Chapter XXII.

PLEADINGS IN CONTESTED ELECTIONS.

678. A person proposing to contest the election of a Member serves notice within thirty days after determination of the result.

A Member on whom has been served a notice of contest shall answer within thirty days of such service.

Both the notice of contest and answer are required to present particular specifications.

The statutes provide.

Whenever any person intends to contest an election of any Member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall have been

[1] As to time of serving notice. Section 38 of this volume.

Instances of notices served too late. Sections 901, 1052 of Volume II.

Extension of time for serving notice. Sections 436, 621.

Committee given discretion to regulate serving of. Section 599.

Manner of serving (section 337 of this volume and sections 862 and 984 of Volume II) and proof of service. Section 862 of Volume II.

Waiver of informality in serving notice. Sections 852, 1057 of Volume II.

More than one notice may be served (section 839), but each must be within the required time. Section 855 of Volume II.

House may disregard law as to notice where its observance has been impracticable. Sections 327, 599.

As to the determination of result of election, on which the issuance of the notice is predicated. Sections 425, 527 of this volume and 862, 884, 992 of Volume II.

Construction of words "specify particularly" in law as to notice. Section 337 of this volume, and sections 821, 824, 830, 835, 848, 864, 905, 909, 917, 942, 972, 1064, 1074, 1075, 1171 of Volume II.

House sometimes proceeds with contest although notice or answer may be vague and indefinite. Section 778 of this volume, and sections 850, 859, 949 and 1107 of Volume II.

Instance of notice by telegraph. Section 467.

Amended notice admitted. Sections 452, 624.

Waiver as to sufficiency of notice. Sections 855, 864.

Notice and answer should be free from personalities (sections 938, 1125 of Volume II) and trivial and irrelevant matter. Sections 1103, 1126 of Volume II.

Before the enactment of the law, contests were instituted by memorial. Sections 322, 362, 370, 434, 435, 525, 547, 647, 708, 729 756, 758, 760, 763, 806, 815, 820 of this volume; and 986 of Volume II. Instance also after the enactment of the law. Section 825 of this volume.

determined by the officer or board of canvassers authorized by law to determine the same, give notice in writing, to the Member whose seat he designs to contest, of his intention to contest the same, and in such notice shall specify particularly the grounds upon which he relies in the contest.[1]

Any Member upon whom the notice mentioned in the preceding section may be served shall, within thirty days after the service thereof, answer such notice, admitting or denying the facts alleged therein, and stating specifically any other grounds upon which he rests the validity of his election; and shall serve a copy of his answer upon the contestant.[2]

679. The House decided in 1806 that a petition instituting an election contest should state the grounds with reasonable certainty.

The House decided that in an election case introduced by petition, the petitioner should not give evidence of any fact not alleged in the petition.

On January 3, 1806,[3] the House concurred in the action of the Committee on Elections giving Michael Leib, of Pennsylvania, leave to withdraw his petition. The committee expressed the grounds for this conclusion as follows:

A petition against the election of any person returned as a Member of the House of Representatives ought to state the ground on which the election is contested with such certainty as to give reasonable notice thereof to the sitting Member, and to enable the House to judge whether the same be verified by the proof, and, if proved, whether it be sufficient to vacate the seat; and the petitioner ought not to be permitted to give evidence of any fact not substantially alleged in his petition.

680. The Tennessee election case of Thomas v. Arnell, in the Thirty-ninth Congress.

The parties to an election case may not by mutual consent waive the requirements that an issue shall be made up by the pleadings of notice and answer.

For exceptional reasons the House may authorize an election case to be made up as to notice and answer after the time prescribed by law.

Form of resolution providing for notice and answer in election case after expiration of time prescribed by law.

On January 21, 1867,[4] the Committee on Elections, through Mr. Henry L. Dawes, of Massachusetts, reported in the case of Thomas *v.* Arnell, of Tennessee. The report states the facts and conclusions as follows:

That the election here contested was held on the first Thursday in August, 1865, and the certificate of election was given by the governor of the State to Mr. Arnell, under which, at the commencement of the present session, Mr. Arnell appeared, was qualified, and still holds the seat.

The statute of February 19, 1851, provides that the contestant shall serve notice of contest upon the sitting Member within thirty days after the result of said election shall have been determined by the officer or board of commissioners authorized by law to determine the same, and the sitting Member shall answer the same within thirty days, and all testimony shall be taken within sixty days thereafter. In the present case the statute has not been complied with; neither notice of contest nor answer have been served. At the hearing before the committee the contestant claimed the right to be heard upon the allegations in his petition without further pleadings, for the reasons set forth in the same, and the sitting Member contended that the case should be dismissed for want of a compliance with the requirements of said statute.

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[1] Revised Statutes, sec. 105. The present system of making up contested election cases dates from 1851. Before that, except for a brief period in the early years of the House, there had been no statute governing the procedure, and contests had been instituted by memorial.

[2] Revised Statutes, sec. 106.

[3] First session Ninth Congress, Contested Election Cases in Congress, 1789 to 1834, p. 165.

[4] Second session Thirty-ninth Congress, 2 Bartlett, p. 162; Rowell's Digest, p. 211.

The following letter from the sitting Member was submitted by the contestant as evidence that he had waived a notice of contest, and there was no other evidence upon this point:

"THIRTY-NINTH CONGRESS OF THE UNITED STATES,

"Washington, D.C., December 4, 1866.

"MY DEAR SIR: Yours of the 3d instant has been received. The following statement contains the substantial facts, so far as I remember them: In the house of representatives at Nashville, Tenn., after learning that Governor Brownlow had given to me the certificate of election for the Sixth Congressional district of Tennessee to the Thirty-ninth Congress, you remarked to me that you intended to contest the election. I replied, 'Very well; I expect you to do so.' After some other conversation of a mutually friendly character, on your turning away, I volunteered the information that it was necessary to give me notice, which you seemed not to have thought of. I further remarked that I desired to throw no obstacles in the way, and would acknowledge notice. You then called up several witnesses and the matter was verbally understood.

"Hoping that this will be satisfactory, I am, very respectfully, yours,

"SAMUEL M. ARNELL.

"Hon. D. B. Thomas."

Without critically examining this note for the purpose of ascertaining whether it sustained the position of the contestant, that it waived all notice whatever, or, as contended by the sitting Member, was merely evidence of an agreement on his part to acknowledge the service of legal notice whenever the same should be made, the committee were of opinion that it was not competent for the parties to entirely waive the requirements of the statute of 1951; that said statute was enacted not only to aid the parties in the preparation of their case, but also to secure a record and a distinct and well-defined issue, upon which the committee and the House were to pass. To this end the statute requires the notice to be in writing, and to specify in such writing particularly the grounds upon which he relies in the contest, and the answer to admit or deny the facts alleged in the notice, and to state specifically any other grounds upon which he rests the validity of his election. To the issue thus distinctly defined the statute and the uniform decisions of the House confine all testimony to be taken. It must be evident to every one that it is impossible for the committee or the House to hear and determine a case without an issue joined. Besides, no testimony could be taken by either party without such issue, previously framed. The statute requires testimony to be taken in a manner therein prescribed, before a time therein fixed, and in support of an issue previously made up. It is perfectly absurd to suppose it possible for either party to take testimony in support of his own allegations, or in contravention of those of the other party, before either have been made, or for the committee to hear the parties upon an issue reserved.

The committee were, therefore, of opinion that this case could not be heard by them in its present position, and that it must be dismissed unless the House should authorize the parties to make up an issue and submit the same, with such evidence as each may be able to produce in relation to the same, to the committee or the House. It was thereupon claimed by the contestant that he has been led into this noncompliance with the statute by the agreement of the sitting Member to acknowledge notice heretofore alluded to, and also by the peculiar condition of the State of Tennessee in reference to representation in this House. All representation from that State had been refused admission into Congress till near the close of the first session, and it was not known till then, long after the time prescribed by the statute for serving notice had elapsed, that a contest would be of any avail.

The committee heard both parties upon the question of recommending to the House that the authority prayed for be given. This authority was given in the case of Williamson *v.* Sickles (Bart., 288) for the special reasons existing in that case, and in the opinion of the committee there are peculiar reasons existing in the present case, not likely again to occur, which will justify the House in authorizing the making up of a record as nearly in conformity with the requirements of the statute as the circumstances of the case will permit. They therefore recommend the adoption of the following resolution:

Resolved, That Dorsey B. Thomas, contesting the right of the Hon. Samuel M. Arnell to a seat in this House as a Representative from the Sixth Congressional district of Tennessee be, and he is hereby, required to serve upon the said Arnell, within eight days after the passage of this resolution, a particular statement of the grounds of said contest, and that said Arnell be, and he is hereby, required to serve upon said Thomas his answer thereto in eight days thereafter, and that both parties be allowed eighteen

days next after the service of said answer to take testimony in support of their several allegations and denials in all other respects in conformity to the requirements of the act of February 19, 1851, except that not more than four days' notice shall be required for the taking of any deposition under this resolution.

On January 23, 1867,[1] the House agreed to the resolution proposed by the committee; but no conclusion was ever reached on the merits of the case, and on March 2[2] the House discharged the Elections Committee from the consideration of the subject.

681. The Virginia election case of Stovell v. Cabell in the Forty-seventh Congress.

Although there may be irregularities in pleadings and in taking of testimony, the committee sometimes examines an election case on the merits.

Where no law requires the use of only one ballot box at a voting precinct, the use of two does not justify rejection of the return.

On July 18, 1882,[3] Mr. Gibson Atherton, of Ohio, from the Committee on Elections, submitted the report of that committee in the Virginia case of Stovell *v.* Cabell. The official returns gave sitting Member a majority of 859 votes.

The committee say:

The contestant does not claim in his notice of contest that he was elected a Representative to the Forty-seventh Congress, but that he would have been elected but for certain wrongs of which he complains. To all of contestant's allegations the contestee interposed a general as well as a specific and particular denial, and challenged the proof.

The contestant has not attempted to substantiate by proof any of the grounds of contest specified in his notice, except such as relate to the precincts of Danville, Cascade, Brosville, Hall's Crossroads, and Ringgold, in the county of Pittsylvania; Charity and Gates's Store, in Patrick County; and Hillsville and Dalton's Store, in the county of Carroll.

He has offered some testimony, which has been duly considered, relating to the precinct of Phillips's Store, Nester's, Fancy Gap, and Smith's Mill, in Carroll County. But these precincts are not mentioned in the notice of contest, and the depositions relating to them were objected to for that reason by the contestee, and are inadmissible. Besides, the depositions were, in disregard of the contestant's objections, taken in Carroll County by a Pittsylvania, County notary, who had no authority, under State or Federal law, to take them.

If all the demands made by the contestant in his notice of contest respecting the precincts to which his proofs relate be conceded, the result will be as follows: Cabell, 10,225; Stovell, 9,844; a majority of 381 for sitting Member.

The committee examined the testimony of contestant, however, but find it inconclusive.

It was shown that at Hall's Crossroads separate ballot boxes were used to receive the votes of white and colored voters. The report says of this:

The testimony shows that two boxes had been used since the period of reconstruction, without objection from any source.

There is no statute which expressly, or by necessary implication, forbids the use of two boxes in that way. The only question is whether their use interfered with the purity, freedom, or convenience of the election. That it did not is incontestably proven by the testimony.

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[1] Journal, p. 250.

[2] Journal, pp. 559, 560.

[3] First session Forty-seventh Congress, House Report No. 1696; 2 Ellsworth, p. 667.

As to Charity precinct, the report says:

The contestant, in his notice of contest, asserts that the county canvassers of Patrick County illegally rejected the returns of Charity precinct, and demands that the returned vote of this precinct be counted.

But his own proof shows that the only return made by the judges of election of the precinct was a return of the vote for electors of President and Vice-President, which return wholly omits the votes cast for the Republican electoral candidates. It shows that the judges of election made no return at all of the vote for Representative in Congress. The omission of the county canvassers to canvass votes not returned was not illegal. On the contrary, the canvass of votes not returned would have been a lawless proceeding.

If it were true, as the contestant asserts in his brief, that 51 votes were cast for the contestant, and only 20 for the contestee, at this precinct, the contestant might have availed himself of the net result by proper averments in his notice, duly supported by legal proof. But he made no such averments. His only averment was that the county canvassers illegally rejected the return; and that averment was not true. Nor is the testimony taken on the subject before the county clerk admissible.

In accordance with their views the committee reported resolutions confirming the title of sitting Member to the seat.

These resolutions were agreed to by the House without division or debate.[1]

682. The Pennsylvania election case of Reynolds v. Shonk, in the Fifty-second Congress.

The notice of contest in an election case must be specific in its allegations.

A notice of contest condemned in an election case as inadequate.

The Committee on Elections sometimes hears a contest on its merits, although the notice may fail in definiteness.

On January 17, 1893,[2] Mr. Littleton W. Moore, of Texas, from the Committee on Elections, submitted the report in the Pennsylvania case of Reynolds *v.* Shonk. The contestant had served on sitting Member the following notice of contest:

Hon. GEO. W. SHONK.

SIR: This is to notify you that I design and intend to contest your election and your seat in the Fifty-second House of Representatives of the United States, and I specify particularly the grounds upon which I rely.

First. Fraud in the election, and bribery, intimidation, and corruption of voters. (*a*) In the use of money with election officials and Democratic poll men. (*b*) In the purchase of voters to vote for you, especially well-known Democratic voters, by the payment of sums of money of various amounts; in the employment of large numbers of men by you, at various prices, each to attend the polls, and by intimidation and numbers compel Democratic voters to vote for you; by bargaining with and paying to leaders and influential men of foreign nationality large sums of money, who agreed to and did, by various devices and tricks, by influence and violence, compel or influence their countrymen to vote for you; by the use of the regular Democratic ticket, with your name inserted as the candidate for Congress and my name excluded, and the employment and purchase, with money, of Democrats and others to induce voters to vote the same, by representing this fraudulent ticket to be the straight Democratic ticket; by this and other practices of deception and guile deceiving large numbers of voters; by promise of patronage of office; by agreement to nominate or procure the nomination of individuals to certain offices of our State and the United States; and by engagements to procure executive clemency or immunity from punishment for violation of the election laws, voters were induced to cast their votes for you in every election district of the Twelfth Congressional district of Pennsylvania.

Respectfully, yours,

JOHN B. REYNOLDS.

WILKES-BARRE, PA., *December 2, 1890.*

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[1] Record, p. 6174; Journal, p. 1664.

[2] Second session Fifty-second Congress, House Report No. 2268; Rowell's Digest, p. 477; Stofer's Digest, p. 47; Journal, p. 94.

Sitting Member filed exceptions to this notice, on the ground that it was too informally drawn and too vague, not stating in what district the election was held, or who were the candidates, or what votes they received, or that the certified result of the election was not correct; and that it did not give specific instances of wrongdoing, particularizing as to locality, method or form of the alleged unlawful acts.

The committee, after citing the law of Congress as to notices of contest, say:

It will be observed that the contestant nowhere claims that he was elected, but seeks only to impeach the title of the contestee to the office. The committee took no formal action upon the exceptions filed to the notice of contest nor pronounced their decision upon it. But we are of opinion that the notice of contest in its various charges upon which there was any testimony is too vague and indefinite and does not conform to the act of Congress referred.

In Blomberg *v.* Haralson (Smith's Report of Election Cases, p. 355) the committee say:

"The statute requires that the contestant in his notice shall 'specify particularly the grounds upon which he relies in his contest.' It is impossible to conceive of a specification of the grounds of contest broader or more general in its terms. It fixes no place where the act complained of occurred. It embraces the whole district in one sweeping charge. The specifications embrace three general grounds of complaint, not one of which possesses that particularity essential to good pleading."

The committee, however, heard the case on its merits, but found no evidence sufficient to assail successfully the 1,484 plurality returned for sitting Member. Sitting Member admitted that he spent $9,550 in the canvass, but explained to the satisfaction of the committee that the expenditure was for legitimate purposes. Therefore resolutions confirming the title of sitting Member to the seat were recommended, and on February 16, 1893, were agreed to by the House without debate or division.

683. Instances wherein the House permitted amended notices of contest to be filed, with right to file amended answers.

The House denied the petition of certain electors in a district asking leave to take testimony in an election case.

On March 14, 1871,[1] Mr. George W. McCrary, of Iowa, submitted from the Committee of Elections the following resolutions, which was agreed to without debate or division:

Resolved, That James H. Harris, contesting the claim of Hon. Sion H. Rogers to a seat in this House as the Representative of the Fourth district of North Carolina, shall be permitted to serve upon said Rogers an amended notice of contest within ten days from and after the passage of this resolution, and that said Rogers be permitted to answer the same within thirty days after the service thereof, and the time for taking testimony under the law is extended sixty days from the date of the service of the answer to said amended notice.

On April 13,[2] also, a similar resolution in the case of Schenck *v.* Campbell provided that the notice of contest might be amended "by adding thereto an allegation charging fraud in the election in the second ward of the city of Hamilton, Ohio, which amendment shall be served on or before," etc. On April 10, 1872,[3] Mr. George W. McCrary, of Iowa, from the Committee of Elections, reported adversely petition of certain electors of the district asking leave to take testimony in the case. The petition was laid on the table.

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[1] First session Forty-second Congress, Journal, p. 57; Globe, p. 101.

[2] Journal, p. 150; Globe, p. 627.

[3] Second session Forty-second Congress, Journal, p. 666; Globe, p. 2342.

684. The Texas election case of Rosenthal v. Crowley in the Fifty-fourth Congress.

An instance wherein, after an amended notice of contest had been authorized, the House heard the election case as if it had actually been made.

On January 21, 1896,[1] Mr. Samuel M. Stephenson, of Michigan, introduced the following resolution, which was referred to Committee of Elections No. 3:

Resolved, That the contestant, A. J. Rosenthal, be, and he is hereby, authorized to so amend his notice of contest in the case of A. J. Rosenthal *v.* Miles Crowley, Tenth Congressional district, State of Texas, by adding thereto the following, to wit: "That there were unlawfully counted in making up the returns from said district divers precincts in Galveston County." [Here follow specifications and numbers of the precincts.]

The committee, in hearing the case, heard it as if the amendment had actually been made, and it being evident that, even if all should be proved as claimed, the contestant could not make out his case, recommended the resolution adversely and on January 31[2] the House laid it on the table.

As to the merits of the case the committee reported on January 30,[3] confirming the title of the sitting Member to the seat, and on January 31[4] the House agreed to the report.

The sitting Member had been returned by a plurality of 1,303 votes. Contestant asked that votes be excluded in one county because returns received by the county commissioners' court after the limit prescribed by law had been forwarded to the secretary of state; and in another county where such belated returns had not been forwarded by the county commissioners the contestant asked that they be counted. The committee believed that there was no reason shown why one rule shall not be applied to both cases, and such being the case the plurality of sitting Member could not be attacked successfully.

685. The Missouri election case of Reynolds v. Butler in the Fifty-eighth Congress.

Question as to the serving of amended notices of contest in election cases.

Sundays and legal holidays are not excluded in computing the forty days allowed for taking testimony in an election case.

In an election case testimony taken ex parte, in another case involving only a portion of the district, was not admitted.

On December 15, 1904,[5] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, presented the report of the committee in the Missouri election case of Reynolds *v.* Butler.

The report states the case as follows:

At the regular Congressional election in 1900, James J. Butler was returned as elected to a seat in the Fifty-seventh Congress. His election was contested by William M. Horton. The Committee on

[1] First session Fifty-fourth Congress, Journal, p. 134; House Report No. 197; Rowell's Digest, p. 529.

[2] Journal, p. 166.

[3] House Report No. 177.

[4] Journal, p. 166.

[5] Third session Fifty-eighth Congress, Record, pp. 313–317; House Report No. 3129.

Elections No. 1, to which the contest was referred, reported that, "fraud so permeated the conduct of the election in a large part of the district as to prevent a full, free, and fair expression of the public desire in respect to the election of a Representative in Congress," and the House, on the 28th of June, 1902, adopted a resolution declaring the seat vacant.

The governor of Missouri thereupon ordered a special election. Mr. Butler was again a candidate and returned as elected to fill the vacancy caused by his own unseating. His opponent in that election was Mr. George C. R. Wagoner, who contested his seat in the second session of the Fifty-seventh Congress, which assembled on the first Monday of December, 1902.

As the time fixed by statute for the taking of testimony would have carried the case beyond the expiration of the term for which Wagoner claimed to have been elected, he presented a memorial to the House, which, on the 11th day of December, 1902, adopted a resolution specifying a certain time within which the contestant might take testimony, a certain time for the contestee, and again a certain time for the contestant in rebuttal, and required the Committee on Elections No. 2 to consider and report upon the case so that it might be disposed of during the life of that Congress. That committee reported that by reason of gross frauds, clearly shown, making it impossible to ascertain the legal votes cast, the returns from certain precincts must, in accordance with the well-established precedent of the House and the rule laid down by courts and learned authors, be entirely rejected, and that Wagoner had been duly elected and was entitled to his seat. Resolutions to that effect were adopted by the House, and Wagoner seated February—, 1903.

November 4, 1902, the day fixed by the governor for holding the special election for filling the vacancy in the Fifty-seventh Congress, was also the day fixed by law for the general election, at whicn there was to be chosen a Representative in this the Fifty-eighth Congress. Mr. Butler was a candidate for that seat also and was opposed by Mr. George D. Reynolds, the present contestant.

The Missouri legislature had by act of March 16, 1901, redistricted the State, so that the district in which Reynolds competed with Butler for a seat in the Fifty-eighth Congress was not identical with the district in which Wagoner, upon the same day, competed with Butler for a seat in the Fifty-seventh Congress. Although the district, which is within the city of St. Louis, is still known as the Twelfth, at least one-half of it, territorially speaking (and being the one-half in which Wagoner received his majority), had been cut off from the district, while some new territory had been added. To be explicit, precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of the Twenty-fourth Ward; precincts 1 and 2 of the Twenty-eighth Ward; precinct 11 of the Twelfth Ward; precinct 12 of the Seventh Ward; precinct I of the Twentieth Ward, and precincts I and 2 of the Twenty-first Ward, which formed part of the district in which Wagoner ran against Butler for a seat in the Fifty-seventh Congress, were not in the district in which Reynolds ran against Butler for a seat in the Fifty-eighth Congress, while precincts 7, 8, 9, 10, 11, 12, and 13 of the Twenty-fifth Ward, and precincts 2, 3, and 4 of the Fifteenth Ward, which never had been in the district in which Wagoner ran against Butler, are in the district in which Reynolds ran against Butler. All of the Fourth, Fifth, Sixth, Thirteenth, Fourteenth, and Twenty-third wards and parts of the Fifteenth, Twenty-second, and Twenty-fifth wards were in both districts.

Differently stated, the old district in which Wagoner ran against Butler for the Fifty-seventh Congress, contained 20 election precincts which are not in the present district in which Reynolds ran against Butler for a seat in the Fifty-eighth Congress, and 10 precincts in the present district in which Reynolds ran were not in the district in which Wagoner ran.

The returns of the election for the Fifty-eighth Congress showed Butler to have received 15,316 votes and Reynolds 8,698, an apparent majority of 6,618 for Butler, who was sworn in at the beginning of the present Congress and now occupies the seat which Reynolds contests.

In his notice of contest, in more or less general terms, he charges frauds of various kinds, and in the ninth paragraph thereof specifically charges that in sundry precincts, therein set forth, there were frauds so gross and extensive that it was impossible to ascertain the actual and legal votes, and that the returns should therefore be rejected altogether.

The contestant was not diligent in prosecuting his contest. Provision for the taking of testimony in such cases is found in section 107, United States Revised Statutes, which reads thus:

"Time for taking testimony: In all contested election cases the time allowed for taking testimony shall be ninety days, and the testimony shall be taken in the following order: The contestant shall take

testimony during the first forty days, the returned Member during, the succeeding forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period."

The act of March 2, 1875, chapter 119, section 2, declares:

"That section 107 of the Revised Statutes of the United States shall be construed as requiring all testimony in cases of contested election to be taken within ninety days from the day on which the answer of the returned Member is served upon the contestant."

In this case the notice of contest was dated December 20, 1902. Mr. Butler's answer was served December 22, 1902. Contestant thereupon served an additional or supplemental notice of contest, to which the contestee made reply December 24. The statute makes no provision for the service of additional grounds of contest, and these amended specifications must be considered, if received at all, as served in the original notice of contest. (McDuffy v. Torpin, Stofer, 355; McCrary on Elections, 448.) Certainly after answer filed, a supplemental notice of contest can not be held to extend the time for the taking of testimony. Contestee's answer having been served December 22, 1902, the forty calendar days expired with the 31st day of January, 1903. Within those forty days contestant called no witnesses and took no testimony whatever. On the forty-second day (February 2), contestant proposing to take testimony, and having himself been sworn, counsel for contestee objected to the taking of any testimony whatever, and in his statement of objections said, inter alia:

"George D. Reynolds has slept on his rights, and the forty days during which Congress says testimony for contestee shall be taken have expired without his having taken any testimony whatsoever, and George D. Reynolds has, to all intents and purposes, abandoned his contest, and can not now revive the same in the time allotted to contestee in which to take testimony had he obeyed the mandatory provision of the law."

This and other objections were spread at length upon the record. Contestant was then himself examined, but testified simply to the service of notice of contest and of the additional grounds of contest. Two other witnesses testified also as to the service of these papers, and the papers themselves were put in evidence as exhibits, whereupon the further taking of testimony was adjourned until February 3. This was the forty-first calendar day after the service of the answer to the additional notice of contest and the forty-third after the service of the answer to the original notice. One witness was examined and an adjournment had to February 4 (the forty-fourth day). Two witnesses were then examined and an adjournment had to February 5 (the forty-fifth day). Depositions were also taken on the 6th, 7th, 9th, 10th, and 11th of February (the forty-sixth, forty-seventh, forty-ninth, fiftieth, and fifty-first days). No testimony was at any time taken by contestee and none by contestant between February 11 and March 31. Upon the latter date (the one hundredth day) certain testimony was taken by contestant. Also upon the 1st, 2d, 3d, 6th, 7th, and 10th of April (the one hundred and first, one hundred and second, one hundred and third, one hundred and sixth, one hundred and seventh, and one hundred and tenth days).

Contestant insists that in computing the time under the statute, Sundays and legal holidays must be excluded so as to leave forty working days. It has never been so considered and we can not take that view. Section 108 of the Revised Statutes, being part of the same act, referring to notice of intention to take depositions, requires that it "shall be served so as to allow the opposite party sufficient time by the usual route of travel to attend and one day for preparation, exclusive of Sundays and the day of service." The exclusion of Sundays in one section and not in the other is very significant. In section 1007 it is provided that in order to make a writ of error a supersedeas it must be served upon the adverse party "within sixty days, Sundays exclusive," and generally where Congress has intended to exclude Sundays it has so stated.

"Sundays are included in computations of time, except when the time is limited to twenty-four hours, in which case the following day is allowed." (Endich on Statutes, sec. 393.)

"In the computation of statute time an intervening Sunday is to be counted, unless expressly excluded by the statute." (King *v.* Dowdall, 2 Sand., 131 N. Y.)

Mr. Justice Brown, in Monroe Cattle Co. *v.* Becker (147 U. S., 55) states the general rule to be "that when an act is to be performed within a certain number of days and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation."

Subject to that rule we hold that the statute means calendar days. The contestant took no testimony whatever within the time prescribed by the statute, and some upon which he relies was taken many days after the statutory period, even if construed as he desires.

It is quite true that the statute providing and limiting the time for the taking of testimony is not binding upon this House, which under the Constitution is the only and absolute judge of the qualifications and elections of its Members. But, as has frequently been held, it furnishes a wise and wholesome rule of action and ought not to be departed from except for sufficient cause shown, or where the interests of justice clearly require. It would seem that contestant might have commenced and concluded his testimony in this case within forty days. Certainly he might have commenced. No reason whatever appears upon the record why he could not, or did not, but upon the argument before your committee it was stated that counsel for the present contestant were also counsel for Wagoner in his contest, and that some or all of them were engaged upon that case most of the time. There must, however, have been other counsel in St. Louis quite capable of taking such testimony as was taken in this case.

The report then goes on to cite testimony to show the character of the evidence produced. The contestant called the notaries public before whom testimony was taken in the case of Wagoner *v.* Butler, and by them proved carbon copies of the depositions taken in that case. The report says as to this procedure:

Mr. Butler was not present, either in person or by counsel, at this hearing, having previously given notice that he would not attend any hearing, as he protested against the right of contestant to take any testimony at all after the expiration of forty calendar days. Neither of the witnesses Moore and Halter were examined at all touching the case of Reynolds against Butler. They were called for the single purpose of introducing in that way the testimony of witnesses examined before them, as notaries public, in the Wagoner case. No notice was given Butler that the testimony of the witnesses in the Wagoner case was thus to be introduced, and the notice served upon him of contestant's intention to take testimony did not include even the names of Moore and Halter. Several other notaries before whom depositions were taken in the Wagoner case were also called, and in like manner there were introduced carbon copies of the depositions taken before them in the Wagoner case. The testimony of 21 witnesses in the Wagoner case was thus introduced April 10, 1903 (the one hundred and tenth day). These witnesses were examined in the Wagoner case between December 19 and December 27, 1902, and the only reason given for delay in introducing copies of their depositions in the Reynolds case was that the notary would not surrender carbon copies until his fees were paid.

It is not pretended that the testimony taken directly in this contest makes out a case against the sitting Member, but contestant relies upon the testimony taken in the Wagoner case and proved, or attempted to be proved, by the notaxies public in the manner above indicated. For the competency of this evidence his counsel rely upon Greenleaf on Evidence, section 553, which they cite in their brief as follows:

"In regard to the admissibility of a former judgment in evidence, it is generally necessary that there be a perfect mutuality between the parties, neither being concluded unless both are alike bound. But with respect to depositions, though this rule is admitted in its general principle, yet it is applied with more latitude of discretion; and complete mutuality is not required. It is generally deemed sufficient, if the matters in issue were the same in both cases, and the party against whom the deposition is offered had full power to cross-examine the witness."

That is not a fair citation, as it omits more than half of the section, particularly the following:

"If the power of cross-examination was more limited in the former suit in regard to the matters in controversy in the latter, it would seem that the testimony ought to be excluded."

Furthermore, it omits the fact, manifest from a reading of the entire section, and particularly in connection with section 163, that the learned author referred, in any event, only to cases in which the witnesses were dead or for some other reason not compellable to testify in person.

The matter in issue in the Wagoner case was the right to a seat in the Fifty-seventh Congress from the old district. The matter in issue in this controversy is the right to a seat in the Fifty-eighth Congress from the new district. The matters in issue are therefore not identical. The parties are not the same, except that Mr. Butler, the contestee here, was also the contestee in the Wagoner case. He certainly did not, in the Wagoner ease, have "full power to cross-examine" the witnesses touching the Reynolds case. His "power of cross-examination was more limited in the former suit, in regard to the matters in controversy, than in the latter." Indeed, in the Wagoner case, which related solely to a seat in the Fifty-seventh Congress, he had no opportunity to cross-examine witnesses at all concerning his controversy

with Reynolds for a seat in the Fifty-eighth. No questions concerning the Reynolds contest were asked in direct examination of the witnesses, and cross-examination concerning it would not have been in order. As a matter of fact, he did not cross-examine them at all in the Wagoner case. Doubtless he had his own reasons for not doing so. He may have thought it useless to make much of a fight in that district, and yet he might have been very anxious to cross-examine them touching the present contest, involving an election from a changed district more favorable to his party because of the elimination of sundry Republican precincts which had been in the old district. He was certainly under no obligation to cross-examine them in the Wagoner case, and the fact that he did not is no bar to his right to cross-examine them in this entirely different controversy.

It is asserted in contestant's brief that the elections were held by the same officers and by the use of the same official ballots, but he has failed to show even that fact by any evidence offered in the case. It is not claimed that the witnesses, whose testimony in the Wagoner case contestant seeks to introduce, are dead or were for any other reason beyond the reach of service of subpoena. So far as we are advised their presence could readily have been secured, and failure to call them was based purely on reasons of convenience and expense. Under such circumstances, copies of their depositions would not be admissible in a court of justice.

But there is a further objection. Section 108 of the Revised Statutes requires that the party desiring to take depositions in a contested election case "shall give the opposite party notice, in writing, of the time and place when and where the same will be taken, of the names of the witnesses to be examined and their places of residence." Mr. Butler was not given the names of the witnesses whose testimony, in the Wagoner case, it was proposed to introduce in this contest, and in at least one important instance the notice to him did not even give the names of the notaries public who were called as witnesses in this contest for the purpose of proving the depositions of numerous witnesses in the Wagoner case.

But, even if all the testimony offered by contestant were to be received and given its full effect, it is deficient in at least one very important particular. In the notice of contest it is alleged that over 10,000 illegal ballots were received and counted by the judges of election, and that "the parties so voting were not legally registered voters and were not entitled to vote at said election." We find upon examination. of the published report of the committee which passed upon the Wagoner case in the Fifty-seventh Congress that the result in that case was largely based upon the reception of illegal ballots from persons whose names did not appear upon the official printed registry sheets." We find in the record in this pending controversy, commencing at page 666, a paper entitled "Contestant's Exhibit No. 14 of February 4, 1903—James D. Halter, notary public, city of St. Louis, Mo." This exhibit purports to contain the depositions of 90 witnesses examined before J. T. Sanders, notary public, in the Wagoner case, between December 13, 1902, and January 3, 1903.

It does not appear from the record that Sanders, before whom the depositions were taken, was called as a witness, or that Halter, as notary public, took any depositions at all in this, the Reynolds case. We are therefore at a loss to account for the appearance in this record of these 90 depositions—We were inclined to think that Sanders, the notary public before whom depositions were taken in the Wagoner case, was called as a witness in this case before Halter, acting as notary public, and handed in carbon copies of the depositions of these witnesses, and that the contestant, while sending Exhibit No. 14, failed to return the deposition of Sanders showing the offering of the exhibit. A letter from contestant's counsel shows this to have been the case.

However that may be, we find among these 90 depositions, constituting the so-called Exhibit No. 14, that of Louis P. Aloe, who, in the Wagoner case, produced a book, concerning which he said:

"This is the complete printed register of the qualified voters of the Twelfth Congressional district for the election of November 4 and thereafter, 1902—that is, the official list."

It appears from the testimony that that book was marked "Exhibit C" in the Wagoner case. It was not printed with the testimony in that case. But it was undoubtedly submitted to and used by the committee in preparing its report. It was not, however, sent by contestant Reynolds to the Clerk of the House with the testimony in this case, nor produced before your committee, and therefore, although we find in the testimony what purport to be lists of the names of the persons who voted, showing also whether they voted for Butler or for Reynolds, we are utterly unable to tell who of said voters were registered and who were not, or to what extent such persons as were unregistered voted, either for Butler or for Reynolds.

Our conclusions are more succintly stated in the following

SUMMARY.

1. No part of contestant's testimony was taken within the forty days allowed by statute for that purpose, and some of it was taken as late as the one hundred and tenth day after answer filed. No good and sufficient reason has been shown for the delay.

2. The witnesses upon whose testimony contestant relies were not called and examined in this case, but he has introduced caxbon copies of their depositions, taken by a different contestant in a former case, concerning a seat in a different Congress, and from a different district. The present contestee was contestee also in the eaxlier case, but did not then have full power of cross-examination of said witnesses touching the present contest.

3. The contestee was not given the names of the witnesses in the former case whose depositions contestant proposed to introduce in this case, nor of his intention to introduce such testimony, and in some instances was not given in advance, as the statute requires, the names of the witnesses who were called in this case and by whom the depositions of the witnesses in the former case were proved or attempted to be proved.

4. There is no evidence that all or any of the witnesses, carbon copies of whose depositions in the Wagoner case have been introduced in this case, are dead or were for any other reason not compellable to attend and testify in this contest.

5. Neither the original nor any copies of the official registry lists having been furnished, it is impossible to determine what votes were illegal by reason of having been cast by unregistered persons as charged.

Upon the whole case your committee recommends the adoption of the following resolution, viz:

"Resolved, That Committee on Elections No. 2 shall be, and is hereby, discharged from further consideration of the contested election case of George D. Reynolds *v.* James J. Butler from the Twelfth Congressional district of Missouri."

After brief debate, from which it appeared that the report of the committee was practically unanimous, the resolution proposed by the committee was agreed to without division.

686. The Virginia election case of Beach v. Upton in the Thirty-seventh Congress.

Rule prescribed by the House for serving notice and taking testimony in a delayed election case.

Instance in 1861 of an election contest instituted by memorial.

In 1861, at the extraordinary session of the Thirty-seventh Congress, Mr. Charles H. Upton, of the Seventh Congressional district of Virginia, had been allowed the prima facie title to the seat, the House laying on the table a motion to refer his credentials to the Committee on Elections. Mr. Upton's credentials purported to show that he had been elected on May 23, 1861.

On December 6, 1861,[1] when the second or regular session of the Congress opened, there was presented a memorial of Mr. S. Ferguson Beach, denying the authority of Mr. Upton to hold his seat, and claiming that he had, himself, been elected Representative of the district on October 24, 1861.

On December 9, 1861,[2] Mr. Henry L. Dawes, of Massachusetts, reported from the Committee on Elections the following resolution, which was agreed to without debate:

Resolved, That S. F. Beach, contesting the right of Hon. Charles H. Upton to a seat in this House as a Representative from the Seventh district of the State of Virginia, be, and he is hereby, required

[1] Second session Thirty-seventh Congress, Journal, p. 7; House Report No. 42.

[2] Journal, p. 47.

to serve upon the said Upton, within six days after the passage of this resolution, a particular statement of the grounds of said contest; and that the said Upton be, and he is hereby, required to serve upon the said Beach his answer thereto in six days thereafter; and that both parties be allowed twenty days next after the service of said answer to take testimony in support of their several allegations and denials before some person residing in said district, or the District of Columbia, authorized by the laws of Virginia or of the United States to take depositions, but in all other respects in the manner prescribed in the act of February 19, 1851.

On February 3, 1862,[1] Mr. Upton presented as a question of privilege a resolution directing the Committee on Elections to summon before them certain of the election officers at one of the precincts of the district.

This resolution was laid on the table, the chairman of the Committee on Elections stating that the committee had all the testimony it required.

687. The election case of Morton and Daily from the Territory of Nebraska in the Thirty-seventh Congress.

The revocation of credentials having reversed the position of the parties, the House by resolution authorized investigation without regard to notice.

On July 8, 1861,[2] the House, without debate or division, agreed to the following:

Resolved, That the papers in the case of the contested seat for Delegate from the Territory of Nebraska be referred to the Committee on Elections, and that they be authorized to investigate and report on the same without regard to notice.

This was a case where Mr. Samuel G. Daily, who had taken testimony under the law of 1851 as contestant, had by reason of the revocation of the certificate of his opponent, become the sitting Member. And Mr. J. Sterling Morton, who had acted under the law as sitting Delegate, had become contestant.

688. The Senate election case relating to Simon Cameron, from Pennsylvania, in the Thirty-fourth Congress.

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

On March 11 and 13, 1857,[3] the Senate considered a report of the Committee on the Judiciary, which was as follows in regard to a protest signed by members of the house of representatives of Pennsylvania:

It is a general allegation "that the election of the said Simon Cameron was procured, as they are informed and believe, by corrupt and unlawful means, influencing the action and votes of certain members of the house of representatives," and the Senate of the United States is asked to investigate the charge.

The committee can not recommend that this prayer be granted. The allegation is entirely too vague and indefinite to justify such a recommendation. Not a single fact or circumstance is detailed as a basis for the general charge. Neither the nature of the means alleged to be corrupt and unlawful, nor the time, place, or manner of using them, is set forth, nor is it even alleged that the sitting Member participated in the use of such corrupt means, or, indeed, had any knowledge of their existence. Under no state of facts could your committee deem it consistent with propriety, or with the dignity of this body, to send out a roving commission in search of proofs of fraud in order to deprive one of its Members of a seat to which he is, prima facie, entitled; still less can they recommend such a course when the parties alleging the fraud and corruption are themselves armed with ample powers for investigation. If it be, indeed, true that members of the house of representatives of Pennsylvania have been influenced by

[1] Journal, p. 262; Globe, p. 608.

[2] First session Thirty-seventh Congress, Journal, p. 51; Globe, p. 26.

[3] Third session Thirty-fourth Congress, Appendix of Globe, pp. 387, 391; 1 Bartlett, p. 627.

corrupt considerations or unlawful appliances, the means of investigation and redress are in the power of the very parties who seek the aid of the Senate of the United States. Let their complaint be made to the house of which they are members, and which is the tribunal peculiarly appropriate for conducting the desired investigation. That their complaint will meet the respectful consideration of that house your committee are not permitted to doubt. If upon such investigation the facts charged are proven, and if they, in any manner, involve the character of the recently-elected Member of this body from the State of Pennsylvania, the Constitution of the United States has not left the Senate without ample means for protecting itself against the presence of unworthy Members in its midst.

There was debate and some dissent; but a resolution discharging the committee from further consideration, as requested by the committee, was agreed to without division.

689. The Senate election case relating to S. C. Pomeroy, of Kansas, in the Forty-second Congress.

The evidence being insufficient to show that the election of a Senator was effected by corrupt means, the Judiciary Committee asked to be discharged from consideration of the case.

On June 3, 1872,[1] in the Senate, Mr. John A. Logan, of Illinois, submitted the following report:

The Committee on Privileges and Elections, to whom was referred a certified copy of the report of the joint committee of investigation appointed by the Kansas legislature of 1872 to investigate all charges of bribery and corruption connected with the Senatorial elections of 1867 and 1871, met on the 20th of April, 1872, and directed the clerk of said committee to prepare an abstract of the evidence furnished by the said report of the legislature of Kansas. On the 23d of April your committee met and adjourned over until the 24th, when, on account of sickness in the family of Senator Thurman, the case was postponed until he should return from a visit home.

On May the 11th your committee met and adopted the following resolution:

"Resolved, That the chairman of the committee do ask the Senate for leave to send for persons and papers in reference to the elections of both 1867 and 1871, and that the committee have leave to sit in the vacation and to take testimony by either the whole committee or a subcommittee, at Washington or elsewhere; that, in asking for authority as aforesaid, the chairman be requested to state that the committee express no opinion upon the subject."

On the same day the Senate, in response to the request of the committee, adopted the following resolution:

IN THE SENATE OF THE UNITED STATES, *May 11, 1872.*

Resolved, That the Committee on Privileges and Elections be authorized to investigate the election of Senator S. C. Pomeroy, by the legislature of Kansas, in 1867, and the election of Senator Alexander Caldwell in 1871; that the committee have power to send for persons and papers; that the chairman, or acting chairman, of said committee, or any subcommittee thereof, have power to administer oaths, and that the committee be authorized to sit in Washington, or elsewhere, during the session of Congress and in vacation.

Attest:

GEO. C. GORHAM, *Secretary.*
By W. J. MCDONALD, *Chief Clerk.*

On the 13th of May your committee met, and, in accordance with the authority conferred upon them by the resolution of the Senate, directed all witnesses in reference to the charges against S. C. Pomeroy, Senator from the State of Kansas, to be summoned to, appear forthwith and testify in reference to said charges, and also the clerk of the committee was directed to make inquiry who is the present custodian of the books and papers of the late Perry Fuller, of Washington, D.C.; and, if such information can be had, that the party having possession of his account books, check books,

[1] Second session Forty-second Congress, Senate Report No. 224; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 426.

and bank books, for the time between December 1, 1866, and February 1, 1867, be summoned to appear with them.

On motion, the committee adjourned subject to the call of the chairman.

On the 21st day of May your committee was called together for the purpose of proceeding with the examination, a portion of the witnesses having arrived.

Senator Caldwell, of Kansas, appeared and urged an early examination and disposition of the question in reference to his election in 1871. Your committee, however, considering the time too short during the sitting of Congress to thoroughly investigate both Senatorial elections, concluded to proceed only with the investigation of the election of Mr. Pomeroy in 1867, leaving the case of Mr. Caldwell to be examined during the vacation of Congress, or at such time as may be agreed upon by your committee.

The examination of the witnesses in the case of Mr. Pomeroy was then proceeded with, and continued from day to day until the case was closed.

Your committee respectfully submit all the testimony, and report as follows:

1. That it appears from the evidence that two United States Senators were elected by the Kansas legislature in 1867, Mr. S. C. Pomeroy for a full term of six years, and Mr. Ross for an unexpired term of four years from the 4th day of March, 1867; that the candidacy of Mr. Pomeroy was generally understood by the people of Km3sas during the election of members of the legislature who were to elect Senators for the State of Kansas, and that the election of Mr. Pomeroy as one of those Senators was generally conceded; that all candidates against Mr. Pomeroy for the long term withdrew from the contest, save Mr. A. L. Lee. Mr. Pomeroy, in joint convention of the two houses of the legislature, received 84 votes; Mr. Lee received 25 votes; the disparity of votes being so great as to preclude of itself the idea that the election of Mr. Pomeroy, against the will of the constituents of those who voted for him, was procured by corrupt means.

2. There is no evidence that Mr. Pomeroy, or anyone for him, used any money or other valuable thing to influence any vote in his favor, or in any manner to bring about his election, except hearsay, and this is plainly contradicted by the direct testimony of the parties either to whom or by whom it is alleged such considerations were given.

3. The evidence that Mr. Pomeroy's canvass for Senator cost him considerable money is clearly shown to be the expenses paid by him for himself and friends during the Senatorial canvass, for hotel accommodations, disconnected entirely with the vote of any member, either for or against him.

4. The evidence shows that some of the friends of Mr. Pomeroy have been appointed to office under the Government of the United States, but fails to show that they were appointed in consideration of any vote or any influence used by them in procuring the election of Mr. Pomeroy, and your committee beg leave to say that they can find no fault with Mr. Pomeroy or anyone else (when they recommend for appointment to office) that they recommend their friends instead of their enemies.

5. It appears from the evidence that Mr. Pomeroy engaged, for a compensation to be made, the services of the Lawrence State Journal to advance the interests of the Republican candidates and of the Republican party in the State of Kansas in the year 1866, but it also appears that said journal broke its engagement, and supported the Conservative or Democratic ticket.

Your committee therefore, after maturely considering the testimony adduced before them, are clearly of the opinion that the charges of bribery and corruption against S. C. Pomeroy, connected with his Senatorial election by the Kansas legislature in 1867, totally fail to be sustained by any competent proof, but seem to have been urged for some purpose, unknown to your committee, beyond that of correcting existing evils. Your committee therefore beg to be discharged from the further consideration of the same.

O. P. MORTON,
B. F. RICE,
JOHN A. LOGAN,
H. B. ANTHONY,
MATT. H. CARPENTER,
Committee.

We concur with the other members of the committee in the finding that there is not evidence before us sufficient to show that Mr. Pomeroy's election was procured by the use of corrupt means; and having no definite, reliable information leading to the conclusion that further investigation would

develop such evidence, we concur in the recommendation that the committee be discharged from the further consideration of the subject. Here we think that our duty ends. We do not think it proper to impugn the motives of those who urged this investigation. The subject was brought to the notice of the Senate by the general assembly of Kansas, and, as it seems to us, a proper respect for that body precludes an imputation of improper motives.

We can not, therefore, concur in the last paragraph of the report, and there are other passages that do not meet our approval. For these reasons we have preferred to state our views in our own language.

A. G. THURMAN.
JOSHUA HILL.

In 1873,[1] at the third session of the Congress, another investigation was ordered on the motion of Mr. Pomeroy; and on March 3, the last day of the Congress, and the last day of Mr. Pomeroy's Senatorial term, a report was submitted discussing the testimony favorably to Mr. Pomeroy, but with minority views expressing the opinion that the charges were sustained.

690. The Senate election case of John T. Ingalls, from Kansas, in the Forty-sixth Congress.

The Senate decided to investigate the election of one of its Members on the strength of a memorial formulating specific charges, and accompanied by evidence relating thereto.

Bribery enough to affect the result not being shown, and the Member not being personally implicated, the Senate did not disturb his tenure.

An election inquiry instituted in the Senate by memorial.

On March 18, 1879,[2] at the beginning of the Congress, Mr. John J. Ingalls was sworn in as Senator from Kansas.

On March 19[3] the Vice-President presented the memorial of certain members of the. legislature of Kansas in relation to the election of Mr. Ingalls. This memorial was referred to the Committee on Privileges and Elections.

On March 27[4] the Vice-President laid before the Senate the authenticated report of a committee of the Kansas house of representatives which had investigated the election of Mr. Ingalls. This was referred to the Committee on Privileges and Elections.

The memorial[5] was addressed to the Senate, and signed by members of the legislature, who represented "that they have good reason to believe that" Mr. Ingalls "secured his election by acts of bribery and corruption." The memorial proceeds with ten specifications, naming instances of bribery or attempted bribery, as well as other matters tending to cast suspicion on the election. The charges as to bribery were specific, naming persons and sums of money.

The committee, on January 20,[6] reported a resolution authorizing it to investigate the charges and statements contained in the memorials, with power to compel testimony, etc., and on June 21 the resolution was agreed to without debate.

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[1] Senate Document No. 11, special session Fifty-eighth Congress, p. 434.

[2] First session Forty-sixth Congress, Record, p. 1.

[3] Record, p. 15.

[4] Record, p. 75.

[5] Second session Forty-sixth Congress, Senate Report No. 277, pp. 2–4.

[6] First session Forty-sixth Congress, Record, pp. 2196, 2257.

On February 17, 1880,[1] the committee reported, embodying their conclusions in this resolution:

Resolved, That the testimony taken by the committee proves that bribery and other corrupt means were employed by persons favoring the election of Hon. John J. Ingalls to the Senate to obtain for him the votes of members of the legislature of Kansas in the Senatorial election in that State. But it is not proved by the testimony that enough votes were secured by such means to determine the result of the election in his favor. Nor is it shown that Senator Ingalls authorized acts of bribery to secure his election.

Three members of the committee presented views concurring in the main conclusion, but calling attention to the fact that persons opposing Mr. Ingalls's election had also resorted to bribery.

It does not appear that this resolution was acted on, Mr. Ingalls retaining his seat as a matter of course.

691. The Senate election case of Henry B. Payne, from Ohio, in the Forty-ninth Congress.

On the ground that the memorials and accompanying papers presented no allegations that proof existed to support the charges, the Senate declined to investigate the election of a Senator.

Discussion as to the extent to which probable cause should be shown to justify the Senate in investigating charges that an election had been procured by bribery.

Charges made by the bodies of a State legislature were not considered sufficient ground to justify the Senate in investigating the election of one of its Members.

No personal participation in bribery being shown, a Senator should be unseated only on proof that enough votes for him had been influenced corruptly to decide the election.

On March 4, 1885,[2] at the special session of the Senate, during the swearing in of the Senators-elect, the oath was administered to Mr. Henry B. Payne, of Ohio.

On April 27, 1886,[3] the President pro tempore laid before the Senate a letter from the clerk of the house of representatives of the State of Ohio transmitting testimony taken by a select committee of the house of representatives of Ohio, and the report of the committee as to charges against the official integrity and character of certain members of said house of representatives in connection with the election of Hon. Henry B. Payne as a United States Senator.

After a statement by Mr. Payne the papers were referred to the Committee on Privileges and Elections.

On May 4[4] Mr. George F. Hoar, of Massachusetts, presented a letter from the secretary of the committee of the Ohio house calling attention to interpolations in the document as printed by the Senate. The letter was referred to the Committee on Privileges and Elections, and the document as printed was recalled.

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[1] Second session Forty-sixth Congress, Senate Report No. 277.

[2] First session Forty-ninth Congress, Record, p. 1.

[3] Record, p. 3861.

[4] Record, p. 4118.

On May 11 [1] Mr. Hoar presented a memorial of the Republican State committee of Ohio requesting the Senate to investigate charges of corruption in connection with the election of Mr. Payne. This memorial, as well as other papers of a similar tenor, including resolutions of both branches of the legislature of Ohio, presented at a later date, was referred to the Committee on Privileges and Elections.

On July 15 [2] Mr. James L. Pugh, of Alabama, in behalf of a majority of the committee, including besides himself Messrs. Eli Saulsbury, of Delaware, Z. B. Vance, of North Carolina, and J. B. Eustis, of Louisiana, submitted a report asking that the committee be discharged and that the whole matter be postponed. Mr. William M. Evarts, of New York, in behalf of himself and Messrs. Henry M. Teller, of Colorado, and John A. Logan, of Illinois, submitted minority views concurring in the recommendation of the majority, but discussing the case somewhat differently. Mr. George F. Hoar, of Massachusetts, with Mr. William P. Frye, of Maine, submitted other minority views recommending an investigation.

The views submitted by Mr. Evarts embody fully the position of the majority of the committee and the issues of the case:

Upon undisputed facts it appears that of the general assembly of Ohio, as in session and constituted in January, 1884, each house contained a majority of members of the Democratic party; that at a joint caucus of that party held on Tuesday, January 8, upon the first ballot, votes were cast—for Mr. Booth, 1 vote; for Mr. Pendleton, 15 votes; for Mr. Ward, 17 votes; and for Mr. Payne, 46 votes; thus showing a majority in the caucus of 13 for Mr. Payne over the united vote of all the other candidates. In regular conduct of the election of Senator by the legislature Mr. Payne was elected, and his credentials were received by the Senate of the United States at the session of March, 1885, and Mr. Payne since then has held, and now holds, a seat as Senator from Ohio in this body. No action was taken by or before the legislature which elected Mr. Payne calling in question the validity of his election or the conduct of the same in the canvass, the caucus, or the legislature itself.

A new legislature, as in session and constituted in January in the present year, showed a majority of the general assembly of the Republican party, and on the 13th day of January the house of representatives adopetcl the following resolution:

"Whereas the Cincinnati Commercial-Gazette of January 12, 1886, contains a printed statement, on the authority of S. K. Donavin, alleging grave charges against the official integrity and characters of members of this house, namely, Hon. D. Baker, Hon. P. Hunt, Hon. W. A. Schultz, and Hon. Mr. Ziegler, so definite and precise in statements as to call for immediate action in order to vindicate the reputation of members of this house: Therefore,

"Resolved, That a select committee of five be appointed to inquire into all the facts of the charges so alleged, and report their conclusions to this house at as early a date as possible; and in the prosecution of this inquiry said select committee are empowered to send for persons and papers and to examine witnesses under oath."

The select committee commenced the taking of testimony under this inquiry on the 20th January, and concluded the same on the 6th April last. Two reports were made to the house, one presented by a majority of three, and the other by the minority of two. On April 16 the house adopted the following resolution:

"Resolved by the home of representatives of the sixty-seventh general assembly of the State of Ohio, That the clerk of the house be, and he is hereby, directed to transmit a copy, duly authenticated, of the testimony taken by the select committee appointed in pursuance of house resolution No. 28, and the report of said committee, to the President of the United States Senate, to be by him presented to that body."

The President pro tempore of the Senate laid before the Senate the testimony and reports, and the same were referred to the Committee on Privileges and Elections.

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[1] Record, p. 4344.

[2] Record, p. 6948 Senate Report No. 1490.

The majority report of the committee of the Ohio house presented as their "conclusion" the following statement:

"Although, as stated in the outset, the testimony developed nothing of an inculpating character concerning the members of this house named in the resolution of inquiry, we believe that circumstances, surrounding the election of Henry B. Payne as one of the Senators to represent the State of Ohio in the Congress of the United States, as presented by the testimony, are such as to warrant us in recommending that an authenticated copy of the testimony and report be transmitted to the President of the United States Senate for the information of the body of which Senator Payne is a member, and for such action as it may deem advisable."

The minority report presented as their conclusion the following statement:

"The minority of your committee, therefore, find, in conclusion, that there has been no testimony going to show that any unusual or improper methods were resorted to by any person with any member of the sixty-sixth general assembly to induce them to support, or that any member was unduly influenced to support, Hon. Henry B. Payne for either his nomination or election to the United States Senate."

It appears that when the select committee of the Ohio house of representatives was entering upon the inquiry before them the following correspondence took place between Mr. Payne and Mr. Cowgill, the chairman of the select committee, and that Mr. Payne was never advised by the committee that "any testimony tending to inculpate him in any degree with any questionable transaction" had been received, or any opportunity was afforded him of appearing before the committee:

"UNITED STATES SENATE,

Washington, D. C., January 22, 1886.

"HON. THOMAS A. COWGILL,

"Chairman, Columbus, Ohio.

"SIR: As one branch of the general assembly has appointed a special committee, of which you are the chairman, to investigate the conduct of the Democratic caucus which, in January, 1884, nominated a candidate for United States Senator, and as the matter is thus raised to the plane of respectability and placed in charge of intelligent and honorable gentlemen, I propose to give it appropriate attention. For myself, I invite and challenge the most thorough and rigid scrutiny. My private correspondence and books of account will be cheerfully submitted to your inspection if you desire it. I only insist, in case any testimony is given which in the slightest degree inculpates me, I may be afforded an opportunity of appearing before the committee.

"I am, very respectfully, your obedient servant,

H. B. PAYNE."

"COLUMBUS, OHIO, *Jauuary 25, 1886.*

"HON. H. B. PAYNE,

"United States Senate, Washington, D. C.:

"SIR: I acknowledge the receipt of your favor of the 22d instant, wherein you note the fact that a special committee of the Ohio house of representatives has been appointed to investigate the conduct of the Democratic caucus, which, in January, 1884, nominated a candidate for United States Senator, and you also declare that you propose to give the investigation appropriate attention.

"In reply, I have to say that the resolution to which you refer recites the fact that allegations of bribery, published on authority of S. K. Donavin, are of so grave and positive character as to call immediate action in order to vindicate the reputation of members of the present general assembly. It directs the special committee to 'inquire into all the facts of the alleged bribery, and report their conclusions thereon to the house.'

"If in the prosecution of this inquiry any testimony tending to inculpate you in any degree with any questionable transaction be received, I assure you that your request to appear before the committee in such event will be most cordially and fully acceded to.

"Very respectfully,

THOMAS A. COWGILL, *Chairman.*"

Instead of attempting a selection or summary of the testimony transmitted to the Senate by the Ohio house of representatives, for the illustration or support of our views and conclusions as to the proper

disposition of the matter referred to the Committee on Privileges and Elections, we have thought it eminently just to accept as the basis of our observations the two careful and intelligent presentations of the testimony to the Ohio house of representatives by the majority and minority reports of the select committee.

Your committee were addressed by two honorable Members of the House of Representatives from Ohio, Mr. Little and Mr. Butterworth, in exposition and enforcement of the testimony and of the just rules and principles which should govern your committee in their disposition of the matter before them. Subsequently, and while the committee was deliberating upon the case as submitted to them, these honorable gentlemen placed before your committee certain suggestions in the nature of corroborative or cumulative evidence, which we append, with the majority and minority reports to which we have referred, to accompany our report. These supplementary suggestions we have justly given this prominence to, as indicating in nature, if not in substance, what might be shown in testimony if an investigation should be entered upon by the Senate.

The only constitutional rights, powers, and duties which can sustain, or properly induce, an investigation such as is presented for the consideration of the Senate by the honorable house of representatives of the State of Ohio, arise from two separate and independent clauses of the Constitution:

By the first clause of section 5 of Article I of the Constitution each House of Congress is made "the judge of the elections, returns, and qualifications of its own Members."

By the second clause of the same section each House may, "with the concurrence of two-thirds, expel a Member."

As these two ends alone limit the basis and object of any investigation proposed, either for invalidating the election of a Senator or expelling from the Senate a duly elected and qualified member of it, a scrutiny of the grounds, in fact, upon which such action is demanded in any case arising from the Senate requires an ascertainment whether the scope of the proposition and the testimony presented, or reasonably assured, would justify the ultimate action of the Senate under one or the other of these clauses of the Constitution. We do not understand that the house of representatives of Ohio presents any case upon the testimony taken or imagined to be accessible to any investigation by the Senate, or upon any allegation of the existence of facts suspected, though not probable, as would affect Mr. Payne with such personal delinquency or turpitude as would invite or tolerate his expulsion from the Senate for his participation in the transaction which resulted in his election. The examination of the testimony suggests no support for such an imputation, and the course of the select committee in not giving Mr. Payne an opportunity to be heard before them precludes any intimation that such a notion was entertained for a moment by that committee or the Ohio house of representatives.

We do not understand that any member of the Committee on Privileges and Elections has harbored or expressed the idea that the testimony taken, or suggested as accessible or possible, touches the subject of this personal inculpation of Mr. Payne. We shall therefore confine our further discussion of the matter, as presented for the investigation or action of the Senate, to the question arising upon the validity of Mr. Payne's election and the declaration of his seat in the Senate vacant for such cause.

It is no doubt supposable that an election may be vitiated by fraud, corruption, and bribery without the Member unseated being accused even of personal participation in the fraud, corruption, or bribery by which his election was compassed. If the election is thus vitiated, the Member's seat can not be saved by his personal exculpation and vindication. The integrity of the election, and not of the Member, is in question under this clause of the Constitution.

But, on the same reason, the investigation, which now deals with the election as vitiated and not the Member as innocent, must reach the proof that the fraud, corruption, or bribery embraces enough in number of the voting electors to have changed, by these methods, the result of the election. If these corrupted votes gave the innocent Member his seat, the deprivation of these corrupted votes vacates his seat, however innocent he is. But, if the uncorrupted votes were adequate to his election, and he is purged from complicity in the fraud, corruption, or bribery, his seat is not exposed to any question of validity in the election.

Upon a reference to the testimony presented by the Ohio house of representatives, and sifted and emphasized by the select committee's majority and minority reports, we are able to ascertain the number of members of the general assembly of Ohio that have been brought into inculpation, the degree and weight of evidence affecting each of them, and the conclusions of these two committees as to what had been proved, or could be expected to be proved, as bearing upon each of these members.

As to four members, viz, Messrs. Baker, Hunt, Schultz, and Ziegler, being the members of the house of representatives of 1886 upon charges against whom the general investigations were set on foot, we find the committee, by the majority report, declare that "the testimony developed nothing of an inculpating character concerning the members of this house named in the resolution of inquiry." The minority report express their conclusions to the same effect, as follows:

"That there has been absolutely nothing found in any way compromising the four members charged, and they are wholly exonerated from the charges made, and stand to-day without the shadow of a suspicion attaching to them in regard to conduct unbecoming members of this house."

As to two members of the house, viz, Mr. Kahle and Mr. Hull, the majority report names them as "two instances in which attempted bribery in the Senatorial canvass was reported by members of the Sixty-sixth general assembly," and sets forth, as the report expresses it, "the testimony taken as to what those members reported" "in brief." Both Mr. Kahle and Mr. Hull were active and earnest supporters of Mr. Pendleton in the canvass and so continued to the end, voting for Mr. Pendleton in the caucus and in the legislature. The evidence respecting these two members, as given or commented upon by the majority and minority reports, we refer to, conformably to our declared purpose, without attempting any observations of our own upon the testimony. For the immediate consideration now presented it is sufficient to say that no diversion from Mr. Pendleton's support to Mr. Payne's was effected as to these two electors.

The select committee names in the majority report two senators and two representatives and speaks of them as follows:

"Rumors as to suspected bribery with which were connected the names of Messrs. Mooney and Roche, members of the house, and Messrs. White and Ramey, members of the senate, of the Sixty-sixth general assembly, all of whom voted in caucus for Henry B. Payne for United States Senator, were traced by the committee until developments which were regarded as important were reached, as follows"—

giving the testimony bearing upon each, as viewed by the majority of the committee. The minority report takes up the case of each of these members and comments upon the evidence which it adduces from the testimony, and declares as to each of them that the testimony justifies no imputation upon any one of them. We again, without any observations of our own on the evidence, refer to the majority and minority reports on this topic.

It is proper that we should call the attention of the Senate to the very explicit and candid statement of the majority report as to the reach and scope which were given to the investigation and of the distinction drawn between the testimony at large and the report itself, as the latter containing "no facts" "which are not sustained by testimony upon which a legislative body might base further action." This report says:

"Whenever our attention was called to anything which indicated the probable employment of improper means to gain support, we followed the clews presented, on the theory that we were not only authorized, but in duty bound, to pursue any matter that promised, even remotely, to show the use of such means in connection with the election, because the discovery of one important fact, although having no immediate bearing upon the charge against the persons named in the resolution, might lead to the discovery of facts having such bearing. And furthermore, and upon the same theory, our inquiries were not confined to the technical rules of legal proof, but the committee availed itself of any source of information—admitted hearsay statements and even the opinions of witnesses. But we consider that in making this report no facts should be stated which are not sustained by testimony upon which a legislative body might base further action."

The minority report thus speaks of the completeness of the investigation instituted by the committee:

"Your committee, in its anxiety that nothing, however trivial and remote, that might have, either directly or indirectly, any possible bearing on the matter under consideration, have exercised the greatest liberality possible in the taking of testimony, which has extended the scope of its inquiry far beyond the limits that could be given the most liberal construction of the resolution."

As the result of this wide investigation it does not appear that the select committee recommended any action by the legislature looking to a further investigation, or to the incrimination or punishment in the courts of law of any persons named in the report, nor that the legislature itself has proposed any

action in such directions, or either of them. Indeed, the whole recommendation of the committee to the house of representatives is in these words:

"That an authenticated copy of the testimony and report be transmitted to the President of the United States Senate for the information of the body of which Senator Payne is a member and for such action as it may deem advisable."

In pursuance of this recommendation the house of representatives communicated to the senate the testimony taken and the reports of the committee, which are before the Committee on Privileges and Elections. The only action taken by either house of the general assembly of Ohio since that has been brought to the attention of the Senate or of its committee is shown in a resolution of the senate of Ohio and one of the house of representatives, as follows:

"Senatorial election in Ohio.

"[Senate resolution—Mr. Hardacre—No. 58.]

"Whereas by common report, suggested and corroborated by the public press of the State without respect to party, and by a recent investigation of the house of representatives, the title of Henry B. Payne to a seat in the United States Senate is vitiated by corrupt practices and the corrupt use of money in procuring his election; and

"Whereas it is deemed expedient, in order to secure a thorough investigation of his said election as Senator by the United States Senate, that the belief of the general assembly in this regard be formulated in a specific charge: Therefore, be it

"Resolved, That in the opinion of the general assembly, and it so charges, the election of Henry B. Payne as Senator of the United States from Ohio, in January, 1884, was procured and brought about by the corrupt use of money, paid to or for the benefit of divers and sundry members of the Sixty-sixth general assembly of Ohio, and by other corrupt means and practices, a more particular statement of which can not now be given.

"Resolved, That the Senate of the United States be, and the same is hereby, requested to make a full investigation into the facts of such election so far as pertains to corrupt means used in that behalf.

Resolved, That the governor be, and is hereby, requested to forward a copy thereof to the President of the Senate of the 'United States.

"I hereby certify that the foregoing is a true and correct copy of said resolution, as the same appears upon the senate journal of Friday, May 14, 1886, after being changed from a "joint" to a "senate resolution, and adopted by the senate.

"C. N. VALLANDIGHAM, *Clerk Ohio Senate."*

[H. R. No. 89—Mr. Brumback.]

"Whereas it is the precedent in the United States Senate that charges of bribery must be directly made to warrant a committee of said body in proceeding to investigate the title of any United States Senator to his seat: Therefore,

"Be it resolved by the house of representatives of Ohio, That in the investigation made under house resolution No. 28, ample testimony was adduced to warrant the belief that the charges heretofore made by the Democratic press of Ohio are true, to wit: That the seat of Henry B. Payne in the United States Senate was purchased by the corrupt use of money; and

"Further resolved, That the honor of Ohio demands, and this house of representatives requests, that the said title of Henry B. Payne to a seat in the United States Senate be rigidly investigated by said Senate; and

"Further resolved, That the governor of Ohio be requested to forward a copy of this resolution to the President of the United States Senate.

"IN HOUSE OF REPRESENTATIVES.

"Adopted May 18, 1886.

"Attest:

"DAVID LANNING, *Clerk*."

Upon the whole matter as presented, in evidence and argument, to the Committee on Privileges and Elections, we are of opinion that there is no evidence which purports to prove that fraud, corruption, or bribery was employed in the election of Mr. Payne affecting the votes, given either in the caucus or

in the legislature, whereby the election was carried by corrupt votes to the effect of his election. Nor, in our opinion, is there any allegation that proof exists or would be forthcoming to the extent that would vitiate the election of Mr. Payne by reason of the necessary votes, in caucus or in the legislature, for his election having been obtained by fraud, corruption or bribery.

We are of opinion, therefore, that under the first clause of the fifth section of Article I of the Constitution the testimony and other considerations placed before the Senate do not warrant the Senate in instituting by itself an investigation looking to the unseating of Mr. Payne as a member of the Senate.

We have in our conclusions made no distinction between the use of fraud, corruption, or bribery in a caucus vote or in the legislative vote for a Senator. Although a caucus, or what proceeds in it, has no constitutional or legal relation to the election of a Senator, yet, by the habit of political parties, the stage of determination as to who is to be elected Senator, and the influences, proper or improper, that produce that determination, is that which precedes and is concluded in the caucus. So far as the question of personal delinquency or turpitude is concerned, no moral distinction should be taken between corrupt proceedings in caucus and those in the legislature. How far any such distinction would need to be insisted upon in any case, on the question of unseating a Senator, where he himself was not affected with any personal misconduct or complicity with the misconduct of others, we have no occasion, in the immediate case or attitude of the subject, to consider or suggest.

At the outset of our observations we stated the limits which properly should control the action of the Senate under the applicable clauses of the Constitution, and by the same reason the ends which should be proposed in its investigations and to which they should be confined. It is obvious that the province and duty of a State in its investigations of fraud, corruption, and bribery in an election of Senator are much more extensive. A State is not confined at all to the question whether the actual election brought in question involves the Senator personally in misconduct, or whether enough votes for him were effected by fraud, corruption, or bribery that would require his seat to be vacated, although himself free from imputation.

The State should execute its laws respecting the purity of Senatorial elections by the indictment and conviction of a single person who bribes or is bribed, whether the election is affected or not. The State should investigate as well to the end of better laws and surer execution of the laws. The State, too, is charged with the maintenance of "the honor of Ohio," and its vindication rests with its own legislation, its own judiciary, and its own people; but it can not demand this vindication at the hands of the United States Senate, except as that may flow from investigations by that body within the limits of its constitutional powers and duties.

That State has conducted and concluded its investigations into the election of Mr. Payne, and has placed the result before the Senate of the United States. It has attempted no further investigations either by the plenary power of its legislature or through the functions of the courts of law. If, upon further examinations made by the State, through its legislature or its courts, a case should be presented for renewed consideration by the Senate, within the rules and principles we have stated as governing the action of the Senate, the further action of the Senate will be governed by what may then appear. As the whole matter now stands before the committee, we concur in its judgment that an investigation should not be instituted by the Senate, and the committee be discharged from the further consideration of the subject, and for the reasons which we have thus given.

The views submitted by Mr. Hoar take issue with the position of the majority:

The senate and house of representatives of the State of Ohio, and the Republican State committee, representing the political party which for much the larger portion of the last thirty years has contained a majority of the voters of that State, have each addressed a memorial to the Senate charging that the election of the sitting member was procured by bribery and corruption, and praying the Senate to cause an investigation into said charges. Two gentlemen of high character and position, Messrs. Little and Butterworth, both now Members of the other House from the State of Ohio, the former lately attorney general of that State, appeared before the committee, declared their personal belief in the truth of the charge, asserted that in their opinion the belief is entertained by a large majority of the people of Ohio of both political parties, and asked to be permitted to lay before the committee evidence to support it. Besides Messrs. Little and Butterworth eight of the Ohio delegation in the House add their earnest request

to the same effect, affirm that the investigation is demanded by a large majority in number and influence of the press of the State, say that additional testimony is in the possession of Messrs. Little and Butterworth, and express their belief that "if opportunity is offered, the charges of the Ohio senate will be sustained by testimony to your full satisfaction."

Before the memorials above referred to were presented there had been presented to the Senate for its information the evidence taken by a committee of the house of representatives of Ohio, who were directed to investigate charges of corruption in said election against four members of the present house of representatives of Ohio, being the only members of the legislature who made the election against whom allegations of bribery were made who have been continued in the public service, and the conclusions of the committee upon said evidence. Messrs. Little and Butterworth also produced certain affidavits and letters stating confessions of persons implicated, and pointing out other sources where evidence would probably be obtained if lawful authority should be given by the Senate to procure it.

We think this presents a case where it is the duty of the Senate to permit the petitioners to present their evidence and to authorize the issue of proper process to aid them in procuring the attendance of witnesses.

The Constitution declares that "each House shall be the judge of the elections, returns, and qualifications of its own Members." The Senate is the only court which has, or under the Constitution possibly can have, jurisdiction of this question. There can be no trial, inquiry, or adjudication anywhere else to which this inquiry is not totally foreign and immaterial. The courts in Ohio may exercise jurisdiction of the offense of bribery of or by an individual. But the question whether the result of an election of Senator was thereby changed can never be before those courts. Either house of the legislature may inquire as to the personal turpitude of its own members. But the action which may result from such investigation must be precisely the same, whether other persons also were or were not corrupted and whether the choice of Senator were or were not affected.

As the Senate is the only court that can properly try this question, so the charge is made, if not in the only way it can be made, yet certainly in the way beyond all others in which it can be made with most authority. The legislature of Ohio is the representative of the dignity, interest, and honor of the State. It appoints the Senators of the United States, and if a vacancy in the office exist it must fill it. It is supported in this charge by the committee who are, under our political customs, the organ of more than half the voters of the State concerned.

For the Senate to refuse to listen to this complaint, so made, would, it seems to us, be, and be everywhere taken to be, a declaration that it is indifferent to the question whether its seats are to be in the future the subject of bargain and sale, or may be presented by a few millionaires as a compliment to a friend. No more fatal blow can be struck at the Senate or at the purity and permanence of republican government itself than the establishment of this precedent.

But the case does not rest alone upon the charge and character of the parties who make it and who ask to be permitted to produce evidence in its support. If it did, it, in our judgment, would be enough. It is surely a strange answer to be given by a court to a suitor to say that it has already considered the question and decided the case before it is presented.

But the petitioners adduce strong reasons to show probable cause that they can establish their case. The testimony taken by the committee in Ohio has been referred to us. Our attention has also been called to evidence pointing to a large mass of additional testimony. The committee of the Ohio house has power only to inquire into the conduct of four members of that body. They report that—

"A number of clews furnished were not followed, because we were convinced that they could lead only to points at which further pursuit would become necessary, but which could not be passed without authority to reach beyond the limits of the State for witnesses, and much anonymous information was ignored by the committee chiefly for the same reason."

We have examined the evidence taken by that committee. It does not support the charges as to the four members implicated; it does not connect Mr. Payne with the transactions; it does not show that the result was changed or effected by corrupt means. But it does show that Mr. Payne's name was not publicly suggested as a candidate for Senator until after the State election; that it was not very prominently suggested until shortly before his election in January; that many persons who had been supposed to favor Pendleton voted for Payne; that there was a widespread belief that corrupt means were

used to procure the result; that one member was offered a large sum of money by another member to vote for Payne; that there were hearsay statements charging corruption as to several others; that two members of the legislature received large sums of money about the time of the election, of which they, being called as witnesses, gave no satisfactory account; that the prominent managers of Mr. Payne's canvas, viz, Paige, McLean, Huntington, and Oliver H. Payne, did not testify before the committee. There was no evidence tending to show the bribery of any particular member, except as above stated.

When we say it was not shown that the result was changed or effected by corrupt means, we are speaking of direct testimony. But the consideration should not be forgotten that where persons familiar with the whole case would be quite sure to know whether such means were needful to change the result, or whether their candidates would be elected without it, if they are found expending large sum of money corruptly the fact alone affords strong reason for the inference that the result was thereby controlled. But the result of the investigation in Ohio seems to the undersigned absolutely unimportant. That committee, while they took a wider range of inquiry than the matter committed to them, neither had, nor conceived they had, any power to inquire into Mr. Payne's title to his seat. They issued no process extending beyond the limits of Ohio. They report no conclusion, except as to the four members. When witnesses refused to answer, they did not press them. They went beyond the scope of the resolution appointing them only, as they say, "to gain something like a comprehensive view of the situation."

The Ohio senate of 1883–84 contained 33 members. Of these, 22 were Democrats and 11 Republicans. The house contained 105 members, of which 60 were Democrats and 45 Republicans. The members entitled to vote on joint ballot were 138 in all, 82 Democrats and 56 Republicans. Eighty-two persons were entitled to vote in the Democratic caucus, of whom 42 were a majority. Seventy-nine persons actually attended that caucus, of whom 40 were a majority. Is there fair reason for instituting an inquiry whether the result of the election was procured by bribery? We think that the character of the persons making the charge is of itself sufficient to require the Senate to listen to it. But they produce a great body of evidence, all pointing in the same direction.

We are not now to consider whether the case is proved, or even whether there be a prima facie case. There has as yet been no evidence laid before us addressed to either of these considerations. That can not be done without the issue of process for the attendance of witnesses. Messrs. Little and Butterworth now offer, on their personal responsibility, to establish to the satisfaction of the Senate, largely by witnesses who were not within the reach of the Ohio committee, and partly by evidence which strengthens, supplements, and confirms that which was before that committee, the following among other propositions:

First. That of the Democratic members elected to the sixty-sixth general assembly more than three-fourths were positively pledged to Mr. Pendleton and General Ward, and more than a majority pledged to Mr. Pendleton. This they offer to prove by Mr. Pendleton himself, by Col. W. A. Taylor, and others.

Second. That in these pledges these members represented the opinion and desire of their constituents.

Third. That Mr. Payne was nowhere spoken of or known as a candidate during the popular election, or until a very short time before the appointment of Senator.

Fourth. That just before the legislative caucus, where the nomination was made, which was one week before the election, large sums of money were placed by Mr. Payne's son and other near friends of his at the control of the active managers of his canvass in Columbus. This they allege can be shown by the books of one or more banks.

Fifth. Mr. Payne's near friends declared that his election had cost very large sums.

A gentleman whose name is offered to be given will testify that David R. Paige declared to him that he had handled $65,000.

Oliver B. Payne stated to the same person that it had cost him $100,000 to elect his father.

Sixth. That the members of the legislature who changed from Pendleton to Payne did so after secret and confidential interviews with the agents who had the disbursement of these moneys.

Seventh. That members of the legislature who so suddenly changed their attitude can be proved to have, at about the time of the change, acquired large sums of money, of which they give no satisfactory account.

Eighth. Respectable Ohio Democrats affirm that just before the caucus the room of Mr. Payne's manager, Paige, "was like a banking house;" that the "evidence of large sums of money there was

abundant and conclusive;" that Paige's clerk declared in the presence of a gentleman of integrity that "he had never seen so much money handled in his life."

Ninth. That the public belief that the choice of Senator was procured by the corrupt use of money prevails almost universally in Ohio among persons of both parties, which finds very general expression in the press.

Tenth. That there is specific proof leading with great force to the conclusion that each of 10 members will be shown to have changed their votes corruptly, and thereby that the result was changed.

The Senate has also recently referred to the committee certain resolutions adopted by a convention of the Republican editors of Ohio, held at Columbus, July 8, 1886, praying the Senate to investigate these charges. The newspaper reports of the convention show that the governor of the State was present at the convention, and declared his concurrence in said prayer. There have also been communicated to us extracts from the Democratic newspapers of Ohio, showing that a majority of those papers have declared their opinion that the election was procured by corruption. Copies of these extracts are appended.

What is the effect upon an election of Senator of bribery of voters in a caucus of the legislators who are to make the choice is a question upon which we prefer not to form an opinion until the evidence is before us. The members of a caucus ordinarily deem themselves bound in honor to vote in the election for the person whom it nominates by the vote of a majority, on condition that such person belong to their party and is fit for the office in point of character and ability. Bribery, therefore, which changes the result in the caucus would ordinarily determine the election.

If B, C, and D have promised to vote as A shall vote, if A be corrupted four votes are gained by the process, although B, C, and D be innocent. In looking, therefore, to see whether an election by the legislature was procured or effected by bribery, it may be very important to discover whether that bribery procured the nomination of a caucus whose action a majority of the legislature were bound in honor to support. Seventy-nine persons attended the Senatorial caucus and voted on the first ballot. Of these Mr. Payne had the votes of 46, Ward 17, Pendleton 15, Booth 1. If 6 only of Mr. Payne's votes in the caucus were procured by bribery, the result of the election of Senator was clearly brought about by that means. Now, Messrs. Little and Butterworth tender specific proof, part of which was before the Ohio committee and part here offered for the first time, directly and very strongly tending to create the belief as to each of 10 of the members of the Ohio legislature that his vote for Mr. Payne was purchased and that proper process and inquiry will establish the fact by competent and sufficient evidence.

One member after the caucus deposited $2,500 in two amounts, and being charged that it was the price of his vote, did not persist in a denial.

Another, who changed to Payne, just before the caucus stated to a colleague that he was offered $5,000 to vote for Payne, and intended to accept it, and tried to induce his colleague to do the same. That person's wife just afterwards deposited $2,500 in a bank in Toledo, took a certificate therefor, which she transferred to her husband.

Another who is claimed to have changed suddenly from Pendleton to Payne is found making, soon after, expenditures amounting to $1,600 with his own money on land, the title to which was taken in the name of his father, who paid $2,000 for it about the same time. The father and son lived together in the same house. The son testified that he did not know where the father got the money to pay the $2,000. The father refused to state where he got his $2,000, and said he did not know where the son got the $1,600, and if he did he would not tell. The same member also made other large payments of money about the same time.

Another, who had to borrow money when he went to Columbus, and changed suddenly from Pendleton to Payne, was shown just after the election to be in possession of money to purchase property, refurnish his house, etc. He was denounced by another member as having sold his vote. He turned exceedingly sick, made no denial, and was taken away. Two others, elected as antimonopolists, became supporters of Mr. Payne and were heard discussing together the amount of money each had received. Another, who had before been for another candidate, but voted for Mr. Payne, received from Oliver B. Payne $3,500, which he said was a loan. Another, according to affidavits produced by Mr. Little, was declared by a fellow member to be claiming $3,500 for his vote. Another, who had been very earnest in support of Pendleton, visited the room of Mr. Payne's managers, where the large sums of money are alleged to have been seen, and immediately afterwards voted for Mr. Payne.

The committee received this communication from Messrs. Little and Butterworth in addition to the statements made by them at the hearing:

"HON. GEORGE, F. HOAR,

"CHAIRMAN OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, UNITED STATES SENATE:

"DEAR SIR: Since our appearance before your committee the last time we have received information, deemed by us important, bearing upon the question of investigation, and desire to indicate its general character.

"First. We have information, regarded as trustworthy, that a member of the sixty-sixth general assembly, one of the sudden converts to Payne, with meager means and without financial credit prior to January, 1884, was able to and did deposit in bank to his own credit shortly after the election, to wit, February 13, 1884, $1,350, besides showing other signs of prosperity not accountable for in ordinary ways.

"Second. We can show by witnesses, whose credibility will not be questioned, that just prior to the meeting of the caucus at which Mr. Payne was nominated he (witness) was, in the interest of Payne, summoned by telegraph to Columbus. He went, and was asked by Payne's managers what sum of money would be required to withdraw the vote of the representative of his (witness's) county from Pendleton and give it to Payne. The question was squarely and seriously addressed to witness: 'How much money does he (the representative) want?'

"Third. We have from reliable sources additional information of a convincing nature pointing to bribery, consisting of conversation, statements, and admissions of implicated members and others, which we are not at liberty to state more explicitly in this communication, owing to the conditions under which the information is imparted, but which, with the other matters referred to, we can verbally communicate to you in more particular form if desired.

"In the line of matter heretofore submitted we deem it worth while to give this additional instance:

"Fourth. We quote from a letter in our possession from a responsible person in Ohio, omitting names:

"'Our representative, ———, had been elected as a Pendleton man and had agreed ——— to support Pendleton. A few days before the caucus it was whispered that "——— had been seen" and that he would vote for Payne. A telegram was at once sent from hereto ——— (the member) by leading Democrats, warning him against such a course, and ——— and others at once went to Columbus and saw the member. He hooted at the idea that he would vote for Payne. ——— assured Pendleton that the member would support him. ——— then came home feeling confident that the member would not disappoint him.'

"This member was interviewed in the presence of a friend of Mr. Pendleton and asserted his devotion to him, but was suspected and watched. As the hour of the caucus approached it was noticed that he was not present. The friend of Mr. Pendleton went to his room for him. We quote further:

"'He found him in company with one of the men who handled the "boodle," and he was much embarrassed by ———'s presence. But he went to the caucus with ———, and on the way again asserted his allegiance to Pendleton. If I remember correctly, ——— said they had printed ballots for both candidates and that he gave ——— (the member) a Pendleton ticket. But when the vote was taken, ——— (Pendleton's friend) observed that ——— (the member) wrote something on a piece of legal cap and then tore it off. He afterwards discovered that ——— (the member) put in the hat the same piece of paper, and then ——— (Pendleton's friend) went to ———'s (the member's) desk and tore off a piece of the legal cap large enough to include the small piece torn off by ——— (the member). I think ——— (Pendleton's friend) was one of the tellers. At any rate, he got the ballot which fitted the piece of legal cap, and which ——— had voted, and found that Payne's name was on the ballot.'

"This member was thereupon charged by the Democratic county paper of his county with betrayal, etc.

"We do not question that the facts can be shown substantially as indicated with respect to the member referred to.

"Should this information not be used, names and means of identity placed on record would or might lead to annoyances for no purpose. They are, therefore, not here given.

"Your committee, we will venture to add in conclusion, will not overlook the fact that our showing,

made in the face of a most persistent and powerful opposition, of unlimited means and expedients, has been one for an investigation, and not final action following an investigation.

"Very respectfully,

"JOHN LITTLE,
"BENJ. BUTTERWORTH."

It is said that much of this is hearsay and that taken together it is insufficient to establish a case which will overcome the presumption arising from the certificate of election. We are not now dealing with that question. The Senate is to determine whether there is probable cause for an inquiry. Any man who lays a claim to any property, real or personal, may institute his process at pleasure, and compel the courts to hear and try the case. Even a criminal accusation requires only the oath of the accuser, who is justified, if he has probable cause.

It will not be questioned that in every one of these cases there is abundant probable cause which would justify a complaint and compel a grand jury or magistrate to issue process and make an investigation. Is the Senate to deny to the people of a great State, speaking through their legislature and their representative citizens, the only opportunity for a hearing of this momentous case which can exist under the Constitution? We have not prejudged the case, nor do we mean to prejudge it. We sincerely trust that the investigation, which is as much demanded for the honor of the sitting Member as for that of the Senate or the State of Ohio, may result in vindicating his title to his seat and the good name of the legislature that elected him.

But we can not consent to be accomplices in denying justice to either. We do not believe the American people will be satisfied that the Senate should refuse to hear this case either on the ground that some other tribunal has tried some other case, or on the ground that it has already been decided without hearing or evidence, or on the ground that a bribe paid for a vote in a legislative caucus is not understood by both parties to include a vote in the legislature for the candidate of that caucus.

How can a question of bribery ever be raised or ever be investigated if the arguments against this investigation prevail? You do not suppose that the men who bribe or the men who are bribed will volunteer to furnish evidence against themselves? You do not expect that impartial and, unimpeachable witnesses will be present at the transaction. Ordinarily, of course, if a claim like this be brought to the attention of the Senate from a respectable quarter that a title to a seat here was obtained by corrupt means the Senator concerned will hasten to demand an investigation. But that is wholly within his own discretion, and does not affect the due mode of procedure by the Senate. From the nature of the case the process of the Senate must compel the persons who conducted the canvass and the persons who made the election to appear and disclose what they know; and until that process issue you must act upon such information only as is enough to cause inquiry in the ordinary affairs of life.

The question now is not whether the case is proved—it is only whether it shall be inquired into. That has never yet been done. It can not be done until the Senate issues its process. No unwilling witness has ever yet been compelled to testify; no process has gone out which could cross State lines. The Senate is now to determine, as the law of the present case and as the precedent for all future cases, as to the great crime of bribery—a crime which poisons the waters of republican liberty in the fountain—that the circumstances which here appear are not enough to demand its attention.

It will hardly be doubted that cases of purchase of seats in the Senate will multiply rapidly under the decision proposed by the majority of the committee. The first great precedent to constitute the rule under this branch of law is to be this:

Held, by the Senate of the United States, that a charge made by the legislature of a State, and by the committee of the political party to which the larger number of its citizens belong, and by 10 of its Representatives in Congress, that an election of Senator was procured by bribery, accompanied by the offer to prove the fact, does not deserve the attention of the Senate, and this, although it also appear—

That there is a general and widespread public belief in the truth of the charge; that there was a sudden and unexpected and unaccounted for change to the sitting member from another candidate, to whom a majority of the electing body had been previously pledged; that large sums of money were brought to the place of election just before the choice by the managers of the canvass for the person elected; that there is evidence tending to show the bribery of several members, and the acquisition by others, who so changed their support, of considerable sums of money, immediately after such change, affect at least 10 members of said legislature; that a change by corrupt means of the votes of 6 persons

would have changed the result in a legislative caucus, and thereby bound and committed the vote in the legislature of 82 persons, who were a large majority of such legislature;

Provided it also appear that one branch of a subsequent legislature of the same State have, in investigating changes against four of their members, incidentally inquired into charges against other persons, so far as they could without compelling unwilling witnesses to answer, without use of process extending beyond their State, and "without following out many clues, which they did not follow because they were convinced that they would lead only to points of which further pursuit would become necessary."

We recommend the adoption of the accompanying resolution:

Resolved, That the Committee on Privileges and Elections, or any subcommittee thereof, be authorized to investigate the charges affecting the title to the seat of the Hon. Henry B. Payne, and to send for persons and papers, administer oaths, and employ a clerk and stenographer, and to sit during the recess of the Senate; and that the expenses of the investigation be paid out of the contingent fund of the Senate.

On the issues thus joined, the case was debated at length in the Senate on July 21, 22, and 23,[1] and on the latter day the resolution proposed in the views submitted by Mr. Hoar was disagreed to, yeas 17, nays 44. Then the proposition of the majority was agreed to, yeas 44, nays 17.[2]

692. The Senate election case of William A. Clark, from Montana, in the Fifty-sixth Congress.

A Senator-elect took the oath on his prima facie right without challenge, although charges of bribery in his election were presented immediately thereafter.

A memorial having set forth specifically charges of bribery, and specified evidence in support thereof, the Senate decided to examine a Senator's title to his seat.

Instance of a Senate election case instituted by a memorial.

On December 4, 1899,[3] in the Senate William A. Clark, whose credentials were on file as Senator from Montana, took the oath of office without objection.

Very soon thereafter, on that day, Mr. Thomas H. Carter, of Montana, presented the memorial of Henry C. Stiff, speaker of the house of representatives of Montana, and 26 members of the legislative assembly of that State, protesting against the validity of Mr. Clark's election. Mr. Carter also presented a petition signed by the governor of Montana and other State officers, by the Member of Congress from that State, and an ex-Member, praying for an early hearing on the

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[1] Record, pp. 7251, 7308, 7350–7361.

[2] In 1898 the Senate considered the case of Marcus A. Hanna, Senator from Ohio. (Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 878.) Mr. Hanna was chosen by the legislature of the State of Ohio a Senator from that State for the remaining portion of the term ending March 3, 1899. Mr. Hanna appeared January 17, 1898, and took his seat in the Senate without objection. Subsequently, and on the 28th day of May, 1898, a certified copy of the report of the committee appointed by the senate of the State of Ohio to investigate charges of bribery in the election of Mr. Hanna to the Senate of the United States was filed and referred to the Committee on Privileges and Elections. On the 28th day of February, 1899, the committee submitted a report asking to be discharged from further consideration of the report of the State senate of Ohio. A minority of the committee submitted a minority report recommending further inquiry and investigation. One member of the committee did not join in either the majority or the minority report, but submitted a separate report for himself. No further action was taken by the Senate in the case.

[3] First session Fifty-sixth Congress, Record, pp. 1, 2.

protest. The memorial and petition were referred to the Committee on Privileges and Elections.

On December 6[1] Mr. William E. Chandler, of New Hampshire, presented certain exhibits to accompany the memorial already presented.

On December 7[2] Mr. Chandler reported from the Committee on Privileges and Elections the following resolution, which was agreed to on December 12 without debate:

Resolved, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate the right and title of William A. Clark to a seat as Senator from the State of Montana, and said committee is authorized to sit during the sessions of the Senate, to employ a stenographer, to send for persons and papers, and to administer oaths, and that the expense of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

This decision of the Senate, made without question or debate, was evidently based on the full showing made in the memorial presented by Mr. Carter. This memorial,[3] addressed "To the honorable Senate of the United States," set forth:

1. That the petitioners were citizens of the United States and of the State of Montana, and that they were such long prior to the meeting of the sixth legislative assembly, which convened on the first Monday of January, 1899.

2. That the legislature as organized consisted of certain persons, whose names, politics, and districts are set down.

3. That it was the duty of the said legislature to elect a United States Senator, and that William A. Clark was a member.

4. That the said William A. Clark entered into a conspiracy with certain others to influence the action of the legislature in the choice of a Senator, and that in pursuance of that conspiracy money was paid to divers persons to influence corruptly the choice of Senator. The memorial sets forth the names of the persons thus corruptly in receipt of money and the sum received by each, and also other persons mentioned by name to whom stated sums were offered to cause them as members of the said legislature to vote for the said W. A. Clark for Senator.

5. That the aforesaid corrupt offers were made with the full knowledge and authorization of the said W. A. Clark.

6. That by the aid of these corrupt expenditures of money W. A. Clark received a majority of the votes of the legislative assembly for Senator, and that without such corrupt expenditure he would not have received such majority.

7. That various investigations had been made in Montana by the legislature and by the grand-jury system, and a large amount of testimony taken, whereof transcripts were sent as a part of the memorial.

The memorial concludes as follows:

Wherefore, your petitioners pray your honorable body at the earliest practicable moment to set a time and place for hearing this protest and the evidence in support thereof before the Committee on Privileges and Elections of your honorable body, to the end that substantial justice may be done to the people of the State of Montana and all others concerned in the matters set forth herein, and that pending

[1] Record, p. 85.

[2] Record, pp. 132, 231.

[3] First session Fifty-sixth Congress, Senate Report No. 1052, Part I, Document No. 3.

such investigation the said William A. Clark be denied the privileges of participation in the duties and business of the Senate as a Member thereof.

On information and belief I sign the foregoing statement and charges.

The signatures of the petitioners follow.

The Senate having admitted Mr. Clark on his prima facie showing, no steps were taken to grant the request of the petitioners that he be denied participation in the proceedings of the Senate.

693. The case of William A. Clark, continued.

The committee recommended that a Senator's election be declared void, enough bribery being shown to have affected the result.

A Senator threatened with loss of his seat for bribery having resigned, the proceedings abated.

Criticism and discussion as to latitude of inquiry permitted in a committee's investigation of the right of a Senator to his seat.

On April 23 [1] Mr. Chandler reported from the Committee on Privileges and Elections this resolution:

Resolved, That William A. Clark was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Montana.

This resolution was the result of the unanimous action of the committee. With the resolution was a written report [1] going over the evidence at length, discussing the individual cases of bribery, and summarizing the law and the facts, as follows:

In justifying the finding of the committee it is not necessary to discuss any doubtful questions of law.

(1) It is clear that if by bribery or corrupt practices on the part of the friends of a candidate who are conducting his canvass votes are obtained for him without which he would not have had a majority, his election should be annulled, although proof is lacking that he knew of the bribery or corrupt practices. (Pomeroy's case, Taft Election Cases, 330; Caldwell's case, 334; Clayton's case, 348; Ingall's case, 596; Payne's case, 604, 609, 610; Minority report, 616.)

(2) It seems to have been admitted that if the person elected clearly participated in any one act of bribery or attempted bribery he should be deprived of his office, although the result of the election was not thereby changed. (Pomeroy's case, Taft Election Cases, 330, where Mr. Pomeroy had 84 votes against 25.)

According to the law, as understood by the committee, Senator Clark can not be permitted to retain his seat. He received 54 votes and there were 39 against him, leaving him an apparent majority of 15. If he obtained through illegal and corrupt practices 8 votes which would otherwise have been cast against him, he was not legally elected. More than this number of votes, the committee find from all the evidence, was thus obtained.

It is also a reasonable conclusion upon the whole case that Senator Clark is fairly to be charged with knowledge of the acts done in his behalf by his committee and his agents conducting his canvass. He arrived in Helena from Butte on January 4 and remained there until after his election on January 28, and was in constant conference with his committee and agents.

Two members of the committee, Messrs. E. W. Pettus, of Alabama, and W. A. Harris, of Kansas, while agreeing to the resolution, offered minority views which, besides discussing the evidence, criticised the method of taking it.

It was our misfortune not to agree with a majority of the committee in the general conduct of the investigation of this case. We believed that in this important inquiry the committee was bound by, and ought to act on, the ordinary rules of evidence.

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[1] Senate Report No. 1052, Record, pp. 3429.

And in this contention we merely followed another member of the committee who is one of our great lawyers and who is fresh from a long service as a nisi prius judge under Federal authority. That great lawyer, in gentle but forceful language, admonished us of the great danger of disregarding the common rules of evidence established by great judges through the centuries and known to all lawyers. But it was said the committee was not a court and had a right to receive "hearsay" evidence in order to get on the track of better evidence. And we did receive it constantly, and in great volumes.

We tried merely to discharge our duties as members of this committee and as judges in this most important cause. The chairman, however, left the committee little to do. The committee made an order at the beginning appointing the chairman and another member to determine what witnesses should be summoned, and the two did determine that matter at first, but the chairman kindly relieved the other members of that labor and determined that matter for the committee.

This report of the chairman declares that, as to many matters stated separately, some members of the committee think or believe one way and some think or believe another way. So we preferred to state our individual findings for ourselves.

It is our opinion from the evidence that the friends of Senator Clark illegally and improperly used large amounts of money and thereby caused the election, and that this election is not valid, but under the law of the land is void, and therefore we agreed to the resolution reported by the chairman.

* * * * * * *

A large part of the evidence taken by the committee and submitted to the Senate is irrelevant to the matter of inquiry. Take as a sample the matter of what is called the attempt to bribe the supreme court and the attorney-general. This transaction, so far as we are informed, occurred six or seven months after the senatorial election; no fact proved connects Mr. Clark with any part of that transaction. Doctor Treacy had no sort of connection, directly or indirctely, with Mr. Clark; and if he had there was no connection between the election in January and the supreme judges in the fall of that year.

You can not lawfully charge a man with one crime and prove that he committed that crime by proving that he did commit another crime. The Constitution provides that the accused must "be informed of the nature and cause of the accusation." No mention of the judges of the supreme court of Montana was made in the charges against Mr. Clark. All of that evidence was nothing more than what lawyers call "coloring matter." And it was admitted against the protest of the Senator from Maryland and others.

And in the conduct of this case much other mere "coloring matter" was received as evidence.

In the report made for the committee there are several curious statements of a part of the evidence as to the thing stated. For example, it is stated that Senator Clark, in June, 1899, destroyed the checks which he had drawn on his bank. But the report fails to state that for years past it was his habit to destroy his checks when his account was rendered by the bank and examined. And the report failed to state that the committee had the bank account of Mr. Clark during all the time in which it was charged that money had been illegally used.

And there is another feature of that report which should be noticed. Statements are made as facts which are based only on the testimony of a witness of doubtful credit, and that testimony plainly contradicted.

The only proposition for which we contend is, that this is a judicial case, and a committee of the Senate ought to consider and report it as judges.

On May 3[1] the consideration of the resolution was postponed until May 15. On the latter day,[2] Mr. Clark, rising to a question of personal privilege, and after reviewing the evidence and criticising the methods by which the evidence had been taken, submitted a copy of a letter addressed by him on May 11 to the governor of Montana, in which he resigned his seat in the Senate.

Mr. Chandler thereupon asked that the resolution might go over to the next day. On that day[3] it was further postponed to enable the Committee on Privileges and Elections to determine what further action should be taken. On June 5,[4] near the

[1] Record, pp. 5021, 5022.

[2] Record, pp. 5531–5536.

[3] Record, p. 5584.

[4] Record, p. 6698.

close of the session, Mr. Chandler submitted a supplemental report in which the majority of the committee justified their method of conducting the investigation, and replied to the criticisms made by Mr. Clark:

The distinct criticisms made by Mr. Clark on May 15 of the report of the committee are not serious in their character, and it is fortunate that they were made, because they may be taken as being all the criticisms which the party most at interest can claim can justly be made. The correctness of all other statements made by the committee not criticised by Senator Clark may be taken to be admitted by him. All his statements will not be now reviewed, but some of them should be noticed by the committee.

He complains that the method of procedure of the committee was unfair and nonjudicial, and that testimony was received contrary to the established rules of evidence, hearsay and irrelevant testimony; and that the case was like the Dreyfus case, where there was a constant presumption of guilt instead of innocence.

The answers to this complaint are simple.

(1) That no such testimony was received except after deliberate decision by the committee for the purpose of ascertaining what additional witnesses it might be necessary to summon, as stated by the chairman on page 432 of the testimony, as follows:

"The CHAIRMAN. It would only be admissible as laying the foundation for sending for other witnesses."

(2) That no single finding of the committee has been based upon hearsay testimony.

The finding of the whole committee that the election was null and void was based upon the admitted or undisputed facts with their attendant circumstances, and no facts are recited in the report of the committee beyond the admitted and undisputed facts except in those cases where any denial of those facts is distinctly recited.

The methods of procedure were in no case unfair, but were such as ordinarily prevail in investigations like this.

The presumption of innocence was at no time disregarded, and findings unfavorable to Mr. Clark were made as a court or jury would have made them upon a full and fair consideration of all the facts in the case.

He denies the conclusion of the committee that a sufficient number of legislators were corrupted to change the result of the election.

This criticism is merely the complaint that the committee differed in opinion from him and his eminent counsel and made findings contrary to their desires.

The report then discusses the evidence more at length.

694. The case of William A. Clark, continued.

A Senator having resigned apparently to escape being unseated for bribery, was not readmitted on credentials showing appointment by an acting governor.

On May 22,[1] Mr. Carter presented to the Senate the following credentials:

STATE OF MONTANA, EXECUTIVE CHAMBER,
Helena, Mont., May 15, 1900.

Whereas a vacancy has occurred in the representation of the State of Montana in the Senate of the United States, caused by the resignation of Senator William A. Clark; and

Whereas the legislature of said State is not in session, but in recess:

Therefore be it known that, pursuant to the power vested in me by the Constitution of the United States, I, A. E. Spriggs, the lieutenant-governor and acting governor of the said State, do hereby appoint William Andrews Clark, a citizen and inhabitant of said State, to be a member of the Senate of the United States, to fill the vacancy so caused and existing as aforesaid, to have and to hold the said office and membership until the next meeting of the legislature of this State.

[1] Record, p. 5850.

In witness whereof I have hereunto set my hand and affixed the great seal of said State, at the city of Helena, in said State, this 15th day of May, A. D. 1900.

[SEAL.]

A. E. SPRIGGS, *Acting Governor.*

By his excellency the acting governor:

T. S. HOGAN, *Secretary of State.*

The credentials were, at Mr. Carter's suggestion, laid on the table, no proposition being made to administer the oath to Mr. Clark.

On May 25[1] Mr. Carter presented similar credentials, in due form, but signed by Robert B. Smith, the governor of Montana, certifying that he had appointed Martin Maginnis to fill the vacancy caused by Mr. Clark's resignation. These credentials also were laid on the table.

Mr. Chandler presented a resolution referring the two credentials to the Committee on Privileges and Elections, with instructions to inquire which of the two claimants was entitled to the seat. This resolution was also laid on the table.

On June 5,[2] very near the end of the session of Congress, Mr. Chandler submitted a resolution providing for a more general investigation of the subject, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

On December 4, 1900,[3] at the beginning of the next session of Congress, Mr. Carter called up for consideration the resolution proposed by Mr. Chandler on May 25, providing for an investigation of the rival claims of Messrs. Clark and Maginnis. On December 11[4] the resolution was considered by the Senate and debated somewhat. Mr. Carter, in the course of the debate, stated that the lieutenant-governor of Montana, in the absence of the governor, had appointed Mr. Clark. The governor, on his return, had attempted to revoke that appointment and had then appointed Mr. Maginnis. Mr. John C. Spooner, of Wisconsin, suggested that it might appear that under the decisions of the Senate it might be shown that the governor had no right to appoint at all.

The resolution was then agreed to.

Mr. Chandler next asked that the resolution declaring William A. Clark not duly elected, which had remained as unfinished business since the resignation of Mr. Clark, be recommitted to the Committee on Privileges and Elections. This request led to a debate as to the status of Mr. Clark in the Senate before his resignation and as to the nature of the vacancy in view of the power of the governor to appoint. The matter went over without action.

On March 2[5] Mr. Chandler presented a memorial of Henry R. Knapp and others, of Helena, Mont., remonstrating against seating Mr. Clark.

On the same day[6] (March 2, 1901) Mr. Chandler called up the resolution declaring William A. Clark not duly elected and proposed an amendment substituting a declaration that Mr. Clark was personally responsible for the offenses disclosed by the examination of his alleged election. Mr. Chandler addressed the Senate, but did not press the amendment to a vote.

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[1] Record, p. 6017.

[2] Record, p. 6693.

[3] Second session Fifty-sixth Congress, Record, p. 29.

[4] Record, pp. 216–219.

[5] Record, p. 3389.

[6] Record, p. 3421.

695. The case of William A. Clark, continued.

The Senate seated a Senator-elect on prima facie showing of his election by a legislature, although his election for a prior term had been found by a committee invalid because of bribery.

At the conclusion of Mr. Chandler's speech, on the same day (March 2, 1901), Mr. James K. Jones, of Arkansas, presented these credentials: [1]

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF MONTANA.

To the President of the Senate of the United States:

This is to certify that on the 16th day of January, 1901, William Andrews Clark was duly chosen and elected by the legislature of the State of Montana a Senator from said State to represent said State in the Senate of the United States for the term of six years, beginning on the 4th day of March, 1901.

In testimony whereof I have hereunto subscribed my name and caused the great seal of the State of Montana to be affixed at my office, at Helena, the 24th day of January, in the year of our Lord 1901, and the one hundred and twenty-fifth year of the independence of the United States of America.

[SEAL.] JOSEPH K. TOOLE, *Governor.*

By the Governor:

GEORGE M. HAYS, *Secretary of State.*

These credentials were placed on file in accordance with the custom of the Senate, to await the meeting of the next Congress.

Soon thereafter the Congress ended.

On March 4, 1901,[2] at the special session of the Senate in the new Congress Mr. Clark appeared and was sworn in on the strength of the credentials, without challenge.

696. The Senate election case of Lewis V. Bogy, from Missouri, in the Forty-second Congress.

A memorial to justify an investigation of the title of a Senator to his seat should state the charges and indicate with certainty the character of the evidence.

In 1873 [3] the Senate considered the case of Lewis V. Bogy. March 4, 1873, Mr. Bogy took his seat, having been elected for the term of six years from that date. March 17 the Vice-President laid before the Senate a memorial of members of the legislature, accompanied by a report of a select committee of the legislature appointed to investigate charges of bribery and corruption in the Senatorial election, praying for an investigation by the Senate of said charges. The memorial was referred to the Committee on Privileges and Elections.

The report of the committee, submitted on March 25, 1873, by Mr. Oliver P. Morton, of Indiana, was as follows:

The Committee on Privileges and Elections, to whom was referred the memorial of thirty-seven members of the legislature of Missouri in regard to the election of Lewis V. Bogy to the Senate of the United States from that State, have had the same under consideration and submit the following report:

The memorial sets forth that the recent examination by a committee appointed by the house of representatives of the legislature of Missouri, touching the corrupt use of money in the election of Mr. Bogy, was imperfect; that it was not full and fair, and in the opinion of the memorialists, if the investigation had been conducted with more vigor and with a purpose of revealing the real facts of the case,

[1] Record, p. 3436.

[2] First session Fifty-seventh Congress, Record, p. 1.

[3] Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 609.

other and more important evidence would have been produced showing that there was corruption in Mr. Bogy's election.

The memorial, however, does not state what additional facts can be proven, nor indicate with any certainty the character of the new evidence that may be produced.

The committee understand that the only duty which they have upon this reference is to report to the Senate whether the memorial presents such facts as would justify the Senate in instituting an examination in regard to the election of Mr. Bogy and are of the opinion that it does not. Such a proceeding is of a grave character and should not be set on foot without such a statement of the evidence that could probably be produced as would appear to make it the duty of the Senate to proceed to an investigation.

The evidence taken by the committee of the legislature of Missouri also accompanies the memorial and has been examined by the committee. It is not the province of the committee upon this reference to inquire whether the judgment pronounced by the house of representatives of the Missouri legislature upon this evidence was correct; but they express the opinion that the evidence is not of a character to require of the Senate an investigation.

The committee therefore ask to be discharged from the further consideration of the memorial and the evidence touching the election of Lewis V. Bogy to the Senate of the United States.

The recommendation of the committee was agreed to by the Senate.