

Chapter X.

ELECTORATES DISTRACTED BY CIVIL WAR.

1. Joint rule excluding persons elected in insurrectionary States. Section 361.
 2. Informal elections in districts under military duress. Sections 362-381.
 3. Principles deduced from Senate decisions as to States under military duress. Sections 382-385.
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361. Persons bearing credentials regular in form, but coming from communities disorganized by civil war, have been excluded until Congress should determine the status of the constituencies.

In the days of reconstruction the two Houses, by joint rule, excluded Members-elect with credentials in due form, some entirely, others until the States were declared by law entitled to representation.

An instance wherein credentials of persons claiming to be Members-elect were referred to a joint committee of the two Houses.

Credentials regular in form have been presented as a matter of privilege, although the status of the constituency was, by reason of civil war, in doubt.

On December 12, 1865,¹ Mr. Henry J. Raymond, of New York, as a question of privilege, presented the credentials of the Representatives from the State of Tennessee, signed by the governor, sealed with the seal of the State, and otherwise regular in form.

Mr. Thaddeus Stevens, of Pennsylvania, raised the question that, as the State of Tennessee was not known to the House or to Congress, no question of privilege was presented.

The Speaker² overruled the point of order, saying that the usages of the House since the rebellion began showed that a claimant to a seat, with papers prima facie indicating his election, was entitled, as a question of privilege, to have them presented.

A question then arose as to the reference of the credentials, it not being proposed that the oath should be administered on the prima facie showing.

Finally, after debate, the credentials were referred to the newly constituted

¹First session Thirty-ninth Congress, Journal, pp. 51, 52; Globe, pp. 31-33.

²Schuyler Colfax, of Indiana, Speaker.

Joint Committee on Reconstruction, by a vote of yeas 125, nays 42. This committee had been constituted by resolution of the two Houses, which provided that until the committee should have investigated and reported on the condition of the so-called Confederate States, no Member should be received into either House from any of these States, and that all papers relating to such representation should be referred to the joint committee.¹ On December 14² the House reenforced the provisions of the concurrent resolution by agreeing to the following, by a vote of yeas 107, nays 56:

Resolved, That all papers which may be offered relative to the representation of the so-called Confederate States of America, or either of them, shall be referred to the joint committee of fifteen without debate, and no Members shall be admitted from either of said so-called States until Congress shall declare such States, or either of them, entitled to representation.

During consideration of the resolution it was objected that under the Constitution and laws the Speaker was required to administer the oath to Representatives of States as they should appear.

Later, on February 20, 1866,³ the House passed a concurrent resolution declaring that “no Senator or Representative shall be admitted into either branch of Congress from any of said [insurrectionary] States until Congress shall have declared such State entitled to such representation.”

This resolution was later agreed to by the Senate.⁴

At various times between the adoption of these resolutions and June 4, 1866,⁵ the credentials of various gentlemen from the insurrectionary States were presented and referred under the rule.

The report of the Joint Committee on Reconstruction⁶ showed that Tennessee had a republican form of government, and an act of Congress was passed at this session and approved July 24, 1866, “restoring Tennessee to her relations to the Union” and declaring her “again entitled to be represented by Senators and Representatives in Congress.”⁷ Accordingly, on the day of the approval of the act, and later, the Members-elect from Tennessee appeared and were sworn.⁸

Gentlemen bringing credentials from other insurrectionary States were not admitted during this Congress.

The report of the Joint Committee on Reconstruction,⁹ made at this session of Congress, took the ground that Congress could not “be expected to recognize as valid the election of Representatives from disorganized communities” without first providing constitutional or other guarantees.

¹ Journal, p. 10.

² Journal, pp. 71, 72; Globe, p. 61.

³ Journal, pp. 300–315; Globe, pp. 943–950.

⁴ Journal, p. 353; Globe, p. 1132.

⁵ Journal, pp. 88, 96, 98, 111, 135, 145, 245, 332, 792, 838.

⁶ First session Thirty-ninth Congress, Report No. 30.

⁷ 14 Stat. L., p. 364.

⁸ Journal, p. 1110.

⁹ House Report No. 30, p. xviii.

362. The North Carolina election case of Charles Henry Foster in the Thirty-seventh Congress.

The House declined to seat a claimant chosen by a few people at an election wholly informal because of civil war.

The House declined to honor credentials regular in form, but referring to a constituency notoriously incapacitated by civil war.

Instance of a claim for a seat brought before the House by petition.

On July 13, 1861,¹ the petition of Charles Henry Foster, claiming to have been elected Representative from the First Congressional district of North Carolina, was presented and referred to the Committee on Elections. Mr. Foster apparently did not seek at this time to establish a prima facie right to the seat.

On December 2, 1861,² at the beginning of the next session (the regular long session), credentials in regular form were presented in behalf of Mr. Foster. These credentials referred to another election and had no reference to the petition of the preceding session. It was urged in behalf of Mr. Foster that a provisional government had been formed in North Carolina, that proclamation of the governor had been made calling an election, which had been duly held, and that Mr. Foster now presented the certificate of the governor under the broad seal of the State entitling him to the seat from the Second district.

Objection was made to the admission of Mr. Foster to the seat, and the papers were referred to the Committee on Elections, who had not reported on the memorial presented at the first session.

On December 18³ the committee reported that Mr. Foster was not entitled to a seat either from the First or Second districts of North Carolina, his claim being founded upon imposition. The House agreed to this report without debate or division.

On March 6, 1862,⁴ a memorial of 68 loyal electors of the Second district was presented asking the admission of Mr. Foster to the House. This memorial was referred to the Committee on Elections, who reported on June 16.⁵

In this report the committee say:

This is the fourth time that Mr. Foster has claimed to have been elected a Representative to the Thirty-seventh Congress from the State of North Carolina—twice from the First and twice from the Second district. On the 18th day of December last the House adopted without division the following resolution:

Resolved, That Charles Henry Foster is not entitled to a seat in this House as a Representative in the Thirty-seventh Congress, either from the First or from the Second district of North Carolina."

The present claim is based entirely upon proceedings which have transpired since that date. Those proceedings consist of what purports to be a poll list of 81 votes cast for Mr. Foster at Chickamacomico precinct on the 16th February last, supported by a copy of a paper purporting to be signed by 30 citizens of Carteret County, "ratifying and approving" said election, and a copy of a resolution of like purport, supposed to have been adopted by some citizens—how many it is not known—of Craven County. The other voting presented to the committee were proceedings upon which a former election was claimed, which claim was unanimously rejected by the House.

¹First session Thirty-seventh Congress, Journal, p. 74; Globe, p. 115.

²Second session Thirty-seventh Congress, Journal, p. 7; Globe, p. 3.

³Journal, p. 88; Globe, p. 132.

⁴Journal, p. 413; Globe, p. 1103.

⁵House Report, No. 118.

The Second district of North Carolina is composed of the counties of Wayne, Edgecomb, Green, Pitt, Lenoir, Jones, Onslow, Carteret, Craven, Beaufort, and Hyde, and usually casts about 9,000 votes. The regular day of election was the first Thursday in August, 1861. There was no election for Members of Congress held on that day, because the whole State was at that time in the armed occupation of rebels.

The committee further say that since then some portions have been reclaimed and the authority of the Government asserted. But the claimant admitted that voting in any other precinct than that where the election occurred was impossible. The voting that did occur was without the slightest authority of law. No election was called, no writ of election issued. There was no governor of the State, provisional, military, or of any other character, except the Confederate governor.

The committee also found that the memorial of citizens of Carteret County was of an anomalous character, unworthy of effect as a legal document.

Therefore the committee recommended that Mr. Foster be considered not entitled to the seat. The House concurred in this report without division.¹

363. The Virginia election cases of Joseph Segar, in the Thirty-seventh Congress.

The House refused to seat a claimant chosen by a mere fraction of the people, at an election informally called and held, in a district under duress of armed enemies.

The House declined to give prima facie title to the bearer of informal credentials referring to a constituency notoriously paralyzed by civil war.

A legislature being in existence, a constitutional convention may not fix the times, etc., of elections of Representatives.

On December 2, 1861,² Mr. Joseph Segar appeared with credentials in the form of a certificate of the vote cast, attested by a certificate from the provost marshal of the Federal camp, Hamilton, purporting to give him title to the seat from the First Congressional district of Virginia.

The House had admitted to seats Members elected under authority of the provisional government of Virginia, but in the case of Mr. Segar there arose a question as to what portion of the voters of the district had participated in that election. After debate the House declined to allow Mr. Segar the prima facie title to the seat, and referred his credentials to the Committee on Elections.

On January 20, 1862,³ the committee made its report, recommending that Mr. Segar be not admitted to the seat. In this case, as in the case of Mr. Beach, the election was held under authority of a proclamation of Governor Pierpont. The committee state the facts as follows:

A convention assembled at Wheeling, in the State of Virginia, on the 11th of June last, in which were represented, it is believed, thirty-nine counties of the State, situate in what is known as Western Virginia. This convention adopted on the 19th of June "an ordinance for the reorganization of the State government," after having declared that, because of the treasonable practices and purposes of the State convention lately held in Richmond, and of the executive of the State in connection therewith, "the offices of all who adhere to the said convention and executive, whether legislative, executive, or judicial, are vacated." By the same ordinance a legislature, or general assembly, for the State of Virginia was created, and required to "assemble in the city of Wheeling on the 1st day of July, and

¹ Journal, p. 912; Globe, pp. 2879, 2880.

² Second session Thirty-seventh Congress, Journal, p. 7; Globe, p. 3.

³ House Report No. 12; 1 Bartlett, pp. 415, 426; Rowell's Digest, pp. 179, 181.

proceed to organize themselves as prescribed by existing laws in their respective branches." Said convention subsequently elected a governor for the State of Virginia, who still holds the office thus conferred upon him.

The legislature thus created assembled as required and passed many enactments for the whole State of Virginia, elected two United States Senators, who were admitted to seats in the Senate, and assumed all the functions of the general assembly of Virginia under its preexisting constitution and laws. The convention which created and set in motion this new government did not, however, dissolve itself upon the assumption of the several functions of government by the executive officers and general assembly which, in the exercise of provisional powers, it had itself brought into being, but continued to hold its meeting after the assembling of the legislature and to share with it in ordinary legislation for the whole State. The legislature was in session till the 24th of July, and how much longer the committee are not informed. The convention was in session on the 20th of August, and on that day passed an ordinance providing for the election of Representatives in Congress in each district where from any cause such election was not held on the fourth Thursday in May last, the day provided by law for such election, and also "in the Eleventh district, where a vacancy now exists, an election for such Representative shall be held on the fourth Tuesday in October next, which shall be conducted and the result ascertained, declared and certified in the manner directed in the second edition of the Code of Virginia"

In accordance with the proclamation of Governor Pierpont, an election was held at Hampton, in Elizabeth County, on October 24, 1861, at which 25 votes were cast for Mr. Segar. A certificate of these votes, signed by the election officers and certified by the provost-marshal of Camp Hamilton, were the only credentials presented by Mr. Segar on December 2. On a subsequent day of the session he presented credentials signed by the governor and attested under seal of the Commonwealth.

There was also presented the proceedings of a meeting on Chincoteague Island, at which 136 citizens expressed, on December 10, a preference for Mr. Segar, but Mr. Segar did not rely on this. He based his claim on the 25 votes cast at Hampton, claiming that his claim was strictly legal.

The committee say:

The committee have been led to investigate this claim of legality. The whole authority for this election is the ordinance of the Wheeling convention passed August 20. Assuming that the proceedings of that convention, and of the legislature and executive created by it, have ripened into a State government, legal in all respects, still the question arises, Was it one of the functions of that convention to provide for the time, place, and manner of electing Representatives in Congress, especially after the legislature had assembled? The purpose of that convention was the creation of a new State government. The only basis upon which it rests is necessity.

A new government must begin somewhere, and there must be somebody to make it. As necessity was the foundation, so also it was the limit of the power called into being for the sole purpose of inaugurating a new government. It could do anything necessary to carry out that purpose, and when that was done it could do no more. Its functions ceased the moment the new government took on form and life. The two can not, in the nature of things, exist and move *pari passu*. Now, long before this ordinance had passed the convention there was in existence a governor and a legislature, having all the powers that a governor and legislature could have in Virginia—that is, all the powers which the constitution of Virginia clothes a governor and legislature with not in conflict with the Constitution of the United States. Now, this latter instrument provides (art. 1, sec. 4) that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof." It is a legislative act. It is a law. * * * But this time and manner were not fixed in the organic act nor by the legislature, but by the convention assuming legislative functions in the presence of the legislature itself.

Again, the ordinance itself proposes to conform this election to the Code of Virginia. It "shall

be conducted and the result ascertained, declared, and certified in the manner directed in the second edition of the Code of Virginia.” Has the election under consideration been conducted in all respects according to the requirements of the Virginia Code? Title 3, chapter 7, section 11, of that code provides for elections to fill vacancies in Congress and enacts that they “shall be superintended and held by the same officers, under the same penalties, and subject to the same regulations as are prescribed for the general elections.” Section 12 of the same chapter provides that “a writ of election shall be directed to the sheriff or sergeant of the county or corporation for which the election is to be held; or if the election is to be held for an election district, or to fill a vacancy in the Senate or in Congress, to the several sheriffs and sergeants of the counties and corporations which, or any parts of which, are included in the district. It shall prescribe the day of election (to be the same throughout the district), and may fix a day on which the officers conducting the election are to meet to make returns, not later than that fixed by law in the case of a regular election.”

The committee further go on to show that in this case there was nothing which answered to a writ of election; but that the governor in his proclamation simply “entreats the loyal voters,” and addressed it not to the sheriffs, but “to the people of Virginia.”

In this case it was admitted that there was no election in any other place than Hampton, as notice could not pass beyond the enemy’s lines to other parts of the district. Moreover, the notice was apparently brought to Hampton through the medium of a newspaper publication and a private letter.

The committee concluded that the claim of Mr. Segar could not be maintained if it rested on the plea of a strict conformity with all the provisions of law.

But the committee do not rest their conclusions on so narrow a basis. They say:

If the Union voters of the district had had an opportunity to chose a Representative—if there had been no armed occupation of the district by rebels so that polls could have been opened at the various voting places in the district, and all who desired could have deposited their ballots, and had done so in conformity with the provisions of law, so far as the disturbed and abnormal condition of things would permit, the committee would have sought some way to give effect to such election. But enough of the facts surrounding this election have already been stated to show that such is not the case. There was but one single poll in the whole district opened, and but 25 votes cast. The reason why there were no other polls opened or more votes cast can not be better expressed than by the three freeholders themselves who certify to this election. This is their language:

“And we do further certify that there was no poll opened at any other precinct in said county; and that so far as we can learn and confidently believe there was no poll opened or election held for Member of Congress in any other county or city or town of said First Congressional district, owing to the fact that all the other counties and election precincts of said Congressional district were, on the 24th day of October last, within the lines and under the influence and control of the seceding and rebel States.”

This state of things is no fault of the memorialist or the Union voters of the district, but it did exist on the day of this election. How can it be made to appear, then, that the memorialist is the choice of the district, or that if an opportunity had existed an overwhelming majority of votes would not have been cast against him? In what sense can it be said that those who did not vote are to be presumed to acquiesce, when they neither had the opportunity to vote nor the knowledge that voting was going on? Acquiescence presumes liberty to protest. In this instance that liberty did not exist.

On February 10 and 11,¹ the report was debated at length in the House.

On February 11² a motion was made to substitute for the proposition of the

¹Globe, pp. 727, 751.

²Journal, pp. 295, 296; Globe, pp. 759, 760.

committee a declaration that Mr. Segar was entitled to the seat. This was decided in the negative—yeas 40, nays 85.

Then the resolution of the committee declaring Mr. Segar not entitled to the seat was agreed to without division.

364. The Virginia election case of Joseph Segar, continued.

An instance wherein the House recognized an election legal in form, but participated in by a small fraction of the voters, the district being disturbed by civil war.

The House declined to give prima facie effect to regular credentials, having historic knowledge that the district was incapacitated by civil war from holding a regular election.

Instance wherein a committee unable to agree reported this fact to the House, and it became a basis for action.

On March 24, 1862,¹ the credentials of Mr. Segar were presented again, he claiming to have been elected at another election held March 15, 1862.

It was claimed and not disputed that the certificate presented was in the form required by law, but it was objected that the House knew from the report of the committee on the state of affairs in Virginia that no election could have been held in that State on March 15, 1862.

Then, without division, the credentials were referred to the Committee on Elections.

On April 14² the committee reported the following facts:

That those credentials, a copy of which is annexed, consist of a certificate signed by "William Mears, conductor at the court-house at Northampton," "Michael H. Higgins, conductor at the court-house of Accomac," and "John O. Evans, conductor at the court-house of Elizabeth City," dated the 22d day of March last, certifying that at an election held on the 15th day of said March in the several counties composing said district the claimant was duly elected to represent the same in the Congress of the United States. Mr. Segar also presented to the committee during the hearing a proclamation by Governor Pierpoint to the same effect, of date the 26th day of March last, a copy of which is also annexed. The First Congressional district is composed of seventeen counties, viz, Middlesex, Westmoreland, Richmond, Essex, Northumberland, King and Queen, Lancaster, Gloucester, James City, the City of Williamsburg, New Kent, York, Warwick, Northampton, Accomac, and Elizabeth City. Governor Pierpoint issued writs of election in due form of law on the 24th day of February, 1862, directed to the sheriffs of the several counties composing this district, requiring them to hold an election for Representative to this Congress on said 15th day of March. The claimant stated to the committee that he himself took these writs of election to the sheriffs of the counties of Accomac, Northampton, and Elizabeth City, and that in one of these counties he saw the sheriff post up notice of the election at the several election precincts more than ten days before the day of the election, and in the others he saw the notices after they were put up, but whether they were up the time required by law he does not know. But no writs of election reached the sheriffs in the other fourteen counties, nor was any notice of election given, or any election held, at any precinct in any of the other fourteen counties in the district, for the reason that all the other counties were at the time of the election, and had been for a long time, in possession of the rebel army, and the rebel authorities had proclaimed martial law over them. For the same reason no election was held in Elizabeth City County, except at one precinct, Hampton. Notice to the sheriffs of these counties, to the people thereof, the opening of a poll or the casting of a vote at any precinct in any one of them, were all impossibilities.

¹Journal, p. 472; Globe, p. 1339.

²House Report, No. 70; 1 Bartlett, p. 415.

There were cast at this election in the several voting precincts of Accomac and Northampton counties, and at Hampton, in Elizabeth City County, as appears by the several annexed certificates from commissioners in said counties, in all 1,018 votes.

The committee further found that Mr. Segar had 559 of the total, Arthur Watson 438, and all others 21.

The vote of the whole district for governor at the May election of 1859 was 7,986, and the population of the whole district in 1860 was 122,017.

In all the counties where the election in question was held there were 32,216 inhabitants. This included the county of Elizabeth City, in which only one poll was opened.

The counties occupied by the hostile army at the time the election was held and under martial law had 89,001 population. The committee say:

The committee have no means of knowing, other than may be inferred from the foregoing figures, what portion of the 7,986 electors, who cast their votes in that district for governor, reside in the three counties where this election was held, or how many of them resided at the time in the fourteen counties where it was impossible to hold any election.

Upon these facts the committee were unable to agree upon any recommendation to the House. They therefore ask to be discharged from further consideration of the subject, and report the following resolution:

Resolved, That the Committee of Elections, to whom were referred the credentials of Toseph Segar, claimin a seat in this House as a Representative from the First district in Virginia, be discharged from the further consideration of the subject.

On May 6¹ the question came before the House, and Mr. Henry L. Dawes, of Massachusetts, chairman of the committee, in presenting the case, said:

The difficulty which the Committee on Elections encountered was this: They have laid down a principle heretofore, and the House has acted upon it in several cases which have been brought before the House, that if the voters of a district had an opportunity to vote, if there was no restraint upon them so that they could vote, he who had the highest number of votes is entitled to a seat, whether the votes be few or whether they be many; and the question is whether this case came within that rule.

Here were only three counties out of seventeen, and although they are large counties, they contain a little over 30,000 out of the 122,000 of all the inhabitants, and there were polled only one-eighth of all the votes. Whether it could be said that in the other fourteen counties, which were in the occupation of the rebel armies, the voters could not go to the polls and express their opinion at all, or not, or whether it could be said that the voters of these three counties, numbering about 1,000, expressed the wish or desire of the voters in the other counties so nearly and so fairly that, under the present state of things in Virginia, it is right or proper to admit this man to a seat, is a question which the committee felt disposed to bring before the House to let them pass upon it.

* * * All that the committee desire is that the House shall say when that state of things [the restoration of order in Virginia], all things considered, shall have been so nearly approached as that it shall be safe and proper to admit as a Representative upon this floor, from the First district of Virginia, or from any other district situated as that district is, a man who has received but little more than one-half of one-eighth of the votes of the whole district, and that, too, under circumstances such that the committee was not clear to say that the others could be said, in law or in fact, to have been free, or had the opportunity to vote if they had seen fit.

In the course of the debate the point was made, with effect, that all the provisions of law were followed in holding the election, although after the elections it had been impossible wholly to comply with the required forms. And after the subject had been referred to the Committee on Elections Mr. Segar had presented credentials

¹ Globe, pp. 1971, 1972.

from Governor Pierpont, of Virginia. It was urged that as all the departments of the National Government had recognized the government of Governor Pierpont, that certificate had exactly the same force as that of any other Representative on the floor from any State. It constituted prima facie evidence, and the House was not called on to investigate critically the merits of the case.

The House, by a vote of yeas 71, nays 47, substituted for the resolution of the committee a resolution that Mr. Segar be admitted to a seat as a Representative from the First district of Virginia.¹

Mr. Segar then appeared and qualified.

365. The Tennessee election case of Andrew J. Clements in the Thirty-seventh Congress.

The House seated a loyal claimant voted for at an election called on the legal day, but by the governor of a State in secession.

Instance of an election proven by testimony of participants, the returning officers serving a secession government and making no return.

The House seated a claimant who had received a third of the votes of a district, the remainder being cast for candidates for a secessionist Congress.

The House declined to give prima facie effect to informal papers referring to an election in a district known to be under duress of civil war.

On January 13, 1862,² Mr. Henry L. Dawes, of Massachusetts, from the Committee of Elections, reported in the case of Andrew J. Clements, who claimed to have been elected in the Fourth district of Tennessee. Mr. Clements had first appeared in the House on December 3, 1861,³ and a motion had been made to allow him to take a seat on his prima facie right; but the House decided that his papers should be referred to the Committee of Elections before he should be allowed to take his seat.

The report states sufficiently the facts. Previous to the day for the election of Congressmen, the first Thursday of August, 1861, the State of Tennessee had perfected its acts of secession, and the governor of the State had ordered an election for the choice of delegates to the provisional congress of the Confederacy. The day was the same as that fixed by the constitution and laws of the State for the election of Representatives to the Congress of the United States, the first Thursday of August.

In four of the ten districts of the State the Union men disregarded the acts of secession and cast their ballots for Representatives to the Congress of the United States. One of the districts was that which Mr. Clements sought to represent. The report says further of him:

He brings no certificate from the governor of Tennessee; but the refusal of the governor of Tennessee to grant a certificate of election to one entitled to it can not prejudice his right to it. (Richards's case, Hall & Clark, 95.) It may and has put him to the trouble of substantiating the fact of his election by

¹Journal, p. 649; Globe, p. 1872.

²Second session Thirty-seventh Congress, House Report No. 9; 1 Bartlett, p. 366; Rowell's Digest, p. 174.

³Globe, p. 6. Mr. Horace Maynard, of Tennessee, on December 2, 1861, had been sworn in on the presentation of the certificates of the several counties in his district. Mr. Clements did not have the same prima facie evidence.

other evidence before he can take his seat. The memorialist has presented the proper certificate of the sheriff of one county (Macon County) that he received in that county 433 votes. The sheriffs of the other counties in the district failed or refused to make returns of the votes cast for him in their respective counties, being themselves either open rebels or in sympathy with the rebellion. But the statutes of Tennessee themselves, as well as the precedents of Congress, have provided for this emergency by enacting that "if the judges fail to return the poll books or list of votes, or copies of them certified as aforesaid, the same may be proved by other creditable testimony, and received as evidence in any case arising out of said election." (Code of Tenn., sec. 870.) In accordance with this provision the memorialist presented evidence before the committee to satisfy them that he had received, in addition to the 433 returned by the sheriff of Macon County, votes in each of the other counties comprising the district, except Warren, amounting in the aggregate to more than 1,500 votes; making in all about 2,000 votes. The proof of this has been exceedingly difficult, because of the fact that the indignation of the secessionists against the memorialist for permitting himself to be a candidate rose to such a pitch immediately after the election that he was obliged to flee from the State to escape assassination, and has not been able to return to it since. But he has furnished from the volunteers, now in the service of their country in Kentucky, who were his constituents and voted for him in Tennessee before leaving their State for the war, and from other testimony, evidence which has satisfied the committee of the fact. The committee are also satisfied that on the day of election there was an armed rebel force present in the district preventing or restraining the voters from the exercise of the elective franchise, and that though a violent and bitter public sentiment existed, calculated to overawe and intimidate, yet the rebel forces had not up to that time so taken possession of the district as to prevent such voters as chose so to do to deposit their votes for a Representative in this Congress. The ordinary vote of the district is about 6,000; and then there were at the same time two candidates running for the Confederate congress, but no other candidate except the memorialist for the Congress of the United States.

In conclusion, the committee, upon the whole evidence, find that on the day of election no armed force prevented any considerable number of voters in any part of the district from going to the polls, and that on that day, in conformity with the forms of law, 2,000 votes at least were cast for the memorialist as a Representative to this Congress, and none, so far as the committee know, for any other person. They therefore report the following resolution, and recommend its adoption:

Resolved, That Andrew J. Clements is entitled to a seat in this House as a Representative in the Thirty-seventh Congress from the Fourth district in Tennessee.

The House, on the same day the report was presented, agreed to it without division.¹

Mr. Clements thereupon appeared and took the oath.

366. The Virginia election case of Charles H. Upton, in the Thirty-seventh Congress.

The House unseated a person chosen by a few votes, at an election wholly informal, in a district almost entirely under duress of civil war.

Instance wherein, by majority vote, the House unseated a person whose title was not contested but whose election was invalid.

The presumption that those who do not go to the polls acquiesce does not apply where a condition of civil war prevents due notice of election.

An exceptional case wherein the Clerk, without sufficient evidence, enrolled a person who participated for a time as a Member.

An examination of qualifications of a Member-elect as to inhabitancy.

On January 30, 1862,² the Committee of Elections, in accordance with the direction of the House, reported on the eligibility of and the circumstances attending the election of Charles H. Upton, who at the preceding session had, on his prima

¹ Globe, p. 297; Journal, p. 166.

² Second session Thirty-seventh Congress, House Report No. 17; 1 Bartlett, p. 368; Rowell's Digest, p. 174.

facie right, been admitted to a seat as a Representative of the Seventh Congressional district of Virginia.¹ The election at which he claimed to have been elected was held on May 23, 1861. As to whether or not he was eligible the committee say:

It appears from the facts admitted in the case and the testimony submitted to the committee that the incumbent for the last twenty-five years has been a freeholder in the State of Virginia, having himself for the most of that time been a resident and inhabitant of the county of Fairfax, where he and his family were domiciled. For sometime prior to the month of November, 1860, the incumbent himself had lived at Zanesville, in the State of Ohio, where he owned an interest in and had been engaged in conducting a daily newspaper, and it was shown that he voted at that place at the annual State election in October, and again at the Presidential election in November of the same year. Under the law of Ohio in force at that time the legal right to vote at either of those elections would necessarily imply a previous residence in that State of one year at least. But the evidence adduced upon this point satisfied the committee that in the month of November, soon after the Presidential election, he returned to his previous residence in the county of Fairfax, where his family had remained and then was. From that time to the month of June last he continued to be a resident and inhabitant of the State of Virginia, and consequently not ineligible, on account of the objection in question, as a candidate for Congress from that State at the date above referred to.

As to the conditions prevailing in the district the committee show at the outset that on May 14, 1861, the secession of Virginia from the Union had been perfected, so far as it could be perfected, by the formal admission of the State to the Southern Confederacy. On the 24th of the preceding April the State convention which framed the ordinance of secession had passed the following ordinance:

The election for Members of Congress for this State to the House of Representatives of the Congress of the United States, required by law to be held on the fourth Thursday of May next, is hereby suspended and prohibited until otherwise ordained by this convention.

The committee held that although the acts of secession and the above ordinance "were usurpations upon the rights" of the people of Virginia, and in nature revolutionary, yet it appeared "that they were generally acquiesced in by a very large majority of the people in the whole of the eastern part of the State." The memorial of the incumbent showed to the committee that this was the fact throughout his district. The committee then say:

The law of the State providing for the election of Members of Congress on the 23d of May was regarded and treated by the governor, sheriffs, commissioners, and other officers charged with the duty of seeing it carried into effect, with the exception at most of those of a single election precinct, as suspended and for the time being as practically repealed. This course of the election officers appears to have been adopted and pursued without remonstrance or objection from any considerable number of the people of the Seventh Congressional district. The great body of the people in the district seem to have acted upon the belief that on the 23d of May there was no law in force in the State which would enable them, if so disposed, to elect a Member of Congress, nor was there any evidence before the committee that any very considerable number, if they have had the power, would have had the inclination to exercise it. Such being the state of the district, it is a question well worthy of grave consideration whether its political condition was such that any election for a Member of Congress at that time should be held legally valid either under the law of Virginia or of the United States, even were the evidence of such election clothed with all the ordinary forms of law.

¹On February 26, 1862, in debate Mr. Henry L. Dawes, of Massachusetts, said that Mr. Upton came without certificate of any man touching his right to the seat, and by personal influence only induced the Clerk of the last House to put his name on the roll of Members elect, "without the slightest evidence in the world."

Mr. Upton had advertised himself as a candidate, and had called on the Union men to open "side polls" on election day and vote for him for Congress. It was claimed that such "side polls" were opened at five different voting precincts, at which he received 95 votes. Certain documents were presented containing lists of persons who subscribed to statements reciting that they had been deterred by threats or deprived of the opportunity of voting, and "therefore voted" for Mr. Upton. The committee found that "the votes claimed to have been cast at these 'side polls' were not cast in conformity with any law at that time or heretofore in force in Virginia for the election of candidates for Congress; they were not given at the place of voting in the precinct, nor received by any election officer, nor certified or authenticated by any magistrate or commissioner or conductor of an election, nor proved by the oath of any witness." The committee therefore took no account of these votes.

But from a precinct called Ball's Cross Roads a copy of a so-called poll book was certified, and this showed 10 votes cast for Mr. Upton for Congress. The committee found that this poll book was not authenticated "in due form, or in such manner as to make its contents evidence for any purpose" as would appear by reference to the election laws of Virginia. The State being in rebellion, the returns could not be delivered to the county sheriff, and the return officers could not make out the certificate required by law to be transmitted to the Governor. Armed men had been at the polls at the Cross Roads, and had evidently intimidated voters who might have wished to vote for Mr. Upton.

The committee say further—

In the view the committee have taken of this case, they have not deemed it necessary for them to express any opinion upon the question whether, in a Congressional district containing from 6,000 to 8,000 legal voters, the votes of so few as 10 electors, even if properly authenticated and clothed with all the forms of law, would furnish that evidence of a claim to a seat in this House that ought to be regarded as conclusive of the title. The proper time to determine this question will be when a case shall arise that makes a decision of it more indispensable than the one now submitted to the committee.

It was very apparent, from the evidence before the committee, that but a very small portion of the voters in this Congressional district could have been in any way apprised that the incumbent was, on the 23d day of May, a candidate for Congress. It is probable, from the testimony, that not one voter in ten, of the whole number, could have known at the time that the incumbent, or any other candidate, was seeking an election to that office.

What the legal effect of this general ignorance and want of notice to the voters would be in itself, considered independently of all forms of law, is a matter of very great doubt and well worth grave consideration. Election implies choice, and choice a state of mind in reference to the object of it the reverse of ignorance. With what propriety a person may be said to be elected or chosen as a Representative to Congress in a district in which nine-tenths of those interested in the election had no knowledge that he or anyone else was a candidate, we do not readily or clearly see. If it should be suggested that those who do not go to the polls are presumed to acquiesce in the action of those who do, would not that presumption be sufficiently rebutted by the proof that those who did not go were not only ignorant of the election, but acted under the belief that no election at the time could be legally held?

Accordingly, the committee reported a resolution that Mr. Upton was not entitled to the seat.

When the report came up in the House on February 26 and 27,¹ there was a long debate on the question suggested by the committee as to the size of the elect-

¹ Globe, pp. 975, 1001.

orate. It was urged that there was no law of Virginia requiring for the election of a Member of Congress the votes of any specified proportion of the voters, and that any number of voters attempting under form or color of law to give expression to the will of the people might be sufficient to exercise the power.

On the other hand, it was argued that while the forms of law might be put aside when necessary to allow the voices of the voters to be heard, in this case it was proposed to waive all the requirements of law to give effect to the voices of ten men.

On February 27,¹ a motion was made to amend the resolution proposed by the committee so as to declare Mr. Upton entitled to the seat. This amendment was defeated, yeas 50, nays 73. Then the resolutions declaring Mr. Upton not entitled to the seat was agreed to.

In the debate the point was made that the unseating of Mr. Upton, in a case where there was no contestant to be seated, was virtually expulsion; but this point did not figure largely, as there was no serious questioning of the right of the House to investigate the titles of its Members to their seats.

367. The Virginia election case of Samuel F. Beach, in the Thirty-seventh Congress.

The House decided against the validity of an election informally held and participated in by only a few voters, most of the district being occupied by an armed enemy.

The presumption that those who do not go to the polls acquiesce does not apply where a condition of civil war prevents due notice of election.

A legislature being in existence, a constitutional convention may not fix the times, etc., of elections of Representatives.

On March 3, 1862,² Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, reported on the memorial of Mr. Samuel Ferguson Beach, who claimed to represent the Seventh district of Virginia. Mr. Beach's certificate showed that on October 24, 1861, at an election held at the court-house at Alexandria, he received 138 votes, and that Charles B. Shirley, his opponent, received 11 votes; that no other polls of election were opened in the district, as all other portions than the vicinity of Alexandria were within the lines of a hostile force. The credentials were signed by the conductor and two commissioners who were officers of the election, and were addressed to "His Excellency Francis H. Pierpont, Governor of the State of Virginia."

The conditions under which the election had been held were thus described by the committee:

A convention assembled at Wheeling, in the State of Virginia, on the 11th of June last, in which were represented, it is believed, thirty-nine counties of the State, situate in what is known as Western Virginia. This convention adopted on the 19th of June "an ordinance for the reorganization of the State government," after having declared that, because of the treasonable practices and purposes of the State convention lately held in Richmond, and of the executive of the State in connection therewith, "the offices of all who adhere to the said convention and executive, whether legislative, executive, or judicial, are vacated." By the same ordinance a legislature, or general assembly, for the State of Virginia was

¹Journal, p. 369.

²Second session Thirty-seventh Congress, Report No. 42; 1 Bartlett, p. 391; Rowell's Digest, p. 176.

created, and required to "assemble in the city of Wheeling on the 1st day of July, and proceed to organize themselves as prescribed by existing laws in their respective branches." Said convention subsequently elected a governor for the State of Virginia, who still holds the office thus conferred upon him.

The legislature thus created assembled as required, and passed many enactments for the whole State of Virginia, elected two United States Senators, who were admitted to seats in the Senate, and assumed all the functions of the general assembly of Virginia under its preexisting constitution and laws. The convention which created and set in motion this new government did not, however, dissolve itself upon the assumption of the several functions of government by the executive officers and general assembly which, in the exercise of provisional powers, it had itself brought into being, but continued to hold its meetings after the assembling of the legislature, and to share with it in ordinary legislation for the whole State. The legislature was in session till the 24th of July, and how much longer the committee are not informed. The convention was in session on the 20th of August, and on that day passed an ordinance providing for the election of Representatives in Congress in each district where, from any cause, such election was not held on the fourth Thursday in May last, the day provided by law for such election, and also "in the Eleventh district, where a vacancy now exists, an election for such Representative shall be held on the fourth Tuesday in October next, which shall be conducted, and the result ascertained, declared, and certified in the manner directed in the second edition of the Code of Virginia."

Thereupon, on October 12, Governor Pierpont issued a proclamation, to carry out the ordinance of the convention, and closed with the statement that he did "hereby entreat the loyal voters of this State to hold elections in their several districts," etc.

Such was the authority under which the election was held. Mr. Beach claimed "that the ballot box knows no quorum, and that the number of votes cast is not a legitimate inquiry beyond the necessity of ascertaining for whom a majority was given."

The committee examined two questions on which the determination of the case depended: (*a*) The legality of the election in a technical sense; and (*b*) the acquiescence of the constituency.

As to the legality of the election, the committee examined first the authority under which the election was called. They say in their report:

The whole authority for this election is the ordinance of the Wheeling convention passed August 20. Assuming that the proceedings of that convention, and of the legislature and executive created by it, have ripened into a State government, legal in all respects, still the question arises, was it one of the functions of that convention to provide for the time, place, and manner of electing Representatives in Congress, especially after the legislature had assembled? The purpose of that convention was the creation of a new State government. The only basis upon which it rests is necessity.

A new government must begin somewhere, and there must be somebody to make it. As necessity was the foundation, so also it was the limit of the power called into being for the sole purpose of inaugurating a new government. It could do anything necessary to carry out that purpose, and when that was done it could do no more. Its functions ceased the moment the new government took on form and life. The two can not, in the nature of things, exist and move *pari passu*. Now, long before this ordinance had passed the convention there was in existence a governor and a legislature, having all the powers that a governor and legislature could have in Virginia—that is, all the powers which the constitution of Virginia clothes a governor and legislature with, not in conflict with the Constitution of the United States.

Now, this latter instrument provides (art. 1, sec. 4) that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislatures thereof." It is a legislative act. It is a law. If the time had been fixed in the constitution of the State, recognized and acquiesced in by the legislature, it may be said to be the act of the lawmaking power—a legislative act. But this time and manner were not fixed in the organic act, nor by the legislature, but by the convention assuming legislative functions in the presence of the legislature itself.

Further discussing the legality of the election, the committee point out numerous particulars in which the election failed to be carried out in conformity with the Code of Virginia, which the convention prescribed as the guide. The governor had directed no writ of election to the sheriffs, but had simply entreated the loyal voters, the election had not been advertised over the district, the vote had not been canvassed and proclaimed.

Therefore the committee concluded that if the claim of the memorialist rested exclusively on a strict conformity with all the provisions of law, it could not be maintained.

The committee, however, continue:

But the committee do not desire to rest their conclusions upon so narrow a basis. If the Union voters of the district had had an opportunity to choose a Representative, if there had been no armed occupation of the district by rebels, so that polls could have been opened at the various voting places in the district, and all who desired could have deposited their ballots, and had done so in conformity with the provisions of law, so far as the disturbed and abnormal condition of things would permit, the committee would have sought some way to give effect to such election. But enough of the facts surrounding this election have already been stated to show that such is not the case. There was but one single poll in the whole district opened, and but 149 votes cast. The reason why there were no other polls opened or more votes cast can not be better expressed than by the three freeholders themselves who certify to this election. This is their language:

“And we further certify that there were no other polls of election held at any other precinct in said county of Alexandria, nor in any other of the counties of this Congressional district, as far as we can learn and believe; and that all the other counties of this Congressional district are, and were at the time of said election, included within the lines of the rebel army.”

This state of things is no fault of the memorialist or the Union voters of the district; but it did exist on the day of this election. How can it be made to appear, then, that the memorialist is the choice of the district, or that if an opportunity had existed an overwhelming majority of votes would not have been cast against him? In what sense can it be said that those who did not vote are to be presumed to acquiesce, when they neither had the opportunity to vote nor the knowledge that voting was going on? Acquiescence presumes liberty to protest. In this instance that liberty did not exist.

Therefore the committee recommended the adoption of a resolution declaring that Mr. Beach was not entitled to the seat claimed by him.

On March 31, 1862,¹ the report of the committee was agreed to by the House, without debate or division.

368. The Virginia election case of Wing v. McCloud in the Thirty-seventh Congress.

The House declared invalid an election informally held and participated in by a small fraction only of the voters, the district being largely occupied by an armed enemy.

The House declined to seat on prima facie showing a claimant declared elected by the governor's proclamation, the district referred to being notoriously under duress of civil war.

On January 8, 1863² the credentials of Mr. John B. McCloud, as Representative-elect from the Second Congressional district of Virginia, were presented to the House, and a motion was made that he be permitted to take the oath. This certificate was in the form of a proclamation of Governor Pierpont, of Virginia, declaring Mr. McCloud duly elected.

¹Journal, p. 490; Globe, p. 1452.

²Third session Thirty-seventh Congress, Journal, p. 165; Globe, p. 237.

Objection being made, the credentials were referred to the Committee on Elections, and the oath was not administered. The House, however, allowed the privilege of the floor to Mr. McCloud, as was customary in the cases of contestants and claimants for seats.

On February 4¹ the committee reported both on the claim of Mr. McCloud and also the claim of Mr. W. W. Wing, who contested the election on the ground that certain ballots had been improperly counted for Mr. McCloud, thereby violating the Virginia law requiring viva voce voting.

The committee found it unnecessary to go into this controversy, since the validity of the entire proceeding was in doubt.

The Second district of Virginia was composed of ten counties and Norfolk city. The election occurred December 22, 1862, and in all 1,402 votes were cast, 645 for Mr. McCloud, 621 for Mr. Wing, and 136 for other candidates.

The election was called by proclamation of "John A. Dix, Major-General," and was held in precincts in four counties by election officers appointed by "Egbert L. Viele, Brigadier-General and Military Governor." In addition there were writs of Governor Pierpont directed "To the sheriff, or any constable, or to any freeholder" in the county, and requiring them to hold an election. The committee say in regard to the proceeding:

It is difficult to imagine a proceeding so entirely in disregard of the requirements of the law of this State as this election. Whether authority for it be sought in the proclamation of Major-General Dix, "commanding the department of Virginia," or in that of Brigadier-General Viele, "military governor of Norfolk," or in the writs of election issued by Francis H. Pierpoint, governor of the Commonwealth of Virginia, or in all three combined, it is equally in conflict with the plainest provisions of the law of the State. What territory in Virginia the "department of Virginia" embraces the committee are not informed; so that they are unable to say that it did or did not embrace the Second Congressional district. The committee are also ignorant of the source from whence General Dix obtained authority to call an election at all. He does not purport to call it as military governor, who is clothed to some extent with civil as well as military powers. The committee are not aware that General Dix assumes to discharge any other civil functions whatever. But the proclamation itself undertakes to prescribe the qualifications which alone would entitle a man to vote at this election, when the Constitution of the United States and of Virginia have fixed the qualification of voters for Representative to Congress, and these qualifications can not be added to or taken from.

Article 1, section 2, of the Constitution of the United States is as follows:

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

And the constitution of Virginia provides, article 3, section 1:

"Every white male citizen of the Commonwealth, of the age of 21 years, who has been a resident of the State for two years, and of the county, city, or town where he offers to vote for twelve months next preceding an election, and no other person, shall be qualified to vote for members of the general assembly."

And section 4 provides, as already cited, that "in all elections votes shall be given openly, or viva voce, and not by ballot."

A comparison of these several provisions with the proclamation of General Dix will show the departure and conflict without any comment or inquiry into the authority for issuing it.

The proclamation of General Viele seems to have been in aid of that of General Dix. It is issued by him as "military governor of Norfolk." The committee have failed to obtain the instructions to General Dix in this matter, and are equally ignorant of the extent of jurisdiction of the military gov-

¹ Report No. 23; 1 Bartlett, p. 455; Rowell's Digest, p. 182.

ernor of Norfolk. If anything can be learned from his title, it is confined either to the city or county of Norfolk. If that be so, he could hardly interfere in this election with the counties of Princess Ann, Nansmond, or Isle of Wight. But he not only appointed commissioners of election in the county of Norfolk, but also in the other counties already named, and required all from all these counties to make returns to "these headquarters within three days subsequent to the election." The statutes of Virginia require these commissioners to be appointed by the court of each county, and require them to make returns to the clerks of the county courts of their respective counties, and they to the clerk of the county of Isle of Wight, and he declares the result. But it seems that this proclamation, like that of General Dix, was confined to four out of the eleven counties of this district. There is no authority of law for this selection, and it is supposed to have been induced by necessity, the remainder of the district being within the rebel lines. But whatever the reason, the House can at once see the danger if it were permitted. If certain counties may be selected in a district, and others omitted in the issue of writs of elections, then the control of the representation must rest with the power of selection. It should be sufficient, however, that the law does not sanction any such selection, and requires the issue of writs to the proper officers of all the counties.

But the writs of Francis H. Pierpoint, governor of the Commonwealth of Virginia, were also issued in this case, as has been already said. There were none of them sent to any county in the district except the four already named, and therefore all that has been said touching the same proceeding under the proclamations of General Dix and General Viele has equal force here. But these writs, although bearing date the 12th of December and calling originally for an election upon Saturday, the 27th day of December, were first brought into the district on Saturday, the 20th, and delivered on Sunday, the 21st, to one of the candidates for distribution, and then by erasures and insertions made at some time—the committee do not know when—they became writs for an election on the next day that is, on Monday, the 22d day of December, and they were so distributed that day. Now, it is expressly enacted by the statutes of Virginia that "every officer to whom a writ of election is directed shall, at least ten days before such election, give notice thereof, and of the time of the election, by advertisement at each place of voting in his county or corporation." With this plain and express provision of law before them the committee are at a loss for any explanation of the reason of delivering these writs on Sunday for an election the next day, except that given to the candidate at the time of their delivery by General Samuels, the messenger who brought them, as stated to the committee by Mr. Wing himself, viz, "to give a semblance of legality to the election." Whatever may have been the reason for this proceeding, the proceeding itself will have a tendency to invoke the closest scrutiny on the part of the House into the regularity of each successive step in all elections held under the circumstances which attend this.

But turning from an examination of the conformity to legal requirements in this election to the question whether the voters of this district, conforming as nearly to law as possible, have, unrestrained and unawed by the presence of any considerable rebel force, had full and fair opportunity to express their choice of a Representative, the committee find that but 1,402 votes in all were cast in a district usually polling about 10,000 votes; that of the eleven counties composing this district polls were opened in only four of them, and not in every precinct in these four, for the reason that they were in the armed occupation of the rebels. No polls could, therefore, be opened, and not a single voter—be the number what it may in this much the greater portion of the district—could cast a vote, or in any way have a voice in the selection of a Representative. According to the uniform rule adopted by the committee and sustained by the House this has failed, in any just sense, to be the election of a Representative from the Second district in Virginia. The committee, therefore, report adversely upon the right of either claimant to the seat.

Therefore the committee concluded that neither Mr. Wing nor Mr. McCloud was entitled to the seat.

On February 14,¹ in the debate, it was stated that the testimony of Governor Pierpont had been taken since the report was written, and it appeared that the alteration in the writs had been made by military officers.

The House, without division, agreed to the report of the committee.²

¹Globe, p. 963.

²Journal, p. 400.

369. The North Carolina election case of Jennings Pigott in the Thirty-seventh Congress.

In time of civil war an election participated in by a small number of loyal voters was held invalid, more than two-thirds of the district being unable to participate.

The House declined to give prima facie effect to irregular credentials referring to a district notoriously under duress of civil war.

A mere sojourner in a State was held not to be qualified as an inhabitant to represent a district in Congress.

On January 15, 1863,¹ the credentials of Jennings Pigott, claiming to have been elected to the House from the Second district of North Carolina, were presented and the suggestion was made that Mr. Pigott be sworn in. But the House referred the credentials to the Committee on Elections, and the oath was not administered.

On February 14,² the committee reported, finding that Mr. Pigott claimed to have been elected January 1, 1863, by virtue of a proclamation issued by Edward Stanley, military governor of North Carolina. The committee do not consider the legality of that action, or, in fact, of any of the steps taken in pursuance of that proclamation. They consider only (a) the numbers of loyal voters participating in the election, and (b) the qualifications of the claimant.

As to the election, the committee find that the whole number of votes cast was 864, of which Mr. Pigott received 595. There was voting in only three of the eleven counties composing the district, and in one of the three there was voting in only one precinct. And there were many voting places in the three counties where no polls were opened or notice taken of the election. Generally, the presence of armed enemies prevented the opening of these polls, and the remaining eight counties were almost entirely in the armed occupation of the enemy. Therefore the committee concluded that Mr. Pigott could

in no just sense be deemed the choice of the loyal voters of a district in which more than half of them had no opportunity to express that choice. Voters may voluntarily stay away from the polls, and they are thereby taken and deemed to have acquiesced in what was done by those who are present. But no such presumption rests upon those who are under duress; and it can never be known that they would not have made choice of another if the iron grasp of the rebellion had been unloosed.

As to the second point, whether Mr. Pigott was at the time of the election an "inhabitant" of North Carolina, within the meaning of the Constitution, the committee say:

Mr. Pigott, although a native of North Carolina, had resided in the city of Washington for the last ten or eleven years, owned real estate here, dwelt with his family in his own house here, and had on more than one occasion voted here for municipal officers. After Mr. Stanley was appointed military governor of North Carolina, Mr. Pigott was appointed his private secretary, and, renting his house in Washington, went to North Carolina in that capacity, and had remained there as such private secretary two or three months when this election took place. He had done nothing since his return to the State to indicate a permanency of abode there beyond what is here stated. The committee are of opinion that to be an inhabitant within the meaning of this section of the Constitution, if it does not mean resident or citizen, certainly means more than sojourner, which is all that can be claimed for Mr. Pigott.

¹Third session Thirty-seventh Congress, Journal, p. 194; Globe, p. 334.

²House Report No. 41; 1 Bartlett, p. 463; Rowell's Digest, p. 184.

In the case of John Bailey (Contested election cases, 411), who was elected a Representative from Massachusetts while a clerk in one of the Departments in Washington, where he had been for six years, although a native of Massachusetts, it was decided that he had ceased to be an inhabitant of Massachusetts within the meaning of the Constitution. And the able report of the committee in that case, adopted by the House, defines the word inhabitant in this connection to be "a bona fide member of the State, subject to all the requisitions of its laws and entitled to all the privileges and advantages which they confer." In the opinion of the committee the sojourn of Mr. Pigott in North Carolina, for the temporary and transient purpose of being private secretary to a military governor, was not an inhabitancy within this definition.

Therefore the committee reported that Mr. Pigott was not entitled to the seat.

On February 23¹ the report was considered in the House. A proposition was made to amend by adopting a substitute, reciting that the loyal people of the district, having done their best to secure representation, should not be deprived of their rights because of the act of disloyal persons; that the acts of the disloyal had devolved the responsibilities of citizenship on the loyal; that the Constitution guaranteed to every State a republican form of government and equal representation in Congress; that the payment of taxes was reciprocal with the right of representation; that protection of citizens in their right of voting was the duty of the Government; and therefore that the loss of that right by loyal citizens because of invasion of the disloyal was a misfortune and not a fault; that laws prescribing the time, mode, and manner of holding elections were merely directory; and finally that, in accordance with these principles, Mr. Pigott was entitled to the seat.

This amendment was disagreed to² without division; and then the report of the committee was agreed to. So Mr. Pigott was not admitted to the seat.

370. The Tennessee election case of John B. Rodgers in the Thirty-seventh Congress.

The House declined to seat a claimant voted for in a district established by an insurgent authority and at an election called by that authority.

Instance of a claim for a seat presented by a memorial.

On January 19, 1863,³ the memorial of John B. Rodgers, claiming a seat in the House from Tennessee, was presented and referred to the Committee of Elections, no suggestion being made that Mr. Rodgers should be sworn in.

On February 9⁴ the committee reported as follows:

That Mr. Rodgers claims to have been elected to this House in November, 1861, from a district in Tennessee, made up in part of the counties embraced in the district now represented by Mr. Maynard (the Second) and in part of counties embraced in the district now represented by Mr. Clements (the Fourth). These gentlemen were elected in August, 1861, and subsequently to their election, the committee are informed by Mr. Rodgers that the State was redistricted by the rebel legislature for the so-called Confederate congress, and an election in these new districts was held for the Confederate congress in November following. It is claimed by Mr. Rodgers that at this election votes were cast for him as a Representative to this Congress; and it is by virtue of these votes, that he now claims a seat. All the evidence submitted by Mr. Rodgers in support of his claim accompanies this report. The com-

¹Journal, p. 460; Globe, pp. 1208-1212.

²The Journal, by the evident use of the word "agreed" for "disagreed," states that this amendment was agreed to. The context of the Journal, as well as the Globe, shows that it was disagreed to.

³Third session Thirty-seventh Congress, Journal, p. 206; Globe, p. 382.

⁴House Report No. 32; 1 Bartlett, p. 462; Rowell's Digest, p. 184.

mittee have found no foundation for the claim, and, referring the House to the accompanying papers, do not deem further comment necessary. They accordingly report the following resolution:

Resolved, That John B. Rodgers is not entitled to a seat in this House as a Representative from the State of Tennessee.

The House, on February 14,¹ agreed to the resolution without division.

371. The Virginia election case of Christopher L. Grafflin in the Thirty-seventh Congress.

The House considered invalid an election informally held wherein all but a fraction of the voters were prevented by civil war from participating.

The House declined to give prima facie effect to credentials regular in form but referring to a district notoriously under duress of civil war.

On January 23, 1863,² the credentials of Christopher L. Grafflin, claiming to be elected as Representative from the Eighth Congressional district of Virginia, were presented to the House and the motion was made that he be permitted to take the oath. The credentials were signed by Governor Pierpont and under the seal of the State.

The House did not permit Mr. Grafflin to take the oath, but referred the credentials to the Committee of Elections.

On February 23³ the committee reported as follows:

Writs of election were issued by the governor of the Commonwealth, bearing date the 13th of December, 1862, ordering an election of Representative in this district on the 31st of said December. These writs were placed in the hands of Mr. O. D. Downey, who was instructed to visit the district and determine, from actual observation, whether the district was in a condition to hold an election at the time fixed in the writ; and if, from the presence of rebels or other causes connected with the war, he should deem an election at that time impracticable or unsafe, to appoint such other day as, in his judgment, would be, under all the circumstances, most suitable and proper. On the arrival of Mr. Downey in the district he found the condition of the people so unsettled (a strong force of the enemy occupying several of the counties, and in the immediate neighborhood of others, threatening those desirous of exercising the elective franchise) that he deemed an election upon the day fixed in the writ wholly impracticable. He accordingly fixed upon the 5th of January, 1863, as the time for holding this election. At that time there were cast in the county of Morgan 158 votes for Mr. Grafflin and 58 for Joseph S. Wheat; in the county of Berkeley 115 votes for Mr. Grafflin; and in the county of Hampshire 69 votes for Mr. Grafflin and 2 votes for Mr. Wheat; 342 votes in all for Mr. Grafflin and 60 votes for Mr. Wheat—total of 402 votes. No votes were cast in any other county, and in but two precincts in Hampshire and one in Berkeley. In the counties of Frederick, Page, Warren, Clarke, Loudoun, and Jefferson, six out of the nine composing the district, there were no votes cast. Of some of these counties the rebels had armed occupation, and into others guerrilla bands were constantly making incursions, filling the people with terror, and threatening with imprisonment all who should participate in this election. To open the polls under such circumstances in these counties would have been worse than a farce; it would have been an invitation to the rebels to visit with violence the peaceful and loyal citizens so situated that our forces could not protect them.

This case comes within the precedent established in the recent case of Lewis McKenzie,⁴ claiming a seat as a Representative from the Seventh district in Virginia by virtue of an election precisely similar to this. The laws of Virginia require the governor to fix in his writ the time for holding an election to fill a vacancy, and nowhere authorize him to delegate that power to another.

¹Journal, p. 401; Globe, p. 963.

²Third session Thirty-seventh Congress, Journal, pp. 226, 227; Globe, pp. 489, 491.

³House Report No. 43; 1 Bartlett, p. 464; Rowell's Digest, p. 184.

⁴See Section 372.

The election itself, had the day upon which it was held been authorized by law, like that in the case of McKenzie, already alluded to, was not a general election in the whole district, but only a partial and imperfect one, in which much the largest portion of the voters of the district took no part and had no opportunity to take part. No notices were served and no polls opened; and, if there had been, no voter could, with safety to his property, his liberty, or his life, have voted in much the largest portion of the district. The committee regret that they can not find any ground for pronouncing this an election in any just sense of that term. After a careful revision of the decision to which they arrived in the case of McKenzie, already stated, which was sustained by the House, they see no occasion to question its correctness, and they therefore report the accompanying resolution and recommend its adoption:

Resolved, That Christopher L. Grafflin is not entitled to a seat in this House as a Representative from the Eighth Congressional district of Virginia.

On March 3¹ the resolution proposed by the committee was agreed to without division.

372. The Virginia election case of Lewis McKenzie, in the Thirty-seventh Congress.

The House declined to hold valid an election informally held and, because of civil war, participated in by only a small fraction of the voters of the district.

On January 29, 1863,² the credentials of Lewis McKenzie as Representative-elect from the Seventh Congressional district of Virginia, were presented to the House and referred to the Committee of Elections, no motion being made that the oath be administered to Mr. McKenzie. The credentials were in the form of a statement of the votes cast in two counties, no returns, being received from eight counties, and were signed by "Jefferson Tacey, Clerk."

On February 9³ the committee reported, showing the following facts and conclusions:

TO THOMAS J. EDLEN,

Special Commissioner for Alexandria County:

Whereas the voters of the Seventh (7th) Congressional district of Virginia, composed of the counties of Alexandria, Spottsylvania, Fairfax, Fauquier, Prince William, Rappahannock, Culpeper, Stafford, Orange, and King George, failed to elect a Representative to the Thirty-seventh (37th) Congress of the United States on the 23d of May, 1861, you are hereby required, having first taken the oath or affirmation prescribed by existing laws, to hold an election to supply the vacancy aforesaid, at the several places of voting in Alexandria County, on Wednesday, the 31st day of December, 1862, or such other day as you may appoint, and of which you shall give due notice; and full authority is hereby conferred on you to do and provide whatever may be necessary for the purpose.

Given under my hand and the less seal of the Commonwealth, at the city of Wheeling, this thirteenth day of December, 1862, and in the eighty-seventh year of the Commonwealth.

[L.S.]

F. H. PIERPOINT.

By the Governor:

L. A. HAGANS, *Secretary of the Commonwealth.*

These writs ordered an election upon the 31st day of December, 1862, "or such other day as you may appoint." They were not delivered in the district till the evening of the 21st of December. The statutes of Virginia (Code, ch. 7, sec. 17) require "each officer to whom a writ of election is directed shall, at least ten days before such election, give notice thereof, and of the time of the election, by advertisement, at each place of voting in his county or corporation." It became an impossibility to give the required notice for the 31st after the receipt of these writs, on the night of the 21st. Accordingly,

¹Journal, p. 580; Globe, p. 1540.

²Third session Thirty-seventh Congress, Journal, p. 297; Globe, p. 602.

³House Report, No. 33; 1 Bartlett, p. 460; Rowell's Digest, p. 183.

the person to whom the writ for Alexandria County was directed, and the person to whom that for Fairfax County was directed, met on a subsequent day and fixed upon the 15th of January for the election, and gave the notices in their respective counties accordingly. The only authority for this alteration of the time is in the writ itself, as follows: "or such other day as you may appoint." No authority of law for giving any such power to the commissioners was shown or claimed before the committee; on the contrary, the statutes of Virginia (Code, ch. 7, sec. 16) expressly declares that the writ "shall prescribe the day of election to be the same throughout the district." The committee are of opinion that this power, thus fixed by law in the governor, can not be by him delegated to anyone else, and for this reason the election held on the 15th of January was without any sanction of law. If it were possible that this power could be delegated, still the committee find that the day was agreed upon by the commissioner of Alexandria and of Fairfax counties alone, without regard to those in the seven other counties composing the district. The law is imperative that the day shall be the same throughout the district; yet if the commissioners in any two of the counties can fix upon a day, the same may be done by any other two, and the utmost confusion would be certain to ensue. The committee were unable to sanction any such proceeding.

The committee further show that eight days after the election the legislature of Virginia passed an act providing:

An Act providing for the return of the special election for a Representative in the Seventh Congressional district, held on the 15th day of January, 1863. Passed January 23, 1863.

Be it enacted by the general assembly, That the clerk of the county court, authorized by law to make returns of the elections held on the 15th day of January, 1863, for a Representative in Congress for the Seventh district, be, and is hereby, authorized and required to ascertain the result and grant certificates therefor at any time within the thirty days allowed therefor.

2. This act shall be in force from its passage.

The claimant contended that this legislation ratified and confirmed the action of the two commissioners in fixing the day of the election. But the committee concluded that the act referred wholly to the making of the return, and that it was beyond the power of the legislature to ratify or confirm an election held without authority of law.

The committee also went further and inquired into the character of the election itself. It appeared that there was no election in seven out of nine counties; that in the seven counties an election would have been impossible because of the presence of the armed belligerents; and that the total vote cast was only 554, as compared with 9,273 cast in the Congressional election of 1857. However loyal the people of the district might be, they had had no opportunity to testify that loyalty.

The committee therefore reported that Mr. McKenzie was not entitled to the seat.

On February 17,¹ when the report was considered, a motion was made to amend the resolution of the committee so it should declare Mr. McKenzie entitled to the seat. This amendment was disagreed to without division.

The report of the committee was then agreed to.

373. The Tennessee election case of Alvin Hawkins, in the Thirty-seventh Congress.

The House declined to hold valid an election which was entirely broken up by contending armies, so that only fragmentary and informal returns could be obtained.

¹Journal, pp. 413, 414; Globe, p. 1036.

On February 11, 1863,¹ the credentials of Mr. Alvin Hawkins, claiming a seat from the Ninth Congressional district of Tennessee, were presented to the House and referred. No suggestion was made that Mr. Hawkins should be sworn in on his prima facie showing. The credentials were dated at "Headquarters, District of Jackson, Eighteenth Army Corps, Department of Tennessee," distinguished as "Special Orders, No. 29," and was signed by "Jere C. Sullivan, Brigadier-General Commanding in District of Jackson." The credentials gave the vote cast, and further stated that "forces of the so-called 'Confederate States' were at various places within said district on said day of said election preventing the people from voting."

On February 28,² the Committee on Elections reported the following state of facts: The election was held on December 29, 1862, pursuant to writs of election issued by Andrew Johnson, military governor of Tennessee. It appears that a convention of the people of the district had appointed December 13, 1862, as a time for election; but the appearance of the proclamation and writs of Governor Johnson ordering the election on the 29th so interfered with this election that claimant made it no part of his reliance in his claim to the seat. The election on the 29th was almost entirely broken up by the presence of contending armies in the district. Indeed, General Hurlbut, commanding the Government forces, issued a military order postponing the election. One sheriff was seized by the enemy and his writs of election were destroyed. Mr. Hawkins was himself driven from the district. On his return he gathered up such returns as he could, and procured the general order referred to as his credentials to accompany them.

In relation to this condition of affairs, the committee conclude:

The committee have struggled to find some way to give effect to this effort to secure representation; but they have not been able to bring it within any of the rules adopted by the House in determining the election cases which are analogous to this. How far the election was conducted at the polls in conformity to the law of Tennessee it has been impossible to ascertain. No one would expect to find or should require rigid conformity under the peculiarly trying circumstances under which this attempt was made. But the evidence of any votes at all will be seen, by a reference to the accompanying papers, to be of the most vague, uncertain, and unsatisfactory character. The committee have but to call attention to one or two of these papers. An unofficial person, A. G. Shrewsbury, certifies that he has seen the return of votes in Henderson County, and that "there were over 700 votes polled in that county, over 700 of which were for Alvin Hawkins, and the balance, numbering some 20 or 30, were scattering, and for other persons." This comes, so far as appears, from a private citizen, and has not even the sanction of an affidavit. In no sense can it be taken as evidence. Of a similar character is what purports to be a return from Chestnut Bluff, a precinct in Dyer County, to which the committee call attention. These papers are the bases of the certificate of General Sullivan. The law requires all the returns to be made to the governor, and he is to make the certificate. It was impossible for this to be done, and Governor Johnson has furnished nothing. The committee are of opinion that it would be a very unsafe precedent, sure to be fruitful of mischief, to take, as evidence of an election, the papers here presented. Mr. Hawkins himself was driven from the district and has no personal knowledge of the facts. He has letters from highly respectable citizens corroborating, to some extent, these papers; and while, as a matter of fact, the House may not doubt that these transactions have taken place, yet it would be most dangerous to take, as legal proof of an election, the papers here presented.

Although the evidence, as far as it goes, tends to show that 1,900 votes were cast, nearly all for Mr. Hawkins, yet it also appears that a very small part of the district participated in this election.

¹Third session Thirty-seventh Congress, Journal, p. 373; Globe, pp. 887, 888.

²House report No. 46; 1 Bartlett, p. 466; Rowell's Digest, p. 184.

Some parts had already voted on the 13th; some had postponed still further the day of election, under the military order of General Hurlburt, but more was at the very moment under the control and occupation of contending armies in battle array, in which an election was an impossibility. Under these circumstances, if it be taken as satisfactorily shown that 1,900 votes were polled, that fact must be taken along with the other that they were polled in a very small part of the district, and that much the greater portion of it, for the reasons stated, had no part or lot in the matter. The district at the last election for representative cast 18,000 votes.

The committee are again compelled to come to the same conclusion they have reluctantly arrived at in other cases, adverse to the right of Mr. Hawkins to a seat in this House, upon the state of facts presented to them and which they herewith report. They accordingly recommend the adoption of the accompanying resolution:

Resolved, That Alvin Hawkins is not entitled to a seat in this House as a Representative from the Ninth district in Tennessee.

On March 3¹ the House, without division, agreed to the report of the committee, adopting the resolution.

374. The Virginia election case of McKenzie v. Kitchen, in the Thirty-eighth Congress.

The House declined to hold valid an election participated in by a little less than half the voters of a district divided between contending armies.

The House declined to give prima facie effect to credentials in the form prescribed by a government already suspended and referring to a district distracted by war.

The Clerk declined to enroll persons bearing credentials in form prescribed by a State government already suspended.

On December 7, 1863,² at the time of the organization of the House, after the roll of Members-elect had been called by the Clerk, the following resolution was offered:

Resolved, That the names of L. M. Chandler, Joseph Segar, and B. M. Kitchen be placed on the roll as Representatives from the State of Virginia.

These claimants presented credentials made out in form prescribed by an act of "the general assembly of Virginia, held December 2, 1861, at the city of Wheeling." That legislature, it was urged, had been recognized by the National Government; but since that date the State of West Virginia had been formed. The Clerk had not put on the roll the names of the three gentlemen, not deeming the credentials sufficient.

The House, by a vote of yeas 100, nays 73, laid on the table the resolution.

On December 9,³ Mr. Henry L. Dawes, of Massachusetts, presented the credentials of Messrs. Segar and Kitchen, which were referred to the Committee on Elections without any motion that the gentlemen be sworn in.

On February 8, 1864,⁴ the Committee on Elections reported both on the right of Mr. Kitchen and on a contest which had been made against his claim to the seat by Lewis McKenzie.

As between Mr. Kitchen and Mr. McKenzie the election was determined by the vote of Berkeley County, which the contestant claimed should be included in the

¹ Journal, p. 580; Globe, p. 1540.

² First session Thirty-eighth Congress, Journal, p. 8; Globe, p. 6.

³ Journal, p. 20; Globe, p. 12.

⁴ Report No. 14; 1 Bartlett, p. 468.

State of West Virginia, and therefore formed no part of the district as constituted under the laws of the United States and Virginia. The committee found, as a matter of fact under the law, that, as Congress had never assented to the transfer, Berkeley County belonged to Virginia and that its vote was properly counted.

The contestant further alleged that the commissioners of election in Berkeley County certified the result directly to the clerk of Alexandria County, instead of certifying to the clerk of Berkeley County, who was required by the law to record it in a book and send a certified copy of it to the clerk of Alexandria County. The committee unanimously agreed on the following conclusion:

It was not contended that any fraud was committed or that the true result in Berkeley was not here certified, and therefore the committee were of opinion that the votes should be counted. This determines the result as to Mr. McKenzie. If these votes were counted, he did not receive a plurality and would not, in any event, be entitled to the seat.

On February 26¹ a resolution declaring Mr. McKenzie, the contestant, not entitled to the seat was, after debate, agreed to without division.

The Committee on Elections did not, however, allow the case to rest with the determination of the rights of the contestant. They go into the consideration of the State of the district and its capability for electing a Representative.

The committee found some difficulty in coming to a decision upon this question; but the conclusion to which they have arrived, after a careful consideration, they now submit to the House.

The case comes so near to what seems to be the dividing line, as established by the precedents of the last House in similar cases, and the judgment of this committee in the case of Joseph Segar, heretofore reported to the House, that the difficulty lies in determining upon which side of that line it falls.

It will be seen that between that part of the district where polls could be and were opened, and the part held by the enemy, there is very nearly an equal division, whether it be divided by territorial limits, by the aggregate of population, the entire free population, or the white male population. In each division the part within the occupation and control of the enemy is a trifle the greatest, but it may be treated practically as about an equal division of the district between the rebels and the Union forces. But it should not be overlooked that, while that portion under rebel control is held so by force of arms and the presence of rebel bayonets, it is equally true that the remainder of the district is, as yet, within our lines and under our sway only by a like force of arms and presence of loyal troops. If the Union forces were withdrawn from any portion of the district, it would be immediately overrun by rebel armies. Practically, the Seventh Congressional district of Virginia, the scene of some of the fiercest and bloodiest conflicts of arms in the whole war, is still a battle ground.

The present condition of that portion of it within the Union lines little fits it for the free exercise of the elective franchise. Martial law and military discipline, if not incompatible with, are certainly, at best, poor instrumentalities for ascertaining the choice of freemen. Off against this portion of the district thus selected, and thus held, must be set quite as large if not a larger portion in territory, in population, or in voters, which all the time has been held bound in the chains of an armed enemy, overrun with a hostile army, and ground into the dust by the heel of a usurped power.

The committee have, in this state of the facts, come to the conclusion that this case comes within the precedents of the last Congress, which have been adopted by the committee in the case from the First district of Virginia, already reported to the House. They cannot satisfy themselves that there has been such a freedom of election in this district as to warrant the conclusion that Mr. Kitchen is the choice of the loyal voters of the whole district. However near to a majority of such voters those came who participated in this election, yet it appears to the committee that a greater portion failed to participate in it for the reason that they were held under the power of the rebel army, and therefore by no method can it be shown that the claimant is the choice of the Union voters of the whole district. It may not be improper to call attention to the fact that while the whole number of votes cast was 2,059,

¹ Globe, pp. 847-850; Journal, p. 309.

only 962 of these were cast for Mr. Kitchen; and that of those, 730 were cast in the county of Berkeley, where Mr. Kitchen now resides, a county which, on the same day that these votes were cast, voted also unanimously to attach itself to West Virginia, and which has, so far as the legislature of both States can effect it, been made a part of the new State, and separated from this district altogether. Although, for reasons already stated, this can have no legal effect upon the vote to its exclusion, yet it is a circumstance which, if it can have any effect, certainly will not lead to the conclusion that Mr. Kitchen would have been the choice of the other counties whose voters were not permitted to participate at all in the election.

Therefore the committee found that Mr. Kitchen was not entitled to the seat. One of the committee filed minority views.

This report was debated on February 26¹ and on April 16,² the length of the debate as well as the nature showing that the case was considered of great importance.

A motion to amend the resolution proposed by the committee so as to declare Mr. Kitchen entitled to the seat was disagreed to without division. Then, also without division, the resolution was agreed to As reported by the committee.

375. The Virginia election cases of Chandler and Segar, in the Thirty-eighth Congress.

An election by one-third of the voters of a district was held invalid when the presence of an armed enemy prevented the remainder from expressing their wishes.

The holder of credentials in due form, whose prima facie title is not contested, may not take the seat if a question exists as to the competency of the constituency.

On December 7, 1863,³ at the organization of the House, after the Clerk had called the roll of Members-elect, the credentials of L. M. Chandler, claiming a seat as a Member from Virginia, were presented, and a resolution was offered to provide for putting the name of Mr. Chandler, with the names of two other gentlemen, B. M. Kitchen and Joseph Segar, also claiming seats from Virginia, on the roll of Members-elect. This resolution was laid on the table—yeas 100, nays 73.⁴

The cases having been referred to the Committee on Elections, that committee reported on Mr. Chandler's case on April 25, 1864,⁵ and on Mr. Segar's case on January 25, 1864.⁶ The report shows that in the Second district of Virginia, which was composed of eleven counties, polls were opened in nine places in Norfolk County, Portsmouth, and Norfolk, and the whole number of votes cast was 779, of which Mr. Chandler received 778. No polls were opened in any other places in the district, because the other counties except Norfolk were so under control of hostile forces that no man could go to the polls in safety. By the census of 1860 Norfolk County (including Norfolk city and Portsmouth) had 36,227 population out of 156,626 in the whole district. The committee conceived that this case was governed by the same principles as were set forth in the report on

¹ Globe, p. 850.

² Globe, pp. 1673–1678.

³ First session Thirty-eighth Congress, Journal, p. 8; Globe, p. 6.

⁴ See case of B. M. Kitchen, Section 374.

⁵ House Report No. 59; 1 Bartlett, p. 520; Rowell's Digest, p. 190.

⁶ House Report No. 9; 1 Bartlett, p. 577; Rowell's Digest, p. 197.

Mr. Segar's claim, and therefore reported a resolution that Mr. Chandler was not entitled to the seat.

Mr. Segar claimed to have been elected in the First district of Virginia, composed of twenty counties, receiving about 1,300 votes out of 1,667 cast in four counties. The remainder of the district was so occupied by hostile forces that polls could not be opened. The committee estimated that while 1,667 votes were cast, there were about 5,100 loyal men in the district who did not vote. The committee therefore conclude:

It is true that the legality of an election does not necessarily depend upon the relative number of loyal voters who attend the polls and of those who stay away. If all are at liberty to vote, those who stay away must always be considered as acquiescing in the action of those who do not. But acquiescence implies liberty to protest. If one stays away because he could not go, it is absurd to say that he stays away because he acquiesces. When a man is forcibly silent because his mouth is stopped, nothing can be taken against him for not speaking. If, then, 5,000 Union men have been kept from the polls by the arms of the rebels, it can not be said that they acquiesce in the choice made by 1,700 who were at liberty to go. It can not be known, therefore, by the proceedings on election day, that Mr. Segar was the choice of the legal voters of the district. He might have been, and he might not have been. The committee have no evidence that, had all been permitted to vote, he would not have been such choice, nor have they that he would. Upon this point it is impossible to know, for less than one-fourth of the voters were permitted to speak.

The question is, upon this state of facts presented, whether, upon any known principle or precedent, Mr. Segar can be admitted to this seat as the legally chosen representative of this district. All principle seems against it. By no process of reasoning can the committee infer from what was done that Mr. Segar is the choice of the district; and it is upon no other base that a right to, a seat here can at any time rest. And precedent is equally against it. In the reported cases during the last Congress the Committee of Elections and the House had occasion frequently to pass upon this very question. And the principles there laid down by the committee, and sustained in every instance by the House, both when reporting in favor of a right to the seat, as in the cases of Clements, from Tennessee, and Flanders and Hahn, from Louisiana, and when reporting adversely, as in the cases of Upton, Segar, and McKenzie, from Virginia, and Hawkins, from Tennessee, govern this case. Each of these cases was determined upon the facts peculiar to the case. But in them all it was recognized as a rule that where the vote actually polled was such a minority of the whole vote that it could not be determined that the person selected by that minority was the choice of the whole district, and the absent majority were not voluntarily staying away from the polls, but were kept away by force, then no such selection thus made could be treated as an election.

Therefore the committee concluded that Mr. Segar was not entitled to the seat.

They also, in their report, settled a preliminary question, which they state as follows:

The election was held on the fourth Thursday of May, 1863, and a certificate of election, in substantial conformity with the laws of Virginia as amended by the act of January 31, 1862 (Session Laws, 1861, chap. 44, p. 40), was furnished Mr. Segar by the officer required by that statute to certify an election of Representative in Congress. This certificate accompanies this report. Mr. Segar claimed that having presented a certificate in conformity to the laws of Virginia, he is now entitled to be sworn in, and to occupy the seat as a Representative till some one else appears showing a better title to it. But the committee were of opinion that they should inquire into and report the facts concerning this election and their conclusion thereon.

In debate Mr. Segar stated¹ that the Clerk originally put his name on the list of Members-elect, but erased it before the Congress assembled.

¹ Globe, p. 2312.

On May 17 the cases of Messrs. Chandler and Segar were, by unanimous consent, debated together,¹ as they involved the same principles.

The question was first taken on the resolution declaring Mr. Segar not entitled to the seat, and the House agreed to it, yeas 94, nays 23. The resolution declaring Mr. Chandler not entitled to the seat was then agreed to without division.²

376. The Louisiana election case of A. P. Field, in the Thirty-eighth Congress.

The House declined to recognize an informal election, participated in by a mere fraction of the voters, in a district entirely under military domination.

The House denied prima facie title to a person enrolled by the Clerk on credentials signed by a mere claimant to the governorship in a State disrupted by civil war.

On December 7, 1863,³ at the time of the organization of the House, the name of Mr. A. P. Field was called among those on the Clerk's roll of Members-elect, and Mr. Field voted for Speaker. When the Members were sworn, Mr. Thaddeus Stevens, of Pennsylvania, objected to the administration of the oath to Mr. Field, and on his motion the credentials were referred to the Committee on Elections, and the administering of the oath was deferred until after the report of the committee.

The credentials of Mr. Field are thus described by the committee in their report⁴ on the final right to the seat:

That no undue weight may be given to the credentials of Mr. Field, purporting to come from the government of the State, being signed "J. L. Riddell, governor of the State of Louisiana," it is proper that the facts elicited before the committee bearing upon the authenticity of this certificate should be laid before the House.

Mr. Riddell claims to have been elected governor at the same time with the alleged election of Mr. Field. There were but few votes cast for him, 500 or 600, in the parishes about New Orleans which are joined with that city in the First and Second Congressional districts under the old apportionment.

The whole election, like that of Mr. Field, was under the auspices of a committee, to whom the votes were returned, and he has himself no personal knowledge of the number of votes cast for himself or for Mr. Field. That he received in all the number of votes already stated is only the best opinion he could form upon the subject. All voting for governor, as well as Representative in Congress, in New Orleans, was forbidden by the military governor. The committee express no further opinion here upon the propriety of such conduct on his part, but only state the fact. Mr. Riddell claims to have been elected, and qualified as governor by taking the oath of office before a justice of the peace in New Orleans. The term of office to which Mr. Riddell claims to have been elected did not, according to the laws of the State, commence till the 1st of January, 1864. It is impossible to understand by what process of reasoning this Mr. Riddell has come to the conclusion that he was governor of the State of Louisiana on the 20th day of November, 1863, the day this certificate bears date.

It was also stated by him that the certificate in question was made out in this city upon information received by him from others, which he believed to be true, but of the truth of which he had no personal knowledge.

On the question as to the final right of Mr. Field to the seat, the Committee on Elections found that the alleged election had been held without authority of law, and that there was, moreover, no constituency.⁵

¹ Globe, pp. 2311-2323.

² Journal, p. 670; Globe, p. 2323.

³ First session Thirty-eighth Congress, Journal, pp. 6, 11; Globe, pp. 6, 7, 8.

⁴ House Report No. 8.

⁵ 1 Barlett, p. 580; Rowell's Digest, p. 197.

Mr. Field claimed to have been elected November 2, 1863, the day prescribed, from the law of the State, in the "First Congressional district" under an apportionment next preceding the then existing one. The existing apportionment required five districts instead of the four required by the preceding apportionment; and the law of Congress of July 14, 1862, required the five Members to be elected from "districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled in the Congress for which said election is held." Thus it was necessary for the State to be divided into five instead of four districts before an election could be held. But such division of the State had not been made, and therefore the election of Mr. Field from one of the old four districts was not in accordance with law.

As to the constituency on which Mr. Field relied, the committee say:

The election purports to have been held in the First Congressional district of Louisiana under the old apportionment. That district is composed of the two parishes of Plaquemines and St. Bernard, containing, in 1860, only 12,566 inhabitants, of whom only 2,563 were male whites, and a large portion of the city of New Orleans, containing, in 1862, when this district was formed, about the balance of the then apportionment of 93,000, and in 1860, of course, a much larger number.

But no election was held on the 2d day of November in any part of this district but the two parishes of Plaquemines and St. Bernard.

The precise number of votes actually cast for Mr. Field in these two parishes the committee have not been able to ascertain. Mr. Field had before the committee returns from two or three precincts in St. Bernard, which were made to a committee appointed to aid in conducting the election, and amounting to 156 votes, and he believed, though he had no personal knowledge of the fact, that as many more votes were cast for him in Plaquemines. But in all that part of the district made up of the city of New Orleans, comprising almost the entire district—certainly more than nineteen-twentieths of the inhabitants—there was no election held and no opportunity given for an elector to express his choice. The election, so far as the city of New Orleans was concerned, was suppressed by orders emanating directly from the military governor of the State, Brigadier-General Shepley. This suppression was effectual, so that not a vote was cast in the city, and the only constituency Mr. Field has was the small number of votes already stated from the very small fraction of the district situated outside the city limits.

Therefore the committee were unanimous in finding no grounds for treating this as an election and reported a resolution declaring Mr. Field not entitled to the seat.

The report was debated in the House on January 29 and February 9,¹ and on the latter date the resolution of the committee was agreed to—ayes 85, noes 48.²

377. The Missouri election cases of Bruce v. Loan, Birch v. King, and Price v. McClurg in the Thirty-eighth Congress.

The House, overruling its committee, declined to declare invalid an election because of intimidation in certain counties by State troops on duty by order of the governor.

The House declined, on proof of intimidation at 8 precincts out of 150, to find general intimidation sufficient to render invalid an election.

On April 8, 1864,³ the Committee on Elections reported in the case of Bruce v. Loan, of Missouri.

¹ Globe, pp. 411, 543–547.

² Journal, p. 242; Globe, p. 547.

³ First session Thirty-eighth Congress, Report No. 44.

The question involved in this election was whether or not there had been a valid election in the district.

The election in question, held on November 4, 1862, was the first attempted to be held in the State since the commencement of the civil war. From August, 1861, until the summer of 1862 the affairs of the State had been conducted by a provisional government. On June 10, 1862, a convention of the people of the State adopted an ordinance defining the qualification of voters and civil officers in the State and specifying a form of oath of loyalty, which was the new qualification provided, in addition to the old qualifications of the State constitution.

The civil commotion had been so great in the State that there were serious apprehensions of disturbances on the day of election. Therefore the adjutant-general of the State, on October 23, issued a general order stating that the test oath of loyalty was a sufficient safeguard against the participation of disloyal persons in the election, and therefore warning the enrolled militia, who as citizens would generally be at the voting places, that they should keep order at the polls, prevent intimidation of qualified voters, themselves abstain from interference, and, finally, that in case of disturbance beyond the power of the civil authorities to quell any commissioned officer present should, "at the request of any judge, sheriff, or justice of the peace," use the necessary military force to suppress it.

On November 1 another general order cautioned the enrolled militia against constituting themselves judges of election and warned them to "carefully abstain from all acts calculated to interfere with the freedom of election."

The Seventh Congressional district consisted of fifteen counties. It was admitted that the election was fair in seven counties, but the contestant, in his grounds of contest, asserted the following:

First. For interference by portions of the armed militia of the State of Missouri with the polls, and the tearing up of poll books, and the interference with voters at the polls by your friends, whereby persons desiring to vote for me were prevented and intimidated from voting and rudely driven from the polls; and by thus preventing persons who would have voted for me I lost, in the counties named below, the number of votes set opposite each county:

Buchanan County	800
Andrew County	400
Holt County	400
Atchison County	400
Nodaway County	300
Dekalb County	100
Daviess County	200
Livingston County	600
Making a total of	3,200

which would have elected me over you, and made my entire vote 7,754.

Second. Improper interference and improper conduct of officers of the election in excluding qualified voters from voting for me in the counties named in reason first.

Third. Intimidation on the part of portions of the militia of the State of Missouri and other armed soldiery, by threats intimidating voters from attending the election, who would have voted for me had they attended.

Fourth. Interference of portions of the militia of Missouri by forcibly driving voters from the polls who had tickets in their hands ready to vote for me.

Fifth. Interference of portions of the militia of Missouri, in standing at voting places, with muskets

in their hands, and demanding the tickets of voters; and when shown with my name on them, the tickets were torn up by your friends, and the parties told that they could not vote that ticket; and persons who were legal voters were thus prevented from voting for me.

The whole number of votes returned as cast at the election was 13,803, of which Mr. Loan, the sitting Member, was credited with 6,582; Mr. Bruce with 4,554; Mr. H. B. Brand with 2,665, and 2 scattering. Thus the sitting Member's majority over contestant was 2,028 votes.

It appeared that at the time of the election the sitting Member was a brigadier-general, and had shortly before the election ceased to be in command of the enrolled militia in the Seventh Congressional district, although he still held such official position elsewhere. Many of the candidates for State offices associated with him on the ticket were militia officers then in command. Neither the contestant nor any of the persons associated with him on the ticket were connected officially with the militia.

After examining the case the Committee on Elections divided, a bare majority concluding that neither contestant nor sitting Member were entitled to the seat, since military interference had invalidated the election; while the minority concluded that the evidence did not show sufficient effects of whatever disturbance there may have been to overcome the plurality of the sitting Member.

The decision of the case, both in the Committee and the House, turned on the examination of the evidence as to the alleged intimidation and violence in the several counties.

Buchanan County: The only testimony was as to the election in St. Joseph, in the township of Washington. The sheriff of the county, who favored the sitting Member, found the polls guarded by militia at one precinct, and saw the ticket of a citizen torn up by a soldier and the citizen driven away. Those not favoring certain candidates seemed afraid to vote. What he saw at two other precincts convinced him that there could not be a free and fair election because of the actions of the militia. In one of the three precincts, as shown by other witnesses, bands of armed militiamen broke up the election and tore up the poll book. The majority of the Committee became convinced from the testimony and from comparison with the vote of other years that as many as 900 votes were lost to the contestant in the township because of the disturbance and intimidation. The minority, while not denying that there had been violence and intimidation, thought a deduction of 300 votes about what the testimony indicated, and urged that this, with the deductions in other counties, would not destroy the sitting Member's plurality. It appeared also that the military guard at the polls was asked for by contestant.

Andrew County: The testimony related only to the election precinct of Savannah. Here there was no militia guard at the polls, the local commanding officer having declined to furnish a guard unless called on by the civil officers. The witnesses testified to disturbance and intimidation, but had only estimates as to those deterred from voting for contestant. The minority of the committee did not consider that any considerable number of persons were intimidated at Savannah, although one witness had estimated the number as high as 200. The militia were present as citizens only. The majority of the committee considered the decrease in the total vote of the county as compared with the election of 1860 as of significance.

Livingston County: The testimony related only to Chillicothe precinct. There an officer with a squad of soldiers marched to the polls in the morning and arrested several voters against whose loyalty charges were made. Later the troops were ordered away by a telegram from the governor. The majority of the committee presented the comparison with the vote in the precinct and county two years previous, showing a considerable falling off. The minority of the committee found no evidence to show that any voters were kept from the polls by the military, the voting having gone on after the soldiers had been withdrawn. In the whole county the contestant received more than twice the number of votes received by the sitting Member.

Atchison County: In this county the testimony related to the precinct of Rockport only, where it was shown that the polls were guarded by armed militia, and where a witness testified that he heard of people who tried to vote being thrust from the polls. Witness also testified that he heard of interference at most of the other precincts of the county. Witness also testified that attempts to take depositions in this county for the purposes of the contest were prevented by intimidation, and that by such depositions a loss of about 300 votes for contestant was expected to be proved.

The majority of the committee make the comparison, showing a falling off in the vote of the county. The minority of the committee assail this witness for giving merely hearsay testimony, and call attention to the fact that he had been employed as counsel by contestant.

Dekalb County: The testimony related only to the precinct of Stewartsville. Several witnesses, including a constable who was on duty at the polls all day, testified to specific acts of intimidation by the enrolled militia, and certain witnesses testified that they were deterred from voting. The minority assailed this testimony as inadmissible because ex parte, and also from the fact that the testimony showed only estimates and opinions as to the number of votes kept from the poll by intimidation.

Holt and Nodaway counties: Contestant took no testimony in these counties, as sworn testimony was produced to show that it would not have been safe for contestant or his representatives to go into these counties.

Daviess County: Contestant included this county in his notice as one where there had been illegal interference with the freedom of election; but the majority of the committee, in their report, concede that this was one of the eight counties where the election was fair.

From their review of the conditions in the above named counties and from a comparison of the votes for the respective candidates in these counties and those where no interference was alleged, as well as from a comparison with the vote of two years previous, the majority concluded that the enrolled militia had "by threats, violence, and by various modes of intimidation so far interfered with the election as, in the opinion of the committee, to render the election a nullity." Therefore the majority reported resolutions declaring neither contestant nor sitting Member entitled to the seat.

The minority criticise the nature of the testimony as to a large extent hearsay, call attention to the fact that contestant offered testimony as to only eight precincts,

while there must have been one hundred and fifty in the whole district. The presumption, in the absence of proof, must be that the election in the precincts not attacked by testimony were fair.

The minority also call attention to the fact that the aggregate vote of the district for Congressman was larger than that of any other Congressional district in the State at this election.

The minority cited the cases of *Trigg v. Preston* and *Clements* to show that the acts of "a few loyal State troops, acting under the orders of the State authorities in guarding the polls," should not be considered such acts as to invalidate the election. Therefore it was recommended that the House declare the sitting Member entitled to the seat.

The report was debated in the House at length on May 6, 9, and 10,¹ those sustaining the majority of the committee setting forth the general state of alarm and intimidation which the testimony tended to disclose.

The minority contended that when riotous interference or violence were set up, the law required rigorous proof that the result of the election had been affected by riotous interruption or obstruction; and also when restraint or intimidation were set up, proof was required that an organized system of unlawful restraint or intimidation existed or was acted upon to prevent the freedom of election and to secure the defeat of the contestant. And it was contended that such a state of things was not shown in this case.

On May 10² the House took a test vote on the resolution—

Resolved, That Benjamin F. Loan (the sitting Member) is not entitled to a seat in this House, etc.—

And there were yeas 59, nays 71.

The resolution declaring contestant not entitled to the seat was agreed to without division.

So the contention of the minority was sustained.³

378. The Kentucky election case of McHenry v. Yeaman in the Thirty-eighth Congress.

The House sustained an election generally participated in by the voters, although the district was under martial law and the military power enforced the State requirements as to qualifications of voters.

On May 13, 1864,⁴ the Committee on Elections reported on the case of *McHenry v. Yeaman* of Kentucky. The only question was whether there was a legal election in the Second Congressional district of that State, the contestant asking that the House would vacate the seat "and refer this election back to the people, or take such other action in the matter as may be deemed right and proper."

The main grounds of the contest were the issuance of certain military orders by officers commanding in the district; and the claim that the election was carried by fraud and force, and that test oaths were applied unknown to the laws of Kentucky.

¹ *Globe*, pp. 2155, 2185, 2207–2214.

² *Journal*, pp. 640, 641.

³ The case of *Birch v. King*, also from Missouri, involved the same principles, and the committee asked that it be discharged. This was done after debate. (*Globe*, pp. 2639–2650.) The action was also taken in the Missouri case of *Price v. McClurg*. (*Journal*, p. 787.)

⁴ First session Thirty-eighth Congress, House Report No. 70; 1 *Bartlett*, p. 550; *Rowell's Digest*, p. 193.

By an act of March 11, 1862, the legislature of Kentucky had passed a law providing in its first section that any citizen of the State who had adhered to the cause of the so-called Confederate States "shall be deemed to have expatriated himself, and shall no longer be a citizen of Kentucky, nor shall he again be a citizen, except by permission of the legislature, by a general or special statute." Then the act further provided:

SEC. 2. That whenever a person attempts or is called on to exercise any of the constitutional or legal rights and privileges belonging only to citizens of Kentucky, he may be required to negative on oath the expatriation provided in the first section of this act, and upon his failure or refusal to do so shall not be permitted to exercise any such right or privilege.

On July 20, 1863, in view of the approaching election (in August, 1863, the election in question) the governor of the State issued a proclamation, enjoining "the strict observance and enforcement" of the above act, in order to preserve the purity of the elective franchise.

On July 28, 1863, Col. John W. Foster, commanding at Henderson, Ky., issued the following general order:

In order that the proclamation of the governor and the laws of the State of Kentucky may be observed and enforced, post commandants and officers of this command will see that the following regulations are strictly complied with at the approaching State election:

None but loyal citizens will act as officers of the election.

No one will be allowed to offer himself as a candidate for office, or be voted for at said election, who is not in all things loyal to the State and Federal governments and in favor of a vigorous prosecution of the war for the suppression of the rebellion.

The judges of election will allow no one to vote at said election unless he is known to them to be an undoubtedly loyal citizen, or unless he shall first take the oath required by the laws of the State of Kentucky.

No disloyal man will offer himself as a candidate, or attempt to vote, except for treasonable purposes; and all such efforts will be summarily suppressed by the military authorities.

All necessary protection will be supplied and guaranteed at the polls to Union men by all the military force within this command.

Appended to this order was the following form of oath:

OATH TO BE TAKEN AT THE ELECTION.

I do solemnly swear that I have not been in the service of the so-called Confederate States in either a civil or military capacity, or in the service of the so-called provisional government of Kentucky; that I have not given any aid, assistance, or comfort to any person in arms against the United States; and that I have, in all things, demeaned myself as a loyal citizen since the beginning of the present rebellion. So help me God.

On July 30 a duplicate of this order was issued by Brigadier-General Shackelford, commanding at Russellville, Ky.

On July 31 Major-General Burnside, commanding the Department of the Ohio, issued a general order reciting that the State of Kentucky was invaded by a hostile force with the avowed purpose of keeping loyal voters from the polls and forcing the election of disloyal candidates on August 3, and declaring the State under martial law. The order disclaimed any intention of interfering with the proper expression of public opinion, and declared that all discretion in the conduct of the election would be, as usual, in the hands of the legally appointed judges at the polls, who

would “be held strictly responsible that no disloyal person be allowed to vote, and to this end the military power is ordered to give them its utmost support.”

As part of the record was included a dispatch from General Burnside to General Halleck, dated August 3, 1863 (the day of the election), announcing that a hostile force, which had crossed the Kentucky River to assist the command of Morgan, was in full retreat.

The majority of the committee (which included all but one Member) declined to enter into a consideration of the question whether the military orders were or were not proper; but declared that they “were designed to carry out the law of Kentucky, and in no wise to interfere with the freedom of the elective franchise.”

The majority go on to say that the only question was whether there was an election or not, there being no pretense of title on the part of the contestant. As a conclusive answer to the question whether Mr. Yeaman was the choice of the legal voters of the district, the committee give the official votes at preceding elections: In Presidential election of 1860 it was 15,236; in May, 1861, for delegates to border State convention, 13,328; in June, 1861, for Representative in Congress, 14,665; in August, 1863, for governor, 10,652. In August, 1863, Mr. Yeaman received 8,311 votes and Mr. McHenry 3,087. It was evident, therefore, that Mr. Yeaman received a majority of the whole voting population of the district, measured even by the standard of 1860. And it was in evidence that the district had contributed 5,714 men to the Army of the United States alone.

Therefore the majority of the committee recommended a resolution declaring Mr. Yeaman entitled to the seat.

The minority views, filed by Mr. D. W. Voorhees, of Indiana, on May 12, did not deny that the sitting Member received a large majority over the contestant, but denied that the election was “a free and equal election,” such as the constitution of Kentucky guaranteed:

Any election for a civil officer held under martial law, where the qualifications of voters are prescribed by military officers, is not such an election as the founders of this Government intended should be held under the Constitution which they framed, and should be declared void in all cases by the Congress of the Nation.

The minority views further present an analysis of the testimony to show intimidation of voters, the administering of various oaths as tests of loyalty, etc.

On May 27 and 30¹ the report was debated at length in the House. The supporters of the majority report argued that the sitting Member was manifestly the choice of the district. A few, while supporting the sitting Member on these grounds, condemned the act of the military authorities in proclaiming martial law.

On May 30² the resolution of the majority was agreed to by the House—yeas 95, nays 26; so Mr. Yeaman was confirmed in his seat.

379. The Louisiana election cases of Flanders and Hahn in the Thirty-seventh Congress.

The House seated a person elected according to the essential requirements of law, except that the time of the election was fixed by proclamation of a military governor.

¹ Globe, pp. 2527, 2579.

² Journal, p. 719; Globe, p. 2585.

Discussion of the powers of a military governor, and his status as a de facto executive.

The House declined to give prima facie effect to credentials signed by the military governor of a State lately in secession.

On December 19, 1862,¹ Mr. Benjamin F. Flanders appeared and presented credentials purporting to show his election to fill a vacancy in the office of Representative of the First Congressional district of Louisiana. These credentials were under the seal of the State and signed by "G. F. Shepley, military governor of Louisiana," and countersigned by "James F. Miller, acting secretary of state."

The request was made that the oath be administered to Mr. Flanders at once, but objection being made to the nature of the credentials they were referred to the Committee of Elections.

On December 22² Mr. Michael Hahn appeared with similar credentials for the Second district of Louisiana. The same objection being made, the credentials were referred to the Committee on Elections.

On February 3, 1863,³ the committee reported on the two cases, as they involved the same principles. The regular elections for Members of the Thirty-seventh Congress should have been held in Louisiana, under the State law, on the first Monday of November, 1861. But the State was then in rebellion, and the governor neglected and refused to order the election. The reoccupation by the national armies of the portions of the State comprising the First and Second districts had been followed by the resumption of allegiance on the part of many citizens, the total number being over 60,000 up to October 21, 1862.

On November 14, 1862, the military governor of the State, George F. Shepley, issued a proclamation ordering an election for Members of Congress in the First and Second districts. This proclamation, over which the principal issue in this case forms, was as follows:

A PROCLAMATION.

BY BRIGADIER-GENERAL GEORGE F. SHEPLEY, MILITARY GOVERNOR OF THE STATE OF LOUISIANA.

Whereas the State of Louisiana is now and has been without any Representatives in the Thirty-seventh Congress of the United States of America; and whereas a very large majority of the citizens of the First and Second Congressional districts in this State, by taking the oath of allegiance, have given evidence of their loyalty and obedience to the Constitution and laws of the United States:

Now, therefore, I, George F. Shepley, military governor of the State of Louisiana, for the purpose of securing to the loyal electors in the parishes composing these two Congressional districts their appropriate and lawful representation in the House of Representatives of the United States of America, and of enabling them to avail themselves of the benefits secured by the proclamation of the President of the United States to the people of any State, or part of a State, who shall on the first day of February next be in good faith represented in the Congress of the United States by Members chosen thereto at elections wherein a majority of the qualified voters of such State have participated, have seen fit to issue this my proclamation, appointing an election to be held on Wednesday, the third day of December next, to fill said vacancies in the Thirty-seventh Congress of the United States of America, in the following districts, namely:

The First Congressional district, composed of that part of the city of New Orleans heretofore known as municipality number one and municipality number three, and now designated as districts

¹Third session Thirty-seventh Congress, Journal, p. 101; Globe, p. 144.

²Journal, p. 106; Globe, p. 164.

³House Report No. 22; 1 Bartlett, p. 438; Rowell's Digest, p. 181.

numbered two and three, and Suburb Treme, that portion of the parish of Orleans lying on the right bank of the Mississippi, and the parishes of St. Bernard and Plaquemines.

The Second Congressional district in the State of Louisiana, composed of that part of the city of New Orleans above Canal street, known as the First district, and district number four, formerly the city of Lafayette, and of the parishes of Jefferson, St. Charles, St. John the Baptist, St. James, Ascension, Assumption, Lafourche, Terrebonne, St. Mary, and St. Martin.

Writs of election will be issued, as required, and the election held at the places designated by law.

The proceedings will be conducted and returns thereof made in accordance with law.

No person will be considered as an elector qualified to vote who, in addition to the other qualifications of an elector, does not exhibit to the register of voters, if his residence be in the city of New Orleans, or to the commissioners of election, if his residence be in any other place in said districts, the evidence of his having taken the oath of allegiance to the United States.

Given under my hand and the seal of the State of Louisiana, at the city of New Orleans, this fourteenth day of November, A. D. 1862, and of the independence of the United States of America the eighty-seventh.

GEORGE F. SHEPLEY,
Military Governor of Louisiana.

By the Governor:

JAMES F. MILLER, *Acting Secretary of State.*

In accordance with this proclamation the election was held. It was claimed by the Committee of Elections, and not disputed, that in essential respects the election was conducted according to the forms prescribed by the laws of Louisiana, excepting a law of the disloyal legislature prescribing an oath to support the Confederacy as a qualification of voters. The registration required by law was not wholly completed however, and persons not registered were in some precincts allowed to vote after proving that they had the requisite qualifications. The Committee of Elections held that the spirit of the law was not in this respect violated, and they further say:

And had its provisions been ignored in this particular it would clearly have been only a disregard of a mere directory provision of the law. The principal and only aim of the law is to secure fair elections, and the nonobservance of directory provisions can not annul an election carried on with all the essentials of an election and with perfect fairness.

This principle of law, with regard to directory provisions, has been repeatedly and clearly laid down by the supreme court of Louisiana and the supreme courts of other States, as well as by the Supreme Court of the United States, and is too well understood by every legal mind to need any elucidation here. And it is expressly enacted that no elector shall be deprived of his vote by any omission to give him a certificate of his election.

But this phase of the question was little in issue, and there was in the controversy little insistence that the election had not been conducted in accordance with the requirements of law.

The main issue of the case is thus stated by the committee:

The committee have found little difficulty in coming to a conclusion that the claimants should be admitted to their seats, except in doubts as to the power of the military governor to fix the day of this election. In all things else there has been strict conformity to law. The districts were entirely free from a rebel force to restrain or overawe the loyal votes. The old voting precincts and voting places were all restored, and votes polled at every one of them, except in one inconsiderable parish, and part of another in one district into which guerrillas sometimes made incursions. There was a very full vote given a remarkably full one when compared with the vote at former Congressional elections, if allowance be made for the usual proportion of voters among the soldiers absent in the Union and rebel armies. Two thousand men had been recruited by General Butler into his own regiments, and two full regiments of Louisiana troops had been organized by him from these two Congressional districts, while more had

gone into the rebel army, though many of these had returned to the city and their allegiance. Deducting the proper proportion of voters from these, and there can be no doubt of a full vote when the result is compared with that in former years. At the last election for representative in the First District, in 1859, the whole number of votes was 4,970; at the present election, 2,643; difference, 2,327. In the Second district, in 1859, the whole number was 10,367; at the present election the whole number was 5,117; difference 5,250.

* * * * *

It remains to be considered, finally, whether this election, thus conducted, in which all the loyal voters in such numbers participated in conformity with all the provisions of law, shall be set aside by this House and the representation denied, because the time for holding it was fixed by the military governor in the absence of any other governor. The exact powers of a military governor can not be easily defined. They have their origin in, and are probably limited by, necessity. They are to some extent civil as well as military, and the authority for his civil functions is no less clear than for his military. The Supreme Court and Congress have recognized both. The former, in the case of *Cross v. Harrison* (16 Howard, 164), recognized as valid the imposition and collection of duties by a military governor, even after the port at which they were imposed and collected had been by statute included in a collection district and a collector appointed, but who had not entered upon the duties of his office. And Congress admitted California into the Union, with a State government formed and set in motion, even to the election of Senators and Representatives in Congress, exclusively under the auspices of a military governor. The constitutionally elected governor of Louisiana had turned traitor and refused to discharge his constitutional obligations in this regard. What were the loyal voters to do? Were they to turn traitors also or be disfranchised? The Constitution imposes upon the United States this obligation (Art. IV, sec. 4):

“The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them from invasion; and on application of the legislature or of the executive (when the legislature can not be convened), against domestic violence.”

Representation is one of the very essentials of a republican form of government, and no one doubts that the United States can not fulfill this obligation without guaranteeing that representation here. It was in fulfillment of this obligation that the Army of the Union entered New Orleans, drove out the rebel usurpation, and restored to the discharge of its appropriate functions the civil authority there. Its work is not ended till there is representation here. It can not secure that representation through the aid of a rebel governor. Hence the necessity for a military governor to discharge such functions, both military and civil, which necessity imposes in the interim between the absolute reign of rebellion and the complete restoration of law. Suppose Governor Moore to be the only traitor in Louisiana. One of two things must take place. The people must remain unrepresented, or some one must assume to fix a time to hold these elections. Which alternative approaches nearest to republicanism—nearest to the fulfillment of our obligations—to guarantee a republican form of government to that people, closing the door of representation, or recognizing as valid the time fixed by the military governor? Are this people to wait for representation here till their rebel governor returns to his loyalty and appoints a day for an election, or is the Government to guarantee that representation as best it may? The committee cannot distinguish between this act of the military governor and the many civil functions he is performing every day, acquiesced in by everybody. To pronounce this illegal, and refuse to recognize it, is to pronounce his whole administration void and a usurpation. But necessity put him there and keeps him there.

Again, this George F. Shepley assumes to act as governor of Louisiana, discharging the civil functions of such governor. This is one of them. All loyal men in the State acquiesce in these acts. There is no other man discharging them or seeking to discharge them. This act of fixing the time of an election comes in conflict with no time fixed by any other man. This is to be governor *de facto*. This House has no jurisdiction to determine who is rightfully in the office of governor of Louisiana. Thus if this act be taken as the act of a governor *de facto* it must be recognized as valid.

The committee cited in support of its position the case of Clements, of Tennessee, and concluded by recommending resolutions declaring both Mr. Flanders and Mr. Hahn entitled to seats in the House.

The debate began on February 9 and continued through February 10 and 17,¹ the issue being joined almost entirely on the question of the constitutionality of the proclamation of the military governor. It was objected that the Constitution had fixed the method by which Members should be elected to the House, and that the time, place, and manner were to be determined by the legislative power only. This provision was derived from the English constitution, where it had been needed to curb the authority of the sovereign. So in this country the fixing of the time

of election by a military governor, appointed by the President, was an invasion by executive power. "No Representative can be elected to the Congress of the United States," it was argued,² "except in pursuance of the legislation of a State, or of the legislation of the Federal Government. * * * A State election law, which by its terms requires State officers duly qualified to execute it, can not be executed by a military governor appointed by the President." No State law and no law of Congress authorized the calling of the election in question. Hence it was contended that the two gentlemen were not entitled to admission.

On February 17 the following substitute was proposed for the resolutions of the committee:

That the proclamation issued by George F. Shepley, styling himself military governor of Louisiana, at New Orleans, on the 14th day of November, 1862, etc. * * * was null and void, without the authority of law, and imparts no validity to the election of Benjamin F. Flanders and Michael Hahn.

Resolved, That the election of said Flanders and Hahn appearing to have been free and unrestrained, and in accordance with the laws of Louisiana, except that being on a day other than a day of general election, had not been directed to be held by the governor of Louisiana, the action of the electors in the premises is ratified and confirmed, and said Flanders and Hahn are declared entitled to their seats as Members of this House.

This amendment was disagreed to—yeas 11, nays 115.

Then, by a vote of yeas 92, nays 44, the House agreed to the resolutions declaring Messrs. Flanders and Hahn entitled to their seats.³

380. The Arkansas election cases of Johnson, Jacks, and Rogers in the Thirty-eighth Congress.

The House as a matter of course declined to give prima facie effect to credentials emanating from the loyal provisional government of a State lately in secession.

In 1864 the Elections Committee favored the seating of claimants coming from districts almost free from armed foes, but elected in an election called by a loyal convention and by a fraction of a normal vote.

On February 10, 1864,⁴ Mr. Henry L. Dawes, of Massachusetts, presented the credentials of James M. Johnson, from the Third Congressional district of Arkansas.

The credentials⁵ were in the form of a proclamation issued by the provisional governor of Arkansas, reciting that in accordance with the schedule appended to the constitution adopted by the late convention of the State of Arkansas (held in January, 1864) an election had been held on March 14, 15, and 16, 1864, at which

¹ Globe, pp. 831, 855, 1030.

² By Mr. John A. Bingham, of Ohio.

³ Journal, pp. 411, 412; Globe, pp. 1035, 1036.

⁴ First session Thirty-eighth Congress, Journal, p. 244; Globe, p. 574.

⁵ Second session Thirty-eighth Congress, House Report No. 18.

the constitution had been adopted, various State officers elected, and three Congressmen, one of whom was Mr. Johnson, from the Third district.

Mr. Dawes asked that the credentials be referred to the Committee on Elections. No request was made that the oath be administered.

Mr. Henry Winter Davis, of Maryland, moved that the credentials be laid on the table.

On February 16,¹ the motion to lay on the table being withdrawn to permit debate, Mr. Davis said he had moved to lay the credentials on the table because other action on them might lead to the recognition by the House of the State of Arkansas.

After debate at length, Mr. Robert C. Schenck, of Ohio, moved to amend the the motion to refer by adding instructions that the committee investigate whether or not there was such government existing in Arkansas as to entitle the State and people to representation in Congress.

On the question of agreeing to the instructions there were yeas 53, nays 104.

A motion by Mr. Davis to lay the whole subject on the table was disagreed to; and then the motion of Mr. Dawes that the credentials be referred to the Committee on Elections was agreed to.²

On May 12³ the credentials of Mr. T. M. Jacks, from the First Congressional district of Arkansas, were presented to the House and referred to the Committee on Elections; and on May 16⁴ those of Mr. A. A. C. Rogers were similarly presented and referred.

On February 17, 1865,⁵ the committee reported resolutions declaring that Messrs. Johnson and Jacks were entitled to seats as Representatives from Arkansas. The committee say:

There seems in Arkansas at all times to have been a large number of unconditional Union men. It is evident that the so-called secession ordinance was not passed in accordance with the wishes of the people of the State. The convention elected in 1861 was largely Union, but, without instructions from the people, passed the ordinance of secession.

After three years of war and desolation, the loyal people of Arkansas assembled in convention at Little Rock in January, 1864. The result of the convention's deliberations was the amending of the State constitution, the appointment of a provisional governor, lieutenant-governor, and secretary of state, and the designation of the 14th, 15th, and 16th days of March as the time for holding a general election throughout the State.

The acts of this convention, judging from the statements of its members, were rather suggestive than obligatory. Indeed, it did not claim its acts as binding until they were ratified by the people, which was done with a unanimity seldom met with. At the election on the 14th, 15th, and 16th of March, the acts of the convention were approved by 12,177 voters, while they were disapproved by only 226. At that election the people of more than 40 counties elected State and county officers necessary to set to work again the machinery of a loyal State government, which had been overthrown by the rebellion in the month of May, 1861.

On the 18th of April, 1864, the State government was formally inaugurated, since which time it has been struggling for an existence under difficulties which those who are strangers to its trials can not properly appreciate.

¹ Globe, pp. 680–687.

² Journal, pp. 268, 269; Globe, p. 687.

³ Journal, p. 650; Globe, p. 2253.

⁴ Journal, p. 660; Globe, p. 2289.

⁵ Second session Thirty-eighth Congress, House Report No. 18; 1 Bartlett, p. 597; Rowell's Digest, p. 199.

The committee go on to describe the amended constitution, showing that it abolished slavery, and to show that a State government under this constitution was in operation, and the legislature had shown by its legislation that the disloyal elements of the State were not to participate in its government. It was also noted that Arkansas had furnished at least 10,000 Union volunteers.

The First district was composed of twenty counties, which at the Presidential election of 1860 cast 16,841 votes. Fourteen of these counties participated "pretty fully" in the March election in question, casting the aggregate vote of 3,000. These fourteen counties in 1860 cast a total of 14,005 votes. Of the 3,000 votes cast for Member of Congress at the March election Mr. Jacks received all but 15.

In the Third district all but one of the nineteen counties participated pretty fully, the total vote being nearly 5,000, of which Mr. Johnson received over 4,000. These counties gave in 1860 an aggregate vote of 16,932.

The committee then go on to quote the position taken in the case of Mr. Bonzano, of Louisiana, as to the course to be taken when the people had reorganized State governments.

The report of the committee in these Arkansas cases was presented near the end of the Congress, and was not acted on by the House.

381. The Louisiana election cases of Bonzano, Field, Mann, Wells, and Taliaferro, in the Thirty-eighth Congress.

In 1864 the Elections Committee were divided as to seating persons chosen under authority of a constitutional convention in a State recently in insurrection.

The House did not permit prima facie effect to credentials coming from a State lately in insurrection and from a government of doubtful standing.

On December 5, 1864,¹ the Speaker laid before the House the credentials of M. F. Bonzano, A. P. Field, W. D. Mann, T. M. Wells, and Robert W. Taliaferro, as Representatives from the State of Louisiana. No motion was made to administer the oath, and the credentials were referred to the Committee on Elections. The claimants were allowed the privileges of the floor.

On February 11, 1865,² the Committee reported on the case of Mr. Bonzano, who had been returned by 1,609 votes out of a total of 3,065. The committee say:

This election derives its authority from the constitutional convention which commenced its session in New Orleans April 6, 1864, which amended essentially and adopted anew the constitution of Louisiana, and, among other things, did, on the 22d of July, 1864, divide the State into five Congressional districts, in accordance with the number of Representatives assigned to that State in the apportionment under the census of 1860, and ordered an election to be held on the first Monday of September, 1864, to fill the vacancies caused by the failure of the State hitherto to elect Representatives to the present Congress.

Previous to this constitutional convention there had been a State government, elected in pursuance of a proclamation of the major-general commanding the department. The State convention, which met April 6, 1864, and adjourned July 25,

¹ Second session Thirty-eighth Congress, Journal, p. 7; Globe, p. 2.

² Journal, p. 242; 1 Bartlett, p. 583; Rowell's Digest, p. 198; House Report No. 13.

adopted a provision abolishing slavery as part of the new constitution, and the proceedings were, by proclamation of the governor, submitted to the people on September 5, and were ratified without material opposition. The whole number of votes was over 9,000.

The constitutional convention, by ordinance, divided the State into five Congressional districts, and directed elections to be held on September 5, 1864. In accordance with this ordinance the governor issued his proclamation directing the elections to be held. Mr. Bonzano was elected in accordance with these proceedings, and received his certificate of election from the governor.

The committee say in regard to this election:

This election depends for its validity upon the effect which the House is disposed to give to the efforts to reorganize a State government in Louisiana, which have here been briefly recited. The districting of the State for Representatives, and the fixing of the time for holding the election, were the acts of the convention. Indeed, the election of governor and other State officers, as well as the existence of the convention itself, as well as its acts, are all parts of the same movements.

It is objected to their validity that they neither originated in nor followed any preexisting law of the State or Nation. But the answer to this objection lies in the fact that, in the nature of the case, neither a law of the State nor Nation to meet the case was a possibility. The State was attempting to rise out of the ruin caused by an armed overthrow of its laws. They had been trampled in the dust, and there existed no body in the State to make an enabling act. Congress can not pass an enabling act for a State. It is neither one of the powers granted by the several States to the General Government, nor necessary to the carrying out of any of those powers, and all "the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people." It is preposterous to have expected at the hands of the rebel authorities in Louisiana that, previous to the overthrow of the State government, they should prepare a legal form of proceeding for its restoration. In the absence of any such legal form prepared beforehand in the State, and like absence of power on the part of the General Government, under the delegated powers of the Constitution, it follows that the power to restore a lost State government in Louisiana existed nowhere, or in "the people," the original source of all political power in this country. The people, in the exercise of that power, can not be required to conform to any particular mode, for that presupposes a power to prescribe outside of themselves, which it has been seen does not exist. The result must be republican, for the people and the States have surrendered to the United States, to that extent, the power over their form of government in this, that "the United States shall guarantee to every State a republican form of government."

It follows, therefore, that if this work of reorganizing and reestablishing a State government was the work of the people, it was the legitimate exercise of an inalienable and inherent right, and, if republican in form, is entitled not only to recognition, but to the "guaranty" of the Constitution.

The attention of the committee has, therefore, been directed to the inquiry how far this effort to restore constitutional government in Louisiana has been the work of the people. Those engaged in the traitorous attempt to destroy the government form no part of that people engaged in the patriotic effort to restore it. The government is to be made, if at all, for and by patriots and not by traitors. In answering another and essential question, whether a government once erected in that State will be able to maintain itself against domestic violence, traitors must be counted, but not for their voice in making the government itself. As well might the inmates of a State prison be enumerated and consulted upon determining the character of a code of laws designed for their government.

The evidence before the committee, and all the information they could obtain, satisfied them that the movement which resulted in the election of State officers, the calling of a convention to revise and amend the constitution, the ratification of such revisal and amendment by a popular vote, and the subsequent election of Representatives in Congress, was not only participated in by a large majority, almost approaching to unanimity, of the loyal people of the State, but that that loyal people constituted a majority of all the people of the State.

The committee go on to say that they entertain no doubt of the ability of this government to maintain itself against domestic violence if protected from enemies without.

Therefore, the committee recommended a resolution declaring Mr. Bonzano entitled to a seat as Representative from the First district of Louisiana.

A minority of the committee dissented from this conclusion. They say:

Has evidence been presented which authorizes this House to declare that the people of Louisiana, by any proper mode of expression, have changed the status in which they were placed by their own acts and established a republican government? Such only is the form contemplated by the Constitution; such only has any title to representation on this floor; such only is the United States bound to guarantee or authorized to recognize.

The indispensable quality of such government is that it shall emanate from the people; and not only must it be derived from the great body, but their agency in its organization must have been voluntary. The idea of restraint is incompatible with volition. The government must not only rest on the consent of the governed but that consent must not be procured by force or intimidation.

It is not sufficient that the result may show that a government apparently republican has been created, but the creation must be the exercise of a will unaffected by the presence of an overawing power.

The erection of a State government is a purely civil act. It has no affinity or connection with martial law. The civil power is alone capable to distinguish or declare the fact of its establishment or the essential conditions of its existence. The Congress of the United States is the only body having authority, primarily, to recognize the government of a State. Neither the Executive nor any subordinate military commander has capacity to incept or consummate its creation. The undersigned do not insist that an act of Congress is necessary as a prerequisite to enable the people of Louisiana to form a government, but the judgment of Congress must be passed on the result of the action of the people in the recognition of their act before Representatives can be entitled to admission on this floor. This House must be satisfied that their constitution is ordained in accordance with their deliberate and unforced will before it can lend its sanction to the act or recognize its validity. Two questions, therefore, are presented for consideration:

1. Did the great body of the loyal people of Louisiana, in fact, participate or clearly concur in the establishment of the government offered for recognition?

2. Was their act the result of their deliberate will and voluntary choice, unprocured by military interference?

The minority answer the first question by showing that only nineteen of forty-eight parishes in the State sent delegates to the constitutional convention, and that the votes on the ratification of the constitution were not representative of the vote of the State.

The minority answer the second question by citing testimony and documents tending to show that the military power was all-powerful, and that civil government did not in fact exist except in a weak condition.

The report in this case of Mr. Bonzano was not acted on by the House.

Reports similar in nature were made on the cases of Messrs. Field and Mann, but were not acted on by the House.¹

382. The Senate election cases of Fishback and Baxter, from Arkansas, in the Thirty-eighth Congress.

The Senate declined to give prima facie effect to credentials regular in form but from a State known to be kept from the duress of an armed foe only by a partial military protection.

¹House Reports Nos. 16, 17; 1 Bartlett, pp. 596, 597.

The Senate declined to admit persons elected under the auspices of a State government representing a portion only of the people in a State menaced by hostile armies.

On May 21, 1864,¹ the credentials of Hon. William Fishback, claiming a seat as a Senator from Arkansas, were presented in the Senate, and a motion was made that the oath be administered to Mr. Fishback. The credentials were in regular form, but a question was raised as to the status of the State of Arkansas.

On June 13,² after long debate, the Senate referred the credentials of Mr. Fishback, and also of Hon. Elisha Baxter, also claiming a seat from Arkansas, to the Committee on the Judiciary.

On June 27, 1864,³ the report was submitted to the Senate. It begins:

That the credentials presented are in due form, purporting to be under the seal of the State of Arkansas, and to be signed by Isaac Murphy, governor thereof; and if the right to seats were to be determined by an inspection of the credentials, Messrs. Fishback and Baxter would be entitled to be sworn as members of this body. It is, however, admitted by the persons claiming seats, and known to the country, that, in the spring of 1861, the State of Arkansas, through its constituted authorities, undertook to secede from the Union, set up a government in hostility to the United States, and maintain the same by force of arms.

The report then goes on to recite the history of secession, and then the later reorganization of the State government by loyal citizens, citing the cases of Robbins and Potter in the Senate, and the decision of the United States Supreme Court in the case of *Luther v. Borden* as to the rule of recognition of State governments. The committee conclude:

The number of persons in Arkansas who voted for President in 1860 was 54,053, less than one-fourth of whom, as appears from the statement of the claimants, took part in the reorganization of the State government. This, however, would not be fatal to the reorganization, if all who were loyal to the Union had an opportunity to participate, and the State was free from military control. Such, however, is understood not to have been the case. The President had not then, nor has he up to this time, recalled his proclamation, which declared the inhabitants of Arkansas in a state of insurrection against the United States, nor was there any evidence before the committee that said insurrection had ceased or been suppressed. At the time when the body which chose the claimants was elected, when it assembled, and at this time, the State of Arkansas is occupied by hostile armies, which exercises supreme authority within the districts subject to their control. While a portion of Arkansas is at this very time, as the committee are informed, in the actual possession and subject to the control of the enemies of the United States, other parts of the State are only held in subordination to the laws of the Union by the strong arm of military power. While this state of things continues, and the right to exercise armed authority over a large part of the State is claimed and exerted by the military power, it can not be said that a civil government, set up and continued only by the sufferance of the military, is that republican form of government which the Constitution requires the United States to guarantee to every State in the Union.

When the rebellion in Arkansas shall have been so far suppressed that the loyal inhabitants thereof shall be free to reestablish their State government upon a republican foundation, or to recognize the one already set up, and by the aid and not in subordination to the military to maintain the same, they will then, and not before, in the opinion of your committee, be entitled to a representation in Congress and to participate in the administration of the Federal Government. Believing that such a state of things

¹ First session Thirty-eighth Congress, *Globe*, pp. 2392, 2458.

² *Globe*, pp. 2895–2906; *Senate Journal*, p. 552.

³ 1 *Bartlett*, p. 641.

did not at the time the claimants were elected, and does not now, exist in the State of Arkansas, the committee recommend for adoption the following resolution:

Resolved, That William M. Fishback and Elisha Baxter are not entitled to seats as Senators from the State of Arkansas.”

On June 29,¹ after full debate, the resolution was agreed to, yeas 27, nays 8.

383. The Senate election case of Willey and Carlile, from Virginia, in the Thirty-seventh Congress.

From a State distracted by civil war the Senate admitted Senators chosen by a legislature representing no more than a third or fourth of the people.

The withdrawal of a Senator to join the foes of the Government was held to create a vacancy which a legislature could recognize, although the Senate had not expelled him.

Instance wherein the Senate gave immediate prima facie effect to credentials from a de facto government in a State disturbed by civil war.

On July 13, 1861,² in the Senate, Mr. Andrew Johnson, of Tennessee, presented the following credentials:

VIRGINIA, *to wit*:

The legislature of this State having, on the 9th day of July, 1861, in pursuance of the Constitution of the United States, chosen Waitman T. Willey, esq., a Senator of this State, to fill the vacancy which has happened by the withdrawal and abdication of James M. Mason, esq., I, Francis H. Pierpont, being governor of the Commonwealth, do hereby certify the same to the Senate of the United States.

Given under my hand and the seal of the Commonwealth this 11th day of July, 1861.

[L.S.]

FRANCIS H. PIERPONT.

Mr. Johnson also presented similar credentials certifying the election of John S. Carlile, esq., as the other Senator from Virginia, to fill the vacancy caused by the “withdrawal and abdication of Robert M. T. Hunter, esq.”

Mr. Johnson proposed that Messrs. Willey and Carlile take the oath at once, but Mr. James A. Bayard, of Delaware, objected, and moved that the credentials be referred to the Committee on the Judiciary for examination before the administration of the oath.

It appeared from the ensuing debate that the Senate had recently, on July 11, expelled Messrs. Mason and Hunter. But the election of Messrs. Willey and Carlile had occurred on July 9, two days before the expulsion. Mr. Bayard made the point that the legislature of Virginia, even if a valid legislature, might not create or assume a vacancy. The Senate itself could expel, but the legislature could not. Neither could the legislature determine that the charge of crime vacated the seats. Mr. Bayard further objected that if, as he believed, Virginia was out of the Union, she certainly should not have representation in the Senate. If she was in the Union then the Senate must take cognizance of her laws and constitution, and under those John Letcher, and not Francis H. Pierpont, was governor. The legislature which had elected Messrs. Willey and Carlile was only a portion of the real legislature of Virginia. Mr. Lazarus W. Powell, Senator from Kentucky, stated that they represented not more than a fourth, or at most a third, of the people of Virginia. Only

¹ Globe, pp. 3360–3368; Senate Journal, p. 677.

² First session Thirty-seventh Congress, Globe, pp. 103–109.

thirty or forty counties out of over one hundred and fifty were represented in the legislature. This statement was not denied.

In opposition to these objections it was urged by Mr. Johnson that in fact the vacancies did exist on July 9. Both Mason and Hunter had withdrawn from the Senate, had abdicated before July 9. That fact was notorious, and the Senate's resolution of expulsion on July 11 did not change that fact. Messrs. Jacob Collamer, of Vermont, and Lyman Trumbull, of Illinois, urged that the resolution of expulsion had relation to the time when Messrs. Mason and Hunter committed the criminal act of withdrawing and joining the foes of the Government. And the legislature of Virginia might take cognizance of that act as well as they might of the death of a Senator or a resignation. In the case of John F. Mercer the House of Representatives had settled that the executive of a State might take cognizance of the resignation of a Representative and order a new election.

As to the second objection it was urged that the loyal portion of the people of Virginia had a government which was at least the de facto government of the State; and Messrs. Willey and Carlile bore uncontested prima facie evidence of election from that government. There was no evidence from any quarter that these gentlemen were not the Senators-elect as their credentials purported to show.

Mr. Bayard's motion was disagreed to—yeas 5, nays 35.

Thereupon Messrs. Willey and Carlile appeared and took the oath.

384. The Senate election cases of Segar and Underwood, from Virginia, in the Thirty-eighth Congress.

The Senate declined to admit to a seat a person bearing uncontested credentials of election by a legislature representing a small fraction of the people in a seceding State.

On February 17, 1865,¹ in the Senate, Mr. Waitman T. Willey, of West Virginia, presented the credentials of Mr. Joseph Segar, as Senator-elect from the State of Virginia, to fill the vacancy caused by the death of Lemuel J. Bowden, who had been admitted to a seat as Senator from Virginia in 1863, at the time that certain counties of old Virginia had been organized and admitted to the Union as the new State of West Virginia. The condition of affairs was briefly set forth at a later day in a Senate report² submitted by Mr. George F. Hoar, of Massachusetts, in relation to a claim by Mr. Segar for compensation:

On the 23d of February, 1863, Mr. Bowden was elected Senator for Virginia by the legislature assembled at Wheeling, the great portion of Virginia, including Richmond, its former seat of government, being then in rebellion. He was admitted to his seat, the Senate thereby recognizing the legal existence of the State he represented. West Virginia was then erected into a separate State. The legislature of Virginia assembled at Alexandria and continued the functions of a State legislature of Virginia. Mr. Bowden continued to represent Virginia in the Senate until his death, on the 2d of January, 1864. December 8, 1864, the petitioner was elected to succeed Mr. Bowden, and prosecuted his claim with diligence. The Alexandria government was recognized as a valid State organization by President Lincoln in his amnesty proclamation of December 8, 1863. It gave its constitutional assent to the adoption of the thirteenth amendment of the Constitution of the United States, and its assent is treated by Mr. Seward in his proclamation announcing the adoption of the amendment as necessary thereto.

¹Second session Thirty-eighth Congress, Globe, pp. 845-849, 1433, 1434.

²Second session Forty-fifth Congress, Senate Report No. 509.

Mr. Charles Sumner, of Massachusetts, immediately upon the presentation of the credentials, objected to the immediate administration of the oath and moved that they be referred to the Committee on the Judiciary. Mr. Sumner urged that the so-called legislature of Virginia was little more than a common council of the city of Alexandria, while the greater part of Virginia was in armed resistance to the Government, and the President of the United States had declared the people of the State generally to be in insurrection. Certain counties, however, had been excepted, as stated in the debate by Mr. Jonathan Doolittle, of Wisconsin:

The Presidential proclamation declaring the population of certain States to be in insurrection excepted from its operation the counties of Alexandria city and county, Berkeley, Accomac, Northampton, Princess Anne, Norfolk, Norfolk city, Portsmouth city, and Elizabeth city and county, in the State of Virginia, containing a population of over 175,000; and these counties are now represented in the legislature at Alexandria.

In favor of the admission of Mr. Segar it was urged that the credentials were sufficient on their face, and that the right of Virginia to representation had been settled when Mr. Bowden was admitted to a seat.

Mr. John Sherman, of Ohio, pointed out that the term for which Mr. Segar had been elected would expire on March 4 next, and that it was hardly worth while to delay the pressing public business to determine this question. He therefore moved that the credentials lie on the table. This motion was agreed to—yeas 29, nays 13.

On March 9, 1865,¹ on the first day of the special session of the Senate, Mr. Jonathan Doolittle, of Wisconsin, presented the credentials of John C. Underwood as Senator-elect from the State of Virginia for the term beginning March 4 instant.

Mr. Charles Sumner, of Massachusetts, moved that the credentials be referred to the Committee on the Judiciary.

At this time the question of admission of Senators elected in Louisiana and Arkansas was before the Senate, and in view of the doubt as to the future treatment of the seceding States a motion to postpone the consideration of the credentials to the next session of Congress was agreed to without division.

Neither Mr. Underwood nor Mr. Segar were ever admitted to a seat.

385. The Senate election case of Cutler and Smith, from Louisiana, in the Thirty-eighth Congress.

The two Houses of Congress having by law declared the State of Louisiana in a state of insurrection, the Senate in 1864 did not admit persons bearing credentials therefrom.

On December 6, 1864,² the credentials of R. King Cutler and Charles Smith, as Senators from Louisiana, were presented in the Senate. At the same time memorials were presented containing the protests of citizens of Louisiana against their admission to the Senate. No proposition was made to administer the oath to the claimants, but on December 8 the credentials were referred to the Committee on the Judiciary.

¹ Second session Thirty-eighth Congress, Globe, pp. 1433, 1434.

² Ibid., pp. 5, 8.

On February 18, 1865,¹ the committee reported, reviewing at length the condition of affairs in Louisiana and concluding:

The persons in possession of the local authorities of Louisiana having rebelled against the authority of the United States, and her inhabitants having been declared to be in a state of insurrection in pursuance of a law passed by the two Houses of Congress, your committee deem it improper for this body to admit to seats Senators from Louisiana, till by some joint action of both Houses there shall be some recognition of an existing State government, acting in harmony with the Government of the United States, and recognizing its authority.

Your committee therefore recommend for adoption, before taking definite action upon the right of the claimants to seats, the accompanying joint resolution:

“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States do hereby recognize the government of the State of Louisiana, inaugurated under and by the convention which assembled on the 6th day of April, A. D. 1864, at the city of New Orleans, as the legitimate government of said State, entitled to the guarantee and all other rights of a State government under the Constitution of the United States.”

The report was debated on February 23, 24, and 25,² but was not finally acted on.

¹1 Bartlett, p. 643.

²Globe, pp. 1011, 1061, 1091, 1101.