by the Newberry campaign committee, but the fact that approximately \$195,000 was used in the primary was frankly and freely admitted and nothing in the testimony has materially changed this admission.

Whether the amount was approximately \$195,000, as was fully reported or openly acknowledged, or whether there were some few thousand dollars in excess of that amount, as contestant alleges, is immaterial. It is, in either event, a larger sum than ought to have been expended.

¹First session Sixty-seventh Congress, Senate Report No. 277, Record, p. 5866.

Mr. Newberry in his statement¹ on the floor of the Senate referred to this phase of the case as follows:

I knew, as a matter of fact, that a campaign of publicity was being extensively carried on, and I realized that such a campaign must necessarily cost a considerable sum of money; but I did not have the faintest idea as to the amount of money that actually was expended until after the report was made public. The cost of the campaign was about \$195,000, according to the report, and when I learned of this amount I was at once filled with amazement and regret.

I have no criticism to make of those who managed the campaign which resulted in my election to the United States Senate. Whatever may happen, it is a gratification for me to remember that in the examination before the grand jury in New York City, in the diligent and detailed examinations which were made by numerous agents of the Department of Justice from Washington in all that was brought out, in the minute investigation of every step in the campaign in Michigan, in all that was presented to the grand jury at Grand Rapids, and before the petit jury who tried the Grand Rapids case, there was not the slightest evidence which involved moral turpitude in the remotest degree, nor was there any evidence, so far as I have been able to learn, of a single dollar that was spent dishonestly for corruption or bribery. The amount expended was large, more than I had any idea was being expended, and more than ought to be necessary to expend in any ordinary campaign. But this was not an ordinary campaign.

I shall not dwell upon the reasons which the committee thought imperatively demanded a campaign of newspaper publicity involving this expenditure of money. I can only say that I regret exceedingly the fact that so large an amount of money was necessarily expended. I can further say that in the acquisition of that money, in the solicitation of that money, in the collection of that money, in the use of that money, I had nothing whatever to do. I knew nothing whatever about it—not even the amount of it.

I make this statement not to escape any responsibility but in order that the actual facts in the matter as I know them, may be presented to the Senate. How the money was spent in the State of Michigan, how the books of account were kept, who were engaged in the work, or what they did, I did not know.

For this lavish expenditure of money the majority do not hold Mr. Newberry in any wise responsible.

The report says:

Truman H. Newberry was absent from the State of Michigan continuously during the entire campaign and until long after the election had been held. He took no part whatever either in the financial or other features of the primary campaign or its direction or control. Nor did he take any part in the general election.

Mr. Newberry was during all that time actively engaged in the service of the United States as a naval officer in New York.

He was kept fully informed from time to time as to the progress of the campaign in Michigan, but he had no knowledge of the financial management of the campaign; he did not know the amount of money being expended, nor by whom contributions were made, nor the purposes for which the money was used.

From his general knowledge of the character of the campaign that was being conducted in Michigan, and the extent of publicity given to his candidacy through the newspapers, it is presumed that he had a general idea that a large sum of money was necessarily being spent.

The evidence shows conclusively that the financial cost of the campaign was voluntarily borne by relatives and friends of Truman H. Newberry, and was entirely without solicitation or knowledge upon his part.

Your committee condemns the use of such a large sum of money in any primary campaign, but in the instant case there is not the slightest foundation upon which to connect Truman H. Newberry with its solicitation, its acquisition, or its use, nor to condemn him because of the amount.

¹Second session Sixty-seventh Congress Record, p. 1140.

While the aggregate was large, it was not spent for any purposes that were in themselves illegal or improper, and its use was wholly managed by a campaign committee entirely free both in its selection and its action from Truman H. Newberry.

The majority quote in support of this position the words of Mr. Justice Pitney in his opinion rendered when the Grand Rapids case came for final decision before the Supreme Court of the United States:

Justice Pitney said of Mr. Newberry's alleged connection with the campaign fund:

His mere participation in the activities of the campaign, even with the knowledge that moneys spontaneously contributed and expended by others, without his agency, procurement, or assistance, were to be or were being expended, would not of itself amount to his causing such excessive expenditure.

Justice Pitney continued:

A candidate can not be made a principal offender unless he directly commits the offense denounced. Spontaneous expenditures by others being without the scope of the prohibition, neither he nor anybody else can be held criminally responsible for merely abetting such expenditures.

His remaining in the field and participating in the ordinary activities of the campaign, with knowledge that such activities furnish in a general sense the "occasion" for the expenditure, is not to be regarded as a "causing" by the candidate of such expenditure within the meaning of the statute.

Among the purposes for which this money was expended, and which the majority do not consider illegal or improper, were the following:

The evidence discloses that a most comprehensive and far-reaching campaign of publicity was vigorously conducted in a thorough and systematic manner through the newspapers of the State of Michigan.

That, with the exception of a few Democratic newspapers, advertising was placed in practically every newspaper, daily, weekly, and monthly, published in the State of Michigan.

That a series of 13 advertising announcements, covering the entire 13 weeks of the primary campaign, were carried in upward of 500 papers and publications, going into every portion of the State.

In addition to this, a very general and systematic plan of publicity was carried on through correspondence; thousands and thousands of form letters being sent into every county in the State; the names of persons to whom sent being alphabetically arranged and card indexed. This work necessitated the assistance of a large corps of clerks and helpers. The evidence discloses that at one time more than 50 stenographers alone were employed in the Newberry headquarters.

This program of publicity necessitated the expenditure of a large amount of money. More than 80 per cent of the money spent in the primary campaign was, according to the evidence, spent for advertising and other publicity.

Accordingly, the majority thus sum up the evidence:

Two facts which are decisive of the present case stand out clearly in the record as entirely established:

First. That none of the money spent in the primary election, large as was the amount, was spent for corrupt, illegal, or improper purposes. It was spent without the knowledge or consent of Truman H. Newberry, for publicity, and for ordinary campaign purposes and expenditures which are perfectly familiar to every man who has ever been a candidate for office, and which are generally regarded as both necessary and proper.

Second. That Truman H. Newberry had no part whatever in the solicitation of the campaign fund, or in its acquisition, or in the expenditure of it. It came from sources entirely voluntary,

and it was spent by a voluntary committee which was in no sense the agent of Mr. Newberry and which had complete control of it and entire responsibility for its use.

The minority views submitted by Mr. Atlee Pomerene, of Ohio, do not agree with the majority findings, either as to fact or theory. On the contrary, it is claimed by the minority:

First. That Mr. Truman H. Newberry participated in, if he did not dictate, the organization of his campaign committee.

Second. He knew in advance that this campaign would cost "his friends" at least \$50,000.

Third. Reports almost daily were made to him by his campaign manager, Mr. Paul King, and others.

Fourth. Almost daily reports were made to him by his attorney in fact, Fred P. Smith, as to the business and financial affairs of himself, his brother, John S. Newberry, the chief contributor to the campaign fund, and of 10 other Newberry interests. He knew that Fred P. Smith, who was acting under his power of attorney, was checking money out of the bank accounts of Truman H. Newberry and other Newberry interests and depositing them to the credit of John S. Newberry, and then issuing checks on this fund payable to the Newberry campaign fund committee as its demands might require.

Fifth. He aided in the preparation of the publicity material, received constant reports concerning it, and regarded himself responsible to Mr. Templeton, Mr. King, and Mr. Oakman "for actual travel and publicity costs." (B. E. 652.)

Sixth. He knew for weeks in advance of the primary that the extravagant expenditure of money had gone to such an extent as to be a common scandal in the State, and that he was the beneficiary thereof.

Seventh. This extravagant expenditure of money was called to his attention not only by the public press of his State but by letters written to him personally by some of Michigan's most honored citizens.

Eighth. A careful study of this record will show that the campaign committee was composed of his close personal and business friends, and that they were in fact his very "alter ego," or at least they were so closely allied with him, and he was in such close touch with every phase of the campaign that it does not lie in his mouth to claim the usufruct of their work and deny the responsibility for the way in which it was brought to his door.

Ninth. With all of this knowledge brought to him in the way disclosed by this record, we fail to see how Mr. Newberry could honorably say as he did in his affidavit of August 14, 1918, filed with the Secretary of the Senate:

"The campaign for my nomination for United States Senator has been voluntarily conducted by friends in Michigan. I have taken no part in it whatever, and no contribution or expenditures have been made with my knowledge or consent."

Tenth. Nor do we understand how, in his further affidavit filed with the Secretary of the Senate on August 29, 1918, he could honorably say:

"The following is a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by me, or by my agent, representative, or other person for or in my behalf with my knowledge or consent.

"None with my knowledge or consent.

"I have read the general published statement of Paul H. King concerning expenditures made by a volunteer committee of my friends, but these were made without my knowledge or consent."

Twelfth. Neither is the minority able to understand, when Mr. Newberry's title to a seat in the United States Senate is challenged and this challenge is supported by the evidence contained in this record, why he should fail to come before the committee of his colleagues to give to them the knowledge which he possesses bearing upon this subject, but content himself with a general denial.

Thirteenth. After it was announced that Senator Newberry would not appear to testify the minority moved that he be invited to appear, and they are not able to understand why the majority

of the committee refuse to honor this request and call him before it so that the Senate might have the benefit of any explanations he might see fit to make concerning his relations to his campaign.

Fourteenth. A careful reading of this record will convince fair-minded men that the Newberry senatorial committee was the agency through which Mr. Newberry conducted the campaign, sometimes directing, sometimes vetoing, but nearly always participating in and approving its acts. The acts of this committee were his acts, and for them he is responsible at the bar of the Senate.

74. The Senate election cases of Ford v. Newberry, continued.

Though ordering a recount of the ballots the committee declined to request attendance and testimony of contestee or to require the production of bank records.

Construction of Michigan corrupt-practices act.

Instance wherein a Senator, following an inquiry vindicating his title to his seat, resigned.

The minority cite the Michigan statutes governing primary elections and make the following deductions:

We deduce from the Michigan statutes just quoted:

(a) That Mr. Newberry could not spend, or authorize, or incur obligations to be paid by him in excess of \$3,750.

(b) That no candidate and no treasurer of any political committee can pay, give, or lend, or agree to pay, give, or lend, directly or indirectly, any money or thing of value in order to secure a nomination, except for the 11 purposes set out in section 3830.

(c) While the statute places no express limitation on the amount which a committee may expend for the 11 defined purposes, no candidate can under this law create or use a committee as his agency and thereby defeat the express limitation prescribed for the candidate.

(d) Every candidate and every treasurer of a political committee must file a sworn, full, true, and detailed account and statement setting forth each and every sum of money received or disbursed by him for nomination expenses, the date of each receipt, the name of the person from whom received or to whom paid, and the person to whom and object or purpose for which disbursed. It must also set forth "the unpaid debts and obligations, with the nature and amount of each and to whom owing in detail."

(e) No candidate can excuse himself for not filing such account because the treasurer of the committee may have filed one.

(f) If moneys for election purposes were paid to county chairmen or secretaries or to hired workers, the law has not been complied with, because the treasurer may have charged the sum to some one connected with the committee who acted as a disbursing officer. The law requires the naming of the ultimate payee and not the intermediate agent.

(g) No candidate can loan money to a brother or business associate in order to enable him to meet the extraordinary demands of a moneyed campaign, and thereby defeat the purpose of the law.

(h) The intent of section 45 is "to prohibit the prevailing practice of candidates hiring with money and promises of positions, etc., workers on primary day and prior thereto.

(i) And section 48, in part, declares:

"It shall be unlawful for any other person to do or perform for or on behalf of any such candidate, or to help or injure the candidacy of any candidate, any of the acts or things which it is by this act made unlawful for such candidate to do."

The minority then discuss evidence claimed to show that in violation of the statute as thus interpreted Mr. Newberry organized his own campaign committee, was intimately familiar with the activities of the committee in the prosecution of the campaign, and himself contributed indirectly to the campaign fund.

According to the minority:

The evidence shows conclusively Senator Newberry's active participation in the organization of his committee, his approval of all of its activities, with few exceptions, his direction as to many of them, and the contributions from his own funds as well as other family funds in which he was interested through the medium of his brother, John S. Newberry, so that it can in no sense of the word be claimed that the moneys expended were spontaneously contributed by his friends, and that he did not participate therein.

The voice of the senatorial campaign committee may be the voice of the friends and business associates of the candidate, but its hand was the hand of Truman H. Newberry.

Therefore, the minority thus summarize their contentions:

The exorbitant expenditures in this primary campaign shocked the conscience of the country.

The attorneys for the contestant claim in their supplemental brief that the record shows disbursements in behalf of Senator Newberry aggregating \$263,060.67.

Some of these expenditures may be duplicates. The original books and records of the committee have been destroyed, or at least not produced. The books of the Newberry interests are likewise gone. The majority of the committee would not permit the subpoenaing of bankers to produce their books showing the Newberry accounts. There is no way in the present state of the record to arrive at the exact cost of this campaign. We are reasonably certain that much money was expended of which there is no account.

On the other hand, the Blair report, filed under the Michigan statute, shows total disbursements of \$176,568.08. After this report was filed Secretary Charles A. Floyd testified that additional bills were presented, which were paid, aggregating between twelve and fifteen thousand dollars.

Accepting this smaller figure as correct, the total cost of Mr. Newberry's primary campaign was \$188,568.08. In other words, to secure him the nomination there was an outlay in Michigan of a sum sufficient to pay his salary for more than 25 years.

In the language of Senator Hoar and Senator Frye in the Payne case, "no more fatal blow can be struck at the Senate or at the purity and permanence of the republican Government itself than the establishment of this precedent.

True, Mr. Newberry, in his sworn statement filed with the Secretary of the Senate, says the campaign was voluntarily conducted by "his friends." "I have taken no part in it whatever, and no contributions or expenditures have been made with my knowledge or consent," says he.

But with the accusing finger of a large portion of the people of his State pointing at him and with this incriminating record before him he has not up to date volunteered to tell his colleagues in the Senate what the facts are, and the majority members of this committee refuse to invite him to tell them.

We submit that a careful review of this report supplemented by a reading of the record in this case will show conclusively.

First. That his nomination as a candidate for United States Senator was secured by this extravagant expenditure of money, without which he could not have hoped to win over his competitors, because he was little known in the State.

Second. This money was expended through the agency of the Newberry senatorial committee.

Third. This committee was organized at his instance and manned by executives whom he himself chose, or if they were suggested by his friends he approved them.

Fourth. While a larger part of the planning of the campaign may have been done by the executives of the committee, they were submitted to him for his approval.

Fifth. He approved or disapproved these plans according to his judgement.

Sixth. Every general activity of this committee and its executive officers, whether in organization or publicity work, was reported to him almost daily by Mr. Paul H. King, the executive chairman, and others.

Seventh. Many conferences were held between him and the executive members of his committee at New York for the purpose of originating, or criticizing, or revising the plans of the campaign

Eighth. While Mr. Paul H. King insists that he never discussed with Senator Newberry the financing of the campaign, except in his first conversation when he told him that it would cost "his friends" \$50,000, he did know concededly the enormous expenses of the plan of organization and publicity of his senatorial committee, and he knew also that his own bank account and the bank accounts of the other Newberry interests were being depleted by his own attorney in fact, Frederick P. Smith, in order to replenish the waning balance in the bank account of his brother, John S. Newberry, out of which the campaign expenses were being paid. This is known because this same Frederick P. Smith testifies, as above quoted, that Senator Newberry talked to him "about the drain on the balances in the office, and he was complaining about the money that was being spent," and again that he (Senator Newberry) was "kicking about the balances."

Ninth. These drains on the Newberry finances must have been heavy because out of these various funds were furnished net \$99,900, the amount charged in the Blair report.

Tenth. The Michigan law limited the expenditure of any candidate for the Senate to \$3,750. We submit that this amount could not be increased by the organization of a committee to act as his agent, and this committee did so act. *Qui facit per alium, facit per se.*

Eleventh. The Newberry senatorial committee, the agent of the candidate, violated the Michigan law by far exceeding the limitations upon expenditures, by hiring workers on primary day and for days before, and its members by purchasing drinks and cigars for voters.

Twelfth. The Blair report of the receipts and expenditures of the Newberry senatorial committee clearly violates the Michigan law because it does not give the names of the men who did active work in the campaign and to whom money was paid, nor does it in many instances state the purpose for which it was paid, and gives no account of the liabilities which were outstanding and unpaid at the time that the report was filed.

Thirteenth. The Michigan statutes require both Senator Newberry, the candidate, and the treasurer of the senatorial committee to file accounts of their receipts and expenditures. The treasurer's account does not comply with the law for the reasons hereinbefore stated, and Senator Newberry filed no account whatsoever.

Fourteenth. Not having filed any account under the Michigan statutes it was unlawful for the Michigan authorities to issue a certificate of nomination to Mr. Newberry.

Fifteenth. The Federal corrupt practices act required statements of receipts and disbursements to be filed in connection with the primary and general election campaigns.

Under this statute and under oath he filed on August 17, 1918, a preprimary statement in which he said:

"The campaign for my nomination for United States Senator has been voluntarily conducted by friends in Michigan. I have taken no part in it whatever, and no contributions or expenditures have been made with my knowledge or consent."

Under date of August 29, 1918, he filed his account of receipts and expenses for the primary election held August 27, 1918, in which he said, under the printed words:

"The following is a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by me or by my agent, representative, or other person for or in my behalf with my knowledge or consent, etc."

Then in his handwriting appears the words "none with my knowledge and consent."

This qualification follows:

"I have read the general published statement of Paul H. King concerning expenditures made by a volunteer committee of my friends, but these were made without my knowledge or consent."

These statements were made under oath and filed in conformity with the Federal statute. Presumably they influenced to some extent the voters of Michigan. The minority members regret to say that they were not true, and while the statute under which they were filed has been held unconstitutional the moral turpitude involved in their making is just as great as if the statute had been held constitutional.

Sixteenth. In our opinion the record as hereinbefore shown conclusively establishes a conspiracy upon the part of Truman H. Newberry et al., who were indicted and tried for a conspiracy to violate both Federal and State laws; that such conspiracy had for its object the violation of the election laws of the State of Michigan as well as the Federal statute limiting the expenditures allowed by a candidate for United States Senator and contemplated the debauching of the electorate of the State of Michigan by the expenditure of large sums of money; that said Truman H. Newberry participated in said conspiracy and actively engaged in its execution; that in pursuance thereof he selected agents and directed their activities; that he was familiar with the fact that large sums of money were being expended and would be expended in the primary election for the purpose of corrupting the electorate of the State of Michigan and in violation of the election laws of said State; that he knew that not less than \$188,568.08 were expended in said primary election and that the expenditure of said money was in violation of law; that he aided in the creation of a committee to take charge of his campaign as a candidate for the United States Senate and directed the work of said committee and was cognizant of its activities, including the expenditure of large sums of money in violation of the election laws of the State of Michigan; that he approved of the work of said committee and of its activities and of its large expenditures and was fully aware of the nature, character, and accomplishments of said committee and of the methods employed by it to secure his nomination at the primary election; that through his confidential agent and attorney in fact he contributed to said expenditures various large sums from time to time, but the amounts so contributed or the aggregate thereof are not known to the committee because neither said Truman H. Newberry nor those who controlled the payment of said amounts testified in respect thereto, and further contended that the books and accounts showing such payments were either lost or destroyed; that the payments so contributed by said Newberry, in the manner hereinbefore described, to said committee for the purposes aforesaid were so large as to impair the account of said Newberry at the bank where he conducted his business, resulting in his complaining to Frederick P. Smith, his confidential agent and attorney in fact, because of his reduced balances in bank, as stated in the eighth finding herein; that notwithstanding the knowledge by said Newberry of the facts hereinbefore stated, he filed under oath the statements referred to in the fifteenth finding hereinbefore set forth; that said statements submitted under oath were false and untrue to the knowledge of said Newberry in this, to wit: That he did take part in said campaign and did make contributions and expenditures and that contributions and expenditures were made to secure his nomination, with his knowledge and consent, and pursuant to his direction and control; and that the campaign for his nomination was conducted under the direction of said Newberry and pursuant to said conspiracy hereinbefore set forth.

The minority report also sets forth the following resolution submitted for adoption in the sessions of the Committee on Privileges and Elections and denied by the majority of the committee:

Resolved by the Committee on Privileges and Elections, That the subcommittee be instructed to invite Senator Newberry to appear before it to give testimony concerning the charges pending against him involving his title to a seat in the United States Senate.

A request by minority members of the committee for an inspection of bank records showing deposits and disbursements by Mr. Newberry during the period immediately preceding the election was likewise denied.

In commenting on this phase of the case Mr. Selden P. Spencer, of Missouri, said¹ in debate in the Senate:

I call the Senate's attention to the fact that every witness, that every paper, that every document, that every book, was before the grand jury in Grand Rapids; that the agents of Henry Ford scoured the State of Michigan for every man who knew anything about that election, to see if perchance there might be some remark, some event, or something unexplained, which, when

¹First session Sixty-seventh Congress, Record, p. 7787.

presented to the grand jury, might look like evidence against Truman H. Newberry; and from that scouring of the State of Michigan 483 were subpoenaed before the grand jury at Grand Rapids. Every man who had anything to do with the primary election of Truman H. Newberry was subpoenaed. Every book, every paper, every witness was before the grand jury in Grand Rapids, and they examined into every detail of the primary election with a degree of particularity that has been unequaled in any similar election proceedings in the history of this land. And everything before the grand jury which was deemed at all relevant was introduced at Grand Rapids, and the entire testimony at Grand Rapids was available to this committee which, on the part of the Senate, examined into this matter.

So that if we hear upon the floor of the Senate anything said about a witness not being present before our committee or about any papers or checks not being presented before our committee, I ask Senators to remember that there were before our committee not only the living witnesses who were—44 in number—examined by the committee but the complete bill of exceptions in the trial at Grand Rapids as it was presented to the Supreme Court, with its summary of the testimony of every one of the witnesses. More than that, there was incorporated in our hearings the testimony of every witness taken at Grand Rapids that either side desired to have put into our record, so that when Senators come to look into the record in this instant case they will find every scrap of evidence in regard to the primary election in Michigan.

Subsequently,¹ in the Senate, Mr. James A. Reed, of Missouri, said:

Mr. President, it seems to me this case is complete, indisputable. If there were one thing needed to make it a certainty it is the failure of Senator Newberry to take the witness stand. If Senator Newberry did not know of the expenditure of this money, why did he not take the witness stand and say he did not know of it? If there was any circumstance requiring explanation and exculpation, why did he not take the stand to make that explanation? Here was a tribunal the members of which, regardless of politics, would have been glad to have heard him vindicate himself. But he did not take the stand. He remained silent. I will not vote for a man who can not testify in his own behalf. I will not vote to seat a man who dare not open his lips regarding transactions which unexplained are condemnatory.

On January 9,² in speaking to the report in the Senate, Mr. Newberry said:

Mr. President, I can not remain silent any longer during the consideration of my right to represent the State of Michigan as one of its Senators. I did not volunteer to appear before the committee of the Senate which took testimony in this matter because I really had no information that would assist in the investigation of the charges filed by my opponent. It seems to me that the time has come to speak, because my silence may be misunderstood by my friends.

In concluding their report the majority recommended:

- (1) That the contest of Henry Ford against Truman H. Newberry be, and it is hereby, dismissed.
- (2) That Truman H. Newberry is hereby declared to be a duly elected Senator from the State of Michigan for the term of six years commencing on the 4th day of March, 1919.
- (3) That his qualification for a seat in the Senate of the United States, to which he has been elected, has been conclusively established, and the charges made against him in this proceeding, both as to his election and qualification, are not sustained.

The minority express the opinion:

First. That the irregularities complained of do not relate to the general election but to the primary. Henry Ford did not receive a plurality of the votes cast at the general election. We therefore find that the petitioner, Henry Ford, was not elected and is not entitled to a seat in the Senate of the United States.

¹ Second session Sixty-seventh Congress,² Record, p. 626.

² Record, p. 962.

Second. We find that under the facts and circumstances of this case corrupt and illegal methods and practices were employed at the primary election and that Truman H. Newberry violated the corrupt practices act and the primary act of the State of Michigan, and that by reason thereof he ought not to have or hold a seat in the Senate of the United States, and that he is not the duly elected Senator from the State of Michigan for the term of six years commencing on the 4th day of March, 1919, and we recommend, therefore, that his seat be declared vacant.

Mr. Henry F. Ashurst, of Arizona, a member of the committee, concurring in the minority report, filed views giving personal reasons therefor and declared:

The credentials of the sitting Member are stained by fraud and tainted by illegal expenditures of money. His seat should be declared vacant.

The case was exhaustively debated in the Senate on November 15, 16, 17, 18, 19, 21, 22, December 7, 12, 21, January 4, 5, 6, 7, 9, 10, 11, and 12. On January 2,¹ on suggestion of Mr. Frank B. Willis, of Ohio, the majority resolution was modified to read as follows:

Resolved, (1) That the contest of Henry Ford against Truman H. Newberry be, and it is hereby, dismissed.

(2) That Truman H. Newberry is hereby declared to be a duly elected Senator from the State of Michigan for the term of six years commencing on the 4th day of March, 1919, and is entitled to hold his seat in the Senate of the United States.

(3) That whether the amount expended in this primary was \$195,000, as was fully reported or openly acknowledged, or whether there were some few thousand dollars in excess, the amount expended was in either case too large, much larger than ought to have been expended.

The expenditure of such excessive sums in behalf of a candidate, either with or without his knowledge and consent, being contrary to sound public policy, harmful to the honor and dignity of the Senate and dangerous to the perpetuity of a free government, such excessive expenditures are hereby severely condemned and disapproved.

Mr. George W. Norris, of Nebraska, proposed to add to the resolution the following:

And, therefore, Truman H. Newberry is not entitled to a seat in the United States Senate.

The amendment was disagreed to—yeas 41, nays 46.

Mr. Thomas J. Walsh, of Montana, offered the following amendment in the nature of a substitute, which was disagreed to—yeas 41, nays 46:

Strike out all after the word "*Resolved*," in line 1, and insert in lieu thereof the following:

"That Henry Ford, contesting the election of Truman H. Newberry as United States Senator from the State of Michigan for the term commencing March 4, 1919, not having received a majority of the votes cast at the election, is not entitled to a seat in this body.

Resolved further, Considering that it is against a sound public policy that huge sums of money should be spent for the nomination or election of a candidate for the United States Senate, and that such excessive sums were spent to secure for Truman H. Newberry the Republican nomination as such candidate for the State of Michigan at the primary election in that State for the term mentioned, and considering that the campaign for his nomination was conducted in gross and flagrant violation of the laws of the State of Michigan and in contravention of the statutes of the United States, he was not duly elected and is not entitled to a seat in this body."

Thereupon Mr. Robert L. Owen, of Oklahoma, proposed a substitute amendment, to strike out all after the word "*Resolved*" in line 1, and insert in lieu thereof the following:

¹Record, p. 1116.

That Truman H. Newberry is not entitled to a seat in this body because his relatives and friends, against a sound public policy, confessedly expended approximately \$200,000 at the primary election to acquire the nomination for him, and because such a precedent would be harmful to the honor and dignity of the Senate of the United States and contrary to the best interests of the United States Government.

This substitute was disagreed to—yeas 41, nays 46.

The question recurring on the majority resolution as modified it was decided in the affirmative—yeas 46, nays 41.

So the resolution recommended by the committee as modified, was agreed to.

On November 21, 1922,¹ the President pro tempore laid before the Senate the following communication:

DETROIT, MICH., *November 17, 1922.*

Hon. CALVIN COOLIDGE,

The Vice President, Washington, D. C.

Dear Mr. President: I inclose herewith a copy of my resignation which I have this day forwarded to the Governor of the State of Michigan, and I respectfully request that this be read into the records of the Senate as soon as possible.

Yours respectfully,

TRUMAN H. NEWBERRY.

DETROIT, MICH., *November 18, 1922.*

Hon. ALEX. J. GROESBECK,

Governor of Michigan, Lansing, Mich.

SIR: I tender herewith my resignation as United States Senator from Michigan, to take immediate effect.

I am impelled to take this action because at the recent election, notwithstanding his long and faithful public service and his strict adherence to the basic principles of constructive Republicanism which I hold in common with him, Senator Townsend was defeated. While this failure to reelect him may have been brought about, in part, by over four years of continued propaganda of misrepresentation and untruth, a fair analysis of the vote in Michigan and other States where friends and political enemies alike have suffered defeat will demonstrate that a general feeling of unrest was mainly responsible therefor.

This situation renders futile further service by me in the United States Senate, where I have consistently supported the progressive policies of President Harding's administration. My work there has been and would continue to be hampered by partisan political persecution, and I, therefore, cheerfully return my commission to the people from whom I received it.

I desire to record an expression of my gratitude for the splendid friendship, loyalty, and devotion of those who have endured with me during the past four years experiences unparalleled in the political history of our country. By direction of the Democratic administration, these began immediately upon my nomination, by proceedings before a specially selected grand jury, sitting in another State, which, by a vote of 16 to 1, completely exonerated those who had conducted my campaign. Then followed my election, with every issue which has since been raised clearly before the electorate of the State. A recount was demanded, and after a thorough and painstaking review of the ballots by the United States Senate, I was found to have received a substantial majority. While this was in progress I was subjected, with a large number of representative men of Michigan who had supported me, to a trial, following indictments procured by a Democratic Department of Justice, which through hundreds of agents had hounded and terrified men in all parts of the State into believing that some wrong had been done. Under the instructions given by the court, convictions of a conspiracy to spend more than \$3,750 naturally followed, and sentence imposing fines and imprisonment was immediately passed. All charges of bribery and corruption were, however, quashed by the specific order of the presiding judge.

¹Third session Sixty-seventh Congress, Record p. 14.

On appeal, the Supreme Court of the United States reversed the action of the court below, because, as stated by Chief Justice White, of the grave misapprehension and the grievous misapplication of the statute, which was also declared unconstitutional. A protracted investigation before the Committee on Privileges and Elections of the Senate resulted in a report sustaining my election; and after a bitter partisan debate the Senate declared that I was entitled to my seat.

In view of all these proceedings my right to my seat has been fully confirmed, and I am thankful to have been permitted to serve my State and my country, and to have the eternal satisfaction of having by my vote aided in keeping the United States out of the League of Nations.

For those who so patriotically and unselfishly worked for my election, and in defense of my own honor and that of my family and friends, I have fought the fight and kept the faith. The time has now come, however, when I can conscientiously lay down the burden, and this I most cheerfully do. If in the future there seem to be opportunities for public service, I shall not hesitate to offer my services to the State which I love and the country I revere.

Respectfully,

TRUMAN H. NEWBERRY.

75. The Pennsylvania election case of Farr v. McLane in the Sixty-sixth Congress.

Although sitting Member disclaimed knowledge of campaign expenditures in his behalf the House held he must be presumed to have had constructive knowledge of such expenditures.

The House unseated returned Member for whom campaign expenditures had been made in excess of amount permitted under the corrupt practices act.

Charges of fraud in the voting of persons under the legal age, of persons who had not registered as required by law, of fictitious persons, of persons who were not citizens, of persons who were fighting overseas or had died, of persons disqualified on account of nonpayment of taxes, having been sustained, such votes were rejected and were deducted from the total vote of the candidates for whom cast.

Illegal change of a polling place on election day, taken in connection with other evidence of fraud, was deemed sufficient cause for rejecting the entire vote of the precinct.

The alphabetical arrangement of names in the poll books constitutes evidence of collusion and fraud on the part of election officials.

Delay in opening the polls at the time fixed by law, where unattended by evidence of fraud, does not justify rejection of the vote.

Where the rejection of votes alleged to be illegal would not alter the result of the election it was not deemed necessary to consider the charge.

Discussion of methods of deducting illegal votes from the official returns.

Where irregularities occur in isolated instances and the illegal votes are capable of identification those votes only will be rejected, but where disregard of the law by election officials has been so flagrant as to render their returns unreliable the entire vote of the precinct will be rejected.

On February 15, 1921,¹ Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report in the Pennsylvania case of John R. Farr v. Patrick McLane.

¹Third session Sixty-sixth Congress, House Calendar No. 1325, Record, p. 3202.

The sitting Member had been returned by an official majority of 201 votes. The notice of contest charged violation of the federal corrupt-practices act in exceeding the limit placed upon campaign expenditures, and specified frauds and irregularities in numerous voting precincts of the district. The contestee in his answer made countercharges of fraud and irregularity in various other precincts.

The act of August 19, 1911, commonly known as the corrupt-practices act, provided in part:

No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides: *Provided*, That no candidate for Representative in Congress shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding \$5,000 in any campaign for his nomination and election; and no candidate for Senator of the United States shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding \$10,000 in any campaign for his nomination and election: *Provided further*, That money expended by any such candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or for his necessary personal expenses, incurred by himself alone, for travel and subsistence, stationery and postage, writing or printing (other than newspapers), and distributing letters, circulars, and posters, and for telegraph and telephone service, shall not be regarded as an expenditure within the meaning of this section, and shall not be considered any part of the sum herein fixed as the limit of expense and need not be shown in the statements herein required to be filed.

The committee found:

The evidence shows that on December 5, 1918, Patrick McLane filed a personal return of his campaign expenses showing total receipts of \$275 and total expenditures or disbursements of \$748.04.

On the same date George Hufnagel, treasurer, filed a return in behalf of the "McLane Campaign Committee" showing total receipts of \$12,800 and total expenditures of \$11,749. Under the head of "Expenditures or disbursements" occurs this item:

"November 3, P. J. Noll, secretary Democratic county committee, \$6,000."

On December 2, 1918, Albert Gutheinz, treasurer of the Democratic county committee of Lackawanna County, which county is situated in the tenth congressional district of the State of Pennsylvania, filed a return with the Clerk of the House of Representatives showing total receipts of \$10,195 and total expenditures or disbursements of \$7,476.96 and unpaid debts and obligations of \$158.79. At the top of this return, the original of which was examined by the committee, appears the following statement:

"I hereby certify that the following is a full, correct, and itemized statement of all moneys and things of value received by me as treasurer of the Democratic county committee of Lackawanna County, Pa., together with the names of all those who have furnished the same, in whole or in part, in aid or support of the candidacy of Patrick McLane for election as Democratic Representative in the Congress of the United States for the tenth congressional district of the State of Pennsylvania at the general election to be held in said district on the 5th day of November, 1918."

It is evident, therefore, that in spite of the fact that Congress by statute has expressly forbidden any candidate for Representative in Congress to expend more than \$5,000 in any campaign for his nomination and election, after deducting \$6,000 which was received by the McLane campaign committee and paid by it to the Democratic county committee of Lackawanna County and expended by the latter, and also deducting the amount of \$760.75 expended for purposes for which no return is required by the Federal statute, there was expended in the interest of the contestee, Patrick McLane, \$7,853.49 in excess of the statutory amount. But omitting entirely the expenditures of the Democratic county committee, the "McLane Campaign Committee"

alone, which was organized solely for the purpose of promoting the election of the contestee, Patrick McLane, spent \$11,749, the whole amount of which, with the exception of items aggregating \$292.50, was expended for purposes for which, if expended by the candidate himself, a return is required to be made by the Federal law.

It was contended by the contestee, Patrick McLane, that he had not violated the corrupt practices act, because he personally had expended only \$748.04 and that the balance of the money was expended by a committee of which he claims that he had no knowledge. If his contention is correct then the corrupt practices act becomes a farce and the limitation placed by Congress upon campaign expenditures is meaningless. The reading of the entire statute clearly shows that it was the intent of Congress to prohibit a candidate for Congress from expending directly or indirectly more than \$5,000 for his nomination and election.

After quoting from the report in the case of *Gill v. Catlin* in the Sixty-second Congress on this point the committee held:

The committee therefore finds that the contestee, Patrick McLane, must under the law be held to have had constructive knowledge of expenditures made in excess of the amount permitted under the corrupt practices act. For that reason, in accordance with congressional precedent and as a matter of principle, he is not entitled to his seat in the Sixty-sixth Congress.

Charges of fraud and irregularity were considered by the committee in detail, precinct by precinct. According to the report, the evidence showed that persons were permitted to vote in many precincts who were not legally qualified to vote because they had not registered and did not make affidavit of their right to vote in absence of their registration as required by law. In a number of precincts unnaturalized aliens voted with the knowledge and consent of the election officials. One precinct returned 16 more votes than were actually cast. In two precincts votes were cast by persons who had not reached the legal age. In other precincts votes were cast by persons disqualified under the State law on account of nonpayment of taxes. In a number of instances the poll books bore the names of soldiers who were known to be fighting overseas or who had died. In many instances names appeared on the lists of names returned by the election officials as having voted who as a matter of fact did not vote.

As to the change of the polling place in Archbald Borough, third ward, on election day:

The contestant also claims that the polling place in this district was illegally changed on election day contrary to the laws of Pennsylvania, and that, in accordance with the decisions of the supreme court of that State, the entire returns of that district should be thrown out. While the committee finds that the evidence and decisions strongly support this contention, this fact alone would not have caused the committee to recommend the rejection of the entire return. Considering the question, however, in connection with the evidence of fraud hereinbefore referred to, the committee is of the opinion that the entire return from this district should be rejected, as recommended hereafter.

In the second ward of Dickson Borough it appeared that the names were written on the poll books in alphabetical sequence as if the voters had appeared and voted in that order.

The report says:

The committee finds that this was true in at least 10 instances. The committee also finds that the alphabetical arrangement of the names in the poll book constitutes strong circumstantial evidence of collusion and fraud on the part of the election officers.

The contestee submitted that the returns from the first precinct of the sixth ward in Taylor Borough should be rejected because the polling place was not opened on time.

The committee say:

The contestee claims that the returns from this district should be thrown out on the ground that the polls were not open at the time fixed by law and that in the absence of the regular election officers an irregular election board was chosen. The committee finds that while the polls were late in opening, the election in the district in question was carried on in good faith, and that there are no facts which would justify the committee in throwing out the vote of the district.

The contestee also claimed that the votes taken in various military encampments and naval stations should be rejected because not taken in accordance with the requirements of the law, of the State of Pennsylvania

The committee decided:

While it is undoubtedly true, as the contestee claims, that some camps and naval stations submitted returns which failed to comply with all the provisions of the statute, nevertheless, your committee feels that in the absence of evidence that the soldiers who voted were not otherwise disqualified to vote, it would be reluctant to disfranchise them. Inasmuch, however, as the rejection of the entire soldier vote would not alter the result arrived at by the committee upon all the other evidence in the case, it is not necessary to pass upon this question.

Some of the returns were so tainted with fraud as to necessitate the rejection of the entire poll. In other instances it was impossible to determine for which candidate the illegal votes were cast. The report discusses these questions as follows:

In a vast majority of these cases there is no way of ascertaining for whom these illegal votes were cast for the office of Representative in Congress. In many of these districts there is conclusive evidence of actual fraud on the part of the election officers, which would justify the rejection of the entire vote of the district in accordance with a long line of State and congressional precedents. In all of them there was a reckless disregard of the essential requirements of the Pennsylvania election laws on the part of the officers conducting the election, to such an extent as to render their returns unreliable and to bring about the same result as actual fraud.

In the case of *In re Duffy* (4 Brewster, 531), a Pennsylvania case, in which were involved some of the very election districts that are involved in the present case, the court held that when there is a reckless disregard of the provisions of the election law on the part of the election officers, such a condition renders the returns of the election officers unreliable and is sufficient to set them aside. If in the present case the entire vote of the districts in question should be rejected, as has been done by election committees of the House of Representatives in a large number of contested-election cases, the most recent of which was the Massachusetts case of *Tague v. Fitzgerald* in the present Congress, the result would be as follows: John R. Farr, 10,858 votes; Patrick McLane, 8,438 votes; and John R. Farr would be elected by a plurality of 2,420 votes.

If, on the other hand, the rule of deducting the illegal votes pro rata from the total vote of the two candidates, which rule was followed in the case of *Finley v. Walls* in the Forty-fourth Congress and in other contested-election cases, notably, in the recent case of *Wickersham v. Sulzer* in the Sixty-fifth Congress, it would result in a deduction of 164 votes from the total vote of John R. Farr, and in a deduction of 841 votes from the total vote of Patrick McLane, which would make the result as follows: John R. Farr, 11,400; Patrick McLane, 10,924; and John R. Farr, would still be elected by a plurality of 476.

After most careful consideration your committee is of the opinion that in the present case both methods should be used. While in all of the election districts in question persons were permitted to vote who had not been legally registered—in certain of the districts there was in addition evidence of other fraud of various kinds, together with collusion on the part of the election officials of such a character as to destroy the integrity of the returns and to justify their

absolute rejection. Accordingly, your committee has rejected the entire returns from the last mentioned districts, in which John R. Farr received 322 votes and Patrick McLane received 1,669 votes.

In accordance with their findings the committee conclude:

The evidence in this case, therefore, clearly shows that the contestee, Patrick McLane, must under the law be held to have had constructive knowledge of expenditures made in excess of the amount permitted under the corrupt practices act, and for that reason, in accordance with congressional precedent, he is not entitled to a seat in the Sixty-sixth Congress.

Moreover, entirely apart from the unlawful expenditure of money incurred to secure the election of the contestee, there was widespread fraud and illegality in the election itself. The rejection of the entire vote of the election districts in which such fraud and illegality occurred, in accordance with a long line of congressional and State precedents, results in the election of John R. Farr, the contestant, by a plurality of 2,420 votes.

Your committee therefore respectfully recommends to the House of Representatives the adoption of the following resolutions:

Resolved, That Patrick McLane was not elected a Member of the House of Representatives from the tenth congressional district of the State of Pennsylvania in this Congress and is not entitled to retain a seat herein.

Resolved, That John R. Farr was duly elected a Member of the House of Representatives from the tenth congressional district of the State of Pennsylvania in this Congress and is entitled to a seat herein."

When the case came up in the House for debate, on February 25, 1921,¹ Mr. James V. McClintic, of Oklahoma, a member of the committee, claimed that only 8 boxes impounded by the committee had been examined, and urged that the remaining 32 be counted. Mr. Leonidas D. Robinson, of North Carolina, explained that ballots were examined from those precincts only in which the returns were disputed, and as there were no allegations of fraud in the precincts represented by the 32 boxes they were not examined by the committee.

Mr. McClintic thereupon offered the following motion which was disagreed to, yeas 120, nays 161:

Resolved, That the report in the Farr against McLane contested case be recommitted to the Committee on Elections No. 1, with instructions to examine the tally sheets and the registration lists in the 32 boxes impounded by a court order under date of April 5, 1919, on the prayer of the contestee, and to report back to the House when all of the testimony and facts have been properly considered.

The resolutions recommended by the committee were then agreed to; the first resolution unseating the returned member, yeas 161, nays 113; and the second resolution seating the contestant, yeas 158, nays 106.

76. The Illinois election case of Rainey v. Shaw in the Sixty-seventh Congress.

The Federal corrupt practices act held to be unconstitutional so far as it relates to nominations.

The statute requiring filing of statements of receipts and expenses of candidates is directory rather than mandatory, and failure to comply with its requirements will not invalidate election.

¹Journal, p. 190; Record, p. 3899.

Where no resulting injury or moral obliquity is shown, failure to comply with the statutory requirements for filing of answer to notice of contest within stipulated time does not warrant exclusion from the House.

On December 6, 1921,¹ Mr. Robert Luce, of Massachusetts, from the Committee on Elections No. 2, submitted the report of the committee in the case of Henry T. Rainey *v.* Guy L. Shaw from the twentieth district of Illinois.

The sitting member was conceded to have received a majority of the votes cast at the election, and no charges were made reflecting upon the regularity of the election or the integrity of the count.

The only point involved was the failure of contestee to comply with the technical provisions of the corrupt practices act relative to the filing of statements of receipts and expenditures in connection with the primary and election, and of the statute requiring that answer to notice of contest be filed within 30 days.

As to the application of the corrupt practices act the report says:

After notice of contest had been filed, the Supreme Court, in the case of Truman H. Newberry *et al. v.* The United States, gave an opinion, May 2, 1921, bearing upon the corrupt practices act. As to the effect thereof, the Attorney General had advised your committee as follows:

"It is my opinion that the Newberry decision should be construed as invalidating all of the provisions of the act referred to, relating to nominations for the office of Senate or Representative in Congress, whether by primaries, nominating conventions or by indorsement at general or special elections. I am also of the opinion that as to statements of receipts and disbursements to be filed by candidates for the office of Representative in Congress under section 8 of the act, the only provision now in force and effect is the one which requires such statements to be filed in connection with the election of such candidates."

Agreeing with this view, we conclude that such of the allegations of the contestant as concerned the primaries in the district in question fall to the ground, by reason of the unconstitutionality of so much of the act as related to nominations.

With the elimination of issues relating to the primary, the committee turn to the question of contestee's failure to file statements of receipts and expenditures within the stipulated time:

On this point the testimony of Mr. Shaw is to the effect that he duly mailed such statements. They were not received by the Clerk of the House. Had Mr. Shaw taken advantage of the statute and sent the documents by registered mail, no question would have arisen. However, the law does not make registration a requisite, and, as a matter of fact, many returns forwarded without registration have been unhesitatingly accepted. Apart from the nonarrival of the statements, there was no evidence tending to contradict Mr. Shaw's testimony, but, on the other hand, there was evidence to the effect that at least some of the statements had been duly prepared. With the case so standing, it seemed clear to your committee that in this particular no sufficient reason had been advanced for declaring Mr. Shaw to be disqualified, even if it were to be assumed that the requirements of law in the matter of filing statements are mandatory rather than directory. Therefore that question need not here be once more discussed, though in passing it may not be undesirable to point out that the precedents support in general the view such requirements are directory and therefore that failure to observe them will not of itself invalidate an election.

Relative to observance of the statute specifying the time within which answer to notice of contest may be filed the committee conclude:

The only other contention seriously pressed in behalf of the contestant was that Mr. Shaw had failed to comply with the statutory requirements for the filing of an answer to notice of contest

¹Second session Sixty-seventh Congress, House Report No. 498; Report p. 55.

within a stipulated time. Here the evidence showed no willful neglect on the part of Mr. Shaw, nor any injury to Mr. Rainey. Mr. Shaw appears to have erred in his understanding as to what would be a compliance with the law, and did not receive legal advice in the matter until the time for proper reply had passed, but a proper reply was then made, and in ample tune to protect all of Mr. Rainey's rights. Under such circumstances, where no harm has resulted to anybody, where no act of failure to act has shown moral obliquity, where no statutory purpose has been thwarted to the public detriment, there is no ground for the contention that a district ought to be deprived of the services of its duly chosen representative, or that the dignity or the honor of the House calls for his exclusion.

The report was considered on December 15, 1921,¹ when the usual resolutions reported by the committee, declaring the contestant not elected and the sitting member entitled to his seat, were agreed to without division.

77. The South Carolina election case against Richard S. Whaley in the Sixty-third Congress.

Instance of a case instituted by memorial from an elector of the district.

The willful making of a false oath to statements required by the corrupt practices act constitutes perjury.

Violation of the corrupt practices acts, either Federal or State, are tried in the respective courts having jurisdiction and not in the House of Representatives, but any Member found to have violated such acts is subject to prompt expulsion.

An election committee, while authorized to subpoena witnesses and compel the production of papers in an election case, is without such authority in proceedings for expulsion unless authorized by the House.

A committee lacking the power of subpoena permitted the petitioner to present evidence ex parte in the form of affidavits.

The ordinary rules of evidence govern in election contests as in other cases.

On December 20, 1913² Mr. James D. Post, of Ohio, from the Committee on Elections No. 1, submitted the majority report on the charges filed against Richard S. Whaley, of South Carolina.

This case concerns two primary elections held in the first congressional district of South Carolina for the purpose of nominating a Democratic candidate to fill out an unexpired term in the House.

Under the election laws of the State of South Carolina, if there were more than two candidates, the two receiving the highest number of votes in the first primary were required to submit to a second primary.

At the first primary there were five candidates, of whom Mr. Whaley and E. W. Hughes received the highest number of votes, and participated in the second primary. In the second primary Mr. Whaley received a majority of the votes and became the Democratic candidate at the special election held April 29, 1913. There was no other candidate and Mr. Whaley was unanimously elected. None of the candidates instituted contest proceedings, but on September 20, 1913, one John P. Grace,

¹ Journal, P. 37.

² Second session Sixty-third Congress, House Report No. 158; Record, p 1323.

mayor of the city of Charleston, filed charges in the form of an affidavit alleging violation of the Federal and State corrupt practices acts, in promising Federal offices, and in the receipt and expenditure of large sums of money unaccounted for, and in making affidavit to false statements filed with the Clerk of the House as required by the corrupt practices act. The memorial closed with the prayer that these charges be investigated and if substantiated that Mr. Whaley be expelled from the House.

This case, while considered by an election committee of the House, is not in fact the adjudication of an election contest, but proceedings on a proposition to expel.

As the committee say:

The procedure is an anomalous one, and so far as we have been enabled to determine without precedent. The ultimate object sought to be obtained by the petitioner is to expel a Member of the House. Under the circumstances this can only be done upon two-thirds vote of its membership. The question readily occurs to the mind, How is such a case to originate? Can an elector of a congressional district by simply filing an affidavit with the Speaker of the House, invoke the power of the House to expel one of its Members? Will the House upon the complaint of a single elector, ipso facto, take jurisdiction of the subject matter of such a complaint? We call attention to the fact that the charges of bribery and misconduct relate principally to the manner and methods employed in the nomination of the accused. That no charges are made in the complaint against the accused as to the manner and method of his election. The real gist of the petitioner's complaint is the charge of perjury committed before and after the election of the accused as he claims in violation of the Federal statutes.

The majority report sets out the two Federal corrupt practices acts (36 U. S. Stat. L. 822, and 37 U. S. Stat. L. 25,) claimed to have been violated. In neither is the making of a false oath to any statements required by the acts to be filed specifically made the crime of perjury.

However, section 5392 of the Revised Statutes of the United States provides:

Every person who, having taken oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than \$2,000, and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

And the report deduces:

It is apparent that the willful making of a false oath to the statements required by the publicity act would, under the general perjury statute, constitute such willful oath the crime of perjury.

The report then quotes sections 359 to 363 and 365 of the Criminal Code of the State of South Carolina and continues:

A perusal of these sections discloses that repeating, bribery, offering to procure voters by bribery, threats, and duress are all made crimes alike applicable to primary elections and general elections. A candidate for Congress must file with the secretary of state a pledge that he will not give nor spend money nor use intoxicating liquors for the purpose of obtaining or influencing votes. His neglect to file such a statement is a misdemeanor. His violation of such a pledge nullifies his election. It is made a penal offense to give a bribe for the purpose of influencing a voter, but not to receive one, and under section 368 one-third of the pecuniary penalty shall go to the informer and the remainder to the State.

We have cited these statutes, both State and Federal, for the purpose of showing that the memorialist, if the voters at the two primary elections held in the first district of the State of South Carolina were by Mr. Whaley and his friends debauched and the enormous sum of money alleged to have been spent was spent for that purpose, could, and as the majority of the committee believe should, have resorted to the criminal courts either of the State or Federal Government.

As we have heretofore pointed out, the proceeding is not one of contest, but of expulsion. The committee finds that in a proceeding of this nature it is without authority to subpoena witnesses or to compel the production of papers or records, and it was therefore obliged to require the petitioner to present his case by affidavits and such witnesses as he might produce before the committee.

A digest of evidence in support of the memorial and of other evidence in refutation of the charges therein contained is then given and summarized:

The majority of the committee respectfully submit that no testimony whatever was produced in support of the charges that was relevant or that would be accepted in any court at law or would be admissible before the Elections Committees of the House. A careful survey of the testimony will disclose that nothing can be found in any way compromising the accused. It must not be forgotten that the evidence taken in this case was mostly *ex parte* and without the right of cross examination. Notwithstanding this fact, the committee has searched in vain for any relevant testimony implicating Mr. Whaley of any of the acts alleged in the complaint. It is well settled that the ordinary rules of evidence applies as well to election contests as to other cases; that the evidence must be confined to the point in issue and must be relevant. (McCreary on Elections, 4th ed., see. 459.)

78. The case against Richard S. Whaley, continued.

The power of the House to expel one of its Members is unlimited; a matter purely of discretion to be exercised by a two-thirds vote, from which there is no appeal.

An election case may be instituted by a contest filed in accordance with the law, by protest or memorial from an elector of the district, by protest or memorial filed by any other person, or on motion of a Member of the House.

The report differentiates between the present case and an election contest discussing, incidentally, the power of the House to expel:

The question presented to the committee is not a question as to the election, returns, or qualifications of the sitting Member. If it related to the election of the sitting Member, then the House would deal alone with the question of the number of legal votes he received. If it related to the returns of the sitting Member, then the House would deal with the form of returns on which he was admitted to a seat in the House. If it related to his qualifications, neither the question of election nor of returns is involved. The question, however, relates to the eligibility of the sitting Member. Ineligible not for a want of any of the constitutional qualifications, but because it is alleged that the sitting Member was guilty of the crime of bribery in the conduct of his election and the crime of perjury in the verification of his expense statement required to be filed with the Clerk of the House, and which crimes, it is contended, are inconsistent with the trust and duty of the Member.

The Federal Constitution provides that each House may determine the rules of its proceedings, punish its Members for disloyalty, and with the concurrence of two-thirds expel a Member. The power of expulsion is a necessary and incidental inherent in all legislative bodies. It is a power of protection. It necessarily abides in the House in order that it may perform its high functions and is necessary to the safety of the State. A Member may be wholly unfit through some physical disorder or mental derangement to perform the duties of his office. His conduct may be so disorderly as to obstruct the business of the House. He may commit a crime or may be disloyal

or do many things which would render him ineligible as a Member. The precedents are numerous that in cases like these the power to expel a Member is invaluable. This power may be exercised for misconduct on the part of a Member committed in any place and either before or after conviction in a court of law. From a careful survey of the precedents of the House and Senate, its extent seems to be unlimited. It seems to be a matter purely of discretion to be exercised by a two-thirds vote. Of course, this unlimited power must be fairly, intelligently, and conscientiously made with due regard to the propriety, honor, and integrity of the House and the rights of the individual Member affected. For an abuse of this discretion there is no appeal. The honest election of each Member of this House is a matter of the highest importance both to the House and to the people at large.

The election was held April 29, 1913, while Congress was in session. The law requires the filing of notices of contest within 30 days after determination of the result. The memorial, however, was not filed until September 20, 1913, a period of five months.

The report holds:

Mr. Grace has been guilty of laches in that he did not institute a proceeding to contest the seat of Mr. Whaley. The House may adjudicate the question of the right to a seat in either of the four following cases:

- (1) In the case of a contest between the contestee and the return Member of the House instituted in accordance with the provisions of law.
- (2) In the case of a protest or memorial filed by an elector of the district concerned.
- (3) In the case of the protest or memorial filed by any other person.
- (4) On motion of a Member of the House.

Mr. Grace could, and we think should, have filed a protest in the nature of a contest and within the time prescribed by the statute. By his own admission he knew about the things of which he now complains within the time for filing a contest, because he was a part and parcel as the manager of Mr. E. W. Hughes in both of the primary elections, the conduct of which he complains.

Had he filed his contest within the time prescribed by the statute, a method of taking testimony would have been provided for and the sitting Member would have been given an opportunity to have known the nature and cause of the accusations, the right to answer thereto, and to examine and cross-examine the witnesses.

The committee in accordance with their conclusions recommended the following:

Resolved, That the charges filed by John P. Grace against Richard S. Whaley, Representative from the first congressional district of the State of South Carolina to the Sixty-third Congress, be dismissed.

Mr. Charles M. Borchers, of Illinois, a member of the committee, considered the evidence as warranting an investigation, but did not file minority views. Mr. Burton L. French, of the committee, concurred in the majority report but submitted that the corrupt practices act was as binding upon unsuccessful candidates as upon those elected, and that while Congress manifestly had no disciplinary authority over the defeated candidate, it was within the province of the House to inquire into the incidental allegations which had been made touching the expenditure of money on his part and the application of the law thereto.

Mr. James A. Frear, of Wisconsin, did not concur in the opinion of the committee and submitted minority views reviewing the testimony in detail and holding

the evidence submitted before the committee sufficient to justify an investigation, and recommended the following:

Whereas the charges of John P. Grace, of Charleston, against Richard S. Whaley, Congressman from the first congressional district of South Carolina, have been supported by oral testimony and other evidence that presents prima facie a violation of law on the part of said Richard S. Whaley which, if true, disqualifies him from remaining a Member of Congress:

Resolved, That this committee request its chairman to immediately prepare and introduce a resolution in the House asking for authority to prosecute a thorough investigation as to the facts and to extend its inquiry to the several counties of said first Carolina district, if need be, in order to ascertain the truth or falsity of such charges.

The case was fully debated on January 26 and 27¹ On the latter day the House disagreed to the minority resolution offered by Mr. Frear—yeas 98, nays 227. The resolution of the majority was then agreed to without division.

79. The Missouri election case of Gill. v. Catlin in the Sixty-second Congress.

Interpreting the corrupt practices act of the State of Missouri.

A candidate who purposely remained in ignorance of the acts of agents in his behalf when the means of information were within his control was held to have ratified such acts and to have assumed responsibility therefor.

The election laws of a State are followed by the House, which is influenced in its construction of such statutes by well-considered decisions of the State courts.

On August 5, 1912,² Mr. James A. Hamill, of New Jersey, from the Committee on Elections No. 2, submitted the report of the majority of the committee on the Missouri case of Patrick F. Gill *v.* Theron E. Catlin.

The principal question involved in the case was the expenditure of money by the sitting Member in excess of the amount allowed under the corrupt practices act of the State.

Section 6046 of the Revised Statutes of the State of Missouri (1909) provides:

No candidate for Congress or for any public office in this State, or in any county, district, or municipality thereof, which office is to be filled by proper election, shall, by himself or by a through any agent or agents, committee, or organization, or any person or persons whatsoever, in the aggregate pay out or expend, or promise or agree or offer to pay, contribute, or expend, any money or other valuable thing in order to secure or aid in securing his nomination or election or the nomination or election of any other person or persons, or both such nomination and election, to any office to be voted for at the same election, or in aid of any party or measure, in excess of a sum to be determined upon the following basis, namely: For five thousand voters or less, one hundred dollars; for each one hundred voters over five thousand and under twenty-five thousand, two dollars; for each one hundred voters over twenty-five thousand and under fifty thousand, one dollar; and for each one hundred voters over fifty thousand, fifty cents, the number of voters to be ascertained by the total number of votes cast for all the candidates for such office at the last preceding regular election held to fill the same; and any payment, contribution, or expenditure, or promise or agreement or offer to pay, contribute, or expend any money or valuable thing in excess of said sum, for such objects or purposes, is hereby declared unlawful.

¹ Journal, p. 152; Record, p. 2350; Moores' Digest, p. 67.

² Second session Sixty-Second Congress, House Report No. 1142; Journal, p. 923; Record, p. 10225.

On this basis the personal expenses of a candidate in the election in question were limited to \$662.

The sworn statement filed by the contestee in conformity with this act showed an expenditure of \$611, but it appeared from the testimony as outlined in both the majority and minority reports that relatives of the contestee have expended in his interest during the campaign sums in excess of \$10,000.

Testimony was introduced to prove that these expenditures were made without the knowledge or consent of the contestee and was rebutted by other evidence introduced to show that he had attended dinners at which campaign expenditures were discussed and provided for; that he had access to office records relating to them; that he canvassed the district in company with men who expended money in his behalf; that those who made expenditures acted as his agent; and that he could have been fully informed in the matter had he chosen to avail himself of the sources of information at hand.

Evidence of agency is particularly stressed:

One occurrence during the campaign is well worthy of notice as showing a studied purpose on the part of the contestee to remain designedly in ignorance of the transactions carried out during his campaign. A meeting was arranged at the home of the elder Catlin to which all the congressional committeemen and Mr. Kirby were invited. A dinner was served and at its conclusion some one suggested that the party "get down to business." Immediately the contestee arose and left the gathering, although the business to be discussed was the conduct of his own campaign, something in which he was necessarily, vitally, and deeply interested. From the evidence it appears that the business lasted about 15 minutes, and at its conclusion it never occurred to the contestee to ask what had taken place at the meeting. This action on the part of the contestee, far from establishing his innocence of any knowledge, tends strongly to confirm his knowledge and connivance in a plan for the consequences of which he wanted to escape responsibility. We are irresistibly compelled to conclude that Daniel N. Kirby was the agent of Theron E. Catlin.

It is therefore ruled that:

It is fundamental that one may, by affirmative acts and even by silence, ratify the acts of another who has assumed to act as his agent. (Clark and Styles on the Law of Agency, Vol. I; p. 264.) It is further laid down that:

"Although as a general rule a principal must have full knowledge of all the facts, * * * yet the principal can not purposely remain ignorant where the means of information is within his control, so as to escape the effect of his acts that would otherwise amount to a ratification. (Clark and Styles on the Law of Agency, Vol. I; p. 339.)"

Therefore Daniel N. Kirby having acted in behalf and for the benefit of the contestee, with the latter's full knowledge and consent, the failure to file a statement of these expenditures and the fact that they exceeded the amount permitted by the law of Missouri, under the laws of that State necessitate the ousting of the contestee from office.

In support of this position the following statute of the State of Missouri was cited:

In any such action, such applicant, upon his own motion or on the motion of the defendant, shall be made a party plaintiff; and in any case in which such applicant shall be a party, if judgment of ouster against the defendant shall be rendered, as provided in section six thousand and fifty-four of this article, said judgment shall award such office to said applicant, unless it shall be further determined in such action, upon appropriate pleading and proof by the defendant, that some act has been done or committed which would have been ground in a similar action against such plaintiff had he been declared elected to such office, for a judgment of ouster against him,

and if it shall be so determined at the trial, such office shall be in the judgment declared vacant, and shall thereupon be filled by appointment or a new election, as may be otherwise provided by law regarding such office.

The majority then make the following application:

It is, we believe, incumbent upon this committee to follow the law of Missouri. It has been held in this House in the Forty-second Congress (McCreary on Elections, 422) that:

“It is a well-established and most salutary rule that where the proper authorities of the State government have given construction to their own constitution or statutes that construction will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious working of our complex Governments, State and National.”

This law has been adjudicated by the Supreme Court of Missouri and held to be constitutional. We are therefore not only justified but constrained in following this enactment. Therefore, the contestee, Theron E. Catlin, is not entitled to hold the office of Representative in Congress from the eleventh congressional district of Missouri in the Sixty-second Congress.

80. The case of GM v. Catlin, continued.

Where it was impossible to ascertain which votes in a precinct were properly cast and counted the entire vote of the precinct was rejected.

A Member whose seat was being contested did not vote on a question incidental to the contest.

Having determined that a returned Member had subjected himself to the penalties of a State election law necessitating his ousting from office, the House held he was not entitled to his seat.

The further question of fraud in the casting and counting of votes alleged by the contestant were also investigated and the majority of the committee held the proof of fraud to be conclusive, especially as to the third and eighteenth wards of St. Louis. As to these wards the report says:

It is impossible for this committee to apportion the number of votes in these wards and determine how many were cast respectively for each of the candidates. The total vote of both wards is so characterized by fraud that it is absolutely inseparable. The only course the committee feel they are warranted in following when dealing with the vote of these wards is the one outlined by the House in the Fifty-seventh Congress, in the case of *Wagner v. Butler*. In this case the committee eliminated altogether the votes in the tainted territory and expressed its reason for doing so by stating:

“There was such manifest fraud and gross irregularity in each of these precincts that it is absolutely impossible to ascertain what votes, if any, were honestly cast and counted.”

The committee adopts this language as its own and determines to follow the principle therein enunciated.

Following this rule the majority deducted the vote credited to each candidate from these wards from their respective total vote in the district.

The official returns from the entire district gave Catlin 20,089 votes and Gill 18,612 votes. Subtraction of the votes credited from the two wards reduced the vote of Catlin to 14,612 and that of Gill to 15,043, resulting in a majority of 431 votes for the latter.

The majority of the committee, therefore, recommended the following resolution:

Resolved, That Theron E. Catlin was not elected a Representative from the eleventh district of Missouri in the Sixty-second Congress.

Resolved, That Patrick F. Gill was duly elected a Representative from the eleventh district of Missouri to the Sixty second Congress and is entitled to the seat therein.

From this recommendation the minority report presented by Mr. Sidney Anderson, of Minnesota, dissents as follows:

The contestee having presented a certificate from the appropriate officers of the State of Missouri to the effect that he was duly elected a Member of Congress from that State, and he having been sworn in and having taken his seat, every presumption must be indulged in favor of the legality of his election and its freedom from fraud, corruption, or violation of law. It necessarily follows, therefore, that the burden is on the contestant to prove to the satisfaction of the House that such fraud, intimidation, corruption, or violation of law was used or occurred in the election of contestee as to vitiate and invalidate that election.

The minority report then joins issue on the contention that there has been any violation by the contestee of the provision of the Missouri law limiting the amount which may be expended by a candidate. It fails to find in the evidence adduced any testimony which would warrant the conclusion reached by the majority.

It also dissents as follows from the statement in the majority report that the statute quoted had been held constitutional by the Supreme Court of Missouri.

The Supreme Court of Missouri in the case of *State ex. inf. v. Towns* (153 Mo., 91) declared the particular section of the Missouri law cited and relied upon by the majority to be unconstitutional. The syllabus which states the conclusion of the court in that case is as follows:

“So much of the corrupt-practices act as authorizes a trial of a person elected to the office of county clerk for a violation thereof, and his removal from office therefor, is constitutional. But so much thereof as directs the court to include in its judgment of ouster an award of the office to the defeated candidate is violative of the constitutional provision which confers on the governor the power of appointment in case of vacancy in the office of a clerk of a court of record.”

This decision unquestionably disposes of that part of the statute so far as this case is concerned.

As to charges of fraud in the casting and counting of votes, the minority call attention to the fact that on a recount of the votes, substantially as many errors were found to have been made in favor of the contestant as in favor of the contestee, indicating that no conspiracy to defraud existed in favor of the contestee and disproving fraud in the counting of the ballots.

The minority therefore declined to concur either in the views expressed or the resolution proposed by the majority of the committee.

On August 12,¹ Mr. Hamill called up the case, when Mr. James R. Mann, of Illinois, raised the question of consideration, which was decided in the affirmative. At the conclusion of the roll call on the question of consideration, the Speaker, in order to make a quorum, directed the clerk to enroll the names of several members, including that of Mr. Catlin, the contestee, who were present but not voting. Mr. Mann submitted that as it was a matter involving Mr. Catlin personally he was not required to vote. The Speaker sustained the point of order and directed that Mr. Catlin's name be not recorded.

After debate, Mr. Anderson offered a substitute resolution declaring the sitting Member elected and entitled to the seat. The question on the substitute was decided in the negative, yeas 70, nays 122. A division of the question then being demanded on the pending resolution, the first section declaring the sitting Member not elected was agreed to, yeas 121, nays 71, and the section seating the contestant was agreed to, yeas 104, nays 79. Thereupon Mr. Gill appeared and took the oath.

¹Journal p. 951; Record, D. 10748; Moores' Digest, p. 52.

81. The Wisconsin election case of Gaylord v. Cary in the Sixty-fourth Congress.

Construing the corrupt practices act of the State of Wisconsin.

A strict observance of the Federal corrupt practices acts and the corrupt practices acts of the State from which returned is incumbent upon candidates and is essential to continued Membership in the House.

No person whose seat in the House has been obtained by fraud or questionable methods should be allowed to perform the duties of the office or receive the emoluments thereof or enjoy the prerogatives with which a Member is clothed.

Hearsay evidence is inadmissible in contested election cases.

In the absence of fraud the voter can not be deprived of his vote by the omission of election officers to perform duties imposed upon them by law.

Only upon proof of conditions under which the law has expressly declared ballots to be void have the courts sanctioned their rejection.

While the failure to observe statutes merely directory is not necessarily fatal, it is the duty of election officers to observe rigidly the directory as well as the mandatory requirements of the election laws.

An election law failing to indicate clearly that a compliance with its provisions is essential to the validity of the election is directory and not mandatory.

The inadvertent omission from the statement filed with the Clerk of the House of items, the inclusion of which would not otherwise prejudice, held not sufficient to warrant action by the House.

Introduction under agreement with a civic organization of pension bill prior to election held not to constitute proof of bribery.

On May 1, 1916,¹ Mr. Lewis L. Morgan, of Louisiana, from the Committee on Elections No. 3, submitted the report in the Wisconsin case of Winfield R. Gaylord v. William J. Cary.

The principal question in the case was whether the contestee had violated the Federal corrupt practices acts and those of the State of Wisconsin.

The committee say:

The proposition that met your committee at the very threshold of the owe at bar was whether the contestee had violated the Wisconsin corrupt-practices acts. If so, whether he thereby rendered himself ineligible, unfit, and unworthy to be a Member of the House of Representatives.

Your committee contend that no person should be permitted to further his own political fortunes by willfully violating the Federal corrupt-practices acts or the corrupt-practices acts of his own State. These highly commendable statutes are intended to stand as a barrier between public decency and the political corruptionist. Hence the necessity of their observance.

Now, after a methodical analysis of the evidence, we find that the contestee failed to include in his State report two items aggregating \$32.25; but these items appear in the statement filed by him with the Clerk of the House of Representatives. The total disbursements of the contestee, as shown by his statement filed with the secretary of the State of Wisconsin, amount to \$1,952.75,

¹First session Fifty-Fourth Congress, House Report No. 619; Journal, p. 640; Record, p. 7144; Moores' Digest. p. 91.

and under the Wisconsin statute a candidate for Congress is authorized to expend \$2,500. Hence, it requires no unusual keenness to perceive that there was no conceivable reason why the contestee, should have knowingly excluded these items from his State report. To hold that the contestee is ineligible because he inadvertently omitted to report the items referred to would not only be an inexcusable misconception of the real object of the corrupt-practices acts, but, moreover, it would mean the establishment of a most dangerous precedent. Therefore, we are unwilling to do violence to our judgment by adopting or sanctioning any such construction.

The fundamental purpose of this law is to prevent fraud, bribery, and corruption of every conceivable character. In the word of the highest court of Wisconsin, "The aim of the statute is to require the aspirant for office to resort to honest means to get it, "and your committee are in entire harmony with the principle thus enunciated. The law should be interpreted and enforced to fulfill its aim. To do otherwise would be a clear perversion of the law.

It was also urged in the notice of contest that the contestee in violation of the corrupt-practices act had dispensed large sums of money to various men for political purposes.

The report, however, considered:

The testimony relating to these charges is wholly hearsay and was given mainly by witnesses whose character and credibility were thoroughly impeached. It is axiomatic that hearsay evidence is inadmissible in contested-election cases. This proposition of law is so unequivocal that we shall refrain from citing authorities in its support.

It was further contended that the contestee had introduced a pension bill for the purpose of influencing political support, but in the absence of evidence the committee agreed the mere fact that the contestee had fathered a pension bill was no proof of bribery under any reasonable construction of the law.

It was also averred that in certain precincts in the city of Milwaukee voters were unlawfully assisted, and that ballots were handed out by persons other than the election officers, but the committee point out:

The courts have uniformly held that in the absence of fraud, the voter can not be deprived of his vote by the omission of the election officers to perform the duties imposed upon them by law. It is only where a law has expressly declared the ballot to be void that the courts have sanctioned its rejection. In other words, an act is considered merely directory when it does not clearly indicate that a compliance with the provision in relation to the method of conducting the election is essential to the validity of the election.

While this is a well-established rule of law, yet your committee firmly believe that there ought to be a rigid observance of the directory as well as the mandatory requirement of the election laws by the election officers. Otherwise elections will never be entirely free from fraud or the suspicion of fraud.

However, after a painstaking examination of the evidence presented by contestant relating to these precincts we find that there was not the slightest semblance of an effort made to establish the names of the illegal voters; no definite evidence as to the number of illegal voters; no evidence that the election officers were guilty of fraudulent misconduct in the booths with reference to the preparation and marking of ballots for illiterate voters; no proof that the returns made by the election officers are false. Hence, we feel impelled to conclude that the facts as disclosed in the record do not justify the exclusion of the returns from the precincts hereinabove enumerated.

In conclusion the committee declare—

The honest election of each member of the House of Representatives is a matter of the gravest moment, both to this body and to the American people. No person whose seat in this House has been obtained by fraud or questionable methods should be allowed to perform the duties of the office and receive the emoluments thereof and enjoy the prerogatives with which a Member is clothed.

However, after a careful consideration of the evidence in the record, your committee are unanimously of the opinion that the contestant's averments have failed of proof and therefore recommend the adoption of the following resolutions:

Resolved, That Winfield R. Gaylord was not elected a Representative to the Sixty-fourth Congress from the fourth congressional district of Wisconsin and is not entitled to a seat therein.

Resolved, That William J. Cary was elected a Representative to the Sixty-fourth Congress from the fourth congressional district of Wisconsin, and is entitled to retain his seat therein.

The resolution reported by the committee was agreed to without debate or division.

82. The Senate case of Howard Sutherland, of West Virginia, in the Sixty-fifth Congress.

Instance of an election case inaugurated in the Senate by memorial. Discussion of corrupt practices law of State of West Virginia.

In absence of evidence the Senate declined to investigate charge of improper registration.

No arrest having been made or conviction had for violation of State election law limiting amount to be expended in procuring election, the Senate did not pursue the inquiry.

A petitioner complaining of irregularities in election having failed to present evidence, the Senate confirmed the title of the sitting member.

On June 26, 1918¹ (legislative day, June 24), Mr. Atlee Pomerene, of Ohio, from the Committee on Privileges and Elections' submitted a report on the memorial of Mr. William E. Chilton, of West Virginia, asking an investigation of the election of Howard Sutherland, elected a Senator from the State of West Virginia for the term commencing March 4, 1917. The memorial alleged the violation of the corrupt practices law of West Virginia and asked that the seat be vacated for the following reasons:

First. That Howard Sutherland was not the nominee of the Republican Party for the office of United States Senator, because his nomination was brought about by practices which violate the statutes of West Virginia, in that no candidate is permitted to spend at the primary more than \$75 for each county in the State; that there are 55 counties in the State, making a maximum amount to be expended \$4,125; that the statement of his receipts and expenditures which he filed June 6, 1916, before the primary, shows a total expenditure by him of \$4,395.69, which is \$270.69 in excess of the amount permitted to be spent under the statute; that after the primary, on or about June 20, 1916, he filed another statement, as required by the statute, in which he recites among other things that the sum of \$375 was improperly charged to primary-campaign expenses in the first account filed, leaving a balance of \$4,020.69; that expenses incurred by him after the filing of the first account amounted to \$155.94, making the total amount thus expended in the primary campaign \$4,176.63, or \$51.63 in excess of the maximum permitted by the West Virginia statute; and that, because of these facts, the election should be set aside and his seat declared vacant.

Second. The petitioner further charges that Howard Sutherland's election was brought about by practices which were corrupt and illegal, in that hundreds of persons known to be dead or nonresident of Mingo County were placed on the registration books; that an appeal was made to the county courts, under the statute, to hear evidence touching the legality of these registrations, but the court declined to hear the evidence; that said names were allowed to remain on the registration list and were used in repeating for the Republican ticket, including the said Sutherland;

¹ Second session Sixty-fifth Congress, Senate Report No. 525; Record, p. 8308.

that thousands of votes were cast by persons not registered; that they voted the Republican ticket in various localities; that enough such votes were cast to change the result in the election of the United States Senator; that large sums of money were used for the purpose of corrupting the voters of the State and inducing them to vote the Republican ticket; and that, except for such expenditures contrary to the laws of the State and such illegal votes, the said Howard Sutherland would not have been elected.

Mr. Sutherland entered a general denial of all charges of corrupt, illegal, or improper registration or voting which affected the result of the election.

On the issue thus submitted the committee decided:

In view of these statements by Mr. Chilton and Mr. Sutherland, your committee is of the opinion that there is no evidence before it to justify any investigation of alleged improper registration or improper or illegal voting, and that the charges in respect thereto have been entirely abandoned.

As to expenditures in excess of the statutory limit, Mr. Sutherland admitted that his preprimary account showed an apparent excess expenditure of \$270.69, and that after certain deductions were made there was still an expenditure of \$51.63 in excess of the amount permitted by the law of West Virginia. He claimed, however, that the account included items aggregating \$1,500 which did not constitute expenditures within the limits prescribed by the Federal statutes.

The committee say:

The corrupt-practice act of West Virginia, as amended in 1915, limits the amount of expenditures by the senatorial candidate at the primary election to \$75 for each of the 55 counties in the State, or to \$4,125. His preprimary account, as filed, shows a total expenditure of \$4,395.69, or \$270.69 in excess of the amount permitted by the statute.

The afterprimary account, as filed, recites that \$375 was improperly charged to primary campaign expenses, and after deducting this sum his disbursements totaled \$4,176.63, or \$51.63 in excess of the amount permitted to be spent by the West Virginia statutes.

The only evidence before the committee as to the amount of the expenditures are the statements referred to and which are attached to the memorial or petition. If we accept them as correct, without other proof before us, we must also assume that the sum of \$375, claimed to be improperly charged to primary expenses, was in fact improperly charged.

If, then, the sum of \$51.63 was spent in excess of the statutory limitations, what is the legal effect? It is not claimed that any of the money set forth in the accounts referred to was corruptly spent; the only complaint relates to the amount.

Paragraph b of section 14 of the West Virginia "corrupt-practice act" provides that for certain violations of its provisions, which include excessive expenditures, any person "shall, on conviction, be disqualified from voting or holding any public office or employment during a period of three years from date of conviction, and if elected to or occupying any public office or employment, such office or employment shall be vacated from the date of conviction." But no arrest has been made for this alleged violation of this statute and no conviction has been had for such violation. Senator Sutherland is therefore not subject to the penalties therein provided.

As related in the report, Mr. Chilton filed his petition in the circuit court of the State asking for judicial inquiry into the election.

Thereupon Mr. Sutherland applied to the Supreme Court of Appeals of West Virginia for a writ of prohibition.

In passing upon the case the supreme court of appeals held the corrupt-practices act of the State violative of both State and Federal constitutions.

Quoting the language of the syllabus, it contravened the constitution of the State, because:

In so far as sections 15 and 16, chapter 27, act 1915, purport to authorize a judge to whom application is made, as therein provided, to order a judicial inquiry, if in his opinion the interests of public justice require it, to ascertain whether a candidate for United States Senator, in person or by agents, expended to secure his election money or other things of value in excess of the amount allowed in that chapter sufficient to influence materially the result of the election, and to require the judge to certify his opinion and determination and the evidence adduced before him upon such investigation "to the governor of the State, who shall transmit the same to the proper authorities of the United States Government for such action as said authorities may deem proper, "they are obnoxious to and conflict with Article V of the constitution of this State, in that they attempt to empower a member of the judiciary as such to exercise a volition to determine when, to what extent, or whether the judicial inquiry into alleged corrupt practices shall be undertaken by him upon such application.

It contravened the Constitution of the United States, because:

"In the Senate of the United States, under an express declaration of the Federal Constitution, vests the exclusive power and authority to judge of the election, returns, and qualifications of its Members, and no other power or body lawfully can interpose or in any wise attempt to control or influence the determination of these questions, or declare void an election held to select such a Member."

In conclusion, let it be observed that Mr. Sutherland filed with the secretary of state his preprimary expense statement May 26, 1916, and his after primary statement June 20, 1916, as the statutes of West Virginia required. The information contained therein became accessible to all the electors of the State from the dates these accounts were filed.

So far as this committee is informed no one before the election saw fit to challenge Mr. Sutherland's right to a place on the ticket as a candidate for Senator because of these excess expenditures, and no one either before or since the election has seen fit to institute criminal proceedings against him under the criminal statutes of the State, to which reference is above made. He has neither been arrested nor convicted of any offense against the corrupt-practices act of the State, and the subcommittee does not therefore believe that it would be justified, under all the circumstances, in holding that this excess expenditure of \$51.63 should operate to vacate his seat, particularly when that fact itself is disputed.

Therefore, the committee unanimously conclude:

The subcommittee, however, believes that all election laws, State or Federal, relating to the election of Senators should be strictly complied with, and therefore does not desire this report to be regarded as a precedent for disregard of State laws limiting expenditures in elections, under circumstances differing from those of this particular case. They therefore recommend the adoption of the accompanying resolution.

Resolved by the Senate of the United States, That Howard Sutherland has been elected as Senator from the State of West Virginia, for a term of six years commencing on the fourth day of March, nineteen hundred and seventeen, and that he is entitled to a seat in the Senate as such Senator.

On June 29,¹ the report was called up in the Senate, and was agreed to without debate or division.

83. The Senate election case of Isaac Stephenson, of Wisconsin, in the Sixty-second Congress.

¹Record, p. 8499.

Under instructions from the Senate to investigate and report whether corrupt methods were employed in election of a Senator, the committee investigated expenditures in the primary campaign.

Duty of presiding officer of joint convention of legislature to declare result of ballot for Senator is purely ministerial and failure to perform that duty does not prejudice validity of the election.

On March 15, 1909,¹ in the Senate, Isaac Stephenson, whose credentials were on file as Senator from Wisconsin, appeared and took the oath without question.

On June 30, 1911,² the Vice President laid before the Senate a communication from the secretary of the State of Wisconsin transmitting a resolution passed by the Legislature of Wisconsin charging that corrupt methods were used in procuring Mr. Stephenson's election.

The communication with accompanying testimony was referred to the Committee on Privileges and Elections, and subsequently the following resolution was agreed to by the Senate:

Resolved, That the Senate Committee on Privileges and Elections or any subcommittee thereof be authorized and directed to investigate certain charges preferred by the Legislature of Wisconsin against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, and report to the Senate whether in the election of said Isaac Stephenson, as a Senator of the United States from the said State of Wisconsin there were used or employed corrupt methods or practices; that said committee or subcommittee be authorized to sit during the recess of the Senate, to hold its session at such place or places as it shall deem most convenient for the purposes of the investigation, to employ stenographers, to send for persons and papers, and to administer oaths; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate, upon vouchers to be approved by the chairman of the committee or chairman of the subcommittee.

On February 12, 1912,³ the majority of the committee submitted a short report which after reviewing briefly the methods adopted by the committee in making the investigation, concludes as follows:

Wherefore your committee, having given full consideration to the law and to the testimony and to all of the facts and circumstances brought to its notice, does find that the charges preferred against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, are not sustained, and your committee further finds that the election of said Isaac Stephenson as a Senator of the United States was not procured by corrupt methods or practices.

Mr. Weldon B. Heyburn, of Idaho, chairman of the subcommittee appointed by the Committee on Privileges and Elections, submitted with the report views giving in detail reasons for the conclusions reached by the committee.

These views set out the following specific charges preferred by the Legislature of Wisconsin:

1. That Isaac Stephenson, of Marinette, Wis., now United States Senator and a candidate for reelection, did, as such candidate for reelection, give to one E. A. Edmonds, of the city of Appleton, Wis., an elector of the State of Wisconsin and said city of Appleton, a valuable thing, to wit, a sum of money in excess of \$106,000, and approximating the sum of \$250,000, as a consideration for some act to be done by said E. A. Edmonds, in relation to the primary election held on the 1st day of

¹ First session Sixty-first Congress, Record, p. 16.

² First session Sixty-second Congress, Record, p. 2599.

³ Second session Sixty-second Congress, Record, p. 1946, Senate Report No. 349.

September, 1908, which consideration was paid prior to said primary election, and that said Isaac Stephenson was at the time of such payment a candidate for the Republican nomination for United States Senator at such primary, and did by such acts as above set forth violate section 4543b of the statutes.

2. That said Isaac Stephenson did, prior to said primary, pay to said Edmonds above-mentioned sums with the design that said Edmonds should pay to other electors of this State, out of said sums above-mentioned and other sum of money received by said Edmonds from said Isaac Stephenson, prior to said primary, sums ranging from \$5 per day to \$1,000 in bulk, as a consideration for some act to be done in relation to said primary by said electors for said Isaac Stephenson as such candidate, in violation of said section.

3. That with full knowledge and with instructions from said Isaac Stephenson, as to how and for what purposes said sums were to be expended, said sums were so paid as above stated to said Edmonds by said Isaac Stephenson and that said sums were paid as above stated for the purposes above stated and also for the purpose of bribing and corrupting a sufficient number of the electors of the State of Wisconsin to encompass the nomination of said Isaac Stephenson at said primary for the office of United States Senator.

4. That in pursuance of the purposes and design above stated said Isaac Stephenson did, by and through his agents, prior to said primary, pay to one U. C. Keller, of Sauk County, an elector of this State, the sum of \$300 as a consideration for some act to be done by said Keller for said Stephenson preliminary to said primary, corruptly and unlawfully.

5. That in further pursuance of such purposes and design said Isaac Stephenson, by and through his agents, prior to said primary, paid to one Hambright, of Racine, Wis., large sums of money as a consideration for some act to be done by said Hambright for said Stephenson preliminary to said primary, said Hambright being then an elector of this State, corruptly and unlawfully.

6. That in further pursuance of the purposes and design above stated said Isaac Stephenson did by and through his agents, prior to said primary, pay to one Roy Morse, of Fond du Lac, Wis., then an elector of this State, the sum of \$1,000 as a consideration for some act to be done by said Morse for said Isaac Stephenson preliminary to said primary, and corruptly and unlawfully.

7. That in further pursuance of such purposes and design said Isaac Stephenson, by and through his agents, prior to said primary, paid to diverse persons, then electors of the county of Grant, Wis., ranging from \$5 per day and upward, as a consideration for some act to be done by said several electors for said Isaac Stephenson preliminary to said primary, corruptly and unlawfully.

8. That in further pursuance of such purposes and design, said Isaac Stephenson, by and through his agents, prior to said primary, did pay to diverse persons who were at such time electors in this State a consideration for some act to be done for said Isaac Stephenson by such electors preliminary to such primary, corruptly and unlawfully.

9. That in further pursuance of such purposes and designs said Isaac Stephenson, by and through his agents, prior to said primary, did pay to electors of this State, who were of a different opinion and who held to other political principles than those of the Republican Party, more particularly Democrats, sums of money as a consideration for some act to be done by such electors for said Isaac Stephenson preliminary to said primary, corruptly and unlawfully.

10. That in further pursuance of such purposes and design said Isaac Stephenson, by and through his agents, prior to such primary, did offer to pay to Edward Pollock, of Lancaster, Wis., certain sums of money, as editor of the Teller, a newspaper published in said city of Lancaster, Wis., and to other editors of newspapers who were at such time electors of this State, and for the purpose of purchasing the editorial support of such editors, and as a consideration of something to be done relating to such primary, corruptly and unlawfully.

11. That said Isaac Stephenson did, prior to such primary, by and through his agents, promise and agree to pay to one Lester Tilton, a then resident and elector of this State, and residing at the city of Neillsville, Wis., a sum in excess of \$500 to procure or aid in procuring the nomination of said Lester Tilton to the assembly of this State from Clark County, and did offer to give to said Lester Tilton a sum in excess of \$500 if said Lester Tilton would become a candidate for the assembly from said Clark County, if said Lester Tilton would support said Isaac Stephenson for the office of United States Senator, all of which is in violation of sections 4542b and 4543b of the statutes.

12. That said Isaac Stephenson did, by and through his agents, give and promise and pay, or agree to pay to other electors of this State, sums of money to procure or aid in procuring the nomination of such electors to the senate and assembly of this State, other than those electors residing in the district where said Isaac Stephenson resides.

13. That E. M. Heyzer and Max Sells, prior to said primary, being at such time employees of the Chicago & North Western Railway Co., a corporation doing business in this State, did contribute and agree to contribute free services as such employees for the purpose to defeat the candidacy of former assemblyman E. F. Nelson, from the district embracing Florence, Forest, and Langlade Counties, for the nomination for assemblyman from said district, all of which was done with the knowledge and consent and under the direction of said Isaac Stephenson, his agents, and employees, contrary to chapter 492, laws of 1905.

14. That in further pursuance of the purposes and design above set forth said Isaac Stephenson by and through his agents, did, in addition to paying certain sums as above set forth, offer and agree to pay to electors of this State, prior to said primary, a premium or bonus to those who in his employ carried their respective precincts in such primary for said Stephenson as such candidate.

15. That said Isaac Stephenson, if claiming an election by virtue of receiving a plurality of votes at such primary, then said Isaac Stephenson has violated chapter 502 of the laws of 1905 by failing and neglecting to file his expense account as provided by said chapter.

16. Charging generally the primary nomination or election of said Isaac Stephenson was obtained by the use of large sums of money corruptly and illegally, by the violation of sections 4542b, 4543b, and 4478b of the statutes relating to illegal voting, bribery, and corruption, and other laws above set forth relating to elections and primary elections.

These charges are further supplemented as follows in minority views submitted by Mr. Wesley L. Jones, of Washington:

The following may be taken as admitted facts in this case: Three men were selected as managers by Senator Stephenson; money was placed in their hands from time to time as called for to the amount of over \$107,000; they were not asked how they expended it, nor for what purpose; no accounting was requested; they paid it out in various sum to different individuals in different wards, precincts, and counties; large sums were paid to different individuals holding official positions, and to individuals recognized to be leaders, and to others of prominence in different organizations; no directions were given to these men how the money should be expended; no reports were required and no knowledge obtained as to how they spent the money or for what purpose; men were hired for the ostensible purpose of going over the country talking Stephenson and creating Stephenson sentiment; men, whose occupations led them into different sections of the country, were paid large sums of money for talking Stephenson on their travels; men were paid three, five, and ten dollars per day to be at the polls on election day, or to haul voters to the polls; large sums were paid leaders in different wards and precincts to look after their wards and precincts; hundreds of dollars were spent for treating to cigars, liquors, meals, etc., as much as \$135 in one day by one man; money was paid to candidates for the legislature, at least three of whom were nominated and elected; detailed expenditures were not kept; memoranda were destroyed; records and papers concerning the campaign were shifted from one place to another; mysterious methods and round about ways were employed; original records were destroyed; items and amounts were grouped in such a way as to give no knowledge to the public except the amount of each class of expenditures; a banker acted as treasurer; no account was opened as is usually done by depositors; remittances were received, private memoranda kept, cash disbursements of funds made, but no record was kept on the bank's books, and when the committee of the general assembly started to investigate, local counsel for Mr. Stephenson had such records and correspondence as had not already been destroyed moved out of the State, for the purpose of keeping them beyond the jurisdiction of the general assembly.

The first question discussed by the majority relates to proceedings in the State legislature. The legislature consisted of 33 State senators and 100 assemblymen. The vote on the election of United States Senator was first taken in the two houses

separately. In the senate the total number of votes cast was 17, of which Mr. Stephenson received 12. In the house the total number cast was 84 of which Mr. Stephenson received 60.

On the following day the two houses met in joint session and the lieutenant governor, presiding, announced:

Gentlemen of the joint convention, you are assembled here for the purpose of expressing your choice for United States Senator. In order to comply with the Federal law the clerk of the senate and the clerk of the assembly will read from the journal of each house, respectively, the proceedings of the preceding day with reference to the election of a United States Senator.

At the conclusion of the reading of the respective journals of the two houses the president said:

The clerk will call the roll. As your names are called you will rise from your seats and announce the candidate of your choice.

Thereupon Mr. Hudnull, a member of the State senate, made the following point of order:

I rise to protest against any other proceedings being taken in the joint assembly at this time except the announcement of the presiding officer that Hon. Isaac Stephenson is elected to the United States Senate for the term commencing March 4, 1909. I do that for the reason that it appears from the journal of the senate that the total number of votes cast for persons were 17, of which Isaac Stephenson received 12, Neal Brown 4, Jacob Rummel 1, and the journal of the assembly shows that of the members who voted for persons there were 60 for Stephenson, 10 for Brown, and 3 for Jacob Rummel; and it further appears from both journals of senate and assembly that Isaac Stephenson received a majority of all the votes cast in each house.

It devolves then upon the president of this joint assembly to declare Isaac Stephenson duly elected to the United States Senate, and then the duty devolves upon the president of the senate and speaker of the assembly to certify his election to the governor and to the secretary of state, and they to certify his election to the United States Senate. Any other proceeding is out of order and nugatory.

The president overruled the point of order, and the joint assembly proceeded to vote for a United States Senator. There were 131 votes cast, 65 of which were cast for Mr. Stephenson. Thereupon the president announced that no one had received a majority, and the joint assembly adjourned.

The views say:

At each session of the joint assembly the question as to whether any vote in the joint assembly was necessary was raised by protest against such proceedings upon the grounds that, Mr. Stephenson having received a majority of the votes cast in each house voting separately, no other or further duty remained for the joint assembly than that of reading the journals of the two houses of the proceedings in each relative to the election of a United States Senator on the day previous. These journals were read and the fact disclosed that in each house Mr. Stephenson had received a majority of all votes cast. It remained only that "he shall be declared duly elected Senator." The statute does not prescribe who shall declare the person receiving a majority of the votes in each house elected Senator, nor in what form such declaration shall be made.

From the reading of the law it would seem that when the two Houses voting separately each gave Mr. Stephenson a clear majority and having met in joint session on the day following the vote in the separate houses, the journal of the proceedings of the two houses voting separately being read in joint convention and the result announced, the election was completed; the mere failure to declare him elected could not in any way defeat the will of the two houses as expressed in their separate votes.

The failure to make a specific declaration of his election was not vital. The action of the governor and secretary of state in deferring the certificate of his election or in misstating the time of his election could not affect that election.

If we are correct in assuming that the election of Isaac Stephenson was accomplished when the record of the two houses was read and announced in the joint assembly, then the failure or delay of the executive officers to perform their duty could in no way defeat his election as of the date of the meeting of the first joint assembly.

In this opinion Mr. Pomerene and Mr. Sutherland concur as follows:

On the same day in the assembly 82 votes out of the 100 assemblymen were cast, and Isaac Stephenson received 60 out of the 82 votes. He, therefore, received, in our judgment, "a majority of the whole number of votes cast in each house." The vote thus cast was entered upon the journal of the senate and of the house. In conformity with the provisions of the Federal statute, the members of the two houses convened at 12 o'clock noon, on the day following, in joint assembly. The journal of each house was read, and showed the result of the balloting on the previous day in each house separately, as hereinbefore stated. Having received a majority of all of the votes cast in each house, it was the duty of the presiding officer to declare Senator Stephenson duly elected. This was purely a ministerial duty, and the mere fact that he failed to perform that duty could not, under any legal principle, undo that which was legally done in the separate and joint sessions, and, except for this failure of the presiding officer, was completely done.

84. The Senate election case of Isaac Stephenson, continued.

Expenditure of money for advertising space or editorial comment in newspapers or for the hiring of speakers or personal workers held not to constitute bribery.

Contributions to party campaign committees held not to constitute bribery.

Prior to the adoption of the seventeenth amendment to the Constitution the primary was no part of the election of a United States Senator.

Although condemning lavish expenditure of money in procuring election of Senator, the committee found no evidence warranting recommendation that seat be vacated.

Votes of members of legislature answering present in ballot for election of Senator considered blank ballots and not counted.

Another question relating to the legislative proceedings was the effect of a vote of "present" by members of the legislature on the ballot for Senator. Separate views submitted by Mr. Atlee Pomerene, of Ohio, and Mr. George Sutherland, of Utah, members of the committee concurring in the majority report, thus discuss this question:

Thirty-three members of the senate were present, and, before balloting, passed a resolution providing that "any senator who does not wish to vote for a candidate may vote by answering 'Present.'" The roll was called, and 17 senators voted for candidates, 12 of whom voted for Isaac Stephenson. The 16 other senators simply voted "present." In other words, a quorum, in the language of the statute, voted for "one person for Senator in Congress," and of this quorum Isaac Stephenson received a majority. While the vote "present" of the 16 senators was in accordance with the resolution passed, we do not believe it could either add to or detract from the requirements of the statute. All members, no doubt, should have voted for "some person," but 16 voted "present," which was equivalent to a blank vote.

The views submitted by Mr. Pomerene and Mr. Sutherland give particular attention to the question of bribery, and divide expenditures disclosed by the evidence into the following classes:

First, moneys paid out to persons employed by him or in his behalf to circulate nomination papers in order to get the number of signatures required by the Wisconsin statutes before his name could be placed upon the ticket.

Second, moneys paid out as follows:

(a) to newspapers for political advertising;

(b) for editorial support:

(c) for lithographs, campaign material, postage, telephone, telegraph, and express charges;

(d) office expenses, including rent, clerk hire, and assistants.

Third, payment for services of speakers, hall rent, music, and for men devoting their time and efforts in cultivating Stephenson sentiment throughout the State;

Fourth, moneys expended for workers at the polls, and for conveyances and services in getting out the voters;

Fifth, for drinks and cigars;

Sixth, money given to C. C. Wellensgard, L. L. Bancroft, and Thomas Reynolds, who were candidates for the legislature, to be used by them in the interest of Senator Stephenson;

Seventh, money paid to the game warden, James W. Stone, for use in the Senator's campaign;

Eighth, \$2,000 contributed by Senator Stephenson to the State campaign committee for general election purposes; and

Ninth, expenses incurred during the session of the general assembly in opening and maintaining headquarters at Madison from the beginning of the session until after March 4, 1909, and for hotel bills and traveling expenses.

No part of the contribution to the general campaign committee or the expenses incident to the headquarters during the session of the general assembly were ever reported to the secretary of state.

The above we believe to fairly represent the different classes of expenditure, which were disclosed by the evidence.

While the views conclude that none of the money so classified was expended for unlawful purposes, the lavish use of money in political campaigns is condemned in the following terms:

We have no sympathy whatever with the expenditure of money in excessive amounts, whether in a senatorial or any other political campaign. That an expenditure of \$107,793.05 is an excessive amount to be spent in the candidacy for the office of United States Senator, which pays a salary for six years' service amounting to \$45,000, goes without question; that it is demoralizing and should be prevented can not be denied; that some of this money might have been spent corruptly may, for the sake of argument, be conceded, but it is not sufficient that possible or even probable corruption or bribery exists. The evidence must show it, and this case, like all other cases, must be determined from the facts as they are disclosed in the trial and under the law as it then existed. The committee, proceeding upon the assumption that the expenditure of so large a sum of money required the fullest investigation and explanation, probed every rumor and followed every clue which was brought to its attention, with the result that no evidence was discovered which would justify the conclusion that any of this sum of money was corruptly or illegally spent.

At the time of this primary there was no statute, either State or National, limiting the amount of expenditures. There is no judicial or legislative decision, so far as we are advised, limiting the amount which may be legally expended. Since that election the State of Wisconsin has limited the amount of expenditure in a senatorial campaign to \$7,500 and the Federal Government has limited it to \$10,000.

The majority coincide in this view as follows;

The amount of money expended by Mr. Stephenson, Mr. Cook, Mr. Hatton, and Mr. McGovern in the primary campaign was so extravagant and the expenditures made by and on behalf of these gentlemen were made with such reckless disregard of propriety as to justify the sharpest criticism. Such expenditures were in violation of the fundamental principles underlying our system of Government, which contemplated the selection of candidates by the electors and not the selection of the electors by the candidate.

Regardless of any statute requiring that strict accounts be kept of money expended by and on behalf of candidates, a candidate and every man representing him should know that public opinion would expect the parties to place and maintain themselves in a position so that if any of their acts were questioned they could justify such acts to the extent of giving every detail in regard thereto.

While I do not believe that the law of Wisconsin could constitute any man a candidate or place him in the position of and under the responsibilities of a candidate for an office over which the State had no control and which was not to be filled under any law of the State, yet I feel impelled to criticize the acts of those in charge of the expenditure of the money of men who are called candidates for the Senate, and especially of Mr. Stephenson, in the irresponsible and reckless manner in which they disbursed the money furnished them by Mr. Stephenson during the period of the primary campaign.

The failure to keep detailed accounts, the destruction of memoranda, the shifting of records and papers concerning the campaign from one place to another, the adoption of mysterious methods and roundabout ways in regard to matters that might just as well have been performed in open daylight in the presence of the people, would go far toward creating the impression that there was some occasion for Mr. Stephenson's representatives to avoid candor and to obscure conditions.

The minority also concur:

The expenditure of such a sum of money at a primary election on behalf of one candidate in itself shocks the judgment and conscience of honest men generally, and disbursed as disclosed by the record in this case is conclusive proof of corrupt methods and practices.

The charge of bribery is still more specifically treated in the majority report. The majority views say:

Charges of bribery in the interest of Mr. Stephenson's election had been freely made both before the subcommittee and before the legislative investigating committee. Not one of these charges have been sustained by the testimony.

The word "bribery" has been applied to many acts that do not constitute bribery.

The procurement of advertising space or editorial comment in the newspapers upon the payment of money by or on behalf of a candidate for office can not under any construction of law be held to be bribery.

The procurement of the services of men to speak either publicly or personally on behalf of any candidate, or to canvass the electorate on his behalf, is not bribery under any reasonable construction of the law.

If the testimony were true that money was offered to Assemblyman Leuch to go upon the floor and vote for the purpose of effecting a quorum it would not constitute bribery. It was the duty of such member to go upon the floor and vote.

As to charges of corruption in influencing members of the legislature to absent themselves from the joint session the majority views say:

The next charge is that the election of Mr. Stephenson was made possible by three members, who, it is claimed, at the instigation of Mr. Stephenson's managers and agents, absented themselves from the joint assembly when it became known that their presence would prevent the election of Mr. Stephenson, and it was charged that the absence of these three members had been procured by fraudulent or wrongful means by or on behalf of Mr. Stephenson. It was the only charge of corruption in connection with the election of Mr. Stephenson by the legislature worthy of consideration.

It is true that had these three members been present and voted the total vote would have been 126, and the 63 votes received by Mr. Stephenson would not have elected, but the evidence clearly

establishes the fact that Mr. Ramsey, one of the three absentees, was paired with Mr. Fenelon and that such pairs had been universally recognized, so that Mr. Ramsey can not be said to have been absent for any corrupt purpose, nor would his absence from the joint assembly affect the result of the vote. Being paired, he could not have voted. In that event, had Farrell and Towne been present the total vote would have been 125, of which Mr. Stephenson received 63. Sixty-three would have been a majority and would have elected Mr. Stephenson, so that the absence of Farrell and Towne did not affect the result of the election, and it can not therefore be said that the election was brought about through corrupt practices so far as the absence of Farrell and Towne was concerned.

It is not charged that any other member who voted for Mr. Stephenson did so either from corrupt motives or actions on his own part or that he was procured to do so by any corrupt action on the part of any person in the interest of Mr. Stephenson.

Does the evidence show or tend to show that there were corrupt measures or unlawful methods adopted to secure the absence of either Farrell or Towne?

There has been much sensational testimony introduced before the subcommittee, which was heard largely because such testimony had been received by the legislative investigating committee for the purpose of showing bribery or corrupt methods in connection with the absence of Ramsey, Farrell, and Towne. It was not shown that any money had been traced to either of these men from any source in connection with the matter; but it was claimed that a fund had been raised to be used for corrupt purposes, and that, on the assumption that such fund had been raised, it must at least in part have been used to bring about the absence of these three members of the legislature.

The subject of contributions to campaign committees is also discussed:

It appears that Mr. Stephenson contributed \$2,000 to the Republican State central committee. Against this contribution no legitimate objection can be urged. It was not in violation of any law nor for other than general election purposes.

It was also shown by testimony that Mr. Stephenson before the primary gave money to C. C. Wellensgard, Levi H. Bancroft, and Thomas Reynolds, who were candidates for the legislature. These men testified that they used the money in the interest of Mr. Stephenson at the direct primaries. If we eliminate Mr. Stephenson from the direct primaries the contributions which he made to these candidates for nomination and election to the legislature would be in violation of no law. It appears from the testimony that they were at the time voluntary and ardent supporters of Mr. Stephenson regardless of any money which they may have received or which may have been placed in their hands by him for any purpose.

There is not sufficient evidence upon which to base a charge of bribery or any other charge that would affect the validity of the election of Mr. Stephenson in either of these cases.

The majority views therefore conclude:

We may therefore safely dismiss the charges of corruption in connection with the action of the legislature in electing Mr. Stephenson, whether such election is held to have been on January 26 or on March 4, 1909.

This conclusion is fully concurred in by Mr. Pomerene and Mr. Sutherland as follows:

We therefore conclude:

First, that the election in fact occurred on January 26, 1909; and

Second, that there is no evidence justifying the conclusion that corrupt "methods or practices" were employed in securing the vote on March 4, 1909, even if it should be held that the election took place on March 4.

85. The Senate election case of Isaac Stephenson, continued.

Discussion of status of primary as part of election of Senator prior to adoption of seventeenth amendment to the Constitution.

Discussion of effect upon election of Senator of corrupt practices in the primary, and as to whether practice of corrupt methods in primary campaign warrant invalidation of election.

Interpretation of the Wisconsin corrupt practices law.

Validity of election of Senator held not to be affected by failure to perform thereafter some act enjoined by State statute.

A question arising for the first time in the history of Senate election cases relates to the power of the Senate to inquire into practices and methods employed in primary elections.

The minority contend that:

When candidates for the legislature announce that they will vote for the choice of the primary for Senator, then to buy or corrupt the primary is to buy the member of the legislature; and if it was corrupt to buy off a candidate for the Senate and thereby secure the votes of his friends it is also corrupt to buy the primary and thereby secure the votes of those who announce that they will be controlled by the primary; and if the Senate can go outside of the proceedings of the legislature and investigate corruption in preventing men from being candidates for the Senate before the legislature, then it can certainly investigate methods and proceedings in the primary.

The majority, however, hold:

The subcommittee, in determining the scope of the investigation, was confronted with the question as to how far, if at all, the charges affecting the candidacy of Isaac Stephenson before the direct primary should be considered.

The State legislative committee had directed its attention principally to the direct primary and the conduct of the candidates therein.

It was doubtless competent for the legislature to provide for direct primaries for the nomination of candidates for the legislature and to place legal restrictions about them to secure the integrity of their elections, but, as herein elsewhere more fully stated, it is not competent for the legislature to provide for the nomination of candidates for the United States Senate at direct primaries.

The status of Mr. Stephenson at such primaries is not comparable to that of candidates for the legislature or for any State office.

The language of the resolution under which the subcommittee acted directs it to report whether "in the election of Isaac Stephenson there were used or employed corrupt methods or practices," and the language of the last paragraph of section 1 of the resolution, bringing the matter to the attention of the United States Senate, strictly construed, refers only to the election.

When we speak of the election of a United States Senator under existing constitutional and legislative provisions we contemplate only the election by the legislature of the State. There is as yet no recognition to be given extra-legislative proceedings in the nature of what is termed "direct primaries," no such method of selection being recognized by any law of the United States.

The direct primary, legally speaking, is no part of an election of a United States Senator. The duty of an election of a Senator does not under any law rest with the electorate, but is vested by the Constitution solely in the legislature. The legislature electing had no existence until after the general election. The nomination of such members at the primary vested in the nominees not even an inchoate status. A State may give force and effect to a direct primary law providing for the nomination of candidates for State or minor offices to be elected under the laws of the State, but the legislature has no power to regulate in any manner or to any extent the election of a United States Senator, and there is no such proceeding known under any law of the United States as the nomination of a candidate for the United States Senate.

It would be entirely within the power of a legislature, charged with the responsibility of electing a United States Senator before proceeding to elect a Senator, to repeal any legislation enacted by a previous legislature which placed a limit upon or directed its action.

It seems from this consideration of the question we must conclude that the direct-primary proceedings can not be held to affect the validity of an election by the legislature.

A further charge made by the State legislature was based upon the failure to file and expense account as required by the corrupt practices act of the State of Wisconsin.

The statute requires the filing with the secretary of state of a statement by the candidate—

setting forth in detail each item in excess of five dollars in money, or property contributed, disbursed, expended, or promised by him, and to the best of his knowledge and belief by any other person or persons for him, or in his behalf, wholly or in part in endeavoring to secure or in any way in connection with his nomination or election to such office or place, or in connection with the election of any other person at said election, the dates when, and the persons to whom, and the purpose for which all said sums were paid, expended, or promised by such candidate in any sum or sums whatever.

With reference to the failure to comply with this law the views of Mr. Pomerene and Mr. Sutherland say:

No account whatever was filed of the amount contributed by Mr. Stephenson to the State campaign committee, nor of the amount expended during the session of the general assembly. The account which was filed of the expenses incurred in connection with the primary did not comply with the law in that it lumped the expenses; gave the names of but very few of the persons to whom money was paid; did not give the dates when expended, nor as fully as contemplated by the statutes the purposes for which expended. The account as filed was approved by the general counsel of Mr. Stephenson without any examination of the statute, and simply because it conformed with certain accounts, which had been filed by prominent candidates for other offices. A careful examination of this account justifies the belief that it was purposely drawn so as to give the public as little information as possible.

The penalty for failing to comply with this statute is a fine only, and it does not provide for the forfeiture of the office. If it did, the statute to that extent would be unconstitutional, but Mr. Stephenson, because of his failure to file a proper account, has violated the statute and is subject to a fine. However, he must be absolved from any moral delinquency, because in the preparation and filing of his account he consulted with counsel, and followed their advice, and if it was not properly done they were to blame rather than he.

In addition to this, the validity of the election which had already taken place could not be affected by the failure to thereafter perform some act enjoined by the State statute. The election was already an accomplished fact and its validity must be determined by the facts theretofore or then existing. Anything done thereafter can not be regarded as a substantive ground for invalidating the election. Its only evidential value would be in reflecting light upon or as giving color to the preexisting facts.

The majority views are in harmony with this conclusion:

The fifteenth specific charge is based upon the failure or neglect of Isaac Stephenson to make and file an expense account under the laws of Wisconsin. This requirement is under section 270 of the election laws which provides that every person who shall be a candidate before any convention or at any primary or election to fill an office for which a nomination paper or certificate of nomination may be filed, shall, within thirty days after the election held to fill such office make out and file with the officer empowered by law to issue the certificate of election to such office or place, a statement in writing, etc., and that any person failing to comply with this section shall be punished by fine of not less than \$25 or more than \$500. This being a penal statute, the validity of an election could not be affected by the failure to comply with it.

In conclusion the majority and minority members of the committee differ widely in their recommendations.

The majority hold:

The testimony clearly shows that the candidates felt compelled to spend more money than they wanted to spend. The pressure upon them from those who were undertaking to manage their campaigns seems to have been very great and persistent, but I can find nothing in the testimony nor in the circumstances or conditions surrounding the senatorial contest which resulted in the election of Mr. Stephenson that in my judgment would justify the committee in recommending that the seat be vacated, or that he be declared not legally elected to the United States Senate; and therefore I recommend that the Senate find that the charges preferred by the Legislature of Wisconsin against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, are not true, and that Isaac Stephenson be acquitted of such charges.

In opposition to this view the minority say:

We regret that we can not feel warranted in finding for the sitting Member, but we believe the methods employed at the primary were corrupt; that they were against public policy; that they were demoralizing in character; that they directly contributed to destroy the purity and freedom of the election; that they violated the fundamental principles at the basis of our system of government; and that they are not to be tolerated by the Senate of the United States as a means of procuring a seat in that body.

We desire to submit the following resolution:

Resolved, That Isaac Stephenson was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Wisconsin."

The case was debated in the Senate on February 19, 20, 21, 29, March 1, 2, 4, 25, 26, and 27. On March 22,¹ Mr. Jones offered the following amendment in the nature of a substitute for the motion of Mr. Heyburn that the Senate agree to the report of the committee:

Resolved, That Isaac Stephenson was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Wisconsin.

The question on agreeing to the amendment was decided in the negative, yeas 27, nays 29.

The question recurring on the motion of Mr. Heyburn that the report of the committee be adopted and that Isaac Stephenson be declared entitled to a seat as Senator from the State of Wisconsin in the United States, there were—yeas 40, nays 34. So the majority motion was agreed to unamended.

86. The question of eligibility of Edward E. Miller, of Illinois, in the Sixty-eighth Congress.

A resolution relating to the right a member to his seat was entertained as a question of the privilege although the organization of the House had not been completed.

A question of the privilege of the House is presented in the form of a resolution.

A question being raised as to the eligibility of a member under the operation of the corrupt practices act, a resolution authorizing inquiry was referred.

When resolution is brought directly before the House independently of a committee the proponent's right to prior recognition for debate takes precedence over the motion to refer.

¹Second session Sixty-second Congress, Record p. 3777.

A motion to lay a proposition on the table is in order before the member entitled to prior recognition for debate has begun his remarks.

On December 5, 1923,¹ at the organization of the House, Mr. Henry T. Rainey, of Illinois, claiming the floor for a question of privilege,² said:

I have in my possession here evidence which shows that Edward E. Miller, a Member elect from the State of Illinois, has expended nearly \$65,000 in securing his election to a position in this House, and that over \$63,000 of that amount was a part of a trust fund.

Mr. Everett Sanders, of Indiana, made the point of order that a question of privilege of the House should be presented in the form of a resolution.

The Speaker³ sustained the point of order and Mr. Rainey thereupon submitted the following preamble and resolution:

Whereas it is charged that Edward E. Miller, a Representative elect from the State of Illinois, is probably ineligible to a seat in the House of Representatives;

Whereas such charge is made through a Member of the House and on his responsibility as a Member;

Whereas it is charged that said Miller has grossly misused two trust funds committed to his charge by the State of Illinois while he was treasurer of the State of Illinois in promoting his candidacy for election to the Sixty-eighth Congress; and

Whereas it is charged that said fund so used also greatly exceeds the amount he is permitted by law to expend for said purpose;

Resolved, That the question of the right of said Miller to a seat as a Representative of the State of Illinois in the Sixty-eighth Congress, in the House be referred to a committee of seven Members of the House, to be appointed by the Speaker, and said committee shall have the power to send for persons and papers and examine witnesses on oath as to the subject matter of the resolution.

Mr. Nicholas Longworth, of Ohio, moved to refer the resolution to one of the three Committees on Elections when constituted.

Mr. Rainey made the point of order that the gentleman from Ohio did not, have the floor to make the motion since he as the proponent of the resolution had not yielded it.

The Speaker sustained the point of order, saying that while certain motions were privileged the motion to refer was not one of them.

Mr. Longworth thereupon moved to lay the resolution on the table.

Mr. Rainey again made the point of order that he was entitled to the floor.

The Speaker said:

The matter is very simple. The gentleman from Illinois raises the question of privilege of the House, the right of a Member to his seat. That is always privileged. Such a resolution is customarily referred to one of the Committees on Election and have it there considered, but the House has a right to have it considered by a committee, and considered at once. On the other hand, the House has the right, if it prefers, when the resolution is offered to lay it on the table. That motion the gentleman from Ohio has made. The motion is always in order and takes precedence.

¹ First session Sixty-eighth Congress, Record, p. 7.

² For preliminary proceedings see section—of this work.

³ Frederick H. Gillett, of Massachusetts, Speaker.

Whereupon, on motion of Mr. Finis J. Garrett, of Tennessee, by unanimous consent the resolution was referred to the Committee on Elections No. 3.

On January 18, 1924, Mr. Richard N. Elliott, of Indiana, from the committee, submitted the following report: ¹

A thorough hearing and investigation was made by the committee, and after hearing the evidence presented it finds that no good reason has been shown to it which would justify the passage of the resolution and the appointment of a special committee of seven Members of the House of Representatives to investigate the charges contained in said resolution.

And it unanimously recommends to the House of Representatives that said House Resolution No. 2 be laid on the table.

In the absence of a request for reference to the calendar the report was laid on the table.

87. The Senate election case of Clarence W. Watson and William E. Chilton, of West Virginia, in the Sixty-second Congress.

The Senate declined on vague and indefinite charges of corruption to investigate the election of duly returned Members.

Mere rumors of bribery in election of Senator unsupported by evidence do not warrant investigation by the Senate.

Charges that corrupt practices were resorted to in procuring election of Senators being retracted and withdrawn, the Senate did not consider it necessary to order an investigation.

On February 2, 1911,² the credentials of Clarence Wayland Watson, elected a Senator by the legislature of the State of West Virginia to fill the vacancy occasioned by the death of Stephen Benton Elkins for the term ending March 3, 1913, were presented and Mr. Watson took the oath of office.

On the following Monday, February 6,³ the credentials of William Edwin Chilton, elected Senator by the same legislature for the term beginning March 4, 1911, also were presented and on April 4, following,⁴ Mr. Chilton was sworn and took his seat in the Senate.

More than a year after, on the last day of the second session of the Sixty-second Congress, and on August 26, 1912,⁵ the President pro tempore laid before the Senate a petition from the governor of West Virginia and others alleging that bribery and corruption were practiced in the election of Mr. Watson and Mr. Chilton, and asking an investigation by the Senate. The petition was referred to the Committee on Privileges and Elections.

On February 5, 1913,⁶ Mr. Chilton, for himself and Mr. Watson, made a statement in the Senate denying the charges, and submitted a communication from the

¹ First session Sixty-eighth Congress, House Report No. 56.

² Third session Sixty-first Congress, Record, p. 1797.

³ Record, p. 1969.

⁴ First session Sixty-second Congress, Record, p. 2.

⁵ Second session Sixty-second Congress, Record, p. 11862.

⁶ Third session Sixty-second Congress, Record, p. 2582.

principal witness, on whose information the charges were based, retracting statements made and withdrawing the charges as follows:

BURNSVILLE, VA., *January 8, 1913.*

Hon. C. W. Watson, *Washington, D. C.*

DEAR SIR: The time has come when you should know the truth about the so-called Shock statement. I never have signed any statement that was read before the legislature and I never have been under oath. I have let the talking go on because I hated to be put in a wrong light. The truth is that I set up the whole business. Nobody tried to buy my vote and would not swear that they did. I wanted to nominate McGraw, and I thought if I got this thousand dollars and made this play it would hurt you and Chilton. The trick failed to work, and now you have the truth. I do not know you and am sending this to you because I want justice to be done. So far as I know, your election and Chilton's was honest and fair, and it is wrong to have this report going around.

Very truly yours,

L. J. SHOCK.

On February 11, 1913,¹ Mr. William P. Dillingham, of Vermont, from the committee, submitted the report² of the committee:

The report gives the following statement of facts:

First. That the Legislature of West Virginia, which convened on the 11th day of January, A. D. 1911, chose Messrs. Clarence W. Watson and William E. Chilton as Senators of the United States from the State of West Virginia, and that they appeared, took their oath of office, and are now sitting as Senators in this body. The petitioners do not state or allege that in such election any individual member of the legislature was bribed to vote for either of the persons named, or that, in voting for them, or either of them, any member thereof was actuated by any corrupt or improper motive.

Second. It does not appear upon any of the papers before this committee that in such election any member of the Legislature of West Virginia was improperly approached by any person interested in the election of either of the said Senators, or that any improper offer or inducement of any kind or nature was made to any such member to cast his vote for said Senators, or either of them.

Third. The only direct charge that money was improperly used, or attempted to be used, by anyone is contained in a purported statement of L. J. Shock, a member of the West Virginia Legislature, that, on the 18th day of January, 1911, prior to the caucus of the Democratic members of the legislature, which was held to nominate party candidates for United States Senators, he was paid \$1,000, and promised a further sum, to vote for Messrs. Watson and Chilton for United States Senators. This statement was read by Hon. George W. Bland, a State senator, before the Joint Assembly of the Legislature of West Virginia, on the 25th day of January, 1911. But it affirmatively appears, from the papers submitted to this committee, that the charge made by Mr. Shock was without foundation, and has been fully retracted in a statement made by him to Senator Watson.

Fourth. All other matters contained in the petition aforesaid are rumors without apparent foundation—statements of individual opinion, newspaper stories, and speculations as to general conditions existing in and about the legislature and throughout the State of West Virginia just previous to and at the time of such election. These do not in any instance refer to the action of any particular member of the Legislature of West Virginia. They do not charge any act of bribery or attempted bribery. They neither name any member of that body as having received nor as having been asked to receive, money for his vote, nor do they indicate any person who made any attempt to bribe or improperly influence any member of the legislature. They are of that general character too frequently indulged in both by individuals and by the public press on the

¹ Record, p. 2970.

² Senate Report No. 1206.

occasion of election in connection with which great public interest is aroused, and, while calculated to arouse suspicion and create prejudice, they do not, in the opinion of the committee, present a proper basis for action on the part of the Senate.

After consideration of all evidence submitted, the committee was unanimous in declaring that the charges had not been sustained, and recommended the following resolution:

Resolved, That the Committee on Privileges and Elections be discharged from further consideration of the subject.

The resolution was adopted without debate or division.