

Chapter XVI.

INCOMPATIBLE OFFICES.

1. Provision of the Constitution. Section 485.¹
 2. Cases of Van Ness, Hammond, Baker, and Yell. Sections 486–489.
 3. Cases of Vandever, Lane, Schenck, and Blair. Sections 490–492.
 4. General examination as to military officers, paid and unpaid services, etc. Sections 493–496.²
 5. Cases of Mumford, Earle, Herrick, and Wheeler. Sections 497–500.
 6. Questions as to vacancies, contestants, etc. Sections 601–506.³
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485. No person holding any office under the United States shall be a Member of either House during his continuance in office.

No Member may, during the term for which he was elected, be appointed to any office which shall have been created or the emoluments of which shall have been increased during such term.

Section 6 of Article I of the Constitution provides:

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a Member of either House during his continuance in office.⁴

486. The New York case of John P. Van Ness in the Seventh Congress.

¹ Senate discussion of. (Sec. 563 of this volume.)

² Office of assistant district attorney of the United States not incompatible necessarily. (Sec. 993 of Vol. II.)

³ Investigation after a Member's resignation as to his acceptance of. (Sec. 2590 of Vol. III.)

Conclusions when contestants have accepted incompatible offices under the United States (secs. 46 and 746 of this volume), and office under State government (sec. 1003 of Vol. II).

A contestant must prove election before admitted to seat left vacant by returned Member's acceptance of an incompatible office. (Sec. 807 of this volume.)

⁴ On January 4, 1825, the subject of the appointment of Members of Congress to office was debated at length, and resulted in the passage of a resolution calling on the President for a list of all the Members appointed to office since the foundation of the Government. (First session Nineteenth Congress, Journal, pp. 114, 117; Debates, pp. 868–872.) On April 25 the President presented the desired information. (Journal, p. 471.)

A Member who had been appointed a militia officer in the District of Columbia by the President was deprived of his seat in the House.

A Member charged with acceptance of an incompatible office was heard in his own behalf during the debate.

On January 11, 1803,¹ Mr. John Bacon, of Massachusetts, from the Committee on Elections, made a report in the case of Mr. John P. Van Ness, a Representative from New York, who had in the recess between the first and second sessions of this Congress accepted an office under the United States. The committee found that this was in violation of the provision of Article I, section 6, of the Constitution, which provides that "No person holding an office under the United States shall be a Member of either House during his continuance in office," and recommended the adoption of this resolution:

Resolved, That John P. Van Ness, one of the Members of this House, having accepted and exercised the office of major of militia, under the authority of the United States, within the Territory of Columbia, has thereby forfeited his right to a seat as a Member of this House.

Mr. Van Ness, who was heard in his own behalf, urged that the provision of the Constitution was intended to apply only to civil officers; that he was an officer only of a dependent, or colonial district, of the United States; that his exclusion would mean the exclusion of militia officers of the States, since they were subject to the command of the United States; and that there were no emoluments to the office which he had accepted, and therefore could be no danger of corruption.

Mr. Bacon responded that the Constitution used the expression "any office," and the committee felt themselves bound by its terms.

Mr. John Randolph, jr., of Virginia, called for the yeas and nays, and asked the House, in the important precedent which it was about to establish, to vote unanimously to exclude even the shadow of Executive influence. The vote being taken on the resolution, it was agreed to—yeas 88, nays, 0.

487. A Member, Samuel Hammond, having accepted an Executive appointment, the House declared his seat vacant—. On January 30, 1805,² the House—

Resolved, That the President of the United States be requested to inform this House whether Samuel Hammond, a Member of this House, has not accepted an Executive appointment, and when.

Ordered, That Mr. Bryan and Mr. Eppes be appointed a committee to present the foregoing resolution to the President of the United States.

On February 1, President Jefferson, by message, informed the House that—
by a letter of the 30th of May last, from the Secretary of War to Samuel Hammond, a Member of the House, it was proposed to him to accept a commission of colonel commandant for the district of Louisiana, when the new government there should commence. By a letter of the 30th of June he signified a willingness to accept; but still more definitely by one of October 26.

The President stated further that a commission had been made out for him, bearing date the 1st day of October last, and forwarded before the receipt of his letter of October 26.

¹Second session Seventh Congress, Journal, pp. 280, 290 (Gales & Seaton ed.); Annals, pp. 395–399.

²Second session Eighth Congress, Journal, pp. 112, 113, 116 (Gales & Seaton ed.); Annals, pp. 1033, 1139.

On February 2, on motion,

Resolved, unanimously, That Samuel Hammond, a Member of this House from Georgia, having accepted an Executive appointment, has vacated his seat in this House.

Resolved, That a copy of the foregoing resolution be sent to the governor of Georgia by the Speaker of this House.

488. The election cases of Edward D. Baker, of Illinois, and Archibald Yell, of Arkansas, in the Twenty-ninth Congress.

In the cases of Baker and Yell the Elections Committee held that the acceptance of a commission as an officer of volunteers in the National Army vacated the seat of a Member.

Form of resolution declaring vacant the seat of a Member who had become an officer in the Army.

Instance wherein a Member, having appointed a future day for his resignation to take effect, remained and participated in the proceedings of the House before the arrival of that date.

On December 24, 1846,¹ Mr. Edward D. Baker, of Illinois, appeared in his seat, and on the same day the Speaker presented to the House Mr. Baker's letter announcing that he had forwarded to the governor of Illinois his resignation, to take effect from January 15, 1847.

On December 30,² some criticism having been made in relation to his position both as an officer of the Army and as a Member, Mr. Baker arose and resigned his seat, saying:

Mr. Speaker, I now resign my seat as Representative from the Seventh district in the State of Illinois in the Twenty-ninth Congress.

On January 5, 1847,³ on motion of Mr. Robert C. Schenck, of Ohio, the Committee on Elections were instructed to examine the status of Mr. Baker.

On February 26,⁴ the Committee on Elections reported that Edward D. Baker had not been entitled to a seat in the House since the acceptance by him of a commission as colonel of volunteers in the Army of the United States. The committee included in their report a consideration of a similar case relating to Mr. Archibald Yell, of Arkansas, and discussed them together in reference to the provision of the Constitution.

The question then arises, are the offices which have been accepted by these gentlemen offices under the United States, within the meaning of the Constitution? We think they are. If it be urged that the commission is derived from the State authorities, the answer is, that a commission does not confer the office; it is only the evidence of the right to exercise its functions. The commissions of Members of Congress, or, in other words, their certificates of election, are derived from the State authorities. Like the colonels, whose cases are now under consideration, their services are rendered to the United States, and they are paid by the United States, but their commissions are derived from the State authorities. It seems to the committee that the question whether the office is held under the United States or under a State does not depend upon the question who gave the commission, made the election, or conferred the appointment, but upon the question, What are the duties to be performed, the Government for whom they are to be performed, and to what government is the office responsible

¹ Second session Twenty-ninth Congress, Journal, p. 91; Globe, p. 82.

² Journal, p. 112; Globe, p. 99.

³ Journal, p. 136; Globe, p. 115.

⁴ Journal, p. 436; 1 Bartlett, p. 92. House Report No. 86.

for a failure to perform? Testing the offices in question by this standard, and there can remain but very little doubt. These colonels perform like services with those of the Regular Army. They are responsible to the laws of the United States for the manner in which they discharge the duties of their offices.

The committee believe that to hold an office in the Army of the United States is incompatible with the office of a Member of Congress, and that therefore the two offices can not be held at the same time by the same individual; that it is against the whole theory and spirit of our form of government. The Constitution intended that the President should have no power to control the action of Congress in any respect; that it should be perfectly independent. Now, suppose that every Member of Congress were a colonel in the Army in the service of the United States, and the President, who is by the Constitution the Commander in Chief of that Army, should come into the Halls of Congress and order each individual Member to retire immediately, under the penalties inflicted for disobedience to orders, to his post in the Army, what would become of Congress?

The committee therefore reported the following resolution:

Resolved, That Edward D. Baker has not been entitled to a seat as a Member of the House of Representatives since the acceptance and exercise by him of the military appointment of colonel of volunteers from the State of Illinois, in the service of the United States.

The report and resolution were submitted, and without discussion were laid on the table.¹ This action was undoubtedly taken on the report because Mr. Baker had already resigned, and Mr. Yell's case had been settled by the House by the admission of his successor.²

489. The election case of Thomas W. Newton, of Arkansas, in the Twenty-ninth Congress.

In 1847 Thomas W. Newton presented credentials showing his election in place of Archibald Yell, of Arkansas, who was an officer in the Army; and was admitted on his prima facie right.

The Elections Committee found that Thomas W. Newton, already seated on prima facie showing, was entitled to the seat made vacant by Archibald Yell's acceptance of an office in the Army.

On February 6, 1847,³ Thomas W. Newton appeared at the bar of the House, presented his credentials as a Representative in the Twenty-ninth Congress from the State of Arkansas in place of Archibald Yell, and asked that the oath to support the Constitution of the United States might be administered to him, and that he be permitted to take a seat in the House.

Mr. George W. Jones, of Tennessee, proposed the following:

Resolved, That Thomas W. Newton, having presented credentials of his election as a Member of this House from the State of Arkansas, and the House having received no information of the death, resignation, or disqualification of Archibald Yell, heretofore elected and qualified a Member of the Twenty-ninth Congress, the said credentials be referred to the Committee of Elections, and that the said committee report thereon at the earliest practicable day.

Mr. William P. Thomasson, of Kentucky, proposed an amendment in the nature of a substitute providing—

That Thomas W. Newton, who now presents his credentials of election as a Member of Congress from the State of Arkansas, be sworn as a Member and take his seat; and that the credentials of his election be referred to the Committee on Elections.

¹ Journal, p. 437; Globe, p. 527.

² See section 489 of this work.

³ Second session Twenty-ninth Congress, Journal, pp. 305, 306; Globe, p. 339.

Debate arose on these propositions, it being asserted that Mr. Yell had taken his seat at the last session of Congress, and that of his resignation the House had received no notice. Therefore there might be a conflict of his rights with those of Mr. Newton. Moreover, there was a question as to the existence of the vacancy which it was now proposed to fill.

On the other hand, it was urged that Mr. Newton should be sworn in on his *prima facie* right.

A document received from the executive department was then read, showing that Mr. Yell was serving with the Army in Mexico.

Thereupon the amendment and the resolution as amended were agreed to, and Mr. Newton took the oath.

On February 26¹ the Committee of Elections reported the following facts:

Archibald Yell was regularly elected as a Member of the Twenty-ninth Congress from the State of Arkansas; that some time in the month of July, 1846, he accepted a commission as colonel of volunteers raised in the State of Arkansas under an act of Congress approved May 13, 1846; that the commission thus accepted was made out by the State authorities, but that Colonel Yell and the volunteers under his command were, in said month of July, mustered into the service of the United States; that he yet continues in the service of the United States as a colonel, and receives his pay from the Government of the United States. And that Thomas W. Newton was, on the 14th of December, 1846, elected a Representative in the Twenty-ninth Congress from the State of Arkansas. To use the language of his certificate of election, he was elected "to fill the unexpired term of Archibald Yell." The committee have no legal evidence before them that Archibald Yell, at any time before the election of Mr. Newton, resigned his seat as a Member of Congress. The committee are of opinion that the facts above enumerated present precisely the same question for their consideration under the second resolution as is presented to the House in the first resolution.²

The committee are of opinion that under the fifth section of the first article of the Constitution of the United States the House has the right to ascertain and decide upon all questions of law and of fact necessary to be ascertained and decided in order to enable it to determine upon the rights of each individual who may claim to be one of its Members. And hence the committee instituted an inquiry * * * for the purpose of ascertaining whether such a vacancy existed as entitled the people of Arkansas to "elect a successor to Mr. Yell," and concluded "that at the time of the election of Thomas W. Newton there existed a vacancy from the State of Arkansas, occasioned by the acceptance by Archibald Yell of a commission to serve as a colonel of volunteers in the Army of the United States."

The committee, after giving the reasons, identical with those in the case of Mr. Baker,³ recommended the following:

Resolved, That Thomas W. Newton is entitled to a seat as a Member of this House from the State of Arkansas.

The report and resolution, when reported to the House, were without debate laid on the table.⁴

490. The Iowa election case of Byington v. Vandever, in the Thirty-seventh Congress.

A Member who had been mustered into the military service of the United States was held by the Elections Committee to have forfeited his right to his seat.

A Member having disqualified himself by accepting an office in the Army, a resolution for his exclusion may be agreed to by majority vote.

¹ 1 Bartlett, p. 92; House Report No. 86.

² See case of Edward D. Baker. Section 488.

³ See case of Mr. Baker.

⁴ Journal, p. 437; Globe, p. 527.

An instance wherein a contestant in an election case participated in debate on incidental questions arising out of the said case.

Form of resolution declaring vacant the seat of a Member who had become an officer in the Army.

On April 11, 1862,¹ the Committee on Elections reported on the Iowa case of Byington *v.* Vandever. There were two features in this case. It was claimed that sitting Member had not been elected on the day prescribed by the laws of Iowa. The committee briefly state that in their opinion Mr. Vandever had been duly elected and rightfully admitted to the seat.

The question which the report really presented was as to the qualifications of the sitting Member. After his election Mr. Vandever had offered to furnish a regiment for the service of the country, and on July 23, 1861, the President had, by authority of law, accepted this offer. On August 30, 1861, Mr. Vandever was appointed colonel of the Ninth Iowa Volunteer Infantry, and on September 24 was mustered into the actual service of the United States, where he was at the time of the making of the report. He had been commissioned by the governor of Iowa as colonel of militia, but the committee found that in respect to being a colonel of militia the commission was inaccurate. The report, which was unanimous, says:

Colonel Vandever, under the facts, claims, however, that he is simply an officer of the State of Iowa, because (as his letter would seem to imply), in his opinion, the volunteer force he enlisted and commands is simply a part of the militia of Iowa.

But whether Colonel Vandever is to be regarded as an officer in the Army proper of the United States, or as an officer of the militia of Iowa, is, in the opinion of the committee, of little importance. If he was actually mustered into the service of the United States, he was, by that act, placed in an office totally incompatible with that of Representative in Congress.

He has no right as Representative to absent himself from the House without leave, and if he does, is liable to be arrested by the officer of the House and returned and punished. But he is also bound as an officer of the Army to be with his regiment (perhaps a thousand miles distant), ready to execute the commands of his superior officer; and for his default is liable to punishment—it may be with death. Or his military superior may take him by force from his seat and duties in the House to his post in the Army.

That such a physical impossibility as is thus created, to execute the duties of both offices, renders them incompatible, would seem to be beyond a doubt.

But there is also that in the nature of the powers incident to the two positions which renders them incompatible. As Representative he may by his vote repeal the law or army regulation creating a duty or imposing a penalty which, as officer of the Army, he has neglected or incurred. Or in the exercise of his right (and perhaps duty) as Representative, to speak of the conduct of his superior military officers, he might utter words for which, as an officer of the Army, the superior would have an equal right to cause him to be tried by court-martial and punished.

These instances of conflicting irreconcilable duties and powers are sufficient to illustrate the incompatibility of the two offices; and that the acceptance by the same person of an office incompatible with another held by him, is a virtual resignation or forfeiture of the office first held, is too plain a proposition to need illustration. It results from the presumption that no man can intend, as well as from the policy that no man shall be permitted, to hold a trust the duties of which he has disqualified himself from performing. All the authorities agree in this principle.

And again admitting, for the sake of the argument, that Colonel Vandever was originally simply an officer of the militia of Iowa, still your committee are of the opinion that the act of mustering him into the military service of the United States made him an officer of the United States. The authority which an officer is bound to obey and to which he is responsible, and whose pay he receives, determines under what Government he acts and whose officer he really is.

¹ Second session Thirty-seventh Congress, Report No. 68; 1 Bartlett, p. 395.

But your committee are of the opinion that Colonel Vandever was really and truly appointed colonel, not of Iowa militia, but of the Ninth Regiment of Iowa Volunteer Infantry, and that the latter force is in no sense of the term a militia force, but is a force raised solely by the authority of the Federal Government, and hence that its officers (Colonel Vandever among the rest) hold their offices under the United States.

The commission, it is true, styles him colonel of the Ninth Infantry of the militia of the State of Iowa. But a commission does not confer the office. It is, at most, but evidence of an appointment. An error in the commission can not confer a right to an office to which the person holding the commission has not been appointed, neither can it take away his right to exercise the powers and receive the emoluments of one to which he has been appointed. There are numerous officers which the President commissions that are appointed by others. Suppose there should be an error in the commission he confers; certainly it would not take away the office. The appointment itself, and the entrance upon and actual discharge of the duties of an office (by the appointee), under a claim of right, are the real requisites constituting a person an officer, and decisive of the office to which he is appointed.

Neither does the fact that he was commissioned by the governor of Iowa militate against the position that Colonel Vandever is an officer of the United States. The act of Congress under which the force Colonel Vandever commands was raised authorizes the governors of the States where the force is raised to commission certain of the officers. The governor acts only by virtue of that law. He is the mere agent of the United States for the purposes indicated in the act. The appointment and commission would have been just as valid had any other agent been selected to have made and issued them.

But the force Colonel Vandever really was appointed to command, and with which he has ever since been in service as commander, was enlisted by direction of the President under the authority of the act of Congress entitled "An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property," which act could have been passed only under that clause of the eighth section of the Constitution which provides that Congress shall have power to raise and support armies.

The cases of Messrs. Van Ness and Yell were cited as conclusive precedents.

The committee therefore concluded that Colonel Vandever's case fell clearly within the provisions of the sixth section of Article I of the Constitution, and recommended that the House agree to this resolution:

Resolved, That William Vandever has not been entitled to a seat as a Member of this House since he was mustered into the military service of the United States as colonel of the Ninth Regiment of Iowa Volunteer Infantry, to wit, since the 24th day of September, A. D. 1861.

On May 8¹ the report came up in the House and a debate occurred on a motion to postpone until the next session of Congress. The contestant, who had been admitted to the floor and to debate under the provisions of a general order, participated in the debate on this preliminary question. The motion to postpone was agreed to—yeas 79, nays 49.

On January 20, 1863,² the report was debated on the constitutional question of qualification, and after a motion to postpone had been defeated—yeas 53, nays 74—the resolution was agreed to—ayes 65, noes 37.

Thereupon Mr. Horace Maynard, of Tennessee, raised the question of order that the resolution was in fact one of expulsion, and therefore required a two-thirds vote for its adoption.

This point of order was debated on January 20,³ and the Speaker⁴ overruled the point of order.

¹ Journal, pp. 655, 656; Globe, p. 2021.

² Third session Thirty-seventh Congress, Journal, p. 212; Globe, p. 403.

³ Globe, pp. 405, 406.

⁴ Galusha A. Grow, of Pennsylvania, Speaker.

Thereupon Mr. Maynard appealed, and on January 21¹ the appeal was laid on the table—yeas 82, nays 36.

Thereupon Mr. Elihu B. Washburne, of Illinois, moved to reconsider the vote whereby the resolution was agreed to, and the motion to reconsider was agreed to—yeas 70, nays 64.

Mr. Washburne then moved to postpone the subject until March 3, the last day of the session. The question was debated at length,² both as to the status of Colonel Vandever in the light of the constitutional requirement and also in the light of the decision of the Speaker that a majority might pass the resolution.

After the debate, the House, by a vote of yeas 78, nays 68, agreed to the motion to postpone.³

No action was taken on March 3.

On February 5, 1863,⁴ Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, reported a resolution discharging the Committee on Elections from the further consideration of the case of Byington v. Vandever.

He explained that the contestant wished to be heard on that branch of the case which included the question whether Mr. Vandever was actually elected.

Thereupon it was moved to amend the resolution of the committee by substituting resolutions declaring that Mr. Vandever was not elected, and that Mr. Byington was elected.

After debate the proposed substitute was disagreed to. A motion to reconsider was made, and a motion to lay the motion to reconsider on the table. The latter motion was agreed to—yeas 84, nays 28.

Then the resolution of the Committee on Elections was agreed to.

491. The Senate election case of Stanton v. Lane, of Kansas, in the Thirty-seventh Congress.

A Senator-elect who had, before qualifying, exercised the authority of an army officer de facto, was held not to have vacated his seat.

A State executive having issued credentials in due form on the assumption that a Senator had vacated his seat by accepting an army office, the credentials were referred and the bearer was not seated.

Instance wherein a Senator participated in debate on credentials of a claimant for his seat.

On July 12, 1861,⁵ the credentials of Frederick P. Stanton, claiming a seat from Kansas, were presented in the Senate. Mr. James H. Lane, who occupied the seat claimed by Mr. Stanton, was present in the Senate and spoke on the motion to refer the papers to the Committee on the Judiciary, which reference was made.

On August 2, 1861,⁶ the Senate Committee on the Judiciary reported in the contested case of Stanton v. Lane, of Kansas, finding the following facts:

That the sitting member, the Hon. James H. Lane, was, by the Executive, appointed a brigadier-general in the volunteer forces of the United States on the 20th of June, 1861; that he accepted said appointment, and was legally qualified to perform its duties.

¹ Journal, p. 215; Globe, p. 427.

² Globe, pp. 428-434.

³ Journal, p. 219; Globe, p. 434.

⁴ Journal, pp. 338, 401; Globe, pp. 742, 964-971.

⁵ First session Thirty-seventh Congress, Globe, p. 82.

⁶ 1 Bartlett, p. 637; Globe, p. 406.

In the opinion of the committee the office of brigadier-general under the United States is incompatible with that of member of either House of Congress. By accepting the office of brigadier-general, the sitting member, Mr. Lane, virtually resigned his seat in the Senate, and it became vacant at that time.

On the 8th of July, 1861, the governor of Kansas gave the contestant, Mr. Stanton, a commission in due form appointing him a Senator of the United States from the State of Kansas to fill the aforesaid vacancy, and by virtue of that commission Mr. Stanton now claims his seat.

The committee therefore recommended resolutions declaring Mr. Lane not entitled to the seat, and declaring Mr. Stanton entitled to a seat.

On August 6¹ the report was considered but not acted on.

At the next session of Congress, on December 18, 1861,² when the case came up it was urged that the committee had not been fully informed when it made its report; that the brigadier-generalship to which Mr. Lane had been appointed was not in existence at the time of his appointment; and that since the office had been created he had not signified his acceptance. The Senate by a vote of yeas 26, nays 9, recommitted the report.

On January 6, 1862,³ the Judiciary Committee reported again, stating that the committee unanimously found that the status of the case was not changed by the additional evidence.

On January 8, 13, 15, and 16⁴ the subject was debated at length on a motion to strike the word "not" from the first resolution of the committee:

Resolved, That James H. Lane is not entitled to a seat in this body.

It was contended on the one side that Senator Lane had been appointed to the office of brigadier-general; that such office existed *de facto* if not *de jure*; that he accepted the office, taking an oath, issuing a declaration to the people of Kansas, and on June 26, 1861, had as brigadier-general made requisitions for supplies. If the President had no authority to make the appointment at the time, yet subsequent legislation had legalized such emergency acts.

On the other hand, it was insisted that on June 20, 1861, there was no such office as that to which Mr. Lane was said to have been appointed, but that the appointment was in anticipation of the creation of the office; that Mr. Lane did not qualify as a Senator until July 4, 1861, and prior to that had told the President that he would not accept the army office, having learned that it was incompatible with his office as Senator. The cases of Van Ness, Herrick, Earl, and Mumford were cited to show that his appointment while a Senator-elect did not preclude him from electing to accept the office of Senator by resigning the military office before the meeting of the Senate and his qualification. It was further urged that the oath he took as a brigadier-general was not technically the oath required for the office. Mr. Charles Sumner, of Massachusetts, who opposed the report of the committee, summarized the argument:

First, that at the time in question General Lane was not a Senator; and secondly, that at the time in question he was not a brigadier. The whole case is unreal. It is a question between an imaginary Senator and an impossible brigadier; or rather it is a question whether an imagined seat in this body was lost by any acts under an impossible military commission.

¹ Globe, pp. 450–454.

² Second session Thirty-seventh Congress, Globe, pp. 127–130.

³ Globe, p. 185.

⁴ Globe, pp. 222, 290, 336, 359.

After a thorough debate, on January 16,¹ the motion to strike out the word “not” was agreed to—yeas 24, nays 16.

Then the amended resolution, declaring Mr. Lane entitled to the seat, was agreed to.

The second resolution, relating to Mr. Stanton, was postponed indefinitely.

492. The case relating to the alleged disqualification of Messrs. Blair and Schenck in the Thirty-eighth Congress.

A Member-elect was held to have disqualified himself by continuing to hold an incompatible office after the meeting of the Congress.

A Member-elect may defer until the meeting of the Congress his choice between the seat and an incompatible office.

Form of resolution declaring vacant the seat of a Member-elect who has accepted an incompatible office.

On June 13, 1864, Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, made a report² on the cases of Gen. Robert C. Schenck, of Ohio, and Gen. Frank P. Blair, jr., of Missouri, who had held commissions in the Army after their election as Members of Congress. This report gives the following summary of precedents:

The House has ever been awake to this constitutional guaranty of its independence (Art. I, sec. 6): “No person holding any office³ under the United States shall be a member of either House during his continuance in office”, and has never failed when occasion required to resist any invasion of its privileges in this particular. In the Seventh Congress (1803) John F. Van Ness, a Representative from the State of New York, accepted the office of major of the militia, under the authority of the United States, within the Territory of Columbia (District of Columbia), and after due examination and report by the Committee of Elections the House unanimously declared that he had “thereby forfeited his seat as a Member of this House.” (Contested Elections, Clark and Hall, p. 122.)

In the Twenty-ninth Congress (1847) Archibald Yell, a Representative from the State of Arkansas, while a Member, accepted the office of colonel of a regiment in the volunteer service of the United States in the war with Mexico. He received his commission from the governor of Arkansas, but was mustered into the service of the United States. The people of Arkansas treated this act as vacating his seat as a Representative in Congress and elected Thomas W. Newton in his place. When he appeared at the bar of the House to be sworn in, discussion arose upon the question whether the House had any evidence before it of the acts of Mr. Yell which were alleged to have vacated his seat, and the Globe contains this statement (vol. 17, p. 341): “It now appears by an official statement, made in reply to a call of the House, by the Adjutant-General, of the names of Members of Congress who had received commissions and been mustered into the service of the United States, that Archibald Yell was among the number. As soon as the document was read Members withdrew all opposition. Mr. Newton was then qualified and took his seat.” The Committee of Elections, to whom his credentials were referred, at a subsequent day of the session made a report (No. 86, second session Twenty-ninth Congress), including also the subject matter of an inquiry “whether the Hon. Edward D. Baker, a Representative from the State of Illinois, having accepted a commission as colonel of volunteers in the Army of the United States, and being in the service of and receiving compensation from the Government of the United States as such army officer, has been entitled since the acceptance and exercise of said military appointment to a seat as a Member of the House of Representatives.”

This report concluded with a resolution that “Edward D. Baker has not been entitled to a seat as a Member of the House of Representatives since the acceptance and exercise by him of the military

¹ Senate Journal, p. 117; Globe, p. 363.

² House Report No. 110, first session Thirty-eighth Congress.

³ Discussion of the distinction in the Government service between an officer and an employee. (Decisions of the Comptroller, vol. 4, p. 696.)

appointment of colonel of volunteers from the State of Illinois, in the service of the United States," and also with another resolution that "Thomas W. Newton is entitled to a seat as a Member of the House from the State of Arkansas." This report was not made till February 26, 1847, only seven days before the end of the session. An ineffectual attempt was made on the last day of the session (Globe, vol. 17, p. 573) to call up the report for action. No opposition to the report itself is disclosed upon the record, and the failure to act upon it may fairly be imputed to the pressure of business upon the last day of the session. The same question arose in the last Congress. William Vandever, a Representative from the State of Iowa, accepted, while such Representative, the office of colonel of the Ninth Regiment of Iowa Volunteers. He received his commission from the governor of Iowa, but was mustered into the service of the United States under the law authorizing the raising of volunteers to suppress the rebellion. The question whether he had not forfeited his seat by accepting and discharging the duties of the military office thus conferred upon him was directly raised before the Committee of Elections, by whom an elaborate report was made to the House (Report No. 68, second session Thirty-seventh Congress), concluding with a resolution "That William Vandever has not been entitled to a seat as a Member of this House since he was mustered into the military service of the United States as a colonel of the Ninth Regiment Iowa Volunteer Infantry, to wit, since the 24th day of September, A.D. 1861." This resolution was adopted without a division (Globe, vol. 47, p. 405). The vote upon this resolution was afterwards reconsidered and its further consideration postponed until the 3d of March, when, in the pressure of business on the last day of the session, it was not called up.

The report also gives the following precedent as bearing upon the branch of the question raised particularly by the case of General Schenck:

In October, 1816, Samuel Herrick, who was then holding the office of United States district attorney for the district of Ohio, was elected one of the Representatives of that State in the Fifteenth Congress, whose regular session did not commence till one year from the December following. Mr. Herrick continued to hold the office of United States district attorney until November 29, 1817, when he resigned that office and entered upon the duties of the office of Representative in Congress at the commencement of the regular session on the first Monday of the following month. Upon a proper reference to the Committee of Elections an elaborate report was made in conformity with the views here taken, and concluding with a resolution "That Samuel Herrick is entitled to a seat in this House." (Contested Elections in Congress, p. 287.) This report was very fully and ably discussed, and some doubts seem to have been at first entertained whether, by discharging the duties of the office of United States district attorney while he was a Representative-elect, Mr. Herrick had not disqualified himself from holding the office of Representative. The resolution confirming him in his seat was nevertheless adopted. Its position was subsequently ratified by the same Congress in two or three other cases involving the same principle, with little or no opposition. And it is believed that the practice of the House from that time to the present has been uniformly in conformity with this position.

The report concluded with the recommendation of the passage of two resolutions, which summarize the two cases:

Resolved, That Robert C. Schenck, having resigned the office of major-general of volunteers, which he then held, on the 13th day of November, 1863, which resignation was accepted November 21, 1863, to take effect December 5, 1863, was not, by reason of having held such office, disqualified from holding a seat as a Representative in the Thirty-eighth Congress, whose first session commenced on the 7th day of December, 1863.

Resolved, That Francis P. Blair, jr., by continuing to hold the office of major-general of volunteers, to which he was appointed November 29, 1862, and to discharge the duties thereof till January 1, 1864, the date of his resignation, did thereby decline and disqualify himself to hold the office of Representative in the Thirty-eighth Congress, the first session of which commenced on the first Monday in December, 1863.

The facts on which these resolutions and the report were based were transmitted to the House in a message from the President on April 28, 1864.¹ This message

¹First session Thirty-eighth Congress, Globe, p. 1939.

was referred to the Committee on Elections, which reported as outlined above. Later, on May 2,¹ the President transmitted additional facts in response to the request of the House. The committee reported on June 24,² and on June 29 the resolutions were adopted without debate.³

Meanwhile, on May 11, 1864, in the Senate Mr. Davis offered a resolution⁴ referring to an alleged arrangement whereby Generals Blair and Schenck were to be allowed to give up temporarily their commissions in the Army while they were in the House, with the understanding that they might withdraw the resignations and return to the field, and declaring such arrangement in derogation of the Constitution. The resolution was discussed May 16,⁵ and referred to the Committee on the Judiciary. On June 30 the Senate agreed to the following resolution, which the Judiciary Committee had reported on July 15:⁶

Resolved, That an officer of the United States whose resignation has been duly accepted and taken effect, or who, having been elected a member of either House of Congress, qualifies and enters on the discharge of the duties of a Member, is thereby, in either case, out of the office previously held, and can not be restored to it without a new appointment in the manner provided by the Constitution.

In the first session of the Thirty-seventh Congress, July 12, 1861, the question was raised by a resolution introduced by Mr. Vallandigham, reciting that Gilman Marston, of New Hampshire; James E. Kerrigan, of New York; Edward McPherson and Charles J. Biddle, of Pennsylvania, and Samuel R. Curtis, of Iowa, were rumored to have been sworn into the military service of the United States, and that James H. Campbell, of Pennsylvania, had admitted on the floor of the House that he had been so sworn in, and directing the Committee of Elections to inquire whether Members of the House might constitutionally hold positions under the Government in the military service. Messrs. Curtis and Campbell contended that they held commissions from the governors of their States, and were merely State officers loaned to the National Government for the time being. The resolution was laid on the table after a slight discussion—92 yeas to 51 nays. Mr. Vallandigham had previously brought this subject to the attention of the House on July 4 before the organization of the House was effected.⁷

The subject was also brought up informally in the House in the Fifty-fifth Congress, during the war with Spain.⁸

It has been decided that an officer on the retired list of the Army is entitled to receive the salary appropriate to his army rank while he is also in receipt of the salary of a Member of Congress.⁹

¹ Globe, p. 2031.

² Globe, p. 3242.

³ Globe, p. 3389.

⁴ Globe, p. 2218.

⁵ Globe, p. 2275.

⁶ Globe, p. 3412.

⁷ First session Thirty-seventh Congress, Globe, pp. 3, 93.

⁸ Second session Fifty-fifth Congress, Record, pp. 5406, 5407, remarks of Messrs. Joseph W. Bailey, of Texas, and Charles H. Grosvenor, of Ohio.

⁹ Decision of Second Comptroller C. H. Mansur in the case of Maj. Gen. Daniel E. Sickles, a Member of the Fifty-third Congress, February 24, 1894.

493. The examination of 1898 as to incompatible offices.

Conclusion of the Judiciary Committee that the member of a commission created by law to investigate and report, but having no legislative, judicial, or executive powers, was not an officer within the meaning of the constitutional inhibition.

Visitors to academies, regents, directors, and trustees of public institutions appointed by the Speaker under the law are not regarded as officers within the meaning of the constitutional inhibition.

Discussion of the meaning of the word "offices" as used in the constitutional provision prohibiting the Member from holding such as are incompatible.

On December 21, 1898,¹ this resolution was agreed to by the House:

Resolved, That the Committee on the Judiciary be, and it is hereby, instructed to ascertain and report to this House—

First. Whether any Member of the House has accepted any office under the United States; and

Second. Whether the acceptance of such office under the United States has vacated the seat of the Member accepting the same.

On February 21, 1899, Mr. David B. Henderson, of Iowa, from that committee, submitted a report² less in accordance with the resolutions of instruction.

After a careful examination of facts, a review of arguments, and a discussion of the origin and framing of the clause of the Constitution under which the questions arose, the report proceeds as follows in regard to the two branches of the question:

(1) As to members of commissions:³

While it may be admitted that all of the commissions, examining boards, regents, etc., considered by the committee do differ in many particulars as to their duties, still the legal principles involved in the consideration of this class of public servants apply to all of them, and therefore they will be considered together in discussing the law in respect to them.

It can not be contended that every position held by a Member of Congress is an office within the meaning of the Constitution, even though the term office may usually be applied to many of these positions. We are therefore led to an analysis and discussion of the word "office."

The chairman of a committee of Congress is in one sense an officer holding a position different from other members of the committee. Marks of honor and distinction are given to Members of Congress in many ways, but all incident to or growing out of their position as a Member of Congress. It is a mark of distinction to be selected as members of escorts to those of our number who die; designations are made of committees to notify the Senate and the President of certain matters. The mind will

¹Third session Fifty-fifth Congress.

²House Report No. 2205.

³On March 2, 1905 (Third session Fifty-eighth Congress, Record, pp. 3849–3851), in the Senate, Mr. Louis E. McComas, of Maryland, submitted the following summary of instances wherein members of Congress had been appointed to commissions:

"The appointment by the President of Senators, Representatives, and Federal judges upon commissions to inquire into and settle or arbitrate international disputes in cases of special importance or emergency has been so strongly opposed by several eminent Senators in debate here that I concluded to make and place in the Record the full list of such commissions in their order. The category of the names of those who have served on the commissions and the public events to which the commissions have related, in my humble opinion, prove the proposition with which I will conclude.

"It has been said that the practice is unconstitutional; that Senators and other officials thus hold two offices—two incompatible offices—at the same time; that the practice is hurtful to the country,

readily run over a list of many positions of trust and honor that are conferred upon Members of Congress where no pretense will be made that they are offices within the meaning of the Constitution.

In *United States v. Hartwell* (6 Wall., 393) it is laid down that "an office is a public station or employment conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emolument, and duties."

Elsewhere it is held that an office is "an employment on behalf of the Government, in any station or public trust, not merely transient, occasional, or incidental." (20 John., Rep. 492, 7th Ohio State, 556.)

A careful consideration of all of the positions above referred to will show that they are merely transient, occasional, or incidental in their nature, and none of them possess the elements of duration, tenure, or emolument. All of these appointees were but instruments to procure detailed information

injurious to the courts and the House; that it lessens the constitutional power of the Senate and has not benefited the country.

In *Hartwell's* case (6 Wall., 385) it was said that—

"The term [office] embraces the idea of tenure, duration, emolument, and duties. The duties must be continual and permanent, not occasional or temporary."

"When President McKinley sent in the names of two Senators and one Representative for confirmation as commissioners to visit Hawaii, the Senate declined to take action thereon. An eminent Senator expressed the view of the Senate:

"If these gentlemen are to be officers, how can the President appoint them under the Constitution, the office being created during their term, or how can they hold office and still keep their seats in Congress? If they are not officers, under what constitutional provision does the President ask the advice and consent of the Senate to their appointment?"

"That membership upon such temporary commissions is not the holding of an office, or at least is not the holding of an incompatible office, is affirmed by the practice and by the contemporary construction of all the departments of the Government during a century. The recital of the instances I give is the best evidence upon this point. The most liberal view as to incompatible offices was shown by the acts of the great Chief Justice and our earlier Presidents.

"Chief Justice John Marshall accepted that office February 4, 1801, and continued to act as Secretary of State under President John Adam, who had appointed him to the highest judicial office, until March 4, 1801. President Jefferson on that day formally appointed Chief Justice Marshall Secretary of State 'until a successor shall be appointed'—not an appointment for a definite term, but for a temporary exigency.

"In like manner Gen. Samuel Smith, a Member of Congress from Maryland, was actually in charge of the Navy Department under President Jefferson from March 31, 1801, until June 13, 1801.

"The offices thus held were held only by an indefinite tenure temporarily, but I am not now concerned with the holding of incompatible offices. I have confined my research to the special commissions constituted in whole or part of Senators and Representatives and Federal judges.

"It is a suggestive fact that the Presidents and Congress from the earliest days of the Republic continued to practice this method of meeting great emergencies. The most striking instances occur at the very beginning of our Government and were sanctioned by the men who made the Constitution. Those who had the most to do with that instrument made the least objection to the practice of sending such officials upon such special missions.

"If the practice be unconstitutional, President Washington and John Jay, who had so much to do with the making and adoption of the Constitution, were the first violators of it.

"President Washington on April 19, 1794, appointed Chief Justice Jay to be envoy extraordinary to Great Britain, and empowered him to negotiate the treaty. The result was the treaty of amity, commerce, and navigation of November 19, 1794, so famous in our history. This treaty, which accomplished the evacuation of the British posts in our country, really avoided a war with Great Britain. Mr. Jay, who negotiated it, was Chief Justice of the Supreme Court from September 26, 1789, until June 29, 1795. He was Chief Justice during the whole term of his special mission to Great Britain.

"Oliver Ellsworth, of Connecticut, early took the view of the proposition I am now maintaining, the view which has been so strongly and so well stated here by the very able Senator from Connecticut [Mr. Platt], who now honors me with his attention. Ellsworth was appointed by President John Adams

for the better information and guidance of Congress and are wholly lacking in the essential elements of an office within the meaning of the Constitution.

“A public office is the right, authority, and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public.” (Mechem’s Public Offices and Officers, sec. 1; *Matter of Hathaway*, 71 N.Y., 238–243; 3 *Greenleaf* (Me.), 481; *Public Officers*, Throop, sec. 6; *Olmstead v. The Mayor*, etc., 42 N.Y. Sup. Ct., 481.)

It has been held that these functions must be either legislative, executive, or judicial, and that to constitute the person an officer he must have conferred upon him either legislative, executive, or judicial powers. (Mechem’s Public Offices, etc., sec. 4, and cases cited.)

a joint envoy extraordinary to France, with William Vans Murray, of Maryland, and William R. Davie, of North Carolina, on February 26, 1799. The convention of peace, commerce, and navigation of September 30, 1800, was the result of this commission’s work. That treaty avoided actual hostilities with France, and it also secured a recognition by France of the rights of neutral vessels and prospective indemnity for depredations by privateers and men-of-war. The echoes of this treaty still linger in the spoliation claims in our annual appropriation bill to-day.

“Mr. Ellsworth did not resign the office of Chief Justice until after the making of the treaty.

“In 1800 Senator Uriah Tracy during the summer visited and examined the state of the garrisons in the Northwest Territory, and it appears that Tracy was paid \$1,232 for compensation and \$1,985.05 for expenses, in addition to his pay as a Senator, without objection. Mr. Wolcott, Secretary of the Treasury, maintained that Senator Tracy’s employment was an executive agency and not an office of the United States, contending that such powers pertained to the Executive and had been generally exercised. Compared with our view to-day, such construction was very liberal.

“David Meriwether, of Georgia, was a Member of the House of Representatives from 1802 to 1807. Under President Jefferson Mr. Meriwether was appointed, on April 28, 1804, a commissioner to conclude a treaty with the Creek Indians until the end of the next session of the Senate.

“The Indians were then regarded as dependant and yet semi-independent nations.

“Samuel Nelson, of New York, was associate justice of the Supreme Court from 1845 to 1872, and he was appointed by President Grant on February 10, 1871, as one of the members of the Joint High Commission to negotiate the “Treaty of Washington.” This treaty was concluded May 8, 1871, and signed by Justice Nelson. It is the historic treaty for the settlement by arbitration of the Alabama claims, for the determination of fisheries rights and claims, canal navigation, transit of merchandise in bond, and the submission of the boundary question of Article I of the treaty of 1846 to arbitration by the Emperor of Germany.

“Frank Morey, of Louisiana, while a member of the House of Representatives, was appointed by President Grant honorary commissioner to the Vienna Exposition of 1873, under the act of February 14, 1873.

“It is not a very marked case, and yet it comes within the rule of objection stated by the very strict construction I have heard maintained on this floor.

“Under the act of August 5, 1892, Senator William B. Allison, of Iowa, the leader of the Senate, its guide, philosopher, mentor, and friend, who now sits before me, Senator John P. Jones, of Nevada, and Representative James B. McCreary, of Kentucky, were appointed by President Harrison on November 3, 1892, Commissioners to the International Monetary Conference, held at Brussels November 22, 1892.

“President Harrison, on June 6, 1892, appointed John M. Harlan, then and ever since an associate justice of the Supreme Court, and John T. Morgan, then and ever since a Senator of the United States from Alabama, as arbitrators on behalf of the United States under the treaty of February 29, 1892, between the United States and Great Britain, to determine the jurisdictional rights of the United States in waters of the Bering Sea for the preservation of the fur-seal herds.

“President Cleveland, on January 4, 1896, appointed David J. Brewer, then and ever since an associate justice of the Supreme Court, and Richard H. Alvey, then and continually until January 1, 1905, chief justice of the court of appeals of the District of Columbia, to be members of the Venezuelan Boundary Commission. Justice Brewer was president of the Commission, a tribunal appointed by

Says the author:

“SEC. 4. Office involves delegation of sovereign functions. The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.”

This involves necessarily the power to (1) legislate, or (2) execute law, or (3) hear and determine judicially questions submitted.

Therefore, mere power to investigate some particular subject and report thereon, or to negotiate

President Cleveland to make an independent examination of the merits of the case respecting a boundary line between Venezuela and Great Britain. Neither Government was formally represented before the Commission, but the question before it was afterwards, and partly because of the investigation by this Commission, submitted to arbitration between Great Britain and Venezuela practically at the instance of our Government.

“President Cleveland appointed William L. Putnam, then and ever since a circuit judge of the United States, on July 11, 1896, a commissioner under the convention of February 8, 1896, between the United States and Great Britain, to determine through the joint commission the British claims for damages in certain cases additional, and also in the cases mentioned in the findings of fact by the fursal tribunal at Paris in 1893. Judge Putnam was our commissioner, and Judge George Edward King, of the supreme court of Canada, was the commissioner on the part of Great Britain, and on December 17, 1897, this commission awarded damages in favor of British claimants to the amount of \$473,151.26.

“President McKinley, on April 14, 1897, appointed Senator Edward O. Wolcott, of Colorado, the eloquent and brilliant Senator the tidings of whose death we have received today, and whose death has caused profound sadness in this Senate and among all the people of the country, special envoy to France, Germany, Great Britain, and other countries to seek an international agreement to fix the relative value between gold and silver under the act of March 30, 1897.

“President McKinley, on July 13, 1898, appointed Senator Shelby M. Cullom, of Illinois, the present occupant of the chair, and Senator John T. Morgan, of Alabama, and Representative Robert R. Hitt, of Illinois, to serve until the end of the next session of the Senate, as commissioners to recommend legislation concerning the Hawaiian Islands under the joint resolution of July 7, 1898. It is true the Senate declined to confirm them when asked and did not appear to regard this as other than a legislative committee, not requiring executive nomination and confirmation by the Senate.

“President McKinley, on July 16, 1898, appointed Senator Charles W. Fairbanks, of Indiana; Representatives Nelson Dingley, of Maine, and Senator George Gray, of Delaware, as a joint high commission to settle differences between Great Britain and the United States in respect of Canada, and this commission was appointed under the deficiency act of July 7, 1898. Senator Gray resigned later to accept a place upon another commission. Mr. Dingley served until his death. Senator Charles J. Faulkner, of West Virginia, and Representative Sereno E. Payne, of New York, were appointed to fill these vacancies. Senator Fairbanks and former Senator Faulkner and Mr. Payne still remain members of that Commission.

“President McKinley, on September 13, 1898, appointed Senator Cushman K. Davis, of Minnesota, Senator William B. Frye, of Maine, and Senator George Gray, of Delaware, as members of a commission to negotiate a treaty with Spain. This Commission met at Paris on October 1, 1898, and concluded the treaty of Paris on December 10, 1898, the famous treaty which restored peace between the two countries, assured the independence of the people of Cuba, the acquisition of Porto Rico, Guam, and the Philippines by the United States, and, all must concede, greatly advanced the prestige of the United States.

“President Roosevelt, on March 4, 1903, appointed Senator Henry Cabot Lodge, of Massachusetts, a member of the tribunal to consider and decide the boundary line between Alaska and Canada under the provisions of the convention between the United States and Great Britain signed at Washington, January 24, 1903. The decision of the Alaskan Boundary Tribunal, rendered October 20, 1903, was very favorable to the contention of the United States, and of marked importance in settling the last of the series of questions of difference between the two nations.”

a treaty of peace, or on some commercial subject, and report without power to make binding on the Government, does not constitute a person an officer.

"It (public office) implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office." (3 Greenleaf (Me.), 481; Mechem's Public Office, etc., sec. 2; *Olmstead v. The Mayor*, 42 N. Y. Sup. Ct., 481; *Public Officers*, Throop, sec. 6.)

Again, the employment must not be merely transient, occasional, or incidental.

In *United States v. Hartwell* (6 Wall., 385) the court held that the term public office embraces the ideas of tenure, duration, emolument, and duties, and that the duties were continuing and permanent, not occasional or temporary.

In *United States v. Germaine* (99 U. S. Sup. Ct., 508) the question of who is or who is not a public officer was again up, and the court said:

"If we look to the nature of defendant's employment we think it equally dear that he is not an officer. In that case (referring to *United States v. Hartwell*) the court said the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us the duties are not continuing and permanent, and they are occasional and intermittent. * * * He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised. * * * He is but an agent of the Commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. * * * There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case."

The duties of the commissioners appointed under the statutes (to which attention will be called, are not continuing or permanent; they have no place of business for the public use, or even for their own use; they give no bond and take no oath. In fact, they are mere agents appointed by direction of Congress for the purpose of gathering information and making recommendations for its use if the Congress sees fit to avail itself of the labors of the commission. The commissioners appointed under these statutes or resolutions can not be compelled to attend or act, and in the broadest sense they are mere agents of the Congress. These commissioners are not to execute any standing laws which are the rules of action and the guardians of rights, nor have they the right or power to make any such law, nor can they interpret or enforce any existing law.

Under a statute of Maine the governor was authorized "to appoint one or more agents for the preservation of timber on the public lands and for other purposes," and the judges held that these agents were not a civil office of profit under the State, although they were entitled to compensation. (See 3 Greenleaf Reports (Me.), p. 481.)

In *United States v. Hendee* (124 U. S., 309) it was held that a paymaster's clerk in the Navy is an officer of the Navy, and in *United States v. Mouat* (124 U. S., 303) it was held that such paymaster's clerk, appointed by a paymaster in the Navy, with the approval of the Secretary of the Navy, is not an officer of the Navy in the sense that he is an officer of the United States.

The constitution of the State of New York, 1846, article 6, section 8, prohibits the judges of the court of appeals and justices of the supreme court from exercising any power of appointment to public office.

Section 16, chapter 280, laws of 1847, conferred upon the chancellor power to issue a commission to some person empowering him to act as a surrogate in a particular case when by reason of statutory disqualifications the officers designated to act could not do so. It was contended that such person when designated to act as surrogate became a public officer, inasmuch as for the time being and in the matter before whom he was to act as a judicial officer with full power to hear, try, and determine the particular case, but the court of appeals in *matter of Hathaway* (71 N. Y., 238) held:

"The term 'public office,' as used in the constitution, has respect to a permanent public trust or employment, to be exercised generally and in all proper cases. It does not include the appointment, to meet special exigencies, of an individual to perform transient, occasional, or incidental duties, such as are ordinarily performed by public officers; as to such appointments the legislature is left untrammelled, and at liberty to invest the courts with power to make them." (Church, Ch. J., *Andrews and Miller*, JJ., dissenting.)

In *Hall v. State* (39 Wis., 79, chap. 40, laws of 1857) [the law] appointed certain-named persons "com-

missioners to make a geological, mineralogical, and agricultural survey of the State," and provided that such commissioners should arrange and distribute the functions of such survey by mutual agreement. The law provided a salary and provided for filling vacancies, and gave the governor power to remove any member for incompetency or neglect of duty. The court held that these commissioners were officers. The court said:

"The geological survey commissioners were appointed directly by the legislature; no specific term of office was fixed (except by the governor, whose power to do so may well be doubted); provision was made by law for removing them for cause and for filling vacancies; their salaries were paid out of the State treasury, and their functions were not of merely private, local, or temporary concern, but related to the material and permanent interests of the whole State. The duty imposed upon them was an important public trust, to be exercised for the benefit of all the people of the State, and could only be discharged properly by gentlemen of high attainments in physical science. * * * It may safely be asserted that any person charged by law with the performance of public functions affecting the general interests of society, especially if he be elected thereto by the people or appointed directly by the legislature, and who receives his compensation out of the public treasury, is a public officer, and as such can have no vested right in his office, unless secured by the constitution. * * * It may be difficult to draw the exact line between an office and a mere service or employment; but, as already observed, when public functions are conferred by law upon certain persons elected by the people or appointed by the legislature, if those functions concern the general interests of the State, and are not of a nature merely local or temporary, such persons are public officers, especially if they are paid a salary for their services out of the public treasury."

In *re Corliss* (11 R. 1., 638) the question was up whether the office of a commissioner of the United States Centennial Commission is an office of trust under Article II, section 1, of the Constitution of the United States, and it was held that he was such an officer. The law creating that commission provided "for the holding of an exhibition of American and foreign arts, products, and manufactures, under the auspices of the Government of the United States," and the functions of such commissioners were to continue until the close of the exhibition, and their duties were "to prepare and superintend the execution of a plan for holding the exhibition." By the act of Congress approved June 1, 1872, the duties and functions of the commission were further increased and defined, and a corporation was created called "The Centennial Board of Finance," to cooperate with the commission and to raise and disburse the funds. It was to be organized under the direction of the commission. The commission was also to adopt plans for the erection of buildings, and the corporation created was to erect them in accordance with these plans.

The act also provided that the commission should "have power to control, change, or revoke all such grants, and shall appoint all judges and examiners and award all premiums." The commission was also "to supervise the closing up of the affairs of said corporation, to audit its accounts, and submit in a report to the President of the United States the financial results of the centennial exhibition." The act also provided "no compensation for services shall be paid to the commissioners or other officers provided by this act from the Treasury of the United States." The only other officers provided for by the act were alternates to serve as commissioners when the commissioners were unable to attend.

The court properly held that these commissioners were officers of the United States. They were certainly vested with sovereign functions of the Government which were to be exercised by them for the benefit of each and every State in the Union, and for the benefit of all the people of the United States.

In *Bunn v. The People* (45 Ill., 397) the court held:

"A person employed for a special and single object, in whose employment there is no enduring element, nor designed to be, and whose duties when completed, although years may be required for their performance, ipso facto terminate the employment, is not an officer in the sense in which that term is used in the constitution of Illinois."

In *re Attorneys, etc.* (20 Johnson, N. Y.), the court defines the legal meaning of the term "office" to be "an employment on behalf of the Government in any station or public trust not merely transient, occasional, or incidental."

In *matter of Hathaway* (71 N. Y., 238-243) the court said:

"'Public office' as used in the Constitution has respect to a permanent trust to be exercised in behalf of the Government, or of all citizens who may need the intervention of a public functionary or officer,

and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally and in all proper cases the functions of a public trust or employment.”

In *McArthur v. Nelson* (81 Ky., 67) the question was up as to whether certain commissioners were district officers, and the case says:

“The first section of the act authorizes the judge of the circuit court to appoint three commissioners, residents of the district, who shall hold their office at the will and pleasure of the judge. It is made the duty of the commissioners to have the court-house constructed at a cost not exceeding \$50,000, and, to enable them to raise this money, they are authorized to issue bonds, with coupons attached, bearing interest at 5 per cent, payable semiannually; and, to redeem the bonds and pay the interest, they are further empowered to levy an annual tax on the real and personal property in the district not exceeding 12 cents on the \$100, etc. * * * They are not district officers within the meaning of section 10 of article 6 of the constitution, but are the mere agents for the district, required by the act to discharge certain duties with reference to the building of the court-house, and when those duties end, their employment terminates.”

In *United States v. Germaine* (99 U. S., 508) the question as to who are and who are not officers of the United States was quite fully considered. Under section 4777 of the Revised Statutes, United States, it is provided:

“That the Commissioner of Pensions be, and he is hereby, empowered to appoint, at his discretion, civil surgeons to make the periodical examinations of pensioners which are or may be required by law, and to examine applicants for pensions where he shall deem an examination by a surgeon appointed by him necessary; and the fee for such examinations, and the requisite certificates thereof in duplicate, including postage on such as are transmitted to pension agents, shall be two dollars, which shall be paid by the agent for paying pensions in the district within which the pensioner or claimant resides, out of any money appropriated for the payment of pensions, under such regulations as the Commissioner of Pensions may prescribe.”

It was held in the case cited that the appointees under this statute are not officers of the United States but mere agents of the Commissioner of Pensions.

The report next applies the principles discussed to the commissions as to which question had been raised.

It is perfectly clear, therefore, that the commissioners appointed under the act approved July 7, 1898, “An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1898, and for prior years, and for other purposes,” the resolution approved July 7, 1898 (Public Resolution—No. 51) entitled “Joint resolution to provide for annexing the Hawaiian Islands to the United States,” and the act approved June 18, 1898, entitled “An act authorizing the appointment of a nonpartisan commission to collate information and to consider and recommend legislation to meet the problems presented by labor, agriculture, and capital,” are not persons “holding any office under the United States.”

They are persons designated by authority of Congress to make certain investigations, inquiries, etc., or to conduct certain negotiations preliminary to and as a basis for possible action by the Congress of the United States or by one branch of it. They neither make law, execute law affecting the rights of the people, nor perform judicial functions. These commissioners are and are intended to be mere advisory agents of the Congress of the United States. Their investigations are confined to some particular matter or subject, and they are not required to take an oath of office. They have no power to decide any question or bind the Government or do any act affecting the rights of a single individual citizen.

If the House or Senate authorizes or directs the Speaker or President of the Senate, as the case may be, to appoint a special committee to investigate some particular matter or subject and report and recommend legislation, can it be claimed that an office is created or that the members of the House or Senate appointed hold “an office?” Suppose the President of the United States is authorized to make the appointments. Does this create offices, and are the appointees “officers?”

The acts performed are for the information of the Congress, and it alone. Their suggestions and recommendations have no force; they may or may not be adopted. To make their suggestions or recommendations operative, bills or resolutions must be introduced embodying the provisions recom-

mended, or their substance, and these must be enacted into law. If a treaty is recommended by peace commissioners it must be submitted to the Senate and by it ratified. The acts of such a commission do not bind the President, the Senate, or the Government. Then such commissioners neither make, execute, nor interpret law. They do not possess or exercise any of the sovereign power of the Government of the United States.

That the Senate may feel that it ought to ratify or approve the recommendations of such a commission can make no difference, the fact remains that their acts are not binding upon anyone or upon any departments of the Government.

If the Congress of the United States should see fit by joint resolution to authorize the President to appoint ten persons as commissioners, whose duties it should be to investigate the condition of the people residing in Porto Rico and recommend laws suitable to their government, and should appropriate money to pay the expenses of the commission, would anyone contend that such commissioners when appointed would become other than mere agents of the Congress for the purposes specified? Would they possess or exercise legislative, executive, or judicial functions or powers? Such commissioners would possess the mere naked power to investigate and report, and their action would conclude no one, nor would they execute or interpret any law. Their action would not affect in the slightest degree the personal or property rights of a single citizen of the Republic. They would be answerable to no power for misconduct, they would be bound by no oath.

"The officer is distinguished from the employee," says Judge Cooley, "in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or non-feasance in office, and usually, though not necessarily, in the tenure of his position."

Attorneys and counselors admitted to practice in the courts of the United States are not officers of the United States. (Ex parte Garland, 4 Wall. (U. S.), 333; see also, In re Robinson, 131 Mass., 376.)

In *People v. Nichols* (52 N. Y., 478), one of the judges of the court of appeals was designated by statute as one of three persons to examine and report upon the genuineness and value of certain relics which the State proposed to purchase, and upon the certificate of these commissioners the purchase price was to be paid. The court held that this was not an office or a public trust within the meaning of the constitution of that State, which prohibits such judge from holding an office or public trust. Said the court: "It is very plain that the doing of such an act, a single act like this, is not within the meaning of the constitutional prohibition against holding any other office or public trust" (p. 485).

Applying these principles to what is known as the Postal Commission the committee finds that those Members of the House of Representatives appointed or designated as commissioners under public act 131, "An act making appropriations for the fiscal year ending June 30, 1899," are not, nor are any of them, officers under the United States within the meaning of the Constitution.

In respect to the Industrial Commission, the committee finds that those Members of the House of Representatives appointed or designated as commissioners under public act No. 146, "An act authorizing the appointment of a nonpartisan commission to collate information and consider and recommend legislation to meet the problems presented by labor, agriculture, and capital," approved July 7, 1898, are not, nor are any of them, officers under the United States within the meaning of the Constitution.

In respect to the Canadian Commission the committee finds that those Members of the House of Representatives appointed or designated as commissioners under public act No. 182, "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1898, and prior years, and for other purposes," are not, nor are any of them, officers under the United States within the meaning of the Constitution.

In respect to the Hawaiian Commission the committee finds that those Members of the House of Representatives appointed or designated as commissioners under public resolution No. 51, "Joint resolution providing for annexing the Hawaiian Islands to the United States," are not, nor are any of them, officers under the United States within the meaning of the Constitution.

In respect to visitors to the Military Academy, etc., the committee finds that those Members of the House of Representatives appointed and designated as visitors to the Military Academy at West Point, to the Naval Academy at Annapolis, and the regents and directors and consulting trustees to the various public institutions in the District of Columbia and appointed by the Speaker of the House, are not, nor are any of them, officers under the United States within the meaning of the Constitution.

494. The examination of 1898 as to incompatible offices, continued.

In 1898 the Judiciary Committee found that four Members, by accepting commissions in the Army and being mustered into the service after taking the oath as Representatives, thereby vacated their seats.

An opinion of the Judiciary Committee that persons on the retired list of the Army do not hold office under the United States in the constitutional sense.

(2) As to Members of Congress who had accepted commissions in the United States Army the report¹ held:

Before entering into a discussion of the law governing Members of Congress holding commissions in the United States Army, it is but due to the committee to say that it has approached the consideration of the questions involved with a delicacy growing out of their appreciation of the patriotic services tendered to their Government and rendered by these officers. Every opportunity has been given to them to be heard. The committee has proceeded with deliberation and care, and there is not a member of the Committee on the Judiciary but entertains the highest respect for the gentlemen interested. But the resolution was sent to this committee by a vote of the House, and it becomes our duty to consider and report to the House our findings of the law and fact governing these cases.

The most exhaustive treatment that has been given to these questions will be found in Report No. 110, Thirty-eighth Congress, first session, in the matter of the military appointment of Hon. F. P. Blair, jr., which is known as the "Dawes Report." The feeling of this committee can not be better expressed than by quoting a paragraph from that report:

"These questions are all of the gravest importance, and have ever been so considered whenever they have arisen. They affect seriously the privileges and the independence of the House, and can not be disregarded without trifling with both; and when the House of Representatives shall cease to guard its own privileges, and even its own independence, it will cease also to be worthy of a free people, and be fit only to be cast out."

The facts already found in this report clearly show that four Members of the present House of Representatives, after being duly elected, qualified, and acting as such, accepted commissions in the United States Army in the Spanish-American war, and acted in the Army as United States officers under such commissions.

The first question that presents itself is this:

Does a Representative in Congress, duly elected, vacate such office by accepting, during the term for which elected and after he has qualified as such, a commission, issued by the President, as an officer in the Army of the United States? Is the practical question suggested by the inquiry directed by the House to be made by the Committee on the Judiciary.

The question is not now presented for the first time, and we have, therefore, precedent, as well as the plain and unequivocal language of the Constitution, to guide us in answering the question propounded.

Section 6 of Article I of the Constitution of the United States provides as follows:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a Member of either House during his continuance in office."

A person holding a commission in the Army or Navy of the United States and not on the retired list is an officer of the United States and he holds that office under the United States. The office is created by law and filled by appointment of the President, when such appointment is confirmed by the Senate. Such a person is not, however, a civil officer—he does not hold a "civil office."

It follows that a person while holding the position of Senator or Representative in the Congress of the United States may be appointed to an office in the Army or Navy either created or the emolu-

¹Mr. John J. Jenkins, of Wisconsin, dissented from this report.

ments of which have been increased during the time for which he was elected, or to any office in that service.

(Story on the Constitution, sections 791–792.)

The first prohibition relates solely to a “civil office.” May such person accept such new office or any office under the United States and still hold his position as Representative in Congress?

It is evident that it was the policy of the framers of our Constitution to prohibit Senators and Representatives in Congress from creating civil offices or increasing the salaries pertaining to civil offices and then enjoying the fruits of their own work during the term for which they were elected. This provision removes, to some extent, the temptation to bad or unnecessary legislation by Members of Congress. It is true that they may vote to create a civil office or to increase the emoluments thereof and be appointed thereto after their term has expired, but the idea seems to have prevailed that a newly created office might, and probably would, be filled by the appointing power at once, or at least before the legislators creating it would be out of office and so situated as to accept its benefits or emoluments.

But the Constitution goes further and in the same connection declares that “no person holding any office under the United States shall be a Member of either House (of Congress) during his continuance in office.” (The office held by him under the United States.)

The second prohibition relates to “any office” held under the United States whether it be civil or military or naval. It is evident that the framers of the Constitution used the word “civil” understandingly and intentionally in the first prohibition and for the purpose of distinguishing civil offices from military and naval offices. It is also evident that the framers of the Constitution used the word “any” in the second prohibition intentionally and for the purpose of declaring that no Senator or Representative in Congress shall hold an office under the United States and at the same time “be a Member of either House” of Congress.

It has been suggested that it was the purpose of the framers of the Constitution to declare that a person shall not act as a Senator or Representative in Congress during the time he holds an office under the United States, and that the effect of the constitutional provision is to permit a Senator or Representative in Congress to hold his position as such Representative and at the same time hold, accept, and perform the duties of another office under the United States, his right to act in the first capacity being suspended while holding and performing the duties of the second.

Such a construction of this section of the Constitution imputes to its framers the inability to express their ideas with any clearness whatever. It is plainly declared that “no person shall be a Member of either House during his continuance in office” if he holds any office under the United States. This language goes to the very existence of the individual as a Member of the Senate or House of Representatives while holding another office under the United States. Had suspension of the power to act been aimed at, apt words expressing the purpose would have been used. The words “act as” would have been substituted for “be.” “Be” means “to exist, have existence or being.” Therefore the Constitution declares that no person holding any office under the United States shall exist or have existence or being, while in such office, as a Member of either House of Congress.

At the present time, when the patriotic impulses of our people have been so deeply stirred, it may seem unpatriotic to say this—to assert that a Member of this House may not accept a commission in the Army, go upon the field of battle and fight for his country, and still retain his seat in the House of Representatives; but the manifest dangers that would follow any other construction of the Constitution (even were any other construction possible), must make the meaning of the framers of that instrument plain, and no mere patriotic sentiment should be permitted to override the plain language of the fundamental written law.

Both Story and Rawle, in their able and admirable works on the Constitution, have accepted the language of the Constitution of the United States above quoted as prohibitory, and without discussion have proceeded to point out the wisdom of the provision.

Rawle says, chapter 19:

“But although no reasons merely of a legal nature might be opposed to it, the impolicy of admitting such officers to compose a part of the legislature is exceedingly plain.”

Again, he says:

“The public officer being therefore considered with us as having actual living duties which he is bound to perform, and as having no more time than is necessary to perform them, the Constitution expressly excludes him from a seat.”

Story says, Vol. I, section 869:

“The other part of the clause which disqualifies persons holding any office under the United States from being Members of either House during the continuance in office has been still more universally applauded, and has been vindicated upon the highest grounds of public policy.”

In section 871 he says:

“It is true that an acceptance of any office under the Crown is a vacation of a seat in Parliament. This is wise, and secures the people from being betrayed by those who hold office and whom they do not choose to trust.”

The Hon. James Wilson, LL. D., one of the associate justices of the Supreme Court of the United States, and professor of law in the college of Philadelphia (and also a signer of the Declaration of Independence and a member of the convention that framed the Constitution of the United States), in his lectures delivered in 1790–91 (*I Wilson’s Works*, pp. 446–449) takes the same view of the Constitution, and after condemning in severe language the English practice of appointing members of Parliament to other offices under the Crown and then permitting them to be reelected to Parliament while holding such offices, says:

“The result is that a provision by which the members of the legislature will be precluded, while they remain such, from offices, finds, with great propriety, a place in the Constitution of the United States. In this important particular it has a decided superiority over the constitution of Great Britain.”

This language, contemporaneous with the adoption of the Constitution itself, and coming from one of the framers of that instrument, is significant.

And see also Angell and Ames on Corporations, section 434, Wilcox on Municipal Corporations, section 617, in which the doctrine is distinctly laid down that “a resignation by implication may not only take place by an abandonment of the official duties, as before mentioned, but also by being appointed to and accepting a new office incompatible with the former one.”

Again it is stated:

“It is a rule of general law that an officer who accepts another appointment inconsistent with the first is held to have thereby resigned the first.” (*Rawle on the Constitution*, chap. 19, p. 184.)

And again we find the doctrine clearly laid down as follows:

“By force of the constitutional inhibition against the holding of two lucrative offices by the same person at the same time, the acceptance of and qualification for a second office incompatible with the precedent one, ipso facto, vacates the precedent office; and neither a quo warranto, nor other motion, from the office thus vacated is necessary before the vacancy can be supplied.” (*Biencourt v. Parker*, 27th Texas, 558; *Rawle on the Constitution*, chap. 19, p. 184.)

Clearly one accepting an office under the United States, he having previously qualified as a Member of Congress, vacates his seat by such acceptance, and there is no way that he can again hold a seat in Congress but through a reelection by the people and then again becoming qualified as a Member of Congress without the disqualification of holding another office under the United States.

The report then goes on to cite the cases of *Yell*, *Vandever*, *Blair*, *Herrick*, *Earle*, *Schenck*, *Lane*, and continues:

It may be claimed that an exception is found in the action of the Thirty-seventh Congress when on July 12, 1861, Mr. Vallandigham offered the following resolution:

“Whereas it is rumored that Gilman Marston, of New Hampshire; James E. Kerrigan, of New York; Edward McPherson and Charles J. Biddle, of Pennsylvania, and Samuel R. Curtis, of Iowa, holding seats in this Congress as Members thereof, have been sworn into the military service of the United States and hold military offices under the authority of the same; and

“Whereas James H. Campbell, of Pennsylvania, also holding a seat in this House as a Member thereof, has admitted upon the floor of this House that he has been so sworn and does so hold office as aforesaid: Therefore,

Resolved, That the Committee of Elections be instructed to inquire, and without unnecessary delay to report, whether the gentlemen above named, or any others claiming or holding seats as Members of this House and at the same time holding any military office under the authority of the United States, are constitutionally disqualified to be Members of this House by holding such military office.”

This resolution upon its introduction was discussed and the facts denied, and on motion was laid on the table without being sent to the Committee on Elections or to any other committee. It was laid upon the table by a vote of 92 yeas to 51 nays, such gentlemen as Roscoe Conkling, Crittenden, Holman, Voorhees, and others voting in the negative. Nothing was settled, excepting that in the then temper of the House and country the House was determined not to allow Mr. Vallandigham's motion to be investigated either as to the law or the facts. If it settles anything it demonstrates what many will remember, that this was at a heated and exciting time in the history of our country, and the majority of the House was in no temper to receive suggestions from Mr. Vallandigham, who at that time was far from being in harmony, as many believed, with the burning patriotic sentiment of the country in the North. It should be borne in mind also that notwithstanding this action the same Congress, as shown in this report, laid down the doctrine that military officers of the United States could not at the same time be Members of the House.

It is evident that it was the policy of the framers of our Constitution to prohibit Senators and Representatives in Congress while remaining such from holding any other office under the United States, and no plainer language to declare the purpose could have been used than the words of the Constitution, viz: "No person holding any office under the United States shall be a Member of either House during his continuance in office." The framers of the Constitution intended to keep the legislative, judicial, and executive branches of our Government separate and distinct; to prevent Cabinet officers from being Members of Congress, and thereby giving undue power to the President and his immediate advisers; to prevent the centralization of power and office-holding power in a few hands; to prevent judges from acting at the same time as legislators and thus concentrating power in the courts; to avoid the manifold dangers to the existence and perpetuity of our free institutions and a representative government that would follow a concentration of the legislative and judicial or the legislative and executive (the military and naval power being a branch of the executive) in a few and the same hands.

Without this constitutional restraint it would be possible for a President and the Congress to act in collusion; for the Congress to create high military and naval positions without limit and for the President to fill these offices from the ranks of unscrupulous, unpatriotic, and ambitious Senators and Representatives in Congress (the Senate confirming as a matter of course), and as the President is Commander in Chief of the Army and Navy, to thus concentrate all power in the hands of the executive branch of the Government. These military legislators might increase the Army, control the elections by the bayonet, and government by the people and for the people would end. Two printed lines in the Constitution of the United States has made all this impossible.

The thirteen infant colonies, subsequently the thirteen original States of this Union, were dependencies of Great Britain, and in England a person holding a seat in the House of Commons at once vacates it by accepting any public office under the Crown. (One Story on the Constitution, sec. 871.)

This had been the law of England for more than a hundred years prior to the Revolution. It is true, however, that persons holding such an office might be reelected to the House of Commons without vacating the office and then hold both at the same time. The evils and the alleged advantages of this system are many and have been ably pointed out by many writers. It is fair to presume that the framers of our Constitution carefully considered this question, and inserted the language quoted for the express purpose of avoiding the abuses that had sprung up under the English system and of making our liberties the more secure.

So long as we keep the legislative, the judicial, and the executive departments of this Government separate and keep the legislative independent of the military and naval power, seeing to it that competent and patriotic men administer the affairs of each of these branches of Government, we may hope for national prosperity and to preserve our liberties and maintain good government. But when those who make the laws shall at the same time also interpret and execute them, or when those who make the laws hold high places in our Army and Navy, powerful branches of the executive, the lust of power may and probably will lead to encroachments upon the rights and liberty of the citizens, and our form of government will be at an end.

There would be no danger to the Republic in allowing the gentlemen whose seats are in question here to hold their places as Representatives in Congress and their commissions in the Army at the same time, but the question is one of law, and involves a principle of vast importance which must be met and decided without reference to individual cases.

If it be proper and constitutional for one general in the Army to hold the position of Senator or Representative in Congress at the same time, it is also lawful for the President to appoint every Senator and Representative in Congress to a high place in the Army and Navy, and the result would be to transform the National Legislature into a band of military officials, and, while there is no present danger that this will be done, it is easy to see, in the light of history, that this very danger was guarded against by the framers of the Constitution, who believed that the safety of the Republic depended upon the making of encroachments by the military upon the legislative powers impossible.

The result is and must be that the acceptance of an office in the Army under the United States by a Representative in Congress at once and by force of this constitutional provision vacates his position as such Representative and he ceases to be such. Such acceptance of office is *per se* equivalent to an absolute resignation of the seat in Congress. (See the numerous cases hereafter cited.)

As already stated, there is no prohibition upon the President in appointing Senators or Representatives in Congress to offices in the Army or Navy. It is evident that in times of war it may be necessary to create a large number of military and naval offices, and the public good and safety may demand that such offices be at once filled by men holding seats in the National Legislature. Soon after the close of our civil war many of our most able, experienced, and distinguished generals, after being mustered out, were elected to Congress. Had a war broken out with some foreign nation, and a large increase of the Army or Navy, or both, been made necessary, and had a score of important army and naval positions been made necessary and created by the Congress, the public good and safety would have demanded the appointment of such men as Logan and Garfield to high military commands.

During the late war with Spain the appointments of General Wheeler from the House of Representatives and of General Sewell from the Senate to high office in the Army were commended as wise and proper. It was, however, incumbent upon these gentlemen to elect whether they could best serve their country in its legislative halls or upon the field of battle, and he who accepted the position in the Army necessarily and, *ipso facto*, vacated his position as a Member of the Congress of the United States. (See cases cited hereafter.)

It may be said that there are many offices under the United States of little importance and carrying little or no pay, and that it can not be possible that the framers of the Constitution contemplated forbidding a Member of the National Legislature to hold one of these small offices. This is not the question. No line could be drawn between the large and the small offices. The principle declared was that a Member of the Congress of the United States shall not hold any office under the United States and retain his seat as a national legislator.

It will not do to say that the appointment of a Representative in Congress to an office under the United States and its acceptance by him merely operates to suspend the power of the legislator to act, for, if so, the President of the United States by collusion with the Congress might appoint a majority of the legislators chosen by the people to high offices, and thus destroy a quorum in the law-making body, and as the people would be powerless to elect others in their places, there being no vacancies, the power to enact laws for the protection of the people and the preservation of the Republic would be destroyed. Thus by indirection and collusion between the executive and the legislative bodies might the destruction of the Republic be accomplished. In any event great inconvenience would result.

It may be politic and wise at times for some legislator skilled in military science to abandon the halls of Congress for the field, but when he does this his place should be filled by the people of his district or State, who have the right to be represented at all times by a living, acting Member. It was not intended by the framers of the Constitution that a Congressional district or a State should go unrepresented. While the elected Member or Senator, with the approval of the President and Senate, sees fit to absent himself and serve as a military or naval officer, or as a judge, or in some other office under the United States. The Senator or Representative in Congress is a representative of the people, and is elected by them to perform certain specified constitutional duties in their interest, and he has no right to enter some other public office under the United States and, even temporarily, abandon the performance of the duties of the position to which he was elected.

It is evident that our Constitution contemplates, and that public policy demands, that no Representative in Congress shall suspend by his own act, and without the consent of his constituents, his power and duty to act as their Representative during such time as he sees fit to serve in some other obtainable Government office. From a legal standpoint it is immaterial whether such action is taken from patriotic or selfish motives.

It may be argued that our executive and legislative bodies are composed of men too pure minded and patriotic to endanger the nation. This is undoubtedly true as matters now are, but once open the door, extend the temptations, and who can foresee the results?

It may be suggested that there is not an entire and complete severance of legislative and judicial or of legislative and executive powers, duties, and functions under the Constitution. This is true in a limited and restricted sense. The President of the United States must approve acts of the Congress before they become laws, unless passed over his veto, and, as he is to execute the laws, we have here the Executive taking part in the enactment of laws. So the President, heads of Departments, and judges may openly suggest and recommend legislation. As the President is also the Commander in Chief of the Army and Navy, we find here a mild and modified blending of the legislative and military powers. But the President is not a member, even *ex-officio*, of the legislative branch of the Government. So the Senate forms an integral part of the court for the trial of impeachments. Again, both the Senate and House act judicially in determining the rights of persons to seats in those bodies, respectively.

After quoting Black's constitutional law on this point, the report continues:

It must be remembered that our Constitution was framed soon after the close of the Revolutionary war, during the exciting times of the French Revolution, and that it was the declared purpose of the founders of our Republic in establishing its system of government to establish and perpetuate by constitutional guaranties the rights and liberties of the citizen.

See debates where this very provision of the Constitution was discussed and adopted. (Compilation of Senate election cases, Senate Mis. Doc., second session Fifty-second Congress (vol. 6), pp. 13-19.)

We may well ask, and the inquiry is a pertinent one, who in this Republic desires to see a single Member of the National Legislature under the absolute command of the President of the United States? And who desires to see generals of the Army with the Army under their command and bound to implicit obedience, exercising power as legislators or clothed with the power to pass from the Army into Congress and from the Congress into the Army, exercising the powers of either position without reference to the will of the people and only as the President might command?

It can not be that the framers of the Constitution wrote therein a provision so repugnant to the spirit prevailing in that body and among the people—a provision that might completely subordinate the legislative to the military power. In this country we do not fear an encroachment by the military upon the legislative power, because of this very provision, which makes it impossible for an officer in the military department to hold a place in the legislative, and for the further reason that the legislative body, by refusing to raise taxes or vote supplies or appropriate money, may absolutely cripple the military and naval organizations. But fill our legislative halls with army officers, or with those who may swing back and forth at their election, or, in some cases, place therein a small number, and a military despotism will in the end usurp the government in fact, even if the name and form remain the same.

It may be suggested that military officers after being retired and placed on the retired list have been members of Congress.

This is true; but it is settled law that persons on the retired list of the Army do not hold office under the United States in the constitutional sense. (*People v. Duane*, 121 N. Y., 367; *In re Hathaway*, 71 N. Y., 238; *U. S. v. Hartwell*, 6 Wall., 385; *U. S. v. Germaine*, 99 U. S., 508; *U. S. v. Tyler*, 105 U. S., 244.)

It may be contended that persons on the retired list of the Army do hold office under the United States, citing *Badeau v. United States* (130 U. S., 439), but this authority does not so hold. That case simply relates to salary under particular statutes.

These persons are still in the service, but hold no office unless assigned to duty.

To hold an office under the United States the person must occupy a public station or employment conferred by the appointment of government; and it embraces tenure, duration, emoluments, and duties.

Says the court in 212 New York, page 373:

"It is difficult to conceive of the existence in this country of a military office without the power of command, the right of promotion, or the obligation to perform some duty."

And for the reason that retired army officers are not entitled to promotion, do not perform duty, and exercise no command, it is held that when retired they cease to be officers.

It remains to consider what action, if any, is necessary on the part of the House of Representatives.

It is the settled and unquestioned law in England and the United States that—

“The appointment of a person to an office incompatible with one already held by him is valid, and he has a right to elect. (Angell and Ames on Corporations, 255). If he has accepted, takes the oath, and enters. (People v. Ca *qu m 2 Hill, Milwaxd v. Thatcher, 2 Tr Ref, win, Doug., 383, note 22; Rex V. 17; Dillon on Municipal Corp., 3d ed., 46 N. Y., 381; People v. Board Of Poh v. Hawkes, 123 Mass., 525 (per Gray, C. J.); State v. Butz, 9 S. C., 156; Stubbs v. ee, 64 Me., 195; State v. Draper, 45 Mo., 355; Cotton v. Phillips, 56 N. H., 220; Kerr v. Jones, 19 Ind., 351; Regents of the University v. Williams, 9 Gin. & Johns. (Md.), 365; State v. Kirk, 44 Md., 401; Foltz v. Kerlin, 105 Md., 221; People V. Hamifaxr 96 Ill., 420; State v. Hutt, 2 Ark., 282; State v. West, 33 La. Ann., 1261.)”

In *People v. Nostrand*, supra, the court says:

“It is a settled rule that the acceptance of an incompatible office operates as a resignation of the incumbent of the office then held by him.”

In *People v. Kelly*, supra, the court said:

“The moment he accepted the new office the old became vacant. His acceptance of the one was an absolute determination of his right to the other and left him no shadow of title, so that neither quo warranto nor a motion was necessary (citing cases). These cases also show that this would be so at common law and independent of the statute. * * * The office was and is as vacant as if Mr. O’Reilly had never been born; his removal is as complete as if caused by death. When he accepted the new office, the other ceased to have an incumbent.”

Says Angell and Ames on corporations, first edition, 255:

“This is an absolute determination of the original office and leaves no shadow of title to the possessor, so that neither quo warranto nor a motion is necessary before another may be elected.

Said Parke, J., in *Rex v. Patteson*, supra:

“Where two offices are incompatible they can not be held together, is founded on the plainest principles of public policy, and has obtained from very early times.”

This rule is not limited to corporate offices, but extends both in principle and application to all public offices. (Dillon on Mun. Corp., 3d ed., sec. 227; Glover on Corp., 139.)

The whole question is somewhat fully discussed in McCrary on Elections (3d ed.), sections 302904, inclusive.

Is the position or office of Representative in Congress incompatible with any other office under the United States?

The Constitution itself answers the question when it declares “and no person holding any office under the United States shall be a member of either house during his continuance in office.”

This is a constitutional declaration that the two positions are incompatible. In the case of *Stanton v. Lane* (Compilation of Senate Election Cases, p. 181, where the report of the Senate committee on the Judiciary is found in full) the report says:

“In the opinion of the committee the office of brigadier-general under the United States is incompatible with that of member of either House of Congress. By accepting the office of brigadier-general the sitting Member, Mr. Lane, virtually resigned his seat in the Senate, and it became vacant at that time.”

In *Kerr v. Jones* (19 Ind., 351), the court held:

“The offices of reporter of the Supreme Court and colonel of militia are incompatible, and the acceptance of the latter vacates the former.”

In addition to these authorities, the report in the cases of Blair and Schenck is quoted at length, after which the argument proceeds:

Again, Article 1, section 1, of the Constitution says:

“All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.”

The powers of Congress are then specified.

Article II, section 1, says: “The executive power shall be vested in a President of the United States of America.” Section 2: “The President shall be Commander in Chief of the Army and Navy of the United States and of the militia,” etc. Article III, section 1: “The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts,” etc.

It is therefore apparent that it was not intended that the duties of those three departments should be performed by the same man or bodies of men.

“Whether offices are incompatible depends upon the charter or statute and the nature of the duties to be performed. (1 Dillon on Mun. Corp., 3d ed., sec. 227; *Milward v. Thatcher*, 2 Term Rep. (D. & E.), 87; *People v. Carrique*, 2 Hill, 93.)

“Incompatibility in offices exists where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one incumbent to retain both. (1 Dillon Mu. Corp., 3d ed., sec. 227 and note; *Kerr v. Jones*, 19 Ind., 351.)”

The light of the common law, of the Constitution, of the fact that a person should not at the same time both make and execute the law, and that the legislative should not be subservient to the Executive, it is clear that the position of Representative in Congress and of an officer in the Army of the United States are incompatible offices.

The duties of a Member of the National Legislature demand his presence in the legislative chambers at Washington, making laws, as a Representative of the people, while the duties of a military officer demand his presence in other places at all times and that he engage himself in executing the laws of Congress under the command of the President.

It is true that the mere impossibility of the incumbent of two offices being present at all times to perform the duties of each does not make them incompatible, but

“Offices are said to be incompatible and inconsistent, so as not to be executed by the same person when from the multiplicity of business in them they can not be executed with care and ability, and when their being subordinate and interfering with each other it induces a presumption that they can not be executed with impartiality and honesty.” (5 Bacon’s Abridgement, Title Offices, K; Public Offices; Throop, sec. 33; *People v. Green*, 58 N.Y., 304–305, per Folger, C. J.)

Is it proper and public policy for the officers of the Army and Navy acting as legislators to appropriate the money for the support of these departments, expend it as they see fit under laws of their own making, while governed and restrained only by such limitations and restrictions as they see fit to place upon themselves?

If their power as legislators is suspended only while holding offices in the Army or Navy, they may first (and in anticipation of commissions) make obnoxious laws and then go into the military and naval service to execute them, leaving the people powerless, for while there is no possible quorum to do business there are no vacancies in either House, and hence a repeal of obnoxious laws or the enactment of new ones is made impossible. Even repentant and patriotic Representatives would be unable to return to the halls of legislation, unless by the consent of the President, without committing the crime of desertion and incurring the death penalty. Even the court of impeachment might be in the Army and Navy, unable to convene, and the whole Government would be in the hands of what might prove to be an ambitious and unscrupulous Executive.

It is no answer to say, what we all concede, that our present patriotic Executive is above suspicion. What is constitutional to-day will be so until the fundamental law is changed. We are building for the centuries and to avoid all probable, if not all possible, dangers. Our fathers had all these dangers in mind when the Constitution was framed.

In *Indiana, State v. Allen* (21 Ind., 516), the court went so far as to hold that an enlistment in the Army of the United States for three years, or during the war, was an abandonment and vacation of a civil office held under the State. (See also *Willcock on Corp.*, 238. But see *Bryan v. Cattell*, 15 Iowa, 537.)

The question may be asked, What will be the situation if a person holding a commission in the Army of the United States is elected to Congress and, without resigning his office in the Army, presents himself as a Member of the House? In such case does he vacate the Army position? Assume that he refuses to resign either and claims to act in both positions. It will be time enough to cross that bridge when reached. It is clear, however, that in such case he is not entitled to his seat in Congress and should not be sworn in or allowed to act.

It follows that the seats of those Members of the House of Representatives in the Fifty-fifth Congress who entered the Army as officers, commissioned by the President, during the late war with Spain, and took the oath and acted as such, are vacant, and have been since they accepted their commissions in the Army. The only action necessary is to so declare by resolution, as matter of convenience and to aid the Speaker and others in discharging their public duties. No act or resolution of Congress can change the legal effect of their acts.

Our attention has been called to the case of *Bryan v. Cattell* (15 Iowa, 538), as sustaining the doctrine that a Member of Congress might hold a military appointment in the Army. But this case will not sustain the doctrine. Bryan was appointed a captain in the Army, being at the time district attorney for the fifth judicial district of Iowa, for four years commencing with the 1st day of January, 1859. At that time there was no provision of law against holding two offices, but by chapter 54, laws of 1862, it was provided as follows:

“The acceptance of a commission to any military office, either in the militia of this State, or in the volunteer service of the United States, which requires the incumbent in the civil office to exercise his military duties out of the State for a period not less than sixty days.”

This was enacted as a ground for the vacation of any civil office where the officer had entered the United States Army.

Captain Bryan sued for his salary for the entire period covered by his election. The court denied that for such part of the time as came after the enactment just quoted. This clearly sustains the position that with the provisions of Article I, section 6, clause 2, United States Constitution, the office would have been declared vacant by the Iowa court. For the period prior to the enactment just quoted the court allowed the Captain his salary as district attorney upon the ground that he might discharge the duties of district attorney and also the duties of captain. The language of the court is:

“It by no means necessarily follows that the person in the military service might not discharge all the substantial duties of the attorneyship. It is scarcely probable that he could or would, and yet he might.”

Upon this line of thought, not at all sustained by the current authorities, they allowed Captain Bryan to recover for that portion of his salary for the time heretofore stated. But the court laid down this doctrine in the same decision:

“If a party accepts another office which, within the meaning of the law and the case is incompatible with that which he holds, we have no doubt but the first one would become vacant.”

We can well understand how the very patriotic chief justice, Judge Wright, in the great patriotic State of Iowa, then throbbing with very generous impulses for the Government, would use the reasoning quoted in respect to the possibility of his discharging the duties of the two offices. But this case, taken as a whole, thoroughly sustains the position taken by the committee, and when we are confronted with the constitutional provisions it is absolutely certain that had such a case arisen as a Member of Congress holding a commission in the Army, Judge Wright and the supreme court of Iowa would have held, as Congress as ever held, that the offices were absolutely incompatible.

We have then, in considering this matter, two kinds of incompatibility in respect to offices: First, where in the very nature of the two offices they are incompatible and can not be held by the same person at the same time. Clearly, for reasons above given and sustained by the authorities without reference to the Constitution, the office of Member of Congress and an officer in the Army of the United States are incompatible and can not be held at the same time. But while we have considered this view of the case fully it was not really necessary, for the constitutional provision in itself makes it absolutely impossible to hold these two offices at the same time.

The committee therefore recommend to the House the adoption of the following resolution:

“Resolved, That Joseph Wheeler, a Representative in the Fifty-fifth Congress of the United States from the Eighth district of the State of Alabama; Edward E. Robbins, a Representative in the Fifty-fifth Congress of the United States from the Twenty-first district of the State of Pennsylvania; David G. Colson, a Representative in the Fifty-fifth Congress of the United States from the Eleventh district of Kentucky, and James R. Campbell, a Representative in the Fifty-fifth Congress of the United States from the Twentieth district of the State of Illinois, by accepting commissions in the Army of the United States, and being mustered into such service after being sworn in as such Representatives, thereby vacated their seats as such Representatives and ceased to be members of this House as of the dates they accepted such military offices, respectively, and are not now members of the Fifty-fifth Congress of the United States.”

On March 2¹ this report was called up for action on the resolution relating to the army officers. Mr. John F. Lacey, of Iowa, having raised the question of con-

¹Record, p. 2751.

sideration, the House, by a vote of 77 yeas and 163 nays, declined to consider the resolution.

495. The House has distinguished between the performance of paid services for the Executive by a Member, and the acceptance of an appointment to an incompatible office.

The House has investigated the constitutional right of a Senator to perform services for the Executive.

On January 3, 1822,¹ Mr. Daniel P. Cook, of Illinois, offered a resolution of inquiry directing the Secretary of the Treasury to report, among other things, the names of the persons appointed to examine the various land offices of the United States. This resulted in developing the fact that a Senator of the United States had been appointed as one of the examiners, and an examination of the subject by a select committee appointed as follows: Messrs. Cook, Jonathan Russell, of Massachusetts; Cadwallader D. Colden, of New York; Lewis McLane, of Delaware; David Trimble, of Kentucky; Andrew Stevenson, of Virginia, and William Lowndes, of South Carolina.

On March 29, 1822,² Mr. McLane³ submitted a report from this committee:

That, in the year 1820, Jesse B. Thomas, esq., a Senator of the United States, from Illinois, was permitted by the Secretary of the Treasury to examine the offices in Ohio, Indiana, Illinois, and Missouri, for which as appears by the documents before the committee, he received a sum amounting to the allowance which has been established since the year 1817. * * *

The committee are clearly of opinion that the examination of the land offices by Jesse B. Thomas, esq., was not a violation of the Constitution of the United States.

That instrument forbids the appointment of Members of Congress, during the time for which they were elected, to any civil office, created, or the emoluments whereof shall have been increased, during that time; and, also, prevents any person holding an office under the Government from being a Member of Congress during his continuance in office. * * *

But your committee are of opinion that the duty of examining the land offices is not such an office as was contemplated by the Constitution of the United States, which opinion seems to have received the sanction and regulated the practice of the Government since the adoption of the Constitution, by those who bore a principal share in composing it, and must, therefore, be supposed to have understood its real import.

The committee refer to the appointment of Mr. Tracy, a Senator of the United States, by President Adams, in the year 1800, to inspect the posts on the northern and northwestern frontier. For this service, Mr. Tracy received a liberal compensation, and extra mileage, which is stated on the records of the Senate of that day. Under the Administration of Mr. Jefferson, Mr. Dawson, a Member of the House of Representatives from Virginia, was appointed as the bearer of a treaty to France, and was paid for performing the duty; and during the Administration of the same President, Mr. Smith, a Senator from Tennessee, was appointed a commissioner to treat with the Indians, and actually executed two treaties under this appointment. They also refer to the instance, at a still more recent period, during the Administration of President Madison, of the appointment of Mr. Worthington, a Senator, and Mr. Morrow, a Representative from Ohio, to negotiate with the Indians. In

¹ First session Seventeenth Congress, Journal, pp. 111, 284; Annals, pp. 635, 829, 912, 1113.

² Annals, pp. 1407-1414; Journal, pp. 410, 470.

³ The Journal says Mr. Cook submitted the report (Journal, p. 410).

each of these, cases, the individuals referred to executed the trusts confided to them, still retained their seats in Congress, and, in the Senate, passed upon their own acts.

The committee next proceeded to consider the law of April 21, 1808, "An act concerning contracts." They found that the words of the act were broad, but did not consider that they were intended to include a case like that under examination. By various examples of Members and Senators who had performed services for the Executive Department, the committee concluded that the examination of land offices was not among the inhibited functions.

Therefore the committee recommended no action. But Mr. Cook moved the adoption of the following:

Resolved, That the employment of Members of Congress by the Executive, or any executive officer of the United States, in the performance of any public service, during the continuance of their membership, for which they receive compensation out of the Public Treasury, is inconsistent with the independence of Congress, and in derogation of the rights of the people, and, if it be not already, ought to be prohibited.

On April 18 Mr. Cook called this resolution up for consideration, but the House declined to consider it.

496. The House has declined to hold that a contractor under the Government is constitutionally disqualified to serve as a Member of the House.

Discussion of the meaning of the word "officer" in the constitutional provision relating to the qualification of Members.

On February 24, 1806,¹ Mr. John Randolph, of Virginia, after some general remarks on the independence of the membership of the House, offered the following:

Whereas it is provided by the sixth section of the first article of the Constitution of the United States that no person holding any office under the United States shall be a Member of either House of Congress during his continuance in office: Therefore,

Resolved, That a contractor under the Government of the United States is an officer within the purview and meaning of the Constitution, and, as such, is incapable of holding a seat in this House.

Resolved, That the union of a plurality of offices in the person of a single individual, but more especially of the military with the civil authority, is repugnant to the spirit of the Constitution of the United States and tends to the introducing of an arbitrary government.

Resolved, That provision ought to be made by law to render any officer in the Army or Navy of the United States incapable of holding any civil office under the United States.

After debate, in which the meaning of the word officer as used by the Constitution was discussed at length, the first resolution was decided in the negative—yeas 25, nays 26.

On the second resolution there was debate, it being urged that it was not the duty of the House to construe the Constitution; that in several instances like that of General Wilkinson, governor of the Northwest Territory, offices had been combined in the same person to advantage, etc. The resolution was disagreed to—yeas 31, nays 81.

On April 2 the third resolution was agreed to by the House—yeas 94, nays 21—and a committee was appointed to prepare a bill. This bill (H. R. 136) passed the House, but did not become a law, the Senate postponing it.

¹First session Ninth Congress, Journal, pp. 295, 349, 359 (Gales & Seaton ed.); Annals, pp. 507, 880–892, 923–930, 935, 1011.

497. The election case of George Mumford, of North Carolina, in the Fifteenth Congress.

A collector of the Federal direct tax, whose office expired after his election but before he took his seat as a Member of the House, was held entitled to the seat.

On February 6, 1818,¹ the Committee on Elections reported in the case of George Mumford, of North Carolina, who had been appointed a principal assessor in 1813 for the collection of direct taxes and internal duties, and who had not resigned the office on December 1, 1817, when he qualified as a Member of the House of Representatives.

The committee make the following explanation in regard to the office:

The act of July 22, 1813, under which Mr. Mumford held his appointment, was prospective and without limitation. No law then existed laying a direct tax. But, as Congress intended resorting to that system of revenue, it was enacted "that, for the purpose of assessing and collecting direct taxes," the United States should be divided into collection districts, and a principal assessor appointed for each district. If this act has neither expired nor been repealed Mr. Mumford is still in office, and can not rightfully be a Member of this House. But by the second section of the act to provide additional revenues, etc., approved January 9, 1815, the said act was repealed, except so far as the same respected collection districts, internal duties, and the appointment and qualification of collectors and assessors; in all which respects it was enacted that the said act should be and continue in force for the purposes of the last-mentioned act. The act of July 22, 1813, so far as the same was not repealed, was thereby limited to the duration of that act, and was continued in force only for its purposes. By that act a direct tax of \$6,000,000 was annually laid upon the United States, and apportioned agreeably to the provisions of the Constitution. At the first session of the Fourteenth Congress that act was modified by repealing so much thereof as laid an annual tax of six millions, by reducing the same to three millions, and by limiting its continuance to one year; and it was expressly enacted that all the provisions of the act of January 9, 1815, except so far as the same had been varied by subsequent acts, and except the first section thereof (which related to the apportionment of the tax), should be held to apply to the tax of three millions thereby laid. Thus the act of July, 1813, was again limited, and it was continued in force for the purposes of the three million tax laid March 5, 1816. Whenever those purposes were fulfilled that act expired, and, of course, all offices created by it ceased to exist.

The committee found from official sources that the entire tax assessed in the district for which Mr. Mumford was collector was accounted for previous to the 1st of December, 1817, and that no official duty remained to be performed by Mr. Mumford. His office therefore expired previous to his taking his seat in the House.

As a part of their report the committee included a letter from Mr. Mumford, in which, after stating the case, he argued at length its constitutional aspects.

On March 21, 1818, after the report had been considered in Committee of the Whole, the House agreed to the following resolution, which had been recommended by the Committee on Elections:

Resolved, That George Mumford is entitled to a seat in this House.

498. The South Carolina election case of Elias Earle in the Fifteenth Congress.

A Member-elect who continued in the office of postmaster after his election, but resigned before taking his seat, was held to be entitled to the seat.

¹First session Fifteenth Congress, Contested Election Cases in Congress from 1789 to 1834, p. 316.

On January 5, 1818,¹ the Committee on Elections reported in the case arising as to the qualifications of Mr. Elias Earle, of South Carolina. The committee reported the following facts: In April, 1815, Mr. Earle was appointed postmaster at Centerville, S. C. On September 10, 1816, Mr. Earle mailed his resignation as postmaster to the Postmaster-General. His successor was appointed but never commissioned, so Earle continued to superintend the post-office until June 12, 1817, when his connection with it ceased.

Mr. Earle was elected at the last Congressional election one of the Representatives in Congress, and on February 10, 1817, the governor executed a certificate of his election, which Mr. Earle received in April or May following.

The question arose as to the discharge of the duties of postmaster after he was a Member-elect of the House, but before he had taken his seat.

The committee reported this resolution, which, on March 21, was agreed to by the House:

Resolved, That Elias Earle is entitled to a seat in this House.

499. The Ohio election case of Hammond v. Herrick in the Fifteenth Congress.

After a careful consideration of the status of a Member-elect the House decided that such an one was not affected by the constitutional requirement that an officer of the United States shall not be a Member.

On January 5, 1818,² the Committee on Elections made a report in the case of C. Hammond's contest for the seat of Mr. Samuel Herrick, of Ohio. On the 19th of December, 1810, Mr. Herrick had been appointed attorney of the United States for the district of Ohio, which office he accepted and held until his resignation thereof on the 29th of November, 1817. In October, 1816, he was elected one of the Representatives of the State of Ohio for the Fifteenth Congress. The result of the election was publicly announced on the 7th of January, 1817, in the presence of the senate of that State. On the 15th of September, 1817, the governor executed a certificate of Mr. Herrick's election, according to the law of Ohio, which was received by him on or about the 30th day of the same month. Mr. Herrick, therefore, continued in office almost nine months after the 4th of March and two months after receiving the certificate of his election. Congress met December 1, 1817, and Mr. Herrick took his seat on that day in the House of Representatives.

The Committee on Elections which examined the case consisted of Messrs. John W. Taylor, of New York, John Tyler, of Virginia, Ezekiel Whitman, of Massachusetts, Orsamus C. Merrill, of Vermont, Solomon Strong, of Massachusetts, John L. Boss, jr., of Rhode Island, and Henry Shaw, of Massachusetts. Their report, which seems to have been unanimous, examined very carefully whether or not the sixth section of Article I of the Constitution³ had been violated. After referring to the cases of John P. Van Ness⁴ and Philip Barton Key⁵ and certain

¹ First session Fifteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 314.

² First session Fifteenth Congress, Journal, pp. 32, 103, 355, 359, 363; Annals, pp. 1435-1447; House Report No. 30.

³ See section 7 of this work.

⁴ See section 486 of this volume.

⁵ See section 442 of this volume.

English precedents the report proceeds to a very full consideration of the status of a Member-elect of the House:

Persons elected to the House of Commons become at one time members for certain purposes and at another time for other purposes. Thus immediately upon executing the indenture of return by the sheriff or other returning officer, the person elected becomes entitled to the privilege of franking, although the day at which the Parliament is made returnable may not have arrived. Yet he is not a member, for he may thereafter be a candidate for election in another district at any time before the Parliament is made returnable and the return actually filed in the Crown office. From the time last mentioned he becomes a member so far that he can not be a candidate for another district, but yet he may thereafter hold an office incompatible with membership, and upon resigning his office he may immediately qualify and take his seat in the House. It has often been decided by their committee of elections that a person holding an office incompatible with membership is, nevertheless, capable of prosecuting his claim to a fact. After examination of all the parliamentary registers, histories, and journals within our reach we have found no case where a person elected to the House of Commons was brought in on a call of the House before he had voluntarily appeared, qualified, and taken his seat, nor do we find any instance of a person having been expelled until after such time.

A very particular case occurred on the 10th of February, 1620. Sir John Leech having been elected a member of the House of Commons, and appearing to take the oaths of supremacy and allegiance, was asked whether he had not already sat in the House that Parliament in violation of the statute. He confessed that on the Wednesday morning previous he did sit in the House a quarter of an hour, being unsworn. For this offense Sir John was not expelled, but it was resolved that he was disabled to serve in the House, and a new writ of election was issued to supply the vacancy, in the same manner as if no election and return had taken place. The same course of proceeding has been pursued when a person duly elected and returned comes into the House and refuses to be sworn. Such was the case of Mr. Archdale, in the year 1698, who, being elected and returned, came into the House of Commons and said he was ready to serve if his affirmation of allegiance could be accepted instead of his oath. The House resolved that it could not. Mr. Archdale, still declining to take the oath, was refused admittance to a seat and a new writ was issued to supply his place. This case is more peculiar because a person elected to the House of Commons can not relinquish his right to a seat either before or after qualification otherwise than by accepting an incompatible office. But by refusing to be sworn he may do that indirectly which he is not permitted to do directly. We have seen several similar cases which occurred in the colonial assembly of New York, but not now having access to the journals we are unable to report the particulars.

Persons elected and returned to the House of Commons may be chosen members of committees before they appear and qualify. But it is allowed for a reason similar to that which, in courts of law, permits a declaration to be filed *de bene esse* before the defendant appears in court. In both cases the act is conditional; and it is ineffectual unless the condition of appearance be performed.

The practice of this House, which does not allow the appointment of persons to be members of committees¹ until they shall have been sworn and shall have taken their seats, is obviously more reasonable and convenient than the other. It was decided as early as the first session of the Second Congress, in the case of John F. Mercer, who was chosen to supply a vacancy in the representation of the State of Maryland, occasioned by the resignation of William Pinckney, that a Representative-elect might decline his election before taking his seat and before the first session of the Congress to which he was elected. We do not find that the question has since been agitated, although similar cases have often occurred. Our rule in this particular is different from that of the House of Commons; it is also better, for it makes our theory conform to what is fact in both countries, that the act of becoming in reality a Member of the House depends wholly upon the will of the person elected and returned. Election of itself does not constitute membership, although the period may have arrived at which the Congressional term commences. This is evident from the consideration that all the votes given at an election may not be returned by a returning officer in season to be counted, whereby a person not elected may be returned

¹ See, however, sections 4477–4483 of Volume IV of this work. Jefferson's Manual has by rule been made authority in the House since 1837. In the Fifty-sixth Congress Mr. Joseph Wheeler, of Alabama, a Member-elect, was not appointed to any committee.

and take the seat of one who was duly elected. Neither does a return necessarily confer membership, for if he in whose favor it be made should be prevented taking a seat at the organization of a House of Representatives, he might find upon presenting himself to qualify that his return had been superseded by the admission of another person into the seat for which he was returned.

At an election held in the State of Georgia in October, 1804, Thomas Spalding was duly chosen a Representative to the Ninth Congress, but because the votes of three counties were not returned to the governor within twenty days after the election, Cowles Mead received a certificate and took his seat. Mr. Spalding afterwards presented his petition. The House vacated Mr. Mead's seat and admitted Mr. Spalding.¹

In April, 1814, Doctor Willoughby was elected a Representative of the State of New York to the Fourteenth Congress; but by reason of a clerical error of certain inspectors in returning certificates of votes to the office of the county clerk, General Smith was declared duly elected, and a certificate of election was accordingly delivered to him; but he, having omitted to take a seat at the commencement of the session, was, on the ninth day thereafter, declared not entitled, and thereupon Doctor Willoughby was admitted in his seat.²

Several other cases might be cited where persons were returned who never in fact became Members, and where others became Members who were not returned. Neither do election and return create membership. These acts are nothing more than the designation of the individual, who, when called upon, in the manner prescribed by law, shall be authorized to claim title to a seat. This designation, however, does not confer a perfect right, for a person may be selected by the people destitute of certain qualifications, without which he can not be admitted to a seat. He is, nevertheless, so far the Representative of those who elected him that no vacancy can exist until his disqualification be adjudged by the House. Yet it would be easy to state cases where he would not be permitted for a moment to occupy a seat, notwithstanding the regularity of his election and return. To no practical purpose could he ever have been a Member. So, also, if a person duly qualified be elected and returned and die before the organization of the House of Representatives, we do not think he could be said to have been a Member of that body, which had no existence until after his death. We say which had no existence, for we consider that concept altogether fanciful which represents one Congress succeeding to another as members of the same corporation. It has no foundation either in fact or in the theory of our Government. Each House of Representatives is a distinct legislative body, having no connection with any preceding one. It commences its existence unrestrained by any rules or regulations for the conducting of business, which were established by former Houses, and which were binding upon them.³ It prescribes its own course of proceeding, elects its officers, and designates their duties. Even joint rules for the government of both Houses of Congress are not binding upon a new House of Representatives, unless expressly established by it. Although the Fourteenth Congress had never assembled the Fifteenth would have met, under the Constitution, clothed with every legislative power, as amply as it was enjoyed by the Thirteenth. The Constitution does not define the time for which Representatives shall be chosen. It is satisfied provided the choice take place at any time in every second year. The rest is left to the discretion of each State. Accordingly.. in some States Representatives are usually chosen for one year and seven months, and in other States for a longer time.

The privilege of exemption from arrest, granted by the Constitution to Representatives before a meeting of the House, and after its adjournment, furnishes no argument in favor of their membership at such times. Exemptions from arrest is a privilege as old as the Parliament of England. There it is extended, not only to members, but to their servants, horses, and carriages. Our Constitution adopts the very words of the common law, but restricts the privilege to Members. In both countries the object is the same, not the benefit of the Member, but of the public service. It is an essential incident to the right of being represented, and a consequence of that right. But that membership is not coextensive with the enjoyment of that privilege is manifest from the consideration that such a construction might make the Members of one Congress continue in office, not only after the Congress had expired, but also

¹ First session Ninth Congress, Journal, pp. 192, 205, 210–215 (Gales & Seaton ed.).

² First session Fourteenth Congress, Journal, pp. 28, 31, 45.

³ See also sections 6743–6755 of Volume V of this work.

after the next Congress was actually in session.¹ This construction, therefore, is not only absurd, but it serves to illustrate the fallacy of that suggestion which fancies the Representatives of one Congress succeeding to the seats of their predecessors as members of the same corporate body.

The privilege of franking letters, and of exemption from militia duty, are not granted by the Constitution. They are established by law and liable to be changed at the will of the Government. They have been extended and may be restricted, as public convenience shall require. Previous to the last Congress the privilege of franking was not enjoyed until after the commencement of each session. But as that does not prove negatively that persons elected to the House of Representatives were not Members before that time, so the existing law does not prove affirmatively that they are. It is true that the words "Members of the House of Representatives" are used as descriptive of the persons to whom the privilege is granted, but they certainly were used without intending thereby to express an opinion, much less to decide when membership commences, and probably without in any wise adverting to that inquiry.

The conclusion of the committee was embodied in this resolution:

Resolved, That Samuel Herrick is entitled to a seat in this House.

On March 19 this report, which had been committed to the Committee of the Whole² was considered. Mr. Richard C. Anderson, jr., of Kentucky, spoke at length in opposition to the idea that a Member-elect was not a Member. He said the provision of the Constitution that, "a majority of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent Members," must refer to the first as well as to any subsequent session of Congress, and therefore was the plainest evidence that a person elected might be a Member of the House before he had appeared and taken his seat. Other sections of the Constitution, that giving Representatives privilege from arrest while going to and returning from the sessions, that prohibiting a Representative from being appointed an elector, and that fixing the age of the Representative at least 25 years were also evidence of the same thing. If a Member-elect was not a Representative he might be an elector, and thus, in certain contingencies, vote for President once as an elector and again a little later as a Representative on the floor of the House, a situation evidently not contemplated by the Constitution. Also if a Member-elect was not a Representative, a man under 25 years might be chosen provided he would become 25 by the time Congress should meet. But a provision making the eligibility of a Representative depend upon the time of year at which Congress might meet was an evident absurdity.

On March 20, on motion of Mr. Benjamin Adams, of Massachusetts, and by a vote of 67 ayes to 66 noes, the Committee of the Whole inserted the word "not" in the resolution, so it should read that Mr. Herrick was not entitled to the seat.

When this amendment was reported to the House, the House disagreed to it—yeas 74, nays 77. The resolution declaring Mr. Herrick entitled to the seat was then adopted—yeas, 77, nays 70.

¹This probably refers to such a case as actually happened in 1869, when the Fortieth Congress expired March 3, and the Forty-first convened the next day, March 4. A Member of the Fortieth, who was not reelected to the Forty-first, might not reach his home until long after his successor had taken his seat.

²The Committee of the Whole was not in those days limited so exclusively to the consideration of subjects involving the expenditure of money.

500. A Member-elect, who held a commission in the Army and had not taken the oath or his seat in the House, having resigned, a question arose as to when the compensation of his successor should begin.

Opinion of the Judiciary Committee that when a Member-elect retains an incompatible office and does not qualify, a vacancy exists in his seat.

An opinion that a Member-elect becomes a Member from the very beginning of the term to which he has been elected.

As to what acts may constitute a declination of the office of Member of the House.

Conclusions of law as to the time of beginning of compensation of a Member elected to fill a vacancy.

On February 4, 1901,¹ Mr. George W. Ray, of New York, from the Judiciary Committee, submitted a report on the following letter, which had been referred to that committee, with instructions to examine into the facts and law relating thereto and report conclusions:

OFFICE SERGEANT-AT-ARMS, HOUSE OF REPRESENTATIVES

WASHINGTON, D.C., JANUARY 5, 1901.

SIR: A question has arisen in regard to the payment of Hon. William Richardson, Member from the Eighth district of Alabama, who was elected on August 6, 1900, to succeed Hon. Joseph Wheeler. As I am informed, Mr. Wheeler has notified you, under date of August 17, 1900, that he resigned, the resignation to take effect August 6, 1900, while the governor of Alabama has certified to you that the resignation of Mr. Wheeler, hearing date April 20, 1900, was received on April 23 at the executive department of Alabama and unconditionally accepted on that date. Mr. Wheeler has not demanded or received pay since March 4, 1899, the date of the beginning of the Fifty-sixth Congress.

The question which arises is as to the date at which the compensation of Mr. Richardson should begin.

In view of the somewhat complicated legal question involved, I should like to have further advice before making the payment.

RESPECTFULLY,

HENRY CASSON,

Sergeant-at-Arms, House of Representatives.

Hon. DAVID B. HENDERSON,

Speaker of the House of Representatives.

The committee ascertained and reported the following facts:

At the regular general election held in the State of Alabama in the year 1898 Hon. Joseph Wheeler was duly elected Representative in the Fifty-sixth Congress from the Eighth district of Alabama. His credentials (or certificate of election) were duly filed with the Clerk of the House of Representatives February 23, 1899.

At the time of his election Joseph Wheeler held the office of major-general, United States Volunteers, to which office he was commissioned May 5, 1898, to rank from May 4, 1898. He took the required oath of office as such major general May 6, 1898, and was honorably discharged as such April 12, 1899. He drew his pay as such major-general during all of said time. April 12, 1899, the same day he was discharged as major-general, United States Volunteers, he was commissioned brigadier-general, United States Volunteers, to rank from April 12, 1899, and took the oath of office as such April 15, 1899. He held this office and drew his pay from April 15, 1899, up to and including June 16, 1900, when he was commissioned brigadier-general, United States Army, to rank from June 16, 1900, and he took the oath of office as such June 18, 1900, and continued in active service and drew his pay from June 18, 1900, up to

¹Second session Fifty-sixth Congress, House Report No. 2656. The letter was referred January 8, 1901; Journal, pp. 95, 96; Record, p. 707.

September 10, 1900, when he was placed upon the retired list of the Army, under the provisions of existing law, since which date he has drawn his pay as brigadier-general, United States Army, retired.

A communication to the Speaker of the House of Representatives from Joseph J. Johnston, governor of the State of Alabama, under date November 16, 1900, says:

"I hereby certify that the resignation of Hon. Joseph Wheeler as a Member of the Fifty-sixth Congress, bearing date April 20, 1900, was received by me on April 23, 1900, and unconditionally accepted on that date.¹

"Respectfully,

JOSEPH F. JOHNSTON, *Governor.*"

A letter from Joseph Wheeler to the Speaker of the House of Representatives, bearing date August 17, 1900, says:

"I resigned my seat in Congress, and the resignation was accepted by the governor, to take effect on August 6, 1900. My successor was elected on that date.

"Respectfully,

JOSEPH WHEELER."

General Wheeler drew no salary as Representative in the Fifty-sixth Congress and exercised none of the functions of such office.

By virtue of existing law the Fifty-sixth Congress came into existence at 12 o'clock noon on the 4th day of March, 1899. In other words, the Fifty-sixth Congress commenced at that time.

That Congress was not called in extra session, but the first session under the provisions of existing law commenced at 12 o'clock noon on the 4th day of December, 1899.

Joseph Wheeler did not appear at that time or present himself at the bar of the House and take the oath of office or offer so to do. He never has presented himself to take the oath of office. He never exercised any of the functions of Representative or Representative-elect in the Fifty-sixth Congress.

On the 4th day of May, 1900, the governor of the State of Alabama, recognizing that a vacancy existed or, as he states it, would exist in the office of Representative in Congress from the Eighth Alabama district, called a special election to fill such vacancy (see call), and such election was held on the first Monday in August (August 6, 1900) to fill such vacancy, and at such election William Richardson was duly elected. He appeared and took the oath December 4, 1900, and is the sitting Member from that district.

The report then reviews at length the various statutes relating to the pay of Members, quoting them all and noting the changes made from time to time. Among those quoted is section 51 of the Revised Statutes:

Whenever a vacancy occurs in either House of Congress, by death or otherwise, of any Member or Delegate elected or appointed thereto after the commencement of the Congress to which he has been elected or appointed, the person elected or appointed to fill it shall be compensated and paid from the time that the compensation of his predecessor ceased.

After quoting section 6, Article I, of the Constitution² the report says in relation thereto:

First, Representatives during the time for which elected can not be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time. They may be appointed to other civil offices. Then follows an absolute constitutional prohibition upon Senators and Representatives in Congress. They are prohibited from being a Member of either House if they hold any office, civil or military, under the United States. The first provision prohibits them from being appointed to certain civil offices, while the second provision prohibits their being a Member of either House if they hold any other office under the United States. By statute an officer of the Army on the active list is prohibited from holding any civil office.³

It follows that Joseph Wheeler could not be a Member of either House of Congress or hold any civil office under the United States while he held a commission and was on the active list in the Army of the

¹ A letter from Governor Johnston to General Wheeler, dated April 23, 1900, says: "I accept the resignation, to take effect on the day your successor is elected." Report, p. 3.

² See section 485 of this work.

³ Section 1222 of the Revised Statutes, quoted in full below.

United States. He held a commission in the Army of the United States continuously from the time of his election in the fall of 1898 up to and including March 4, 1899, the day that the Fifty-sixth Congress came into existence, and continuously on down to the time he was placed upon the retired list on the 10th day of September, 1900, and was in active service. True, for three days at one time and for two days at another, while waiting to take the oath of office, he drew no pay, but he held his commission and accepted the army offices and took the oath. Section 1756, Revised Statutes, prohibited his drawing pay until the oath was taken.

The two offices were incompatible at common law and he could not hold both. So under the Constitution as always held.¹

By holding the office in the Army the civil office is declined.²

The report goes on to quote section 6, Article I, of the Constitution, which provides that Representatives "shall receive a compensation for their services," and the various statutes prohibiting the same person receiving the emoluments of two offices,³ including section 1222 of the Revised Statutes:

"No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

The effect of these statutes, taken together [says the report], on the question of compensation has been passed upon by the Supreme Court of the United States in *Badeau v. United States*.⁴

It is there held that a person on the retired list of the Army, and by expressed statute entitled to pay as such, can not receive that pay while he holds a civil office and draws the pay or compensation of that office if the duties required or that may be required are incompatible.

Accordingly held that *Badeau*, who was on the retired list and accepted a position in the diplomatic and consular service and drew his pay, was not entitled to pay as a retired officer while he held such position.

Officers of the Army retired from active service are still in the military service of the United States.⁵

Their pay is expressly provided for by statute.⁶

It follows that Gen. Joseph Wheeler, from 12 o'clock noon March 4, 1899, the time when the Fifty-sixth Congress commenced, was not entitled to pay and could not draw pay as Representative or Representative-elect (so called), conceding for the sake of the argument that he had not declined the election, for the reason that he held a commission in the Army on the active list and was discharging the duties and drawing the pay of an army officer and most of the time was on the ocean or in active service in the Philippines, over 8,000 miles from the capital of the United States. His pay as major-general was \$7,500 per year and as brigadier-general \$5,500 per year.

Therefore Hon. William Richardson has had no predecessor, as to compensation, in the Fifty-sixth Congress.

We have not overlooked the cases holding that the above-quoted sections relating to compensation do not apply to persons holding two civil offices the duties of which are distinct but not incompatible, the duties and compensation of each office being expressly fixed by law and appropriated for.⁷ In the *Badeau* case the court points out the distinction very clearly.

The report then propounds the question whether or not Hon. William Richardson had a predecessor in office *de jure* or *de facto* in the Fifty-sixth Congress.

¹ Here are cited the cases of *Van Ness*, *Yell*, *Vandever*, *Blair*, and *Wheeler*. The reports also cites law cases in point.

² The Blair resolution is here quoted. (See section 492 of this work.)

³ Sections 1763–1765 of the Revised Statutes.

⁴ See 130 U. S., pp. 439, 448, 450–452.

⁵ See *United States v. Tyler*, 105 U. S., 244.

⁶ Sections 1275, 1276, Revised Statutes.

⁷ See 120 U.S., 126; 21 How., 463; 110 U.S., 688.

In response to this the committee finds that all Representatives elected¹ become "Members" from the very hour and minute of the commencement of the term for which elected; that is, on the 4th of March next preceding the meeting of the Congress. Therefore the Member-elect is the holder of an "office" as well as the Member who has been sworn.

The report continues:

No person elected or appointed to an office becomes an officer from the mere fact of his election or appointment. Acceptance is necessary. Seeking the office or consenting to be appointed or elected does not constitute an acceptance.²

General Wheeler might have accepted the election to the Fifty-sixth Congress. He could have accepted in more ways than one. He might have signed certificates for drawing his pay and have drawn his pay. He might have exercised the franking privilege. When Congress assembled, he might have appeared, participated in the organization of the House by voting for Speaker, and then have taken the oath of office, which act would have entitled him to take a seat in the House. He did none of these things.

At the time of his election he held a commission as major-general in the Army of the United States on the active list and was in the active service. When the 4th day of March, 1899, arrived, he continued in the Army; continued to perform the duties of his army office; continued to draw his pay as an army officer; in fact, he continued to exercise all the prerogatives and powers and to enjoy all the privileges of an officer of the Army of the United States on the active list.

After referring to the fact that General Wheeler had been a Member of Congress before, and presumably knew of the law forbidding an army officer holding a civil office, the report continues:

The law as well as common sense placed and places an interpretation upon these acts. That interpretation is that he declined to accept the election to the Fifty-sixth Congress. * * * If Wheeler declined the civil office to which elected at the general election in 1898, he never filled the office, was never in it, and it is immaterial whether he declined on or before March 4, 1899, or at the assembling of Congress December 4, 1899. A declination of the office or of the election at any time before acceptance left it vacant from the very beginning of the term. It is not conceivable that a person who declines either an election or an appointment to a civil office the term whereof is fixed and definite has ever filled it for a single moment.

It follows that Joseph Wheeler never held the office of Representative in the Fifty-sixth Congress or of Member of the House of Representatives in the Fifty-sixth Congress and that the office was always vacant until the election of Hon. William Richardson, August 6, 1900.

Therefore the Hon. William Richardson never had a predecessor de jure or de facto in the Fifty-sixth Congress.

The resignation of Hon. Joseph Wheeler as Representative amounted to nothing, as he did not hold the office, and therefore could not resign it. He had declined it.

The report next goes on to show that section 51, of the Revised Statutes, which provides for payment of the successor when a vacancy occurs after the commencement of the Congress, does not apply to the case of Mr. Richardson, because no person occupied the seat of Representative from the Eighth Alabama district in the Fifty-sixth Congress, either de jure or de facto, or was entitled to the pay prior to Mr. Richardson's election. Section 51 of the Revised Statutes had been passed upon by the court, in the case where—

One Pirce held the certificate of election as Representative from the Second district of Rhode Island in the Forty-ninth Congress. He was sworn in, performed his duties as Representative, and drew his pay. The seat was contested, and the contestants claimed that Pirce was not elected to

¹The status of the Member-elect is discussed at length.

²Mechem's Public Offices, secs. 247, 249.

the Forty-ninth Congress. The House finally decided that Pirce was not elected, and that the seat was vacant. The vacancy existed from the very beginning of the Forty-ninth Congress, March 4, 1885, for the reason that no person was elected from the Second district of Rhode Island to fill that seat. February 21, 1887, Page was elected to fill such vacancy, and he claimed that under section 51, Revised Statutes, he was entitled to pay from March 4, 1885, when the Forty-ninth Congress commenced. The court held that section 51 did not apply, because Page in law had no predecessor in the Forty-ninth Congress. As to pay he did have a predecessor, and that predecessor drew his pay so long as he occupied the seat. The court held therefore that under a proper construction of section 51 Page had a predecessor as to compensation within the meaning of section 51 and that therefore Page was entitled to his pay only from the time that the compensation of Pirce ceased. The plain holding is that if Pirce had never occupied the seat and drawn his pay section 51 would not have applied at all.

The following is the unanimous holding of the court in that case:

"The proper construction of section 51 is that the predecessor of the person elected to fill a vacancy must be a person who was the predecessor in the same Congress. If no such person is to be found, because no such person was duly elected, Page had no predecessor in the sense of section 51, and that section does not apply to his case. But we think that, under the proper construction of section 51, Pirce was the predecessor of Page as to compensation or salary. His credentials showed that he was regularly elected; he must have been placed on the roll of Representatives-elect, under section 31 of the Revised Statutes; he was sworn in, took his seat, voted, served on committees, and drew the salary and the mileage. Under sections 38 and 39 he was entitled to his salary, because his credentials, in due form of law, had been duly filed with the clerk, under section 31, and because he took the required oath. Section 51 refers only to a vacancy occurring after the commencement of a particular Congress and in the membership of that Congress, and the reference to a 'predecessor' is plainly intended to apply only to a predecessor in that Congress. If there was any such predecessor of Page, it was Pirce. If there was no predecessor of Page in that Congress, section 51 does not apply to that case."

In the case of Hon. William Richardson, now under consideration, as we have already seen, no person occupied the seat of Representative from the Eighth Alabama district in the Fifty-sixth Congress, either de jure or de facto, or was entitled to the pay of such Representative prior to the election of Hon. William Richardson, and therefore within the decision just quoted section 51 of the Revised Statutes does not apply.

As section 51 has no application, we are relegated to the rules of the common law, and here there is no dispute. A person elected to fill a vacancy, in the absence of any statute establishing a different rule, is entitled to compensation only from the time of his election or appointment. It follows that the Hon. William Richardson is entitled to pay from August 6, 1900, only, that being the date of his election.

Your committee also, by a vote of 10 to 5, 1 member being absent and 1 not voting,¹ adopted the following resolution, which is respectfully reported to the House, viz:

"*Resolved*, That Hon. William Richardson, Representative from the Eighth Congressional district of the State of Alabama, is entitled to pay only from August 6, 1900, the date of his election to the Fifty-sixth Congress."

This resolution was not acted on by the House, but the Speaker certified the salary checks of Mr. Richardson in accordance with the findings of the committee.

501. A Member having informed the House of his acceptance of an incompatible office, the House has assumed or declared the seat vacant.— On December 6, 1792,² the Speaker laid before the House a letter from Joshua Seney,

¹ Messrs. William H. Fleming, of Georgia, Richard W. Parker, of New Jersey, and D. H. Smith, of Kentucky, while supporting the conclusions filed individual views. Mr. John J. Jenkins, of Wisconsin, filed views in support of the opinion that Mr. Richardson's salary began at the date of Mr. Wheeler's resignation, April 20, 1900. Messrs. Charles E. Littlefield, of Maine, and Julius Kahn, of California, taking issue with the conclusions of the report as to the status of the Member-elect, held that Mr. Richardson's pay should begin December 4, 1900, the date when they held that Mr. Wheeler's right to compensation ceased.

² Second session Second Congress, Journal, p. 635 (Gales & Seaton ed.); Annals, p. 738.

one of the Members for the State of Maryland, stating his acceptance of an appointment in the judiciary department of the said State, which disqualified him for a seat in the House. The letter was read and ordered to lie on the table.

January 23, 1793,¹ the Speaker laid before the House a letter from the governor of Maryland with the return of William Hindman, "in room of Joshua Seney, who has resigned," as the Journal expresses it.

502. On February 27, 1804,² the Speaker laid before the House a letter addressed to him from John Smith, of New York, stating that "having been elected by the legislature of the State of New York a Senator of the United States, he had accepted the appointment and taken his seat in the Senate."

On motion—

Resolved, That John Smith, one of the Representatives from the State of New York, having accepted the appointment of Senator from that State, in the Senate of the United States, has thereby vacated his seat in this House; and that the Speaker be requested to notify the executive of the said State of New York accordingly.

503. Instance wherein a Senator-elect continued to act as governor of a State after the assembling of the Congress to which he had been elected.—On January 4, 1906,³ during the first regular session of the Fifty-eighth Congress in the Senate Mr. John C. Spooner, of Wisconsin, said:

Mr. President, I present the credentials of Hon. Robert M. La Follette, Senator-elect from the State of Wisconsin, which I ask may be read and placed on file.

The Vice-President said:

The Secretary will read the credentials.

The credentials of Robert Marion La Follette, chosen by the legislature of the State of Wisconsin a Senator from that State for the term beginning March 4, 1905, were read and ordered to be filed.

Mr. Spooner then said:

Mr. La Follette, the Senator-elect, is in attendance, and I ask that the oath of office be now administered to him.

The Vice-President said:

The Senator-elect will present himself at the Vice-President's desk and take the oath of office prescribed by law.

Mr. La Follette was escorted to the Vice-President's desk by Mr. Spooner, and the oath prescribed by law having been administered to him, he took his seat in the Senate.⁴

¹Journal, p. 677.

²First session Eighth Congress, Journal, pp. 602, 603 (Gales & Seaton ed).

³First session Fifty-ninth Congress, Record, p. 674.

⁴The Senate had met in special session on March 4, 1905, but Mr. La Follette, who was governor of Wisconsin, did not appear either then or at the assembling of Congress at the first regular session, on December 4, 1905. On January 1 he resigned as governor of Wisconsin.

504. A resolution declaring vacant the seat of a Member who has accepted an incompatible office may be agreed to by a majority vote.—On January 20, 1863,¹ the House agreed to the following resolution:

Resolved, That William Vandever has not been entitled to a seat as a Member of this House since he was mustered into the military service of the United States as colonel of the Ninth Regiment Iowa Volunteer Infantry, to wit, since the 24th day of September, A. D. 1861.

Mr. Horace Maynard, of Tennessee, made the point of order that, as a majority only had voted in favor of the resolution, it was not adopted, since the resolution in effect brought about the expulsion of a Member, which under the Constitution required the concurrence of two-thirds of the Members.

The Speaker² overruled the point of order.

Mr. Maynard having appealed, the appeal was debated on this and the succeeding day, the ground being taken in support of the ruling that Mr. Vandever, by accepting an incompatible office, had in effect vacated his seat.

On January 21 the decision of the Chair was sustained—yeas 82, nays 36—the appeal being laid on the table.

505. The South Carolina election case of Bowen v. De Large in the Forty-second Congress.

The House has manifestly leaned to the idea that a contestant holding an incompatible office need not make his election until the House has declared him entitled to the seat.

It being impossible to determine who is elected, the House declares the seat vacant.

In a case where sitting Member's counsel had surreptitiously suppressed his evidence, the taking of further testimony was permitted.

On January 18, 1873,³ Mr. George F. Hoar, of Massachusetts, from the Committee on Elections, submitted a report in the South Carolina case of Bowen v. De Large:

The committee find, upon the whole evidence, that said De Large did not receive a majority of the votes legally cast at the election in said district, and is not entitled to a seat.

This case came on to be heard before the committee at the December session of 1871–72. Mr. De Large then applied for a postponement, and for leave to take further testimony, on the ground that the counsel employed by him to prepare his cause and take testimony in his behalf had possession of the evidence, and refused to surrender the same to be used before the committee, and, further, that said counsel had been tampered with and bribed by said Bowen to act for him. The committee found both these allegations to be proved. Some of the committee are of opinion that this proceeding, which would furnish ground for the expulsion of the contestant, if he were a Member, would justify a refusal to permit him to proceed with the contest, or to award him the seat.

The report goes on to say that the sitting Member was allowed to take further testimony, from which a state of fraud and irregularity was shown that made it impossible to determine who was elected.

It further appeared that on a day after the day when contestant claimed to have been elected to the House he was chosen a member of the South Carolina

¹Third session Thirty-seventh Congress, Journal, pp. 212, 213, 215; Globe, pp. 405–407, 427.

²Galusha A. Grow, of Pennsylvania, Speaker.

³Third session Forty-second Congress, House Report No. 37; Smith, p. 99.

house of representatives for two years, and on November 1, 1872, took his seat and the oath therein.

The committee also say:

It further appeared that in the fall of 1872 said Bowen was elected sheriff of Charleston, S. C., for the term of four years, and on the 19th of November, 1872, took the oath of office and entered upon the duties of the same, which office he now holds. These offices are, in their nature, incompatible with the office of Member of this House, and are expressly declared to be so by the constitution of South Carolina.

Some of the committee are of opinion that the acceptance of these offices by Mr. Bowen disqualifies him from the further prosecution of a claim to a seat in this House, and from taking a seat therein, if he shall be found to have been duly elected.

The committee are unanimous in finding all the facts herein reported.

They are not unanimous in holding that each one of the reasons aforesaid is sufficient of itself to disqualify the contestant.

But they are unanimously of opinion, on the whole case, that Mr. Bowen is not entitled to the seat.

Therefore the committee recommended resolutions declaring that neither the contestant nor the sitting Member was entitled to the seat.

The report was considered in the House on January 24, 1873.¹ The contestant, Mr. Bowen, urged in argument that the acceptance of incompatible offices should not bar him out since the doors of the House were not open to him. When it should be decided that he was entitled to admission to the House he might then resign his State offices and elect the seat in the House. He cited the cases of Herrick, Mumford, Blair and Schenck. This argument impressed the House with its strength, and Mr. Hoar expressly stated that the committee relied entirely on the fact that an investigation of the election on its merits rendered it impossible to determine who was elected. It is evident that the House also preferred to decide the case on that basis, rather than on the basis of qualifications.

The resolutions were adopted without division, and so the seat was declared vacant.

506. In 1815 the House questioned the constitutional right of a Member to accept an appointment as commissioner, the office being created under the terms of a treaty during the period of his membership.—On December 11, 1815,² Mr. Peter B. Porter, of New York, appeared and took his seat in the House. He had not been a Member of the preceding Congress.

On January 23, 1816,³ the Speaker laid before the House a letter from Mr. Porter, stating that he had transmitted his resignation as a Member to the executive of New York.

On February 9, 1816,⁴ Mr. John Randolph, of Virginia, afford this resolution:

Resolved, That a committee be appointed to inquire whether the appointment to and acceptance by the Hon. Peter B. Porter, late a Member of this House from the State of New York, of the office of commissioner under the late treaty of Ghent is in contravention of the Constitution of the United States.

Considerable debate arose over the resolution. Mr. John Forsyth, of Georgia, urged that Mr. Porter had been elected for the term beginning March 4, 1815, and terminating March 4, 1817. The office which he accepted had existed, if it existed at all, from the day of the exchange of the ratifications of the treaty of peace—

¹ Journal, p. 238; Globe, pp. 842–847.

² First session Fourteenth Congress, Journal, p. 32.

³ Journal, p. 212.

⁴ Journal, p. 303; Annals, pp. 940–948.

February 18, 1815. It was not pretended that commissioners for any purpose of foreign intercourse as regulated by treaty might not be created by the President and Senate. The sanction of the House was required only to make an appropriation to pay them for their services. If their services were to be compensated by any act that Mr. Porter had assisted in passing, there would be some evidence of a violation of the Constitution, but no such fact existed. Mr. Robert Wright, of Maryland, said that the provision of the Constitution¹ was intended to guard against the creation of office and the increase of emoluments by Members of Congress for the benefit of themselves. The office in question was not the kind contemplated by the Constitution. It was a ministerial, not a civil, office, made necessary by the treaty, but of which the obligation of the President to appoint was imposed by the Constitution.

On the other hand, Mr. Randolph urged that the House should be very jealous of any invasion of these guaranties of the Constitution, and appealed to the older Members, especially Mr. Richard Stanford, of North Carolina, the "father of the House," who responded by urging the Members "to avoid the crumbs of office from the Executive, and to look to the people only, to whom they owed their appointments, as the source of honor."

Mr. Randolph's resolution was then agreed to, yeas 70, nays 55, and Messrs. Randolph, Thomas P. Grosvenor, of New York, Forsyth, John G. Jackson, of Virginia, and John B. Yates, of New York, were appointed the committee. They made no report.²

¹Section 6 of Article I, which provides: "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a Member of either House during his continuance in office."

²See also opinion of the Comptroller of the Treasury as to the payment of salary to Matt. W. Ransom, as minister to Mexico, the emoluments of the office having been increased while he was a Senator of the United States from North Carolina, and the appointment and confirmation by the Senate and the signing and sealing of his commission having taken place before the expiration of his term as Senator. (Vol. II, Decisions of Comptroller, p. 129.)