

## Chapter CLXIII.<sup>1</sup>

### PLEADINGS IN CONTESTED ELECTIONS.

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1. Time of serving notice. Sections 97-100.
  2. Nature of notice. Sections 101, 102.
  3. Attitude of House as to other informalities. Section 103.
  4. Foundation required for Senate investigations as to bribery, etc. Sections 104-109.
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#### **97. The North Carolina election case of Smith v. Webb in the Sixty-first Congress.**

##### **As to time within which notice was served.**

##### **Specifying particulars in which notice of contest was deficient.**

On June 23, 1910,<sup>2</sup> Mr. James M. Miller, of Kansas, from the Committee on Elections No. 2, submitted the report of the committee in the North Carolina case of John A. Smith v. Edwin Y. Webb.

The charges made by the contestant were general in character, alleging that, votes were cast illegally and by those not qualified as electors, and that in some parts of the district the election laws were practically suspended.

Little evidence was submitted in support of contestant's contentions and the committee were unanimous in declaring that there was nothing in the evidence to justify any of the charges.

There was some question as to whether the notice of contest was served on contestee within 30 days from the date of the determination of the result of the election by the board of State canvassers as required by law, but the committee decided that, while the evidence presented was inconclusive, in their opinion the notice was within the time required.

The committee held, however, that even if in time the notice was deficient in that it failed to allege that claimant was a candidate for Congress, that he was a voter in the district, or that he had any interest in the result of the election.

Accordingly the committee recommended the following resolutions:

*Resolved*, That John A. Smith was not elected to membership in the House of Representatives of the United States from the Ninth Congressional District of North Carolina in the Sixty-first Congress, and is not entitled to a seat therein.

*Resolved*, That Edwin Y. Webb was elected to membership in the House of Representatives of the United States from the Ninth Congressional District of North Carolina in the Sixty-first Congress, and is entitled to retain his seat therein.

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<sup>1</sup>Supplementary to Chapter XXII.

<sup>2</sup>Second session Sixty-first Congress, House Report No. 1702; Journal, p. 827; Record, p. 8833; Moores' Digest, p. 50.

The resolutions were aged to without debate or division.

**98. The Pennsylvania election case of McLean v. Bowman in the Sixty-second Congress.**

**The statute limiting the time within which notice of contest of election may be served is merely directory and may be disregarded for cause.**

**No statute can interfere with the provision of the Constitution making each House of Congress the judge of the qualification and election of its own Members.**

**Having permitted without objection the reference of a contest to a committee of the House, and having taken testimony and presented argument on the merits of the contest, the sitting Member was held to have waived thereby any right to object to irregularities in the filing of the notice of contest.**

**While failure of a contestant to comply with statutory requirements in the filing of a notice of contest does not necessarily preclude consideration by the House, such contestant may not become the beneficiary of his own negligence by succeeding to the seat so vacated.**

**Questions relating to the legality of a nomination are properly tested under the laws and in the courts of the State rather than in the House.**

**Interpretation of the corrupt practices act of Pennsylvania.**

On August 13, 1912,<sup>1</sup> Mr. Timothy T. Ansberry, of Ohio, from the Committee on Elections No. 1, submitted the report in the Pennsylvania case of George R. McLean *v.* Charles C. Bowman.

The returning board of the district reported on November 12, 1910, that Bowman had received 13,662 votes on the Republican ticket and McLean had received 13,844 votes on the Democratic ticket, but Bowman had also received 722 votes on the Prohibition ticket, giving him on the face of the returns a majority of 550 votes.

At the outset a question was raised as to the regularity of the notice of contest. Section 105 of the Revised Statutes of the State of Pennsylvania provided:

When any person intends to contest an election of any Member of the House of Representatives of the United States he shall within thirty days after the result of such election shall have been determined by the officers or board of officers authorized by law to determine the same, give notice in writing to the Member whose seat he designs to contest of his intention to contest the same, and in such notice shall specify particularly the grounds on which he relies in the contest.

The notice of contest which was served on January 11, 1911, closes with this statement:

This notice would have been given at an earlier date had I not been ill and prevented by the advice and compulsion of my physician from taking part in any professional business or political affairs from the 31st of October, 1910, until the 2d day of January, 1911.

The minority views, submitted, by Mr. S. F. Prouty, of Iowa, say:

The result of this election was legally and officially determined November 12, 1910, and the contestant was advised of the result at that time. According to law, therefore, he should have given

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<sup>1</sup>Second session Sixty-second Congress, House Report No. 1182; Journal, p. 955; Record, p. 10850.

notice of this contest on or before the 12th day of December, 1910. The notice was, in fact, given on the 14th day of January, 1911. It will thus be observed that the notice was not served on contestee until 32 days after the time provided by law for the instituting of contest proceedings.

This statute above quoted is expressly made a rule of the Committee on Elections and is and should be binding upon the committee. It is, therefore, the contention of the minority that the giving of this notice is jurisdictional and that the committee has no jurisdiction to determine any question unless this notice has been given.

**The minority further say:**

There are very many cases cited in Hinds' Precedents confirming the doctrine that where the rule established by the law of 1851 was not applicable or grossly inequitable, the House had the power to prescribe different rules and regulations for the penalty. There are several cases where the parties have failed to give notice within the time prescribed by the statutes where the House, for equitable reasons, has fixed another time or mode in which notice might be given, but we believe that there is not a few cited in the precedents where a committee had reported the unseating of the Member where the notice was not given within the time provided by the statutes. We can see that if the contestant had been for any good reason prevented from giving notice in this case, he might have applied to the House for permission to give notice and that the House had the power to grant additional or different time, but no such request as that has been made of the House. The contestant filed his notice 32 days too late and took his testimony out of order, all under protest by the contestee, and we insist that under the precedents the committee had no power or authority to consider the case. The laws of Congress are certainly binding upon Congress until set aside by Congress itself, but the minority contends that even though the contestant was now presenting to the House the question as to whether or not he was entitled to further and additional time in which to give notice his showing does not entitle him to the application of the equitable rule. There is no showing in this record that would excuse the contestant from giving the notice within the time prescribed by the statutes. Certainly the House would not wish to establish a precedent that would warrant anyone in coming in any time he pleased and filing a contest. This would be unfair. No one would know when his seat was secure. Failure to file a notice might lull the sitting Member into such indifference as would allow the testimony by which he could defend his seat to be lost or destroyed. The rule established by the statute is a just one, and this House ought to be slow in establishing another rule.

**The minority therefore contend:**

Our contention on this phase of the case is simply this:

First, that the contestant did not give notice, as prescribed by the statutes; second, that he did not make application to the House for another or different rule for the conduct of his contest; third, that he had no equitable or just ground on which he could have appealed to the House for the right to institute a contest after the expiration of the time provided by the statute. We do not contend that the House has not the power to expel its Members for any or no reason, but the power to expel must not be confused with the right of a party to contest the seat of a sitting Member. They are based upon entirely different provisions of the Constitution and require entirely different procedure. To expel a Member requires the concurrence of two-thirds" (see sec. 5, Art. 1), but to determine a contested-election case only requires a majority. While we concede that the House might now, if it saw fit, expel Mr. Bowman for any reason it pleased, or for no reason, if a two-thirds vote could be commanded, we insist that there is no contested-election case pending before it, and therefore we think that the case should be dismissed, and we so recommend.

**The majority, however, hold:**

Under a strict construction of this section of the statute the committee would have dismissed the case, but the statute is in fact merely directory, and was intended to promote the prompt institution of contests and to establish a wholesome rule not to be departed from except for cause.

Moreover, no statute can interfere with the provision of the United States Constitution making each House of Congress the judge of the qualification and election of its own Members. In this case the contestee permitted without objection in the House the reference of the matter of this contest to this committee for hearing, and after having taken testimony and presented argument on the merits he is in no position to object to such a consideration of the record as will determine in the public interest whether or not he is entitled to a seat in this House.

But the majority also hold:

The committee is not, however, satisfied that the reasons alleged by the contestant are sufficient entirely to excuse him from serving upon the contestee his notice of contest within 30 days from the 12th day of November, 1910, and not believing that he should be a beneficiary of his own negligence under the findings of the committee, they have not considered the case from the viewpoint of reporting a resolution to seat the contestant.

The first point urged by the contestant is that the nomination of the contestee as a candidate of the Prohibition Party, by the substitution of his name for that of the regularly nominated Prohibition candidate, was brought about in contravention of the rules of the Prohibition Party and of the laws of the State of Pennsylvania.

The point is thus disposed of:

With regard to the legality of the substituted nomination of the contestee by the Prohibition Party the committee has felt much doubt. The testimony shows much maneuvering by the contestee to get one Robinson, the original Prohibition candidate, off the ticket. The legality of the substitution should, however, have been tested by filing objections to the nomination papers with the proper official under the laws of Pennsylvania and the contest carried, if necessary, to the courts of that State. That the object of the contestee in securing the Prohibition nomination was to advance that party's interest is nowhere shown. The presence of his name in two columns on the ballot gave opportunity for illegal counting of votes for him beyond doubt, and the fact that Larkin, Prohibition candidate for governor of Pennsylvania received but 242 votes in the district while contestee received 720 is a very suspicious circumstance, but with the legality of the nomination unassailed in the proper tribunal, and in the absence of specific proof of fraudulent counting of these votes, they can not be rejected.

As to allegations of fraud:

Independently of the right of the contestant to claim a seat in this House, the testimony in the case does show such fraud and corruption on the part of the contestee, or his agents, at the election on November 8, 1910, as to compel the statement that there was no such free and untrammelled choice by the voters as is required to constitute a fair and legal election.

The corrupt-practices act of Pennsylvania, approved March 5, 1906, requires the candidate to file a statement of moneys expended by him in the campaign, and if he had a campaign manager that manager is compelled to file a detailed report with the proper officer of the county. The act specifically sets forth all the legal purposes for which money may be spent by a candidate or his manager or a party organization.

The majority report finds:

The expense account filed by the contestee under this act on the 3d day of December, 1910, shows expenditures of \$7,194.40 for the general election, and among other things contains the statement that said Bowman had paid no money to anyone else save Jonathan R. Davis, chairman, and that said moneys were paid to the said Jonathan R. Davis between October and November, or approximately within that period.

This Jonathan R. Davis was the chairman of the Republican county committee in 1910, as well as the manager of the campaign of the contestee. and his statement of receipts and expendi-

tures filed immediately after the election recites that he received and expended the sum of \$8,984.84. The examination of both Davis and the contestee of contested election case, as shown by the record, demonstrates that both of their filed statements of expenses were false, and it is conclusively proved by the testimony of the contestee himself that instead of expending \$7,194.40 in the election he, as a matter of fact, expended \$9,272.70.

That one might find it impossible to make an absolutely accurate statement of campaign expenditures to the extent of \$9,000 is possibly true, but there are items which the contestee failed to include in his statement, so large in amount that when considered in connection with the fact that the expenditures of these sums were sought to be concealed by erasures on check stubs and alteration of memoranda, lead irresistibly to the conclusion that the contestee in making out his statement of expenses designedly sought to conceal the use of large sum of money which he had spent in connection with his campaign.

The majority accordingly recommended the adoption of the resolution:

*Resolved*, That Charles C. Bowman was not elected a Representative in the Sixty-second Congress from the eleventh district of Pennsylvania, and is not entitled to a seat therein.

On August 17, 1912,<sup>1</sup> the report was called up in the House, but at the request of the contestee, after brief debate, was by unanimous consent postponed until the following session.

It was debated at length on December 10 and 12, 1912.<sup>2</sup> On the latter day the following resolution offered by Mr. Prouty was disagreed to, yeas 125, nays 147:

*Resolved*, That the case of George B. McLean against Charles C. Bowman, from the eleventh congressional district of Pennsylvania, be dismissed for want of jurisdiction because said alleged contestant gave no notice of contest within the time or in the manner prescribed by law, and because he has not asked or secured the consent of this House or of the committee for proceeding in any other manner than that prescribed by law and has not shown any equitable excuse for his failure to give the notice prescribed by section 105 of the Revised Statutes.

The question then recurred on the committee resolution, which was agreed to, yeas 153, nays 118.

Mr. A. Mitchell Palmer, of Pennsylvania, then offered the following resolution, which was rejected, yeas 88, nays 183:

*Resolved*, That George R. McLean, the contestant, was elected a Representative in the Sixty-second Congress from the eleventh district of Pennsylvania and is entitled to a seat therein.

### **99. The Pennsylvania election case of Wise v. Crago in the Sixty-second Congress.**

**Where contestant had failed to serve notice on contestee within time required by law the House declined to extend time because of lack of diligence.**

**Where allegations of fraud, even if sustained, would not affect sufficient votes to change the result, the House refused to entertain a proposed contest.**

On August 20, 1912,<sup>3</sup> Mr. Thomas G. Patten, of New York, from the Committee on Elections No. 2, submitted the report in the Pennsylvania case of Jesse H. Wise v. Thomas S. Crago.

<sup>1</sup> Record, p. 11193.

<sup>2</sup> Third session Sixty-second Congress, Journal, p. 52; Record, p. 541; Moores' Digest, p. 54.

<sup>3</sup> Second session Sixty-second Congress, House Report No. 1230; Journal, p. 994; Record, p. 1139; Moores' Digest, p. 59.

The election was held on November 8, 1910, and the canvassing board duly made its return within 10 days thereafter.

In April, 1911, the contestant filed a notice of contest with the Clerk of the House of Representatives, but failed to serve a copy of the notice on the contestee.

On December 4, 1911,<sup>1</sup> Mr. A. Mitchell Palmer, of Pennsylvania, introduced the following resolution which was referred to the Committee on Elections No. 1:

*Resolved*, That Jesse H. Wise, contesting the right of the Honorable Thomas S. Crago to a seat in this House as a representative from the twenty-third district of Pennsylvania, be, and he is hereby, required to serve upon the said Crago, within eight days after the passage of this resolution, a particular statement of the grounds of said contest; and that the said Crago be, and he is hereby, required to serve upon said Wise his answer thereto in eight days thereafter; and that both parties be allowed such time for the taking of testimony in support of their several allegations and denials as is provided by the act of February nineteenth, eighteen hundred and fifty-one.

The committee reported:

Contestant claimed that bribery and intimidation had been employed by the contestee to encompass the defeat of the contestant, naming the precincts affected by these violations of the election laws. The vote in the various precincts so affected was Crago, 5,666; Wise, 2,661; so that if the contestant was permitted to serve notice of contest on the said contestee under the terms of the resolution and could prove to the satisfaction of the committee the truth of his allegations, the purging of the vote that would follow under the application of the ordinary rule would still leave the contestee a majority of 1,766 votes.

The committee, however, reached the conclusion that the charges made by the contestant in support of his position were too general, vague, and indefinite, upon which to predicate a contest, particularly since the contestant, without any very strong reason, had permitted so long a time to elapse before starting his contest. The committee therefore recommends that the resolution be not agreed to.

The recommendation of the committee was Weed to without debate or record vote.

**100. The Missouri case of Reeves v. Bland in the Sixty-sixth Congress.**

**The contestant having failed to serve notice of contest within the time required by law, the committee deemed it unnecessary to take action thereon.**

**Instance wherein a Federal court issued a temporary restraining order enjoining contestant from further proceeding in an election case.**

**A report on an election case with no recommendation for action was not considered by the House.**

On November 7, 1919,<sup>2</sup> Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the committee on the memorial of Albert L. Reeves, charging fraud in the election of William T. Bland from the fifth congressional district of Missouri.

William T. Bland had received a vote of 31,571 according to the returns, and Albert L. Reeves a vote of 18,550. The result of the election was duly certified by the secretary of State on November 18, 1918, but notice of contest was not filed until January 6, 1919, 18 days after the expiration of the 30-day period prescribed by law.

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<sup>1</sup> Journal, p. 10; Record, p. 13.

<sup>2</sup> First session Sixty-sixth Congress; House Report No. 119; Journal, p. 567, Record, P. 8111.

Upon receipt of the notice the sitting Member filed a petition in the circuit court of Jackson County, Mo., praying for an order enjoining Albert L. Reeves from taking any steps as contestant pursuant to this notice. The case was transferred to the United States District Court for the Western District of Missouri, which, on February 6, 1919, denied the injunction.

An appeal was taken to the United States Circuit Court of Appeals of the Eighth Circuit, which, on February 10, 1919, granted a temporary restraining order enjoining further proceeding in the contest.

The memorialist asserts that delay in service of notice was due to the studied absence of the sitting Member from the district and State during—

practically the entire 30-day period immediately following the issuance of the certificate of election; that he had caused his office to be closed and his whereabouts concealed from the contestant until after the time prescribed by law within which to serve such notice had expired and until 18 days thereafter, to wit, January 6, 1919, upon which day the contestant, his attorneys and agents, located the said William T. Bland at San Diego, Calif., and then and there served upon him a copy of said notice of contest and complaint.

The committee after investigation reported:

William T. Bland remained at his home in Kansas City from November 5, 1918, until November 27, when he went to Memphis, Tenn., to visit his son who was a pilot in the Aviation Service of the Government. On December 3 he went to Washington, D. C., and from there returned to Kansas City by way of Memphis, reaching home on December 13, where he remained until December 23, when he left for California on account of his wife's health. During all the time he was away from home he was in constant touch with his office, No. 608 Ridge Arcade, and all important mail was forwarded to him from there. There was no evidence of any attempt on his part to conceal his whereabouts or to prevent the service upon him of any legal paper. Moreover, during the entire period from November 19, 1918, to December 19, 1918, he had no intimation that his election was to be contested.

In view of this finding the committee were unanimously of the opinion that the delay in serving notice of contest was without excuse, and reported as follows:

A mass of ex parte testimony was before your committee indicating extensive and widespread frauds in many of the wards in Kansas City at the last State election and your committee has been strongly urged by the newspaper press, by various nonpartisan civic bodies and by numerous citizens of Kansas City of both political parties to report a resolution providing for an investigation *de novo* of the election in the fifth Missouri district. If the facts alleged in the memorial were true and the petitioner, Albert L. Reeves, had been prevented from serving the notice required by law by the action of the sitting Member, Mr. Bland, your committee might have seen its way clear to report a resolution for an investigation of the conduct of this election.

It is to be regretted that the plain provisions of the statute regulating the election contests were not complied with by the petitioner in this case. The committee is earnestly desirous of preventing so far as it is possible for it to do, the existence and repetition of any such fraud and wanton disregard of law as the ex parte testimony in this case indicates was practiced in some of the Kansas City wards at the election on November 5, 1918.

When brought before the committee, within the time and in the manner provided by law, the committee will always endeavor to prevent any one from enjoying the fruits of such wrong. Under the circumstances, however, although viewing with the deepest concern the charges of wholesale frauds practiced at the last election in Kansas City, we do not feel justified in granting the prayer in the memorial and therefore report that no action is necessary thereon.

On November 11, 1919,<sup>1</sup> the Speaker<sup>2</sup> said:

There is on the calendar by accident a report from the investigation of the election in the fifth Missouri district that contains a report that required no action. The Chair thinks it is improperly on the calendar, and, without objection, it will be stricken from the calendar and laid on the table.

There was no objection.

The report was accordingly stricken from the calendar, Mr. Bland, of course, retaining the seat.

**101. The Tennessee election case of Smith v. Massey in the Sixty-first Congress.**

**Contestant having failed to serve proper notice of contest upon contestee, the case was dismissed.**

**No evidence having been produced to justify a contest, the committee recommended that no fees be allowed.**

On December 6, 1910, the following communication was laid before the House by the Speaker and referred to the Committee on Elections No. 2.

BRISTOL, TENN., *November 28, 1910.*

THE CLERK OF UNITED STATES HOUSE OF REPRESENTATIVES,

*Washington, D.C.*

DEAR SIR: I hereby very respectfully beg to inform you of my intention to contest the congressional election held on November 8 for the purpose of electing a Representative in Congress from the first Tennessee congressional district, and in which it is claimed that Dr. Z. D. Massey and the Hon. Sam R. Sells were elected, the former for the "short" or "unexpired" term of the late Congressman W.P. BROWNLOW and the latter for the regular term.

On the 19th instant I sent written notice of my intention to contest said election to both the above men, in which I set forth the reasons for entering contest.

Begging to request you to take whatever action is necessary in the matter to prevent Dr. Massey from taking a seat in Congress when that body convenes next Monday, I beg to remain,

Very respectfully,

JAMES EDGAR SMITH.

On March 3, 1911,<sup>3</sup> Mr. James M. Miller, of Kansas, from the committee submitted a report in the case.

The election was for an unexpired term and to fill a vacancy caused by the death of Hon. Walter P. Brownlow.

The contestant claimed to have sent a notice of contest to the sitting Member, alleging use of money to influence voters, unfair treatment by boards of election commissioners, the omission of contestant's name from official ballots, and misrepresentations misleading to voters.

The committee found no evidence that any notice of contest had been received by the contestee, and held that even had it been served in form as alleged, it was neither legal nor proper notice as required by the statutes governing contested election cases, in that it failed to comply with the provisions of sections 105, 106, and 107 of the Revised Statutes of the United States.

<sup>1</sup> Record, p. 8350.

<sup>2</sup> Frederick H. Gillett, of Massachusetts, Speaker.

<sup>3</sup> Third session Sixty-first Congress, House Report No. 2290; Record, p. 4215; Moores' Digest, p. 50.

The report further shows that no evidence of any kind was submitted to the committee in support of any of the allegations in the alleged notice of contest.

In conclusion the report says:

While the committee does not care to render any opinion upon the merits of this case in view of the fact that no proper notice of contest was given, yet the committee feels that this is a case where it ought to express its disapproval of the institution of a contest where on the face of the entire record there were no grounds for the same. The committee, therefore, recommends that this case be dismissed for want of proper notice, and at the same time expresses the opinion that in a case such as this there ought not to be any fees allowed.

The House, without debate, unanimously agreed to the report.

**102. The New York election case of Cantor v. Siegel in the Sixty-fourth Congress.**

**Contestant may not impeach the title of sitting Member by general averments of error, fraud, bribery, or coercion, but must specifically set forth in notice of contest the grounds upon which the contest is brought.**

**The committee have entire jurisdiction over questions of pleading and may admit amendments if occasion requires.**

**A recount of any part of the ballots will not be ordered unless all ballots cast in the election are available for recount if desired.**

On January 22, 1917,<sup>1</sup> Mr. Lewis L. Morgan, of Louisiana, from the Committee on Elections No. 3, submitted the report in the New York case of Jacob A. Cantor v. Isaac Siegel.

The sitting Member had been returned by an official majority of 80 votes. The contestant in his notice of contest made general averments of error, fraud, bribery and coercion, and contestee submitted that the notice was so general and insufficient that it was impossible to surmise the nature of the issues sought to be raised.

The committee sustained the contention of the contestee:

Your committee are of the opinion that under no circumstances should the contestant be permitted to impeach the title of the returned Member by general averments of error, fraud, bribery, and coercion. The grounds upon which a contestant relies in any given case must be specifically set forth in the notice of contest. If the returned Member is not sufficiently apprised of the nature of the case he is to meet, he can not be expected to intelligently prepare his defense. We are perfectly willing to liberally construe the law; nevertheless, we think it is always unwise and inadvisable to encourage flagrant violations of its requirements.

Your committee were clearly of the opinion that the notice in this case was insufficient and might have been justified in refusing to consider the evidence introduced in support of allegations so general; but feeling that the question of pleading was entirely within the committee's control, and that the notice could be amended, if the real merits of the case should so require, the committee concluded to examine the testimony disclosed by the record.

The contestant did, however, specially charge the counting of void ballots and the rejection of legal ballots in certain districts and requested an inspection of the ballots in those precincts.

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<sup>1</sup> Second session Sixty-fourth Congress, House Report No. 1325; Journal, p. 146; Record, p. 1756; Moores' Digest, p. 92.

The committee found:

Unfortunately, 7 of the 41 boxes were destroyed, because there was no effort made by any of the interested parties for their preservation. However, the committee do not impute to either contestant or the contestee responsibility therefor. But inasmuch as the contestant has vigorously attacked and undertaken to disparage the correctness as well as the reliability of the returns made by the precinct officials, your committee feel that they can not, in good conscience, accept as true the returns relating to the 7 boxes and wholly disregard and discredit the official returns of the other 34 boxes. To hold that the ballots in the 7 boxes were correctly counted and returned and that the ballots in the remaining 34 boxes were incorrectly canvassed, would be untenable, indefensible, and unprecedented under the peculiar circumstances of the case, and your committee are reluctant to take any such anomalous position.

Your committee, after having examined the facts and the law applicable thereto, with care and attention are of opinion that the destruction of a material portion of the official ballots voted at this election would make it now impossible for them to reach a just and satisfactory conclusion as to the result of the election even if they were to undertake to inspect and review the ballots in controversy, and they do therefore recommend the adoption of the following resolutions:

*Resolved*, That Jacob A. Cantor was not elected a Representative to the Sixty-fourth Congress from the twentieth congressional district of New York.

*Resolved*, That Isaac Siegel was elected a Representative to the Sixty-fourth Congress from the twentieth congressional district of New York, and he is entitled to retain his seat therein."

The resolutions recommended by the committee were unanimously agreed to without division.

**103. The Illinois election case of Golombiewsk v. Rainey in the Sixty-seventh Congress.**

**Contestant failing to comply with rules adopted by committee and ignoring inquiries propounded by the committee, was held not to have sustained charges made in notice of contest.**

**Reaffirmation of findings in other cases submitted simultaneously to the Committee on Elections.**

On February 1, 1923, <sup>1</sup> Mr. Robert Luce, of Massachusetts, from the Committee on Elections No. 2, submitted the report in the Illinois case of John Golombiewski v. John W. Rainey.

The official return in this case was:

John W. Rainey .....	23,230
John Golombiewski .....	21,546
Charles Beranek .....	2,753

By a recount ordered on application of the contestant, under the laws of the State of Illinois, the contestant gained 321 votes while the sitting Member lost 1,008 votes, reducing the latter's majority to 676 votes.

The contestant rested his case upon the allegation that in 16 specified precincts the fraudulent marking of ballots after they had been cast indicated a degree of corruption warranting the exclusion of all the ballots cast in those precincts.

He failed, however, to comply with the rules adopted by the committee in that his abstract of testimony did not cite specific testimony relied upon in support of his contention. A tabulation was submitted listing 179 ballots challenged, but

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<sup>1</sup>Fourth session Sixty-seventh Congress, House Report No. 1500.

the committee held the percentage of ballots so challenged was too small to indicate a degree of corruption sufficient, even if conceded, to warrant total exclusion of a poll.

In stating their conclusions the committee refer to two other cases, submitted simultaneously, as follows:

This is one of three cases from the city of Chicago which were referred respectively to your three committees on elections. The issues involved and the circumstances are much the same in all three cases. The report of the Committee on Elections No. 3 in the case of *Gartenstein v. Sabath*, submitted December 20, last, and the report of the Committee on Elections No. 1 in the case of *Partillo v. Kunz*, submitted January 15 last, contain discussion of the effect of violating statutory requirements, of incomplete recounts, and of the evidence that should be offered under conditions such as here prevailed, together with analysis of testimony and citation of precedents, all of which apply as well to the present case, and to them rehearse here would be needless repetition. It should, however, be added that in this counsel for the contestant has failed to proceed beyond the filing of the required documents, repeated inquiries from your committee as to whether he desired a hearing having been wholly ignored.

The committee accordingly recommend the adoption of the usual resolutions.

On March 4, 1923,<sup>1</sup> the resolutions were agreed to by the House without debate or division.

**104. The Senate case of William Lorimer, of Illinois, in the Sixty-first Congress.**

**A quorum of each house being present at joint meeting of legislature for election of Senator, a majority of those in attendance elects, and a majority of all members of the legislature is not required.**

**In order to invalidate election of Senator on charge of bribery, it must be shown: (1) That the person elected participated in the bribery or sanctioned it. (2) That by such bribery enough votes were obtained to change the result of the election.**

On June 18, 1909,<sup>2</sup> in the Senate, William Lorimer, elected a Senator by the legislature of Illinois, took the oath of office without objection.

More than a year thereafter, on May 28, 1910,<sup>3</sup> Mr. Lorimer rose to a question of personal privilege and said in part:

On the 30th day of April last (1910) the Chicago Tribune published a story over the signature of Charles A. White, a member of the Illinois Legislature, in which it was alleged that I secured my seat in the United States Senate through bribery and corruption. I have made this statement because I feel it my duty to acquaint the Senate with the facts and because I would not feel justified in participating in the deliberations of this body unless I had laid before it the facts concerning this conspiracy.

Therefore, Mr. President, I offer the following resolution and ask unanimous consent for its immediate consideration:

*Resolved*, That the Committee on Privileges and Elections be directed to examine the allegations recently made in the public press charging that bribery and corruption were practiced in the election of William Lorimer to a seat in the United States Senate and to ascertain the facts in connection with these charges, and report as early as possible; and for that purpose the committee shall have authority to send for persons and papers, to employ a stenographer and such other

<sup>1</sup> Journal, p. 2; Record, p. 5473.

<sup>2</sup> First session Sixty-first Congress, Record, p. 3437.

<sup>3</sup> Second session Sixty-first Congress, Record, p. 7019.

additional help as it shall deem necessary; and the committee is authorized to act through a subcommittee; and its expense shall be paid from the contingent fund of the Senate.”

The resolution was referred to the Committee on Privileges and Elections.

Subsequently, and on June 7, 1910, there was presented to the Senate a memorial signed by Clifford W. Barnes, in which the memorialist set forth in substance that he was president of the Legislative Voters' League of Illinois; that on May 2, 1910, pursuant to an order entered in the criminal court of Cook County, a special grand jury was duly convened to investigate and consider, among other things, certain alleged charges of legislative bribery in the Forty-sixth General Assembly of the State of Illinois; that prior to said 2d day of May one Charles A. White, a member of said general assembly, submitted to the Chicago Tribune a confession in which there were contained and embodied certain alleged facts and circumstances relating to said legislative bribery; that such confession was, in substance, printed, published, and circulated in the Chicago Tribune on April 30, 1910; that on May 2, 1910, the grand jury heard the testimony of White, as well as the testimony of H. J. C. Beckemeyer and Michael S. Link, members of the general assembly, from which testimony it was charged that each had received \$1,000 for casting his vote on May 26, 1909, for William Lorimer for United States Senator, and that based upon this testimony the grand jury, on May 6, 1910, returned an indictment against one Lee O'Neil Browne, the minority leader of the House of Representatives of Illinois, which indictment is set forth in the record, and that the statement of Mr. Barnes was made upon his best knowledge, information, and belief.

On June 20<sup>1</sup> the Senate agreed to the following resolution reported by the Committee on Privileges and Elections:

*Resolved*, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate certain charges against William Lorimer, a Senator from the State of Illinois, and to report to the Senate whether in the election of said William Lorimer as a Senator of the United States from said State of Illinois there were used or employed corrupt methods or practices; that said committee or subcommittee be authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress, to hold its sessions at such place or places as it shall deem most convenient for the purposes of the investigation, to employ a stenographer, 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.

On December 21, 1910,<sup>2</sup> Mr. Julius C. Burrows, of Michigan, from the Committee on Privileges and Elections, submitted the report of the majority of the committee.

A preliminary question as to whether a majority of all members elected to each house of the State legislature is required to elect a Senator or whether a majority of all votes cast in the joint assembly is sufficient to elect, is thus disposed of:

It appears from the evidence that Mr. Lorimer was elected a Senator from the State of Illinois on the 26th day of May 1909, by a joint assembly of the two houses of the general assembly of the

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<sup>1</sup>Record, p. 8501.

<sup>2</sup>Third session, Sixty-first Congress, Record, p. 547.

State of Illinois, receiving 108 votes out of 202 that were cast for the several candidates for that office, as follows:

Albert J. Hopkins .....	70
William Lorimer .....	108
Lawrence B. Stringer .....	24

VOTES REQUIRED TO ELECT.

The question is raised by counsel whether the language of the statute regulating the election of United States Senators requires that in order to elect a Senator the person elected must receive a majority of the votes of all the members elected to each house of the legislature, or whether it is sufficient if one person receives a majority of all the votes cast in the joint assembly, "a majority of all the members elected to both houses being present and voting." This question seems to have been decided by the Senate in the case of Lapham, and Miller (Senate Election Cases, 697). In that case it was held that a majority of a quorum of each house is sufficient to elect, and in that decision the committee concur.

When this proposition was debated in the Senate, Mr. Theodore E. Burton, of Ohio, said.<sup>1</sup>

The requirements of the act of 1866 are perfectly clear.

Each house of the legislature must meet separately on the second Tuesday after convening and organization, and vote for a Senator. The statute is silent as to what constitutes a quorum in the respective houses.

It is conceivable, and even probable, that the law or constitution of a State might provide that more or less than half, that two-thirds or one-third, for example might be regarded as a quorum for the transaction of business and that a majority of such quorum, made up of a less number or a greater number than a majority of the respective houses, could elect a Senator; that is, if both houses concur in the election. There is, however, no such uncertainty as regards the joint assembly. If no one has received a majority in both houses, or, if either house has failed to take proceedings as required by law, the joint assembly shall on the following day proceed to choose by a viva voce vote of each member present a person for Senator. The person who receives a majority of all the votes of the joint assembly, *a majority of all the members elected to both houses being present and voting*, shall be declared duly elected.

It is absolutely unnecessary to engage in refinements in regard to this statute. It means that a majority of the members elect to both houses must be present and it means also that the successful candidate must receive a majority of those present and voting.

Recurring to the main question at issue, the majority summarize Senate precedents in such cases in the following rule:

In a number of cases that have been before the Senate of the United States it has been held that to invalidate the election of a Senator on account of bribery it must be made to appear either—

(1) That the person elected participated in one or more acts of bribery or attempted bribery, or sanctioned or encouraged the same; or

(2) That by bribery or corrupt practices enough votes were obtained for him to change the result of the election.

From this ruling Mr. Albert B. Cummins, of Iowa, in debate in the Senate, dissented, saying:

The decision of this particular case is of great moment to the Senate and to the people, but the question whether Mr. Lorimer shall be permitted to retain his seat in the Senate of the United States shrinks into insignificance when compared with the consequences of the rule relating to bribery, first

<sup>1</sup> Record, p. 1892.

announced in the debate by the senior Senator from South Dakota, approved at once by the junior Senator from Texas, and insisted upon yesterday by the senior Senator from Kentucky. They ask the Senate to solemnly declare that the law of the land is that if it is shown that a certain number of bribed votes were given to the successful candidate in a senatorial election and the persons who cast these votes are identified with the bribed votes, the bribed votes must not only be deducted from the number received by the successful candidate, but also from the total number of votes cast, and that if, upon such a readjustment the candidate has a majority of the remaining votes, he is under all circumstances duly and legally elected.

To apply the rule so announced to the present case means this, that conceding that William Lorimer received seven corrupted votes, his election, was nevertheless, legal and valid. To apply it more analytically to the controversy before us, it appears thus: There were 202 votes cast in the Joint Assembly of the Illinois Legislature. To elect a senator it was necessary that one person should receive 102 votes. Mr. Lorimer, in fact, received 108 votes. Deducting the seven corrupted votes from his total leaves him 101; less than a majority of the total number of votes cast. The rule contended for by these Senators requires that these seven votes shall be also deducted from the total number leaving 195 votes. Inasmuch as 101 votes are a majority of 195 votes, the conclusion of these Senators is that Mr. Lorimer would be fairly and legally elected to the office.

This is the most alarming and dangerous proposition ever made in the Senate of the United States. If it were adopted it would be the most cordial invitation ever extended to dishonesty, crime, and corruption. If it were established it would be the most effective weapon ever forged for the use of the wrongdoer. If we assent to it we proclaim to the world that the Senate of the United States welcomes to its membership men whose friends have bought their title to a seat in this body.

These consequences, Mr. President, which I have now pointed out, are so grave and so serious that no matter what the precedents are, no matter what the rulings have been, it would be impossible for us to declare that this rule shall in the future govern the Senate of the United States.

If it is adopted it means that if bribery is skillfully done, if bribery is committed by those who have the rule in view, it can always effect its purpose if there be anything like an even division in the general assembly. It means that bribery, carried on by some other person than the candidate himself will be permitted to seat a Member in the Senate of the United States. It means that you can bribe members sufficient in number without any consequence at all, so far as the validity of the title is concerned, provided you bribe just enough to reduce the total number to the point where the honest votes of the candidate will be a majority. It is an unthinkable proposition to me. It is in conflict with the fundamental rule which we have always acknowledged and which every tribunal has acknowledged wherever it has had occasion to deal with the question at all.

The rule is that no man shall be permitted to enjoy the fruits of bribery. No man shall be permitted to hold a seat in this body that he could not have obtained had it not been for the bribery. The rule contended for by these Senators will permit a Member to hold a seat here which is the direct result of and which has been won through the grossest corruption.

#### **105. The case of William Lorimer, of Illinois, continued.**

**Bribery sufficient to change the result of the election not being shown and no personal participation in corrupt practices being proved, the Senate declined to invalidate the election.**

**Under its constitutional right to judge elections, returns, and qualifications, the Senate may inquire into the personal fitness of a man elected by a State; the manner of his election; and whether votes cast for him by members of the legislature were procured through bribery; but may not inquire into the personal character of the legislators themselves.**

The majority relate:

Four members of the General Assembly which elected Mr. Lorimer testified to receiving money as a consideration for their votes. The members who thus confessed their own infamy were Charles A. White, Michael Link, H. J. C. Beckemeyer and Daniel W. Holstlaw.

## CHARLES A. WHITE.

The chief of these self-accusers and the one on whose testimony the whole fabric of the accusation largely depends was Charles A. White, a member of the lower house of the Illinois General Assembly. White seems to have developed early in his legislative career an insatiable desire to secure a pecuniary compensation for his official acts, and he also appears to have suspected his fellow members of the general assembly of being as corrupt as himself. He endeavored to induce the chairman of an important committee to defer reporting a bill, in order to extort money from those who were interested in its passage. After Mr. Lorimer had been elected to the Senate, White tried to obtain information from another member of the house whether money had not been used to promote Senator Lorimer's election. This inquiry not only shows his corrupt character, but also casts suspicion upon the truth of his story that he had been bribed to vote for the successful candidate for Senator.

White's account of the alleged bribery of himself is given circumstantially and in detail, but in this he has been shown to have falsified in several important particulars concerning which he could not have been mistaken had his narrative been true. Among other things, he stated that Browne came to his room shortly before the election of Senator Lorimer and that two men named Yarborough were then in the room. But it was proved by two reputable and credible witnesses that on the evening in question one of these men was in Chicago.

Without further reference to the details of White's testimony, it may be said that after seeing, observing, and hearing this witness it was the opinion of a majority of the subcommittee that no credence ought to be given to any part of his testimony tending to establish the fact of bribery. And after carefully reading the testimony given by White in the investigation, a majority of the committee concur in the opinion of the subcommittee in that regard.

Discussing this conclusion during debate in the Senate, Mr. Elihu Root, of New York, said <sup>1</sup> in dissent:

It appears by the testimony of Mr. White, testimony that must be accepted, because it is corroborated by this great array of indisputable facts.

Mr. President, I say we are bound to accept that testimony, because it accords with what every one of us knows to be true. Every one of us knows that with bribery, attempted upon seven independent members of a legislature, effective as to four, failing as to three, but evidence of it produced, never in this world did it happen, or could it happen, that there were not others.

So difficult is it to secure evidence of this kind of crime, so almost insuperable are the obstacles to confession and to testimony, that universal experience has established to the knowledge of us all that but a trifling, occasional, incidental portion of the corruption that exists, wherever it exists at all, is ever brought to light. So well is this understood that in England, in order that corruption might not continue to do its demoralizing work in their body politic, they have made by law the proof of the bribery of one voter fatal to an election, and they have made by law the oral admission, not under oath, of a voter that his vote was bought evidence of the truth of the admission.

The difficulties in the way of making proof where, in the vast majority of cases, both parties are guilty and neither can give evidence without stamping himself with infamy, are so great that we are bound to act upon the universal knowledge that the facts brought out here in evidence must have been accompanied by other similar facts; had here you have proof, here you have legal proof. I say, Mr. President, no Senator is at liberty to reject that proof which corresponds with his own belief.

The testimony of other members of the legislature charged with accepting bribes is thus analyzed in the majority report:

## MICHAEL LINK.

According to the testimony of this witness, he was paid the sum of \$1,000 by Lee O'Neil Browne some time after Mr. Lorimer had been elected to the Senate. He further testified that

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<sup>1</sup>Third session Sixty-first Congress, Record, p. 1891.

no money was paid or promised him before he voted for Mr. Lorimer; that he made up his mind as early as in the month of March, 1909, to vote for Mr. Lorimer if an opportunity for so doing should occur, and promised Mr. Lorimer his vote some time in advance of the election of a Senator. When accused of having received money for voting for Mr. Lorimer, he denied it. When Summoned before a grand jury, he stated, under oath that he had not received any money as a consideration for his vote for Senator. Following this statement he was compelled, by means fully set forth in his testimony, to retract his former statement and testify to having received money for his vote for Mr. Lorimer.

H. J. BECKEMEYER.

This witness also testified before the subcommittee that he had received money from Lee O'Neil Browne as a reward for his vote for Senator Lorimer, but he also testifies that no money or other compensation was promised him before he voted for Mr. Lorimer. His experience before the grand jury was similar to that of the witness Michael Link, and as against his declaration last made before the grand jury and repeated to the subcommittee we have his statement to Michael Link denying the use of money in the senatorial election, and also to Robert E. Wilson that he did not get any money for voting for Mr. Lorimer, and if anyone said so he was a liar.

D. W. HOLSTLAW.

This witness testified that in a conversation with Senator Broderick he told Broderick that he intended to vote for Mr. Lorimer for Senator, to which Broderick replied, "Well, there is \$2,500 for you," and that some time afterwards Broderick paid him \$2,500. This witness was also driven to making this statement by certain proceedings taken before a grand jury of Sangamon County, Ill., and in many respects the story told by this witness seemed to the subcommittee to be a highly improbable one.

The circumstances before referred to and many others which might be instanced tended to render the testimony of each and all the witnesses who have been named of doubtful value. And in each case in which it was claimed that some member of the Illinois General Assembly had been bribed to vote for Mr. Lorimer the accusation was positively denied by the person accused of committing the alleged act of bribery. And after a careful examination and consideration of all the evidence submitted the committee are of the opinion that even if it should be conceded that the four members of the Illinois General Assembly before referred to received money in consideration for their votes for Mr. Lorimer, there are no facts or circumstances from which it could be found or legally inferred that any other member or members of the said general assembly were bribed to vote for Mr. Lorimer.

The majority for Senator Lorimer in the joint assembly of the two houses of the general assembly of the State of Illinois was 14. Unless, therefore, a sufficient number of these votes were obtained by corrupt means to deprive him of this majority, Mr. Lorimer has a good title to the seat he occupies in the Senate. If it were admitted that four of the members of the general assembly who voted for Mr. Lorimer were bribed to do so, he still had a majority of the votes cast in the general assembly and his election was valid.

CASE OF BROWNE, BRODERICK, AND WILSON.

It is, however, declared that if the four witnesses before named were bribed to vote for Mr. Lorimer, those who bribed them were equally guilty and that the votes of Browne, Broderick, and Wilson should also be excluded. But the committee can find no warrant in the testimony for believing that either one of said legislators was moved by any corrupt influence. Browne's reasons for voting as he did are clearly set forth in his testimony. He was the leader of a faction of the minority of the house, and for certain political reasons he thought it good policy to aid in the election, of some member of the majority party other than those who had received a considerable number of votes in the general assembly.

After discussing the testimony in detail the majority conclude:

Much of the testimony taken upon the investigation related to the alleged payment of money to members of the general assembly of Illinois by one Robert E. Wilson. This was denied by Wilson and by others, and after considering all the evidence on that subject, the committee are not prepared to find that the fact is established. But whether the sums of money claimed to have been paid were or were not paid, that fact has no relevancy to the matter which the committee was appointed to investigate. If any money was disbursed by Wilson, it is evident that it was from a fund which was neither raised nor expended to promote the election of Mr. Lorimer as a Senator nor to reward those who voted for him for that office. It was therefore no part of the duty of the subcommittee to inquire into either the origin of the fund or the purpose for which it was used. That matter was and is one for the proper officials of the State of Illinois to take cognizance of and one with which the Senate of the United States has no concern.

The committee submit to the Senate the testimony taken in the investigation, with their report that in their opinion, the title of Mr. Lorimer to a seat in the Senate has not been shown to be invalid by the use or employment of corrupt methods or practices, and requests that they be discharged from further consideration of Senate resolution No. 264.

Mr. W. B. Heyburn, of Idaho, concurred fully in the report of the majority of the committee and signed the report but submitted individual views giving additional reasons for his conclusions as follows:

It is not claimed nor was any attempt made to show that Mr. Lorimer was in any way connected with the alleged bribery or that he knew of any bribery or corrupt practice in connection with his election.

The committee is not charged with the investigation of the personal character of the members of the Illinois Legislature, nor should it report upon the same.

The right to investigate the character of the legislative body of a State or any member thereof belongs exclusively to the State and the people thereof.

In the Senate every presumption is in favor of the integrity of the State as certified to it by the chief executive of the State, and no presumption can be indulged that the State acted corruptly in the election of a Senator.

When a question as to the right of an incumbent to sit arises in the Senate which is based upon charges made by persons acting in their individual capacity, the burden of sustaining such charges rests on the charging party, and such party should be held to strict proof of the charges made, and such charges may not be made the basis of a dragnet investigation into the personal conduct or morals of the members of the legislature who participated in the election. The State must stand responsible for the character of its officers, and that responsibility is to its own people and not to any branch of the General Government.

The Senate may inquire into the personal fitness of a man elected by a State to sit as a Senator and may determine such question within the exercise of its exclusive powers, but in doing so it may not inquire into the personal character of the officers through whom the State acts. That question belongs to the people of the State exclusively.

The Senate may, however, inquire into the manner of the election of a Member of its body to the extent, and for the purpose of ascertaining whether such election was an honest one, representing the will of the members of the legislative body which certifies his election to the Senate, and in doing this we may inquire whether the votes cast by members of the legislature were procured by bribery of such members, by the person for whom they voted or by anyone on behalf of such person with the knowledge or consent of such person, and in case we should find that such bribery existed we should find that his election was procured in violation of the law, and the person so selected should not be permitted to hold the office of Senator.

In this case Mr. Lorimer is neither charged nor shown to have bribed or corrupted any member of the legislature who voted for him, or to have furnished any money to any person for such purpose, neither has it been shown that he had any knowledge of any bribery or corrupt practice in connection with his election. We do not have to weight testimony to arrive at this

conclusion, for them was no attempt to establish such conduct or knowledge on the part of Senator Lorimer.

**106. The case of William Lorimer, of Illinois, continued.**

**Discussion of reason for requiring two-thirds vote rather than majority vote for expulsion from the Senate.**

**Charges that the election of a Senator was secured through corrupt practices, investigated and held not to be sustained by evidence.**

**Instance wherein a Senator requested elimination from appropriation bill of item reimbursing him for expenses incurred in defense of his seat.**

Mr. Albert J. Beveridge, of Indiana, did not concur in the opinion of the majority but filed minority views in which he attacked precedents approved by the majority to the effect that in order to invalidate an election it must be shown that a sufficient number of voters were bribed to change the result. After discussing the inequity of these precedents the views say:

I propose that we overthrow such unsound precedents and establish a new Senate precedent, that one act of bribery in the election of a Senator makes such an election void—makes an election foul.

The public welfare, the theory of free and fair elections, which it is our sole business to safeguard, and which is the reason and origin of the power we are now exercising, requires the establishment of this new Senate precedent.

We should in this case establish the law of the Senate in conformity with the ancient common law. We should declare that one act of bribery makes a whole election foul.

This pronouncement by the Senate of the United States would prevent an ambitious and wealthy candidate from perpetrating bribery to make his election sure and doing it in such a way as to cover up his tracks. It would give a needed pause to corrupt interests that undertake to make the election of their favorite certain by corrupt practices. It absolutely would prevent overzealous friends, inspired by nothing but the heat of battle and devotion to their favorite, from undertaking to secure his success by infamous methods.

If we make a new Senate precedent that one act of bribery makes a whole election foul, we shall have an end of the amusing and overworked argument of the improper activities of too enthusiastic friends bribing voters for their favorite without any other motive than their fanatical and money-sacrificing devotion to him.

The time has arrived when we had much better take to heart the people's unsullied and uninfluenced representation than that we should continue to bemoan the possible fate of a virtuous candidate in whose behalf the heinous crime of bribery has been practiced, whether by venal interests or by well-intentioned but overzealous and financially affluent friends.

But waive this point. The evidence shows it is not necessary to a decision of this case. I advance it only because this body ought to establish now that one act of bribery invalidates an election.

In agreement with this doctrine Mr. Burton in debate in the Senate also declared:<sup>1</sup>

The Senate is not bound by any precedent created by a legal decision or even by a report of a committee of Congress. Most of the reports to Congress in contested-election cases have been characterized by a fair disposition and an evident desire to render a decision in accordance with justice. They have also been characterized in many cases by exceptional ability. But a great question of public policy is presented to the Senate in any contested-election case. The country looks here for an example. The State from which the Senator is accredited has a right to demand that exact justice be done.

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<sup>1</sup>Third session Sixty-first Congress, Record, p. 1980.

Thus we may brush aside precedents if they do not accord with justice and the highest moral standards.

In this connection the minority views discuss the reason for requiring a two-thirds vote for expulsion, as follows:

And this suggests another untenable view heretofore suggested in election cases and which we should now decisively negative. This view is that a single act of bribery perpetrated or countenanced by a person elected to the Senate of the United States does not void the election, but only so taints such a person that he must be expelled. That is, if the sitting Senator personally perpetrated or countenanced bribery to secure his election his seat can not be vacated by a majority vote, but he must be expelled by a two-thirds vote.

I think it clear that this view is wrong. The argument for it is that the bribing Senator is guilty only of a moral defect which renders him unfit to be a Member of this body.

It is as if such a Senator had a contagious disease such as smallpox, or that he was dangerously insane, or that he had committed treason, and yet, in any of these cases, insisted upon sitting among us. In any of these cases or others that may suggest themselves such a Member may be expelled, but only by a two-thirds vote.

The reason a two-thirds vote was provided in the Constitution to expel a member was that the mental, moral, or physical defect should be so unquestionable that two-thirds of this body would be impelled to vote for expulsion.

And yet it is upon these grounds and these only that the argument is made that a Senator guilty or knowing of bribery in his election must be expelled by a two-thirds vote rather than his election invalidated by a majority vote.

This position is so dangerous to the public welfare, so contrary to public policy, so abhorrent to reason and repugnant to justice that I repudiate and challenge it.

For conceding that an elected Senator had a majority of perfectly honest votes, would they have so cast their votes if they had known that the candidate was bribing other votes?

Let me put an illustration personally to each Senator here. Suppose that we are electing some man to some office within our gift. Suppose that all but one of us were honest and earnest in our intended votes for this man. But suppose that just before our vote we discovered that he had bribed or countenanced the bribery of one of our number. Would a single one of us with such knowledge vote for the man for whom until that moment we had intended to vote? Of course not.

So it is that one act of bribery perpetrated or countenanced by any Senator to secure his election vitiates the same. It does not necessitate an act of expulsion requiring a two-thirds vote, but a resolution requiring a majority vote invalidating the election.

As to whether knowledge of bribery by its beneficiary is a requisite to invalidation the views say:

Was Mr. Lorimer informed of what was going on in his behalf? While not necessary to a decision of this case, the evidence and circumstances require the Senate to consider this point.

From his speech on this case in this body it appears that Mr. Lorimer is a seasoned politician of nearly 30 years' experience in practical politics in one of the greatest cities of the country and of the world—a superb organizer who gives attention to the very smallest details of any election.

In law Mr. Lorimer must be held to have knowledge of these transactions in his behalf.

If so, I contend that his election is invalid upon this ground. If Senators believe that he knew and countenanced a single act of bribery we need not conclude that we must expel him by a two-thirds vote. We need only to conclude that his election was invalid and so declare by a majority vote.

But for the purpose of this particular case it is not necessary to raise the question of Mr. Lorimer's knowledge of any bribery in his behalf. I raise it only because personally I want to go on record against the proposition hitherto advanced, that an act of bribery by a successful candidate does not invalidate his election, but only taints the successful candidate himself.

I conclude that this election was invalid under any possible view of the law. If the Senate so concludes, it is our duty to so declare.

In consonance with his views Mr. Beveridge offered the following:

*Resolved*, That William Lorimer was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Illinois.

Mr. James B. Frazier, of Tennessee, from the committee, also submitted individual views dissenting from the majority report as follows:

As I understand the precedents as established by the Senate and the other branch of Congress and now recognized as the law governing such cases, they are:

First. If the proof establishes the fact that the Member whose seat is in question because of alleged bribery or corrupt practices resorted to in his election has himself been guilty of bribery or corrupt practices, or knew of or sanctioned such corrupt practices, he may be unseated without reference to the number of votes thus corruptly influenced.

Second. If the proof fails to show that the Member knew of or participated in or sanctioned such corrupt practices, then, in order to justify unseating him, the proof must show that enough members of the legislature voting for him were bribed or influenced by corrupt practices that deducting their votes from the total vote received by him would reduce his vote below the constitutional majority required for his election.

The testimony taken by the committee satisfies me that four members of the legislature were paid money for voting for, or in consequence of having voted for, Senator Lorimer. One senator and three representatives admitted under oath before the committee that they were paid money, and their admissions and the facts and circumstances surrounding the transactions satisfy me that they received it as a bribe for or in consequence of their votes for Senator Lorimer.

The four self-confessed bribe takers implicate three other members of the legislature who voted for Senator Lorimer as the persons who bribed them. The testimony satisfies me that the three alleged bribe givers were guilty of that offense. To my mind the man who bribes another is as corrupt as the one who is bribed, and by his corrupt act of bribery he demonstrated the fact that he is none too honest to receive a bribe if offered him.

While the proof is not clear or conclusive that these three bribe givers were themselves bribed or corruptly influenced to vote for Senator Lorimer, when I take into consideration their corrupt conduct as bribers of others, together with all the facts and circumstances surrounding this case, I can not bring myself to agree with the majority of the subcommittee that their votes are free from taint or corruption. These three votes added to the four confessedly bribed would make seven tainted votes. Eliminate them, and the vote received by Senator Lorimer was less than a majority of the votes cast.

Mr. Frazier then concurs in the resolution offered by Mr. Beveridge.

The report of the committee was debated at length in the Senate on January 18, 23, 25, 26, 27; February 3, 6, 7, 9, 10, 13, 14, 21, 23, 24, 27, 28, and March 1, 1911. On March 1,<sup>1</sup> the minority resolution submitted by Mr. Beveridge was disagreed to—yeas 40, nays 46.

Two days later, on March 3,<sup>2</sup> during consideration by the Senate of the deficiency appropriation bill, Mr. Lorimer requested that an item granting him \$25,000 for expenses incurred in defense of his title to his seat be rejected. After some debate the item was disagreed to.

**107. The Senate case of William, Lorimer, of Illinois, in the Sixty-second Congress.**

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<sup>1</sup>Record, p. 3760.

<sup>2</sup>Record p. 1113.

**Instance wherein the Senate appointed, to investigate an election, a special committee made up of members of the Committee on Privileges and Elections.**

**Instance wherein a special committee was appointed with instructions to investigate and report to the Senate upon the sources and use of a fund alleged to have affected the election of a Senator.**

**A former decision by the Senate on a contested election does not preclude reopening the case if additional evidence is discovered.**

**In passing on an election case the Senate exercises a judicial function, and its decisions must be based upon legal principles and be in accordance with the evidence.**

On May 20, 1912,<sup>1</sup> in the Senate, Mr. William P. Dillingham, of Vermont, from the Committee on Privileges and Elections, submitted the report of the majority of the committee in the second investigation of the election of William Lorimer, of Illinois.

A prior investigation of the same election had been concluded by a vote in the Senate confirming the Senator's title to his seat.

The following chronological statement of the first investigation is thus set out in the report:

The Forty-sixth General Assembly of Illinois met and organized January 6, 1909. On that day the house elected Edward D. Shurtleff speaker.

The first vote for United States Senator in the separate houses of the legislature was taken January 19, 1909. The first joint ballot for United States Senator was taken January 20, 1909. There were 95 joint ballots for United States Senator. More than 150 different men were voted for, for United States Senator, by that legislature.

The first vote for William Lorimer for United States Senator was cast May 13, 1909. William Lorimer was elected Senator on the ninety-fifth joint ballot, taken on the 26th day of May, 1909.

There were 202 members of the legislature present and voting on the ninety-fifth ballot, May 26, 1909. On that ballot William Lorimer received 108 votes for United States Senator, Albert J. Hopkins received 70 votes, and Lawrence B. Stringer received 24 votes. Senator Lorimer had a majority of 14 votes.

Two hundred and four members had been elected to the Forty-sixth General Assembly of Illinois. Paul Zaable, a member of the house, died in January, and the vacancy was not filled at that session. Frank P. Schmidt, a member of the senate, was not present at the taking of the ninety-fifth ballot.

The total number of Republicans elected to the house was 89; the total number of Democrats elected to the house was 64. The total number of Republicans in the senate was 38; the total number of Democrats in the senate was 13. The total number of Republican elected to both houses of the legislature was 127; the total number of Democrats elected to both houses of the legislature was 77.

On the ninety-fifth ballot 55 Republican votes and 53 Democratic votes were cast for Mr. Lorimer. William Lorimer was commissioned United States Senator by Gov. Deneen on May 27, 1909.

Senator Lorimer was sworn in and took his seat in the United States Senate June 18, 1909.

On April 30, 1910, the Chicago Tribune published the White story.

April 29, 1910, State's Attorney Wayman filed a petition for and obtained an order calling a special grand jury in Cook County.

May 2, 1910, the special grand jury convened and was sworn in.

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<sup>1</sup>Second session Sixty-second Congress, Senate Report No. 769; Record, p. 6790.

Lee O'Neil Browne was indicted on the 6th day of May, 1910, on a charge of bribing Charles A. White to vote for Senator Lorimer.

May 28, 1910, Senator Lorimer made a speech in the United States Senate and demanded an investigation of the charges made by the Chicago Tribune April 30, 1910.

On June 7, 1910, Clifford W. Barnes filed charges in the Senate of the United States against Senator Lorimer.

June 20, 1910, the United States Senate adopted a resolution providing for an investigation.

A subcommittee of the Committee on Privileges and Elections of the Senate of the United States, of which Senator Burrows was chairman, was appointed to investigate the charges against Senator Lorimer.

September 20, 1910, the subcommittee of the Committee on Privileges and Elections of the Senate of the United States convened in Chicago to hear testimony. September 22, 1910, the subcommittee of the Senate held its first public hearing.

The subcommittee of the Senate concluded the hearing of testimony in Chicago October 8, 1910.

December 7, 1910, the subcommittee of the United States Senate took further testimony in Washington, D. C., and on that day concluded the public hearings.

December 21, 1910, the Committee on Privileges and Elections of the Senate presented its report to the Senate of the United States. The report exonerated Senator Lorimer and found:

"In our opinion the title of Mr. Lorimer to a seat in the Senate has not been shown to be invalid by the use or employment of corrupt methods or practices."

On January 9, 1911, Senator Beveridge submitted his views to the Senate of the United States, dissenting from the report of the Committee on Privileges and Elections, and offered the following resolution:

"*Resolved*, That William Lorimer was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Illinois."

On January 30, 1911, Senator Frazier, a member of the Committee on Privileges and Elections, submitted his views to the Senate, concurring in the resolution offered by Senator Beveridge.

The report of the Committee on Privileges and Elections and the resolution of Senator Beveridge were discussed and debated on the floor of the Senate at intervals until March 1, 1911.

On the 1st of March, 1911, the resolution of Senator Beveridge was determined in the negative by the Senate; a roll call thereon resulted in a vote—nays 46, yeas 40.

The Sixty-first Congress adjourned sine die at noon March 4, 1911.

While the first investigation was still in progress, the senate of the Illinois Legislature also appointed a committee to investigate the election. During the investigation by the Illinois Senate the Record-Herald, a Chicago newspaper, published an editorial in which the following language was used:

Do we know all there is to be known concerning the \$100,000 fund that was raised to pay for Lorimer's votes?

The editorial attracted wide attention, and Herman H. Kohlsaas, the editor of the paper, was summoned before the Illinois committee and gave the following testimony:

Q. What is your full name?—A. Herman H. Kohlsaas.

Q. You are the editor and proprietor of the Chicago Record-Herald?—A. Yes.

Q. In February of this year, Mr. Kohlsaas, there was published in the Chicago Record-Herald an editorial in reference to the senatorial action at Springfield. I will show you a copy of that editorial, or what purports to be a substantial copy [handing document to witness].—A. (Examining document). I think that is practically correct, because that is the way I felt and feel.

Q. That editorial, then, was written by you?—A. Dictated.

Q. You had information upon which that editorial was based?—A. Yes.

Q. Have you an objection to giving the committee that information?—A. Yes.

Q. Well, do you object to giving the committee the information which you had, without at this time, perhaps, identifying the individual or individuals who gave you the information?—A. Yes; because if I did that it would naturally lead up to the main party in the controversy, and it would undo just what I do not want to do.

Q. There were a number of editorials written along that same line, were there not?—A. Yes.

Q. About that time?—A. Yes. Shall I just tell this in my own way?

Q. Just tell it in your own way, yes.—A. Shortly after the Chicago Tribune published Representative White's story last spring I met a friend of mine, a man of the highest character, intelligence, and a man who does not make reckless statements, and he gave me a detailed account of the raising of \$100,000 to bring about the election of Mr. Lorimer. He gave it to me in confidence. I told him that the confidence would not be betrayed. With that feeling of perfect security that this man's information that he gave me was absolutely reliable, I took the position that the election should be investigated and came out editorially and backed the Tribune in its fight. The natural inclination in cases of that kind, where there are two great papers striving in the same field for circulation, advertising, and influence, is to, in the language of the street, knock the other paper's story. But I was so impressed with the truth of this that I came out editorially next day after this and backed the Tribune in their story, and have done it ever since.

As I say, this was given to me in confidence. The cardinal principle of an honorable, upright newspaper man is confidence.

Q. Did he inform you that a fund of \$100,000 had been raised to induce the election of Senator Lorimer in the State of Illinois?—A. He did.

Q. Did he also tell you that the man or men who had raised that \$100,000 fund desired to reimburse themselves, or solicit 10 other men, residents of Chicago, to make that amount good?—A. I must decline to answer.

Q. And did he tell you that he was one of the men so approached?—A. I decline to answer.

Q. Did he give you the name or names of men who approached him, and what they said to him in connection with the matter?—A. I must decline to answer.

(Whereupon the committee went into executive session, at the conclusion of which the open session was resumed and the following proceedings had:)

Chairman HELM. Mr. Kohlsaas, the committee has agreed that we will have to require you to answer, and if you refuse that we will report the matter to the senate and request you to appear back here next Wednesday to see what the senate desires to do in the matter. Will you still persist in refusing to answer?—A. Yes.

Q. You decline to make any further disclosure?—A. Yes.

The witness persisted in refusing to divulge the name of his informant, until April 5, 1911, when Clarence A. Funk, of Chicago, voluntarily appeared before the committee as the informant referred to, and testified as follows:

Q. What is your full name, Mr. Funk?—A. Clarence S. Funk.

Q. Where do you live?—A. In Oak Park, Chicago.

Q. And what is your business?—A. I am general manager of the International Harvester Co.

Q. I direct your attention to a conversation that you had with Edward Hines, of the Edward Hines Lumber Co., in the latter part of the month of May, 1909, or the early part of the month of June, 1909. Did such a conversation take place?—A. Well, I can not identify the month. I had a conversation with Edward Hines shortly after Lorimer was elected United States Senator by the legislature.

Q. Well, it is in the record here that the election of Senator Lorimer was on the 26th of May, 1909. Directing your mind to that time, or about that time, when was it that this conversation occurred?—A. It was shortly after that. I could not say whether it was 5 days or 10, but it was within a short time afterwards.

Q. Where did that conversation take place?—A. Union League Club, Chicago.

Q. And with whom was the conversation?—A. Edward Hines.

Q. Was the conference arranged in any way or was it more or less accidental?—A. I met Mr. Hines accidentally, and he said he had been trying to get a chance to see me or get time to see me.

Q. Now, will you tell the committee, Mr. Funk, what occurred and what was said at that conversation by Mr. Hines and by yourself?—A. Do you want me to undertake to repeat verbatim?

Q. As near as you can remember; otherwise the substance of the conversation.—A. Well, he said I was just the fellow he had been looking for, or trying to see, and said he wanted to talk to me a minute. So we went and sat down on one of the leather couches there on the side of the room, and without any preliminaries, and quite as a matter of course, he said, "Well, we put Lorimer over down at Springfield, but it cost us about a hundred thousand dollars to do it." Then he went on to say that they had had to act quickly when the time came; that they had had no chance to consult anyone beforehand. I think his words were these "We had to act quickly when the time came, so we put up the money." Then he said "We—now we are seeing some of our friends so as to get it fixed up." He says they had advanced the money; that they were now seeing several people whom they thought would be interested to get them to reimburse them. I asked him why he came to us. I said "Why do you come to us?"—meaning the harvester company. He said, "Well, you people are just as much interested as any of us in having the right kind of a man at Washington." Well, I said—I think I replied, and said, "We won't have anything to do with that matter at all." He said, "Why not?" I said, "Simply because we are not in that sort of business." And we had some aimless discussion back and forth, and I remember I asked him how much he was getting from his different friends. He said, "Well, of course we can only go to a few big people; but if about 10 of us will put up \$10,000 apiece that will clean it up." That is the substance of the conversation. I am repeating it verbatim just as far as I can, Mr. Chairman. I do not undertake to say that is absolutely exact.

I left him then in just a moment. As I left he asked me to think it over. I made no reply to that. I just walked away.

This testimony was given wide publicity through the public press and on the following day, April 6,<sup>1</sup> in the Senate, Mr. Robert M. La Follette, of Wisconsin, presented as privileged the following resolution with the request that it lie on the table subject to call:

Whereas the Senate by resolution adopted on the 20th day of June, 1910, authorized and directed the Committee on Privileges and Elections to investigate certain charges against William Lorimer, a Senator from the State of Illinois and to report to the Senate whether in the election of said Lorimer as a Senator of the United States from said State of Illinois there were used and employed corrupt methods and practices; and

Whereas said committee, pursuant to said resolution, took the testimony of a large number of witnesses, reduced the testimony to printed form, and reported the same to the Senate, which was thereafter considered and acted upon by the Senate; and

Whereas the Illinois State Senate thereafter appointed a committee to investigate like charges against William Lorimer and to report to said State senate whether in the election of said Lorimer to the United States Senate corrupt methods and practices were employed and used; and

Whereas as it appears from the published reports of the proceedings of the said Illinois State Senate committee that witnesses who were not called and sworn by the committee of this Senate appointed to investigate said charges have appeared before the said committee of the Illinois State Senate, and upon being interrogated have given important material testimony tending to prove that \$100,000 was corruptly expended to secure the election of William Lorimer to the United States Senate:

*Resolved*, That Senators John D. Works, Charles E. Townsend, George P. McLean, John W. Kern, and Atlee Pomerene be, and they are hereby, appointed a special committee, and as such committee be, and are hereby, authorized and directed to investigate and report to the Senate whether in the election of William Lorimer, as a Senator of the United States from the State of Illinois, there were used and employed corrupt methods and practices; that said committee be

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<sup>1</sup>First session Sixty-second Congress, Record, p. 101.

authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress, to hold sessions 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, to administer oaths, and to report the results of its investigation, including all testimony taken by it; 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.

**108. The Senate case of William Lorimer in the Sixty-second Congress, continued.**

**Decision by committee that defense of res adjudicata could be invoked against reconsideration of election case once passed upon was rejected by the Senate.**

**Decision by committee that payment to members of legislature of money not shown to have been paid for specific purpose of electing Senator did not invalidate election, overruled by Senate.**

**The Senate invalidated an election procured by corrupt practices without holding the Senator cognizant of the corrupt practices on which invalidated.**

**On June 7, 1911,<sup>1</sup> the Senate agreed to the following resolution:**

*Resolved*, That a committee of the United States Senate consisting of the following members of the Committee on Privileges and Elections: Senators Dillingham, Gamble, Jones, Kenyon, Johnston, Fletcher, Kern, and Lea, be, and are hereby, authorized, empowered, and directed forthwith to investigate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used and employed corrupt methods and practices.

That said committee be authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress; to hold sessions at such place or places as it shall deem most convenient for the purpose of the investigation; to employ stenographers, counsel, accountants, and such other assistants as it may deem necessary; to send for persons, books, records, and papers; to administer oaths; and as early as practicable to report to the Senate the results of its investigation, including all testimony taken by it; 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.

The committee is further and specially instructed to inquire fully into and report upon the sources and use of the alleged "jack-pot" fund, or any other fund, in its relation to and effect, if any, upon the election of William Lorimer to the Senate.

At the outset of the investigation, counsel for Mr. Lorimer raised the issue of res adjudicata, contending that the case had been fully investigated and finally determined by the Senate and such action was a bar to further proceedings questioning the validity of the election.

In support of this doctrine Mr. D. Upshaw Fletcher, of Florida, said<sup>2</sup> in the Senate:

This case has been adjudicated; the action taken March 3, 1911, was final and forever settled the question involved, certainly in the absence of new evidence of such a nature that, had it been introduced before, would or might have produced a different result.

This case was passed upon by the Senate of the Sixty-first Congress, the term expiring March 4, 1911. Some 30 changes had taken place in the membership of the Senate by the time the Sixty-second Congress convened. Owing to these changes this case was ordered retried—the alleged grounds being, however, that new evidence had been discovered, which, if presented and considered,

<sup>1</sup> First session Sixty-second Congress, Record, p. 1732.

<sup>2</sup> Second session Sixty-second Congress, Record, p. 8725.

would make a different case. Many Senators believed additional and newly discovered evidence existed, and in view of the charges made it would be advisable to make another investigation and ascertain what new facts could be uncovered. This action will likely serve as a precedent—although the Senate treats each case, apparently, from the standpoint of power and might—that is liable to plague us in future. In similar cases the Senate adopted the doctrine of *res adjudicata*, as far back as 1858.

The change of the personnel of the Senate should not prompt a change of decision reached as judges acting in a judicial capacity any more than a change in the individual justices on the bench should of itself give grounds for the rehearing of a cause. Unless a different case is presented involving different facts or additional, material facts not known before, clearly it must be recognized as an unjust interference, wrongfully imposing expense and trouble, to repeatedly bring to the bar a Senator and require him time after time to defend his right to his seat in this body. If, in the Sixty-first Congress, he is tried, and again in the Sixty-second, can he not be in the Sixty-third and Sixty-fourth, and yearly to the end of his term? When is the judgment of the Senate to be conclusive, and forever bar any further proceedings to adjudicate the same question? The authorities uniformly hold that the rule of *res adjudicata* applies in this case, and is a complete answer to the resolution offered and now pending. The report of the committee sets forth a number of authorities, and I will not elaborate upon them. The Senate has the *power* to force a reexamination of the questions and a new vote by a new Senate on a resolution to the same effect as the one previously voted on, but that is not the same thing as having the legal or moral *right* to do so.

In opposition to this view Mr. Luke Lea, of Tennessee, said: <sup>1</sup>

The question of law presented is whether the Senate has a right now to consider this case, since, on March 1, 1911, by a vote of 46 to 40, a resolution was adopted declaring the election of Senator Lorimer valid. The second question, one of fact, is whether this record now before the Senate establishes the election of Senator Lorimer to have been obtained by corrupt methods and practices.

Considering the question of law first, the plea of *res adjudicata* was pleaded after the conclusion of all the testimony and immediately prior to the conclusion of the hearings by the special investigating committee. It presents to the Senate the question of whether the plea of *res adjudicata*, as known to court practice, can prevent a reconsideration by the Senate of this case upon its merits.

The judicial functions of the Senate in passing upon the election and qualifications of its Members are purely incidental and subsidiary to its principal functions, which are legislative. The distinction between the functions of a legislative body and a judicial tribunal is that those of the legislative body are necessarily never final, while those of the judicial tribunal must necessarily be final. It is conceded that the plea of *res adjudicata*, can never be properly invoked in court until there is a final judgment, and as there never can be a final judgment in a legislative body, whose judicial functions are merely incidental to its legislative functions, the plea of *res adjudicata*, can never be properly plead.

The true doctrine is that the Senate should never reopen an election case for the purpose of permitting a changed political complexion to reverse a former verdict, but that the Members of the Senate should never hide behind a technical plea to avoid correcting a former erroneous decision; that an election case is never finally decided until it is decided right upon the fullest and fairest investigation and consideration of all the facts that can possibly be obtained. The reason for such a rule is apparent. If a changed political complexion would justify the reversal of the former verdict, then election cases would be decided, not according to their merits or justice to the parties, but according to the dominant political opinion of the Senate. On the other hand, the reason is equally strong that the Senate should reopen an election case wherever there is new or material evidence or where, on the whole record, from an equitable standpoint, it should reconsider its former verdict either for or against the Member whose seat is contested.

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<sup>1</sup>Record, p. 8884.

The report says:

One of the most elementary doctrines of the law, perhaps the one most universally accepted, is the doctrine of *res adjudicata*.

The rule of *res adjudicata*, is in force in every American court and in every governmental body or organization that performs, even though but incidentally, judicial functions. The *Cyclopedia of Law and Procedure* cites the following bodies, boards, and officers whose judgments have been held to constitute *res adjudicata*, (vol. 23, pp. 1219–1221):

Courts-martial; church judicatories; Commissioner of Patents; Comptroller of the Currency; collector of customs; Board of Land Commissioners; road commissioners in adjudicating upon the necessity of a road and in locating and making assessments for it; the common council of a city in canvassing election returns; board of city police commissioners acting as a court for the trial of members of the police force. An these subordinate and merely quasi judicial agencies, and many others of similar character, are bound by the law of *res adjudicata* when they seek to review their former decisions in a matter involving the exercise of a judicial function.

The Senate has held that the doctrine of *res adjudicata*, is applicable to election cases and in numerous instances has enforced and applied that doctrine.

The majority then cite numerous authorities and precedents and continue:

Counsel for Senator Lorimer might well have withheld filing the plea until some resolution was offered declaring the election invalid. The resolution appointing this committee directed an investigation of the election. If, as a result of that investigation or otherwise, any resolution should be hereafter offered to the Senate declaring that the election of William Lorimer as a Senator from Illinois was illegal and invalid, when such a resolution is offered it would be in order for Senator Lorimer to invoke the defense of *res adjudicata*. Until such a resolution is offered and under consideration in the Senate there would be no occasion, measured by the analogies of a pleading in a court of law or in equity, for a Senator formally to present his defense. The Senate by the adoption of the resolution appointing this committee did not vacate or attempt to vacate the former judgment. Neither Senator Lorimer nor anyone else could know what the Senate meditated doing when the investigation was concluded—could not know whether or not any resolution would even be offered assailing the validity of the election in question. But the plea serves to call to the attention of this committee the question of *res adjudicata*; and this committee deems it its duty to present to the Senate the facts and the contentions bearing on that question so that the Senate may, as the defense of *res adjudicata* is made, understand that any resolution which may be offered would be subject to the defense of *res adjudicata*.

In the argument submitted in behalf of Senator Lorimer the case is thus analyzed:

There was in the case at bar (A) a final judgment (B) by a competent tribunal invested with complete jurisdiction to try the issue; (C) the parties to the former judgment are the same parties as are now in controversy, and (D) the issues and causes of action were precisely the same. When these elements are present the former judgment is a bar not only to what was actually litigated in the former suit, but to all matters that might have been litigated under the issues thereof.

The majority agree that each of the enumerated elements is present in the case, and that a resolution declaring against the validity of the election would be subject to the defense of *res adjudicata*.

The majority say as to the first item:

(A) The adjudication by the Senate, by its action of March 1, 1911, on the resolution, was final. By that action the Senate finally adjudged that Senator Lorimer was duly and legally elected to a seat in the Senate of the United States. As pointed out by counsel for Senator Lorimer, "If the resolution had been adopted Senator Lorimer would have been unseated, and he could not have asked the Senate at the Sixty-second Congress to rehear him and change its judgment." Manifestly, the judgment, if against him, would have been final, and equally plain

is the fact that the judgment for him was also final. No contention can be made that the form of the resolution prevents its being considered a final judgment.

The sentence or decision of the Senate is all contested election cases and in all expulsion cases has been made by resolution. Counsel cites many cases in the Senate by some of which the title of a Senator to his seat has been confirmed and by others of which expulsion has been defeated, where the judgment of the Senate was expressed by the determination of a resolution in the negative. We deem it unnecessary to review these cases.

The courts have decided that the determination of a matter of election by the adoption of a resolution in a legislative body constitutes a final adjudication. (*State of Maryland v. Jarrett & Harwood*, 17 Md., 309; *Opinion of the Justices*, 56 N.H., 570.)

As to the second item:

(B) The Senate was a tribunal competent to render the judgment.

The numerous decisions of the courts and of the Senate itself cited of this report establish that the Senate, in passing upon an election case, is a court exercising purely judicial functions. Moreover, the jurisdiction of the Senate in such a matter is exclusive.

Herman on Estoppel says (see. 131, p. 143):

“A much more conclusive effect is given to judgments of courts of exclusive jurisdiction than to judgments of courts which have only concurrent jurisdiction.”

The fact that the judgment was rendered by a divided court does not detract from its conclusiveness as *res adjudicata*. It has been held by the Supreme Court of the United States, and by many other courts, that the fact the former judgment was pronounced by a divided court, or even a court equally divided, as sometimes happens in cases of affirmance by operation of law in courts of appellate review, makes the judgment none the less binding. (*Durant v. Essex County*, 7 Wall., 107; *McAllister v. Hamilton*, 61 S. C., 6; 39 S. E., 182; *Kolb v. Swann*, 68 Md., 516; 13 Atl., 379.)

As to the third item:

(C) The parties to the proceeding are the same.

In cases of judgments in *rem* identity of parties is not an element essential to the application of the doctrine of *res adjudicata* because in such a case the former judgment includes not only the parties, but the whole world. In the *Fitch and Bright* case the Senate treated the former judgment as a judgment in *rem*. When the judgment is in *personam*, the law requires that the parties in the second proceeding be the same as the parties in the proceeding leading to the former judgment. In any proceeding against the validity of the election of William Lorimer the plaintiff would be the Senate itself in its inquisitorial or prosecuting capacity and the defendant would be, of course, William Lorimer. Much of the law of *res adjudicata* has been borrowed by modern jurisdictions from the civil law of Rome. In the Roman law the respective parties were known as the actor and the reus. In legal contemplation the judgment pronounced by the Senate, March 1, 1911, was in the action of the United States Senate, actor, *v.* William Lorimer, reus. The Government and its branches and agencies are subject to the operation of the law of *res adjudicata* the same as individuals. (See the decision of the Supreme Court of the United States in *United States v. California & Oregon Land Co.*, 192 U.S., 355.)

As to the fourth item:

(D) If, as a result of this investigation, there should be presented to the Senate a resolution that the election of William Lorimer was invalid, then the issue raised by that resolution would be precisely the same as that in the proceeding leading to the judgment of March 1, 1911, whereby the Senate adjudicated that the election of William Lorimer was valid and legal. Beyond all question, complete identity of issue is shown by the record.

The majority therefore conclude:

Your committee, therefore, concludes that both on principle and by authority the action of the Senate March 1, 1911, deciding that the election of William Lorimer was valid and legal, con-

stitutes *res adjudicata* as against any subsequent attempt to have the Senate decide that the election was not valid and legal.

In this connection it is well to direct attention to the fact that the principle of *res adjudicata* embraces not only what was actually determined, but extends also to every matter which, under the issues, the parties might have litigated. As pointed out in the briefs submitted, there is some misunderstanding as to the law of *res adjudicata*, due to attempts to cover the whole subject by definite rules intended to be applicable to all cases. Where the issues are the same the bar of the former judgment extends not only to points actually decided but to all the points and questions which could have been litigated under the issues in the former proceeding. Where the issues are not the same and where a former judgment is relied on simply as an estoppel on some limited issue that is common to both proceedings, then the law is that the former judgment is conclusive only as to what was actually decided. But the latter principle has no possible application here because, beyond all question, the issue would be the same as it was in the former proceeding in the Senate, namely, whether the election of William Lorimer as a Senator from Illinois was valid and legal. The rule that where the former judgment was upon the same issues it is a bar not only as to what was actually litigated and decided, but as to everything that might have been litigated under the issues in the former proceeding, has, as said by Herman on Estoppel (sec. 125, pp. 133, 134), "not only gone unchallenged for more than a half century, but a uniform and unbroken line of cases has given it approval."

Everything that has been brought forward in the present investigation could have been presented and litigated in the former proceeding under the issues thereof. The existence of the evidence with the taking of which the present hearing was begun, namely, the testimony of Clarence S. Funk, was known to some Senators at the time of the former hearing of this matter before the Senate. Mr. Kohlsaas, the editor of the Chicago Record-Herald, sent telegrams and letters to a number of Senators advising them of the existence of that evidence during the pendency of the question before the Senate and before its final action. The former committee permitted the Tribune to be represented before it by counsel. The editor of the Tribune knew from Mr. Kohlsaas of the existence of that evidence while the subcommittee was sitting in Chicago engaged in taking the testimony. (Record, 2001-2003.) No effort was ever made by those who undertook to present all the evidence and who knew of the Funk story to present in that proceeding any phase of the subject covered by the testimony of Mr. Funk. Manifestly no judicial tribunal should encourage the trying of a case by piecemeal. The very object of courts is to put an end to controversy. And no court would permit a party who has knowledge of his evidence to withhold it at the first trial for the purpose of getting a second trial if defeated in the first.

As an application of the principle established by the authorities last referred to, the law is clearly to the effect that newly discovered evidence furnishes no ground for avoiding the bar of a former final judgment. Some of the laity may have the impression that a former judgment can be nullified by bringing forth at a second hearing newly discovered evidence. No law author and no court recognizes any such exception to the doctrine of *res adjudicata*.

The authorities make it plain that the Senate is barred by the rule of *res adjudicata* from reopening and rehearing this case on the ground of newly discovered evidence.

But the newly discovered evidence question is not one of great importance in this matter, for the reason that even if the doctrine of *res adjudicata* were not in the way no case whatever has been made out that would warrant the granting of a new trial on the ground of newly discovered evidence. In that class of cases where the courts set aside verdicts and grant new trials for newly discovered evidence, there are certain well-defined limitations upon granting new trials on that ground. The granting of new trials on the ground of newly discovered evidence is a power cautiously exercised by the courts, and the strictest rules are applied in examining an application on such a ground.

In the first place, the evidence newly discovered must be "of such a character and strength that it is reasonably certain that it would have produced an opposite result if produced at the trial"; the new evidence must be incontrovertible and conclusive. (29 Cyclopaedia of Law and Procedure, 900-902, and several hundred decisions cited in notes; 23 Cyclopaedia of Law and Procedure, 1031.) "The evidence must not be merely cumulative or corroborative or merely intended to impeach some

of the witnesses at the former trial." (Same authorities, and 29 *Cyclopedia of Law and Procedure*, 907-918.)

In the next place, the evidence must actually have been discovered after the time of the former trial, and the party seeking the new trial must excuse his failure to produce the new evidence by showing that he failed to discover it, notwithstanding the exercise of due diligence by him. Of course, if the party knows of the new evidence at the time of the former trial, such knowledge is a complete bar to the granting of a new trial on this ground. (29 *Cyclopedia of Law and Procedure*, 885, 886, et seq.; 23 *Cyclopedia of Law and Procedure*, 103.)

The record clearly shows in the present proceeding that the existence of the principal new evidence which it may be claimed was the occasion for making the new inquiry was known to some Senators at the time of the former hearing before the Senate.

Moreover, the granting of new trials on the ground of newly discovered evidence is usually to the party defendant. (6 *Pomeroy's Equity Jurisprudence*, edition of 1905, sec. 661; 23 *Cyclopedia of Law and Procedure*, 1030.) Few, if any, cases can be found where such relief was granted to one who occupied the position of plaintiff in the former trial. The reason for this is that it generally lies within the power of the party plaintiff to dismiss his proceedings and to start them anew if he deems his evidence insufficient, especially if he had any intimation that additional evidence could be produced.

The new evidence introduced on this hearing was mainly of these three classes: (1) Rumor, gossip, and opinion about various members of the Illinois Legislature; (2) evidence such as the testimony of Clarence S. Funk as to talk of a fund in connection with the senatorial election, which we show elsewhere was known by those urging this reinvestigation while the former one was in progress; (3) evidence favorable to Senator Lorimer, contradicting certain testimony adverse to him, and explaining many circumstances not explained on the first investigation.

Of course, the evidence of the third class furnishes no newly discovered evidence to overturn the former judgment.

No one could say that the evidence of the first class was conclusive. It was not even evidence in any legal sense. Thousands of pages of the record contain testimony of this kind, which would not have been competent under any rules governing the admissibility of evidence, but which was received by this committee in order to obtain every possible matter of information bearing on the situation. For example, there was evidence that some members of the Illinois Legislature, several months after the senatorial election, were seen in possession of a number of \$100 bills. The possession of such money was no evidence that it was acquired corruptly, for it is at least as reasonable to infer that it was obtained honestly. But if it appeared the member was unable to account clearly for the possession of the money, and if there were anything to indicate a possibility that the money was obtained as a result of corrupt practices, there is no reason whatever for inferring from the fact of possession of the money by such a member that the money was received as a payment for voting for Senator Lorimer. Such a member voted on several hundred measures in the session. One of the laws enacted at that session limited the hours of work for women in factories to 10 hours. It would be absurd to say that the possession of the money was proof that a member who voted for that law was paid for so doing. It is equally absurd to contend that the mere fact that some member of the legislature not in any way otherwise subject to any imputation of corruption in voting for Mr. Lorimer, was in possession of money several months after the election, was evidence that he had received that money for voting for Senator Lorimer. All the evidence of this class was lacking in that conclusiveness essential to the granting of new trials on the ground of newly discovered evidence.

So, even if it were proper to vacate the former judgment on the ground of newly discovered evidence, there is no newly discovered evidence to which attaches conclusiveness and the other elements uniformly recognized by the courts as necessary to be present in order to warrant granting a new trial on the ground of newly discovered evidence.

If a tribunal will not respect its own judgments it can not expect others to do so. This committee submits the enforcement of the doctrine of *res adjudicata* is essential to uphold the dignity of the court pronouncing the judgment in this case. The reasons which call for the enforcement of the doctrine of *res adjudicata* by the courts apply even more strongly to the Senate.

Our conclusion is the doctrine of *res adjudicata* applies here and the former judgment of the Senate rendered March 1, 1911, herein is conclusive.

**109. The Senate case of William Lorimer in the Sixty-second Congress, continued.**

**Instance wherein the Senate, after investigating an election and declaring it valid, again investigated and reversed its decision.**

**Report of committee minority declaring that Senate in ordering a second investigation thereby passed upon question of *res adjudicata* was sustained by the Senate.**

**Instance wherein minority views, holding a Senator elected by corrupt practices and therefore not entitled to his seat, were sustained by the Senate.**

**The Senate recognizes no precedents save those established by itself in analogous cases.**

**The Senate having invalidated the election of a Senator, no action was taken on a proposition to reimburse him for expenses incurred in defense of title to his seat.**

Minority view submitted by Mr. Lea, signed also by Mr. William S. Kenyon, of Iowa, and Mr. John W. Kern, of Indiana, join issue on the question of *res adjudicata* as follows:

An effort was made, as is shown by the report of the action of the committee on March 27, 1912, to rest the action of the committee in this case upon the plea of *res adjudicata*. We do not believe that such a plea is applicable or tenable in this case.

As we understand the procedure, the resolution relative to the second investigation of the election of Senator Lorimer was referred to the Committee on Privileges and Elections to report whether a new investigation was warranted, and that the committee in reporting the resolution ordering another investigation in fact reported that there was sufficient grounds for another investigation, and the Senate, in adopting this report of the Committee on Privileges and Elections and the resolution presented creating this committee, on June 7, 1911, ordered a new trial, and in ordering a new trial acted upon the question of *res adjudicata*—the plea of *res adjudicata* being such as can be made on the motion of the court or the tribunal acting as a court at any time—and that the committee appointed under the resolution adopted on June 7, 1912, should not, under the authority of its appointment, make any report upon the law involving the right of the Senate to reopen the case, but that said committee had only authority to make a report responsive to the resolution appointing and instructing the committee.

In election cases before the Senate a mistake is frequently made in drawing a comparison between such a trial and a criminal trial in court. Analogies are frequently misleading, and an analogy between the trial of an election case by the Senate and a criminal case is most misleading. The comparison, if drawn, should be between the trial of a Senate election case and a civil case before a court.

Subsection 1 of section 5 of Article I of the Constitution of the United States provides:

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

So that no precedents or decisions of courts or other legislative bodies can have any but argumentative weight in the determination of an election case in either House of Congress.

The Senate is not bound by any precedents, and the only ones that are of any value in the determination of such a question are those which have been made by the Senate in determining similar cases heretofore.

It is submitted that there is no precedent of the Senate of the United States holding that a contested-election case may not be reopened, and at least there are dicta to the contrary.

After discussing cases referred to by the majority the minority say:

Summarizing these cases we find not a single one that has held that the Senate could not reopen a contested-election case on the ground of newly discovered evidence; but, on the contrary, we find statements in support of a report against reopening a case, from which the inference can be fairly and logically drawn that if there had been newly discovered evidence the case should have been reopened, and an unacted upon report by the Committee on Privileges and Elections in favor of reopening on the ground of newly discovered evidence a contested-election case that had been finally decided.

The instructions to the committee to report upon the sources and uses of an alleged jack-pot fund is thus complied with by the majority:

This committee was specially instructed to inquire fully into and report upon the sources and use of the alleged jack-pot fund, or any other fund, in its relation to and effect, if any, upon the election of William Lorimer to the Senate.

The committee has hereinbefore specifically reported its inability to find any evidence of the existence of a jack pot or any other fund raised or used for the purpose of affecting such election.

After discussing exhaustively the evidence submitted in the case the majority conclude:

The Senate has once solemnly and deliberately passed upon the charges made against him. Its judgment, after a full investigation and extensive argument, was in his favor, and should stand unless new and convincing evidence is produced establishing corruption in his election. This rule is more liberal toward the Senate and the people than toward Mr. Lorimer, because if the judgment had been against him he would have been bound by it, and no amount of proof showing the injustice of the decision against him would secure its reversal and his reinstatement as a member of this body.

Absolutely no new and substantial evidence has been produced or discovered on this reinvestigation showing that he was elected by corruption, and we believe that all the rules of law, judicial procedure, and justice require that the former judgment of the Senate should be held to be conclusive and final.

There is absolutely no evidence in all the testimony submitted intimating, suggesting, or charging that William Lorimer was personally guilty of any corrupt practices in securing his election, or that he had any knowledge of any such corrupt practices, or that he authorized anyone to employ corrupt practices in his election.

We are convinced that no vote was secured for him by bribery; that whatever money White, Beckemeyer, Link, Holstlaw, or any other person received was not paid to him or them by anyone on Mr. Lorimer's behalf or in consideration of or to secure such vote or votes for him; that neither Edward Hines nor anyone else raised or contributed to a fund to be used to secure his election; that his election was the logical result of existing political conditions in the State of Illinois, and was free from any corrupt practice, and therefore we must find, and we do find, that William Lorimer's election was not brought about or influenced by corrupt methods and practices.

From this conclusion the minority dissent and after commenting on the evidence say:

In considering the evidence presented in this case, it must be borne in mind that the crime of bribery is distinct from nearly every other crime, in that both parties to it have the same incentive and desire, springing from the instinct of self-preservation, to conceal the crime. In nearly every other crime the person wronged or injured is influenced by motives of revenge or desire for reparation or satisfaction to assist the State in securing the facts and punishing the offender. But in bribery both the bribe giver and the bribe taker are equally guilty and equally desirous of concealing the truth and cheating justice. In nearly every case of bribery proof thereof must rest solely upon circumstantial evidence.

But in this case there are confessions by four men that their votes were secured by bribery, and their confessions are corroborated by strong circumstantial evidence.

If bribery can not be proved in the Senate by confessions of the bribe takers, corroborated by strong circumstantial evidence, then the conclusion is irresistible that only express contracts of bribery, duly authenticated by witnesses, can establish that crime to the satisfaction of the Senate of the United States.

We are of the opinion that the evidence in this investigation shows conclusively that the following votes for William Lorimer were obtained by corrupt methods: Charles A. White, H. J. C. Beckemeyer, Michael Link, Joseph S. Clark, Henry A. Shepherd, Charles Luke, D. W. Holstlaw.

As the vote of the bribe giver is equally corrupt as that of the bribe taker, we include the following votes: Lee O'Neil Browne, Robert E. Wilson, John Broderick.

In view of the proof showing that the 10 votes of the members set out above were obtained by corruption, circumstantial and other evidence show that the following votes were also obtained by corrupt methods and practices: W. C. Blair, Thomas Tippitt, Henry L. Wheelan, John H. DeWolf, Cyril R. Jandus.

Believing that the confessions of the members of the legislature, strengthened by corroborating circumstances and by other evidence relating to the members of the legislature who did not confess, establish conclusively not only that at least 10 votes were purchased for the purpose of electing William Lorimer to the Senate, but that the record reeks and teems with evidence of a general scheme of corruption, we have no hesitancy in stating that the investigation establishes, beyond contradiction, that the election of William Lorimer was obtained by corrupt means and was therefore invalid.

In accordance with these findings the minority recommend the following resolution:

*Resolved*, That corrupt methods and practices were employed in the election of William Lorimer to the Senate of the United States from the State of Illinois, and that his election was therefore invalid.

The report of the committee and the resolution offered by the minority were exhaustively debated in the Senate on June 4, 5, 7, 8, July 6, 8, 9, 10, 11, 12, and 13.

On June 13,<sup>1</sup> the minority resolution was agreed to, yeas 55, nays 28.

On August 10,<sup>2</sup> Mr. Joseph F. Johnston, of Alabama, from the special committee appointed to investigate the election of William Lorimer, submitted an amendment to the deficiency appropriation bill proposing to pay Mr. Lorimer \$35,000 as reimbursement for expenses incurred in defense of his title to his seat. The proposed amendment was referred to the Committee on Appropriations, which took no further action thereon.

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<sup>1</sup> Second session Sixty-second Congress, Record, p. 10643.

<sup>2</sup> Record, p. 10643.