Chapter XXIII.

TESTIMONY IN CONTESTED ELECTIONS.

[1] As to the signing of depositions, section 54 of this volume.

Informalities in depositions, section 736.

Number of places in which testimony may be taken contemporaneously not limited, section 1112 of Volume II.

Both parties may take testimony at the same time, section 606.

As to the officer before whom testimony is taken, sections 857, 1049, 1064, 1070, and 1086 of Volume II.

Law as to transmittal held to be directory, section 736.

As to whether or not House and its committee are bound by legal rules of evidence, sections 960 and 1046 of Volume II.

Incompetent testimony and statements by counsel not to be included in record of case, section 1127 of Volume II.

Testimony should be confined to the pleadings (secs. 640 of this volume and 855, 880, 1015, and 1107 of Vol. II); but irrelevant testimony has been admitted (secs. 643 of this volume and 850 and 1052 of Vol. II).

As to consideration of public documents, sections 353 and 608.

Certified transcripts of records, section 322.

Records of election returns, sections 472, 835, and 839 of this volume and 1013, 1014, 1022, and 1100 of Volume II.

Historic and other knowledge in lieu of, sections 924, 965, 969, 984, 1016, 1017, 1030, 1034, and 1104 of Volume II.

[2] House appoints committee to hear testimony, section 756.

[3] House modifies requirements of the law, sections 449 and 600 of this volume and 1122 of Volume II. Forms of resolutions therefor, sections 814 and 815.

Evidence taken under House's general power of investigation, sections 764, 793, and 803 of this volume and 1018 of Volume II.

[4] Admission of testimony taken improperly, sections 326, 525, and 780 of this volume and 920, 1012, and 1029 of Volume II. Rejection of such testimony, sections 831 of this volume and 1116 of Volume II

Admission of testimony taken after the expiration of the legal time, sections 977 and 1003 of Volume II. Rejection of such testimony, sections 900, 901, 905, and 936 of Volume II.

Testimony taken in another-cause admitted by the House, sections 607 and 624. Rejected by the House, section 685 of this volume and section 913 of Volume II. Considered by the Senate, sections 348 and 356.

Motions to suppress testimony, section 425.

[5] Interpretation of law limiting time of taking, section 936 of Volume II.

House permits taking of testimony after expiration of the legal limit, sections 505, 824, and 830 of this volume and sections 869, 875, 890, 956, 1062, and 1095 of Volume II. But this privilege is not granted where diligence has not been shown, sections 606 and 837 of this volume and 898, 1006, 1063, and 1100 of Volume II. Privilege also granted where returns were rejected, section 1019 of Volume II.

[6] Instances of admission of ex parte evidence, sections 423, 624, 625, 646, 736, and 812 of this volume and 1004, 1006, and 1024 of Volume II. Instances of rejection, sections 321, 685, 834, and 843 of this volume and 872, 927, 930, 1057, 1039, and 1125 of Volume II.

697. Ninety days are allowed for taking testimony in an election case, divided between the parties.

Testimony in an election case must be taken within ninety days from the service of the answer of the returned Member.

The law governing the service of notice by the party desiring to take a deposition in an election case.

Testimony in an election case may be taken at two or more places at the same time.

The statutes provide:

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.[1]

By the act of March 2, 1875, it is provided that "section 107, Revised Statutes, 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."[2]

The party desiring to take a deposition under the provisions of this chapter 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, and of the name of any officer before whom the same will be taken. The notice shall be personally served upon the opposite party, or upon any agent or attorney authorized by him to take testimony or cross-examine witnesses in the matter of such contest, if, by the use of reasonable diligence, such personal service can be made; but if, by the use of such diligence, personal service can not be made, the service may be made by leaving a duplicate of the notice at the usual place of abode of the opposite party. The notice 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. Testimony in rebuttal may be taken on five days' notice.[3]

Testimony in contested election cases may be taken at two or more places at the same time.[3]

698. The law governing the application for issuing of subpoenas for witnesses in an election case.—The statutes provide:

When any contestant or returned Member is desirous of obtaining testimony respecting a contested election he may apply for a subpoena to either of the following officers who may reside within the Congressional district in which the election to be contested was held:

First. Any judge of any court of the United States.

Second. Any chancellor, judge, or justice of a court of record of any State.

Third. Any mayor, recorder, or intendant of any town or city.

Fourth. Any register in bankruptcy or notary public.[4]

The officer to whom the application authorized by the preceding section is made shall thereupon issue his writ of subpoena, directed to all such witnesses as shall be named to him, requiring their attendance before him at such time and place named in the subpoena in order to be examined respecting the contested election.[5]

In case none of the officers mentioned in section 110 are residing in the Congressional district from which the election is proposed to be contested, the application thereby authorized may be made to any two justices of the peace residing within the district, and they may receive such application and jointly proceed upon it.[6]

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[1] R. S., sec. 107.

[2] 18 Stat. L., p. 338.

[3] R. S., sec. 109.

[4] R. S., sec. 110.

[5] R. S., sec. 111.

[6] R. S., sec. 112.

699. The law allowing the parties in an election case, by consent in writing, to waive certain formalities in taking testimony.—The statutes provide:

It shall be competent for the parties, their agents, or attorneys authorized to act in the premises, by consent in writing, to take depositions without notice; also, by such written consent, to take depositions (whether upon or without notice) before any officer or officers authorized to take depositions in common law, or civil actions, or in chancery, by either the laws of the United States or of the State in which the same may be taken, and to waive proof of the official character of such officer or officers. Any written consent given as aforesaid shall be returned with the depositions.[1]

700. The law for summoning and examining witnesses in an election case.

The law relating to the taking and certification of depositions in an election case.

The statutes provide:

Each witness shall be duly served with a subpoena by a copy thereof delivered to him or left at his usual place of abode at least five days before the day on which the attendance of the witness is required.[2]

No witness shall be required to attend an examination out of the county in which he may reside or be served with a subpoena.[3]

Any person who, having been summoned in the manner above directed, refuses or neglects to attend and testify, unless prevented by sickness or unavoidable necessity, shall forfeit the sum of twenty dollars, to be recovered with costs of suit by the party at whose instance the subpoena was issued, and for his use, by an action of debt, in any court of the United States, and shall also be liable to an indictment for a misdemeanor and punished by a fine and imprisonment.[4]

Depositions of witnesses residing outside of the district and beyond the reach of a subpoena may be taken before any officer authorized by law to take testimony in contested election cases in the district in which the witness to be examined may reside.[5]

The party notified as aforesaid, his agent or attorney, may, if he sees fit, select an officer (having authority to take depositions in such cases) to officiate with the officer named in the notice in the taking of the depositions; and if both such officers attend, the depositions shall be taken before them both, sitting together, and be certified by them both. But if any one of such officers attend, the deposition may be taken before and certified by him alone.[6]

At the taking of any depositions under this chapter either party may appear and act in person or by agent or attorney.[7]

All witnesses who attend in obedience to a subpoena or who attend voluntarily at the time and place appointed, of whose examination notice has been given, as provided by this chapter, shall then and there be examined, on oath, by the officer who issued the subpoena, or, in case of his absence, by any other officer who is authorized to issue such subpoena, or by the officer before whom the depositions are to be taken by written consent, or before whom the depositions of witnesses residing outside the district are to be taken, as the case may be, touching all such matters respecting the election about to be contested as shall be proposed by either of the parties or their agents.[8]

701. The law relating to the pertinency of testimony in an election case.—The statutes provide:

The testimony to be taken by either party to the contest shall be confined to the proof or disproof of the facts alleged or denied in the notice and answer mentioned in sections one hundred and five and one hundred and six.[9]

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[1] R. S., sec. 113.

[2] R. S., sec. 114.

[3] R. S., sec. 115.

[4] R. S., sec. 116.

[5] R. S., sec. 117.

[6] R. S., sec. 118.

[7] R. S., sec. 119.

[8] R. S., sec. 120.

[9] R. S., sec. 121.

702. The law for the transcribing and attestation of testimony in an election case.—The statutes provide:

The officer shall cause the testimony of the witnesses, together with the questions proposed by the parties or their agents, to be reduced to writing in his presence, and in the presence of the parties or their agents, if attending, and to be duly attested by the witnesses respectively.[1]

703. The officer presiding at the taking of testimony in an election case has the power to require the production of papers.

The law requires the testimony taken in an election case to be transmitted to the Clerk of the House by the officer before whom it was taken.

The statutes provide:

The officer shall have power to require the production of papers; or on the refusal or neglect of any person to produce and deliver up any paper or papers in his possession pertaining to the election, or to produce and deliver up certified or sworn copies of the same in case they may be official papers, such persons shall be liable to all the penalties prescribed in section one hundred and sixteen. All papers thus produced, and all certified or sworn copies of official papers, shall be transmitted by the officer, with the testimony of the witnesses, to the Clerk of the House of Representatives.[2]

704. The taking of testimony in an election case may be adjourned from day to day.

The notice to take depositions and a copy of the subpoena are attached to the depositions in an election case.

A copy of the notice of contest and the answer in an election case are sent to the Clerk of the House with the testimony.

The statutes provide:

The taking of the testimony may, if so stated in the notice, be adjourned from day to day.[3]

The notice to take depositions, with the proof or acknowledgment of the service thereof, and a copy of the supoena, where any has been served, shall be attached to the depositions when completed.[4]

A copy of the notice of contest, and of the answer of the returned Member, shall be prefixed to the depositions taken, and transmitted with them to the Clerk of the House of Representatives.[5]

705. The law prescribing the method of forwarding to the Clerk of the House the testimony in an election case.

Law governing the duty of the Clerk of the House as to the printing of testimony in an election case.

The law governing the filing of contestant's and contestee's briefs in an election case, and the printing thereof.

The statutes provide:

All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify and carefully seal and immediately forward the game, by mail or by express, addressed to the Clerk of the House of Representatives of the United States, Washington, District of Columbia; and shall also indorse upon an envelope containing such deposition or testimony the name of the case in which it is taken, together with the name of the party in whose behalf it is taken, and shall subscribe such indorsement.

The Clerk of the House of Representatives, upon the receipt of such deposition or testimony, shall notify the contestant and the contestee, by registered letter through the mails, to appear before him at the

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[1] R. S., sec. 122.

[2] R. S., sec. 123.

[3] R. S., sec. 124.

[4] R. S., sec. 125.

[5] R. S., sec. 126.

Capitol, in person or by attorney, at a reasonable time to be named, not exceeding twenty days from the mailing of such letter, for the purpose of being present at the opening of the sealed packages of testimony and of agreeing upon the parts thereof to be printed. Upon the day appointed for such meeting the said Clerk shall proceed to open all the packages of testimony in the case, in the presence of the parties or their attorneys, and such portions of the testimony as the parties may agree to have printed shall be printed by the Public Printer, under the direction of the said Clerk; and in case of disagreement between the parties as to the printing of any portion of the testimony, the said Clerk shall determine whether such portion of the testimony shall be printed; and the said Clerk shall prepare a suitable index to be printed with the record. And the notice of contest and the answer of the sitting Member shall also be printed with the record.[1]

If either party, after having been duly notified, should fail to attend by himself or by an attorney, the Clerk shall proceed to open the packages, and shall cause such portions of the testimony to be printed as he shall determine.

He shall carefully seal up and preserve the portions of the testimony not printed, as well as the other portions when returned from the Public Printer, and lay the same before the Committee on Elections at the earliest opportunity. As soon as the testimony in any case is printed the Clerk shall forward by mail, if desired, two copies thereof to the contestant and the same number to the contestee; and shall notify the contestant to file with the Clerk, within thirty days, a brief of the facts and the authorities relied on to establish his case. The Clerk shall forward by mail two copies of the contestant's brief to the contestee, with like notice.

Upon receipt of the contestee's brief the Clerk shall forward two copies thereof to the contestant, who may, if he desires, reply to new matter in the contestee's brief within like time. All briefs shall be printed at the expense of the parties, respectively, and shall be of like folio as the printed record; and sixty copies thereof shall be filed with the Clerk for the use of the Committee on Elections.[2]

706. The law regulating the fees of witnesses and officers in the preparation of an election case.—The statutes provide:

Every witness attending by virtue of any subpcena herein directed to be issued shall be entitled to receive the sum of seventy-five cents for each day's attendance, and the further sum of five cents for every mile necessarily traveled in going and returning. Such allowance shall be ascertained and certified by the officer taking the examination, and shall be paid by the party at whose instance such witness was summoned.[3]

Each judge, justice, chancellor, chief executive officer of a town or city, register in bankruptcy, notary public, and justice of the peace, who shall be necessarily employed pursuant to the provisions of this chapter, and all sheriffs, constables, or other officers who may be employed to serve any subpoena or notice herein authorized, shall be entitled to receive from the party at whose instance the service shall have been performed such fees as are allowed for similar services in the State wherein such service may be rendered.[4]

707. Rules of the Elections Committees for hearing a contested election case.—Committees on Elections in the House of Representatives have adopted rules to govern the hearing of a contested case:

1. All proceedings of the Committee on Elections shall be recorded in the journal, which shall be signed daily by the clerk.

2. No paper shall be removed from the committee room without the permission of the committee, except for the purpose of being printed or used in the House.

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[1] In the case of Arnold *v.* Lea in 1830, the House by resolution prescribed a similar method of deciding what portions of the testimony in the pending case should be printed for the information of the House during the discussion. (First session Twenty-first Congress, pp. 119, 125. Contested Elections (Clarke), pp. 606, 607.)

[2] Act approved March 2, 1887. 24 Stat. L., p. 445.

[3] R. S., sec. 128.

[4] R. S., sec. 129.

3. Oral arguments may be heard for such time as the committee may allow, not exceeding one hour and a half on each side, unless otherwise ordered

4. After any contested-election case, or any question pertaining thereto, has been argued and submitted to the committee and the committee is ready to proceed with the case there shall be allowed to the members thereof three hours for debate, at the expiration of which time a vote shall be taken upon the pending proposition, unless otherwise ordered. The time allowed for debate in the committee shall be divided as follows: Those favoring the proposition shall open in one hour; those opposing shall follow in one hour and a half; and the former shall close in a half hour, unless otherwise ordered.

When the debate has been closed and the committee is ready to decide, the chairman shall take the opinion of each member of the committee separately. Each member of the committee, when thus called upon, shall announce his opinion.

5. No person shall be present during any consultation of the committee except the members and clerk.

6. All papers referred to the committee shall be entered on the docket by the House docket clerk according to the number of the packages, and they shall be identified upon the docket.

7. Nothing contained in these rules shall prevent the committee, when Congress is in session, from ordering briefs to be filed and a case to be heard at any time the committee may determine.

8. The foregoing rules shall not be altered or amended except by a vote of a majority of all the members of the committee.

708. The Georgia election case of Jackson v. Wayne in the Second Congress.

Instance of an early election case instituted by petition.

Form of petition instituting an early election case.

In 1791 the House, by resolution, adopted a method of taking evidence in contested-election cases.

Reference to the early law for taking evidence in election cases (footnote).

On November 1, 1791,[1] Mr. Anthony Wayne appeared, produced his credentials as a Member-elect from Georgia, and took his seat.

On November 14, 1791,[2] the following petition was presented to the House on behalf of James Jackson:

That at the late election for Members to represent the State of Georgia in your honorable House, for the present Congress, General Anthony Wayne and your petitioner were candidates for the lower or eastern district of said State. That an improper and undue return has been made to your House of the said election; for that the county election of Effingham, in favor of the said Anthony Wayne, was illegal, there being nine more votes at the same than there were voters, and two of the persons presiding thereat were not qualified magistrates; for that the return of Glynn County, in favor of your petitioner, was suppressed; for that a false return was made to the executive of the State for the county of Camden, exceeding the numbers of the legal poll, which amounted to 25 votes, by the number of 64 votes, all of which were in favor of the said Anthony Wayne, and added together with the legal poll very far exceeds the whole number of male inhabitants entitled to vote therein; and for that an illegal or pretended poll was held after the legal poll was closed, and on which illegal poll the aforesaid false return was founded, and the legal return, after being duly certified by the proper officer, was either suppressed or destroyed.

On October 31[3] it was;

Resolved, That a committee be appointed to report a regular and uniform mode of proceeding in cases of contested elections of Members of this House.

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[1] First session Second Congress, Journal, p. 445.

[2] First session Second Congress, Contested Elections in Congress from 1789 to 1834, pp. 47–68; House Journal, p. 452.

[3] Journal, p. 444.

Messrs. Fisher Ames, of Massachusetts, Jonathan Dayton, of New Jersey, John Brown, of Virginia, Thomas Fitzsimons, of Pennsylvania, and Thomas Tudor Tucker, of South Carolina, were appointed of this committee.

On November 16,[1] the petition of Mr. Jackson was referred to this committee, and on November 18 that committee reported.

On November 25[2] the report, after consideration, was agreed to as follows:

Resolved, That the first Monday of February next be assigned for the trial of the articles alleged in the said petition, against the said return.

Resolved, That the evidence which may be offered, on the part of the petitioner, shall be confined to the proof of the articles of charge exhibited in the said petition against the validity of the return of the said election.

Resolved, That, on the trial, the deposition of a witness shall be received, which shall have been taken more than twenty-five days prior to the day assigned for the trial, before any justice or judge of the courts of the United States, or before any chancelor, justice, or judge, of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court, or court of common pleas of any of the United States, not being of counsel or attorney to either the said Anthony Wayne or the petitioner.

Provided, That a notification from the magistrate, before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall have been first made out and served on the adverse party, or his attorney especially authorized for the purpose as either may be nearest, if either is within 100 miles of the place of such caption, allowing time for their attendance, after notified, not less than at the rate of one day, Sundays exclusive, for every 20 miles travel. And every person deposing shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken, together with a certificate of the notice, if any, given to the adverse party, or his attorney, shall be sealed up by the said magistrate, and directed to the Speaker;

Provided, nevertheless, That no ex parte deposition shall be used on the trial of the said petition, which shall have been taken at any time before the 26th day of December next;

Provided, also, That evidence taken in any other manner than is hereinbefore directed, and not objected to by the parties, may with the approbation of the House, be produced on the trial.[3]

709. The case of Jackson v. Wayne, continued.

In 1791 the House admitted the contestant and his counsel to the bar to produce testimony in an election case.

The House declined to admit as evidence in an election case the decision of a State impeachment court on a related subject.

In 1791 the House declined to admit as evidence in an election case official State papers under seal.

In an early election case the House, having ascertained great irregularities, unseated the returned Member, but did not seat contestant.

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[1] Journal, p. 455, 457.

[2] Journal, p. 463.

[3] On December 6, 1797 (Contested Election Cases, Clarke, p. 12), the House discussed a series of resolutions providing a rule for taking testimony in election cases. In 1798 (1 Stat. L., p. 537) a law was passed providing a method of proceeding, but also providing that it should be in force no longer than the end of the first session of the Sixth Congress. In 1800 (2 Stat. L., p. 39) this law was continued for four years longer. At various later dates, up to 1830, the revival of this or a similar law was attempted, but failed. (Contested Election Cases, Clarke, pp. 16, 17.) The present system of law dates from 1851.

A seat being declared vacant, the Speaker was directed to inform the executive of the State.

On November 18 [1] Mr. Ames submitted the report of the committee.

On February 6, 1792,[2] a petition was presented from James Jackson, praying that the trial of the case be postponed "for twenty days, in conformity to the tenor of an agreement entered into between the attorneys of the said Anthony Wayne and the petitioner," and the House postponed the trial for twenty days, it to take place at the end of that time "in the manner prescribed by the resolution of this House of the 25th of November last."

On February 27,[3] the day assigned for the trial, the petitioner, on his application, was admitted to the bar of the House, and an application was made on the part of the sitting Member to postpone the trial further. Both the sitting Member and the petitioner were fully heard, and then the House voted that the case be postponed until the second Monday in March.

On March 12,[4] the case being taken up, the sitting Member with his counsel, and the petitioner were present within the bar of the House. Application was made by the counsel for sitting Member for a further postponement, which the House denied. The petitioner then proceeded to exhibit and read his proofs in support of the allegations of his petition, so far as respected the first article therein contained. This presentation of petitioner's case continued on March 13 and 14. On the latter day [5] an application in writing was made by the petitioner as follows:

> That the decision of the senate of the State of Georgia, on the impeachment of Judge Osborne, so far as respects the Camden return for a Member to represent the State of Georgia, on the 3d day of January, 1791, he received as evidence in the present trial of that election, to establish the corruption of Judge Osborne.

It was alleged [6] by the petitioner that Judge Osborne had been presiding officer at Camden, and at the close of the poll, had been instrumental in a manipulation of the returns, and in the suppression of the return of Glynn County. In offering the decision of the Georgia senate the petitioner declared that "the point at issue [in the impeachment and in the pending case] was the same, whether corruption had or had not taken place at this election." It is to be inferred from the debate, although it does not positively appear, that Judge Osborne's conduct at Camden was one of the grounds of the impeachment.

The counsel for the sitting Member objected to the decision as unconnected with this case, and ex parte.

The question being taken on admitting the decision, the House decided not to admit it—yeas 20; nays 41.

The petitioner having concluded with his exhibits and proof, the sitting Member by his counsel entered into the defense, producing exhibits and proofs in opposition. On March 15,[7] the sitting Member having concluded, the petitioner was heard in reply. After this the parties retired from the bar.

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[1] Journal, p. 457.

[2] Journal, p. 502.

[3] Journal, pp. 521, 522.

[4] Journal, pp. 534, 535.

[5] Journal, p. 535.

[6] Annals, pp. 463–467.

[7] Journal, p. 536.

A motion was then made and seconded:

That certain proceedings of the house of representatives of the State of Georgia, accompanied with other papers, transmitted agreeable to their resolution, under the signature of the governor and the seal of the State, relative to the election of a Member to represent the eastern district of the said State in this House be received.

As to this motion the Journal has the entry that it was lost through a negativing of the previous question. By the usage of that time such a decision defeated the motion.

On March 16[1] the House gave decision. The grounds of the contest and the attitude of the House as to the various specifications do not appear with much certainty; but by a unanimous vote the House agreed to the following resolution, great irregularities being shown:

Resolved, That Anthony Wayne was not duly elected a Member of this House.

It was then moved:

That the Speaker do transmit a copy of the said vote to the executive of the State of Georgia.

On March 19[2] this resolution was proposed:

Resolved, That the petitioner, James Jackson, is entitled to a seat in this House as a Member for the lower district of the State of Georgia; and that the right of petitioning against the election of the said James Jackson be reserved to all persons at any time during the term for which he was elected.

This resolution was debated at length on March 20 and March 21.[3] It was urged that the petition had related only to the right of Mr. Wayne, and that on the case so far as made up the House was authorized only in finding that Mr. Wayne was not elected. It was not for the House to decide as to the election of Mr. Jackson, who did not appear with any credentials from the State of Georgia. On the other hand, it was urged that the one having the greater number of sound votes was entitled to the seat, and that, as there were only two candidates, Mr. Jackson should be seated to fill the vacancy.

The question being taken,[4] there appeared in favor of the resolution to seat Mr. Jackson—yeas 29, and against, nays 29. The Speaker declared himself with the nays.

It was then—

Resolved, That the seat of Anthony Wayne, as a Member of this House, is, and the same is declared to be, vacant.

Resolved, That the Speaker transmit a copy of the preceding resolution, and of this order, to the executive of the State of Georgia, to the-end that the said executive may issue writs of election to fill the said vacancy.

710. The House has issued a subpoena duces tecum in order to procure election returns to be used in determining election cases.—On June 20, 1874,[5] on motion of Mr. L. Q. C. Lamar, of Mississippi, by direction of the Committee on Elections, the House,agreed to the following:

Whereas it is necessary to a proper determination of the several contests from the Congressional districts of Louisiana, now pending in the House, that the Committee on Elections should be in possession

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[1] Journal, p. 536.

[2] Journal, p. 540.

[3] Annals, pp. 475–479.

[4] Journal, pp. 542, 543.

[5] First session Forty-third Congress, Journal, p. 1263; Record, p. 5316.

of the original election returns of the general election held in that State on the 4th day of November, 1872; and whereas those returns are said to be in the possession of John McEnery, and said McEnery being unwilling to produce said returns except upon order of said committee: Therefore,

Be it resolved by this House, That a subpoena duces tecum be issued to said McEnery, requiring him to produce in person before said committee said election returns on or before the first Monday in December, 1874; and also that subpoenas be issued to Archibald Mitchell and William Wareper, of New Orleans, requiring them to be and appear before said Committee on Elections on the first Monday in December, A. D. 1874.

711. The Maryland election case of Jackson v. Smith in the Fifty-ninth Congress.

The evidence in an election case conducted according to law being insufficient, the House authorized its committee to take additional testimony.

On June 28, 1906,[1] Mr. James M. Miller, of Kansas, from the Committee on Elections No. 2, submitted the following resolution, which was agreed to by the House:

Whereas the contested-election case of William H. Jackson *v.* Thomas A. Smith, from the First Congressional district of Maryland, was referred to the Committee on Elections No. 2, and the said committee, after careful consideration of the record therein, finds that the evidence already taken is not sufficient upon which to base a conclusion as to the proper determination of said contest: Now, therefore, be it

Resolved by the House of Representatives, That the Committee on Elections No. 2 shall be, and is hereby, authorized and empowered to take such testimony as it shall deem necessary to the determination of the questions of fact in the contested case of Jackson *v.* Smith, from the First Congressional district of Maryland, and shall have power to send for all such persons and papers as it may find necessary for the proper determination of said controversy, and determine the time, place, and manner of taking said testimony, which may be taken before the said committee, or any subcommittee, or any person selected by said committee for such purpose, and that the expenses incurred in taking said testimony shall be paid from the contingent fund of the House upon the order of said Committee on Elections No. 2.

712. The Pennsylvania election case of Carrigan v. Thayer, in the Thirty-eighth Congress.

A contestant having neglected to take the strictly legal means provided for taking testimony, the House denied his application for new authority to compel testimony.

On June 22, 1864,[2] the Committee on Elections reported in the case of Carrigan *v.* Thayer, of Pennsylvania. The contestant in this case had made application to the committee for authority from the House to summon the mayor and recorder of Philadelphia, the legal custodians of the ballot boxes of a portion of this district, to bring with them these ballot boxes for examination either before the committee or some competent magistrate.

The reason for this request was the allegation that those witnesses had failed to obey a subpoena duces tecum issued by two justices of the peace during the time prescribed by the statute of 1851 for taking testimony, requiring them to appear and produce the said ballot boxes for examination.

The statute of 1851 named as the officers authorized to issue suboenas and examine witnesses "any judge of any court of the United States, or any chancellor,

[1] First session Fifty-ninth Congress.

[2] First session Thirty-eighth Congress, House Report No. 126; 1 Bartlett, p. 576; Rowell's Digest, p. 196.

judge, or justice of a court of record of any State, or any mayor, recorder, or intendant of any town or city, which said officer shall reside within the Congressional district in which said contested election was held."

There was a further provision of this act, which, with the construction put upon it, is thus stated by the committee:

By the ninth section of the same act it is provided that "when no such magistrate as is by the third section of this act authorized to take depositions shall reside in the Congressional district from which the election is proposed to be contested, it shall be lawful for either party to make application to any two justices of the peace residing within the said district, who are hereby authorized to receive such application and jointly to proceed upon it in the manner hereinbefore directed.

It will be seen that two justices of the peace have jurisdiction and authority only when there are none of the magistrates mentioned in the third section resident in the district. When any one of those magistrates resides in the district the two justices can do nothing. Now it appeared that there were resident in this district, during the whole time fixed by the statute for taking testimony in this case, three judges of the court of common pleas of the State of Pennsylvania, a court of record. The two justices of the peace had therefore no jurisdiction or authority in the premises, and their subpoena was therefore only so much blank paper, which no one was bound to obey.

It follows that the contestant had taken no legal steps to procure this testimony within the time fixed by law. The contestant showed no good reason for this omission, and while some of the committee were of opinion, for the reasons stated in the report in the case of Kline *v.* Myers, that the contestant was not entitled to this testimony without first showing some ground of suspicion that the return was not correct, all of the committee were of opinion that, for the reason heretofore stated, the contestant having taken no legal steps to procure this testimony, and showing no good reason for the omission, he is not entitled to the relief prayed for. The application was therefore denied.

Therefore the committee reported a resolution declaring the sitting Member entitled to the seat, and Mr. Carrigan not entitled to it.

On June 24 [1] the report was considered by the House, a protest by the contestant against the technical rule which excluded his evidence being the only debate. The resolutions proposed by the committee were agreed to without division.

713. The Missouri election case of Wagoner v. Butler in the Fifty-seventh Congress.

The House, in a case wherein the terms of the law would prevent taking testimony in an election case in time for decision, provided a method by resolution.

Discussion of the principle that the House is not bound by any statute in exercising its prerogative of judging the elections of its Members.

On December 6, 1902, Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted a report [2] on the memorial of George C. R. Wagoner, who contested the seat of James J. Butler, of Missouri. At the first session of this Congress Mr. Butler had been unseated, and at a subsequent election had been again returned. The preamble and resolutions as submitted by Mr. Olmsted in a supplemental report [3] state the facts of the case:

Whereas James J. Butler having been returned as elected to membership in this Congress from the Twelfth district of Missouri, his right to such membership was contested on the ground of gross frauds in his election, and having heard said contest this House, on the 28th day of June, 1902, declared said Butler not to have been elected; and

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[1] Journal, p. 892; Globe, p. 3243.

[2] Second session Fifty-seventh Congress, House Report No. 2780.

[3] Supplemental Report No. 3857.

Whereas an election having been held November 4, 1902, to fill the vacancy resulting from the said action of this House, the said Butler was again returned as elected from the said district, took the oath of office December 1, 1902, and now occupies a seat in this House, and George C. R. Wagoner has, through a Member of the House, presented a memorial or petition claiming that he, and not the said Butler, was duly elected, alleging gross frauds in the election and showing that he has served upon said Butler a notice of contest; and

Whereas the full time allowed by statute for the taking of testimony, filing of briefs, etc., in such cases would extend beyond the term of the present House, thus preventing it from judging of the merits of the said contest, and the said Wagoner in his petition prays that by appropriate action such time shall be so shortened as that the controversy may be determined before the expiration of the Fifty-seventh Congress; and

Whereas Committee on Elections No. 2, to which said petition was referred, has reported that it awarded a hearing to both parties and that the said Wagoner declares his ability to take the testimony upon his side in fifteen days, and the said Butler making no estimate of the time that will be required by him, and denies the power of this House to shorten the time as fixed by the act of 1851, and other statutes; and

Whereas it is the sense of the House that this contest should be heard and decided at this session: Therefore

Resolved, That in the contested election case of George C. R. Wagoner *v.* James J. Butler, from the Twelfth Congressional district of Missouri, the contestee shall be required to serve upon contestant his answer to notice of contest on or before December 20, 1902, and that the time for taking and completing testimony in such case shall be limited as follows: The contestant shall be allowed from December 15, 1902, until and including January 3, 1903, in which to take testimony; the contestee shall be allowed from January 3, 1903, until and including January 27, 1903, for the taking of his testimony, and the contestant shall be allowed from January 27, 1903, until and including February 1, 1903, for the taking of testimony in rebuttal. As soon as the testimony shall have been received by the Clerk of this House it shall at once be referred to the Committee on Elections No. 2, and the said committee shall proceed to the consideration of the case; and, having first afforded to the parties an opportunity to be heard as to the merits of the same, shall report to this House its conclusions with respect to such case in time to afford to the House an opportunity to pass upon the same during the present session of Congress. Except so far as herein otherwise provided, this case shall be governed by the ordinary rules of procedure in contested Congressional election cases.

The committee had concluded, from the showing made by the contestant, that his contest was not frivolous and not without reasonable grounds.

As to the right of the House to depart from the terms of the act of 1851, a right which sitting Member denied, the committee in their first report cite the precedent of Benoit *v.* Boatner; and in their supplemental report say:

We have no hesitation in saying that there is no statute which can fetter this House in the exercise of the high privilege and important duty devolved upon it by the constitutional declaration that "each House shall be the judge of the elections, returns, and qualifications of its own members."

The first legislative action upon the subject was taken in the Fifth Congress, and resulted in the act which was approved by the President January 23, 1798. That bill was reported to the House by Mr. Harper, of South Carolina, from a select committee of five appointed for the purpose. In their report the committee unanimously conceded that the provisions of such a statute could not be enforced on any future House of Representatives, and that its only proper and necessary function would be to provide the mode in which testimony should be taken and grant the powers for the compelling of attending of witnesses, leaving it for each House to determine when testimony thus taken should be presented, whether it would receive it or not, "while the constitutional rights of each House would be saved by its power to adopt or reject the rule for the admission of the testimony."

In the Senate, however, an amendment was inserted as the result of which the act expired at the end of the first session of the Sixth, or next, Congress. Two or three subsequent attempts were made to enact legislation upon the subject, but the majority of the House seemed to have considered that such legislation would be wholly unconstitutional, and from that time until 1851 there was no method of taking testimony until the first session of the Congress to which the opposing parties claimed to have been elected, thus in ordinary cases deferring for more than a year even the commencement of a contest.

To remedy this difficulty Mr. William Strong, of Pennsylvania, afterwards a justice of the supreme court of that State and later of the Supreme Court of the United States, prepared and championed to its passage the act of 1851. To the argument that it was wholly unconstitutional because infringing upon the privileges of the House, he made much such reply as was embraced in the report made by Mr. Harper's committee to the Fifth Congress, contending that the act, as framed, would not and could not interfere with the constitutional rights of any subsequent House, because, as he said, "there is no provision restraining the power of the House to proceed in another manner." (Congressional Globe, p. 109.)

In the Thirty-fifth Congress, in the case of Brooks *v.* Davis, the House having been asked to depart from the provisions of the act of 1851, a minority of the committee filed a report in favor of granting the request. In said report they said:

"If it is claimed that the act of 1851 prevents the House of Representatives from pursuing an investigation in any other manner than prescribed by that act, it would then be wholly inoperative, coming into conflict with the fifth section of the first article of the Constitution of the United States, which provides 'each House shall be the judge of the elections, returns, and qualifications of its own members.' No prior House of Representatives can prescribe rules on this subject of binding force upon its successor, nor can the Senate interfere to direct the mode of proceeding; the House of Representatives is not a continuing body, each body of Representatives having an independent and limited existence, and having the clear right to determine, in its own way, upon 'the elections, returns, and qualifications of its own members.' A like authority is given, and in similar terms, to each House to 'determine the rules of its proceedings, punish its members for disorderly behavior,' etc.; and no member will pretend that a general law, passed in such terms as the act of 1851, would restrain any House from acting on these subjects independently of the law."

That report was signed by four noted lawyers, among them Mr. L. Q. C. Lamar, of Mississippi, afterwards Attorney-General under President Cleveland and by him appointed a justice of the Supreme Court of the United States.

See also the decision in United States *v.* Ballin (141 U. S., 1), unanimous opinion of the court written by Mr. Justice Brewer, Mr. Lamar being at that time a member of the court.

The majority report, presented by Mr. Boyce, of South Carolina, agreed with the minority as to the powers of the House, but held that in that particular case it was inexpedient to depart from the provisions of the statute until the contestant had first exercised all his rights thereunder.

In Williamson *v.* Sickles (1 Bart., 288) Mr. Dawes, of Massachusetts, presented the report of the committee, holding that the act of 1851 had no binding force upon the House. The minority report raised the direct issue by declaring "that it is not competent for the committee to recommend any action to the House which involves a violation of the law of 1851, because as a law of Congress it is obligatory alike upon the House, the committee, and the contestant." The resolution reported by the majority was adopted by the House, yeas 80, nays 64.

Other cases upon the subject in addition to Benoit *v.* Boatner in the Fifty-fourth Congress, are Reeder *v.* Whitfield, Dailey *v.* Morton, Coffroth *v.* Koontz.

The Kentucky cases in the Fortieth Congress, Congressional Globe, first session, p. 546: Bisbee *v.* Finley, 2 Ells., 172; Jones *v.* Shelly, 2 Ells., 681; Rowell's Digest, 394; Fuller v. Dawson, 2 Bart., 126; McGrorty *v.* Hooper, 2 Bart., 211; Thomas *v.* Arnell, 2 Bart., 162; Hunt *v.* Sheldon, 2 Bart., 530; Sheafe *v.* Tillman, 2 Bart., 907; Kline *v.* Verree, 1 Bart., 574; Chapman *v.* Ferguson, 1 Bart., 267; Howard *v.* Cooper, 1 Bart., 275; Vallandingham. *v.* Campbell, 1 Bart., 223; Ben *v.* Snyder, Smith, 247. See also Paine on Elections, sections 996 and 1003.

The resolution and preamble were considered in the House on December 11, 1902,[1] and debated at length. The legal proposition of the committee was not seriously disputed, however. An amendment extending for five days the time within which sitting Member should file his answer to the notice was agreed to without objection. A substitute proposed by the minority was disagreed to, and then the resolution was agreed to, yeas 155, nays 117.

[1] Journal, pp. 39, 40; Record, pp. 231–245.

714. The Alabama election case of Jones v. Shelley, in the Forty-seventh Congress.

Instance wherein the Elections Committee, on the strength of a memorial from contestant and general knowledge, recommended taking testimony more expeditiously than provided by law.

On January 23, 1883,[1] Mr. A. A. Ranney, of Massachusetts, from the Committee on Elections, submitted the report of the majority in the Alabama case of Jones *v.* Shelley, in the matter of the memorial of John W. Jones, the contestant. The report thus states the case:

The committee have heard the parties more directly interested, examined the memorial, and inquired into the facts, so far as is deemed necessary for present purposes. The House is asked by the petitioner, in a pending contest for the seat as Representative from the Fourth Congressional district of Alabama, to fill a vacancy, to prescribe another and more summary mode of procedure than that provided for by the acts of Congress relating to contested elections. The reason is that the time allowed the parties under such acts is such that the present term of Congress will have expired long before the contest can in regular course be concluded. It is perfectly apparent that unless the House does what is asked the contest will prove futile. That the House has authority to do what is requested does not admit of a doubt. The only question is whether there is time now before the end of the session to accomplish the desired purpose, or whether any other mode of procedure which is reasonable and practicable can avail anything. The memorial sets forth with great clearness and completeness a state of facts which calls loudly for such action, if it is likely to be of any use commensurate with the attendant labor and expense thereof.

The sitting Member, after having been once unseated at the present Congress, has been again returned with a new certificate in hand to fill the vacancy. He was unseated because the certificate before was the result of frauds at the polls, and the fruits of illegal and evil practices on the part of his partisan friends. His present certificate is alleged to have been induced and procured by the same methods in repetition, with perhaps some variations and aggravations.

If this is so, it would seem that there is, as charged, a settled determination on the part of the evil-disposed persons therein that no candidate of the dominant party in the district in question shall be counted in and get the certificate in any event.

A brief statement of some of the main facts alleged will suffice:

A contest was regularly instituted under the said acts of Congress, and the sitting Member has served an answer to the same, so that the contest is now pending. The ninety days allowed for the taking of the evidence will extend beyond the 4th day of March next.

The sitting Member was declared elected on the strength of a vote returned of only 6,752, whereas the claim is that he did not in truth and in fact get over about 5,000 votes. Contestant was declared and returned to the State board of canvassers as having received only 4,811, whereas he in truth and in fact received over 15,000 votes, which were legally cast, counted, and returned to the boards of county canvassers, but 10,000 of which were there counted out either for no assignable reason or because of certain pretended informalities in the returns and upon frivolous objections which were resorted to only as pretexts in an earnest search for some real or plausible excuse. There are other charges of fraud of a more heinous character, which deprived contestant of many votes in the original returns; but laying those aside and taking the returns as made from the voting precincts to the county boards the contestant is said to have been elected by about 6,000 majority; the reports of the United States supervisors give him about that majority, as would appear by certified-copies furnished the committee. It will appear that the vote of the sitting Member (6,752) is less than one-third of the votes cast for both candidates according to the precinct returns. It is less than one-third of the votes cast in prior elections in the same district for Members of Congress, as appears by the history of those elections as read from the records of this House. It is less than one-fourth of the voting population of the district, as appears by the last census, and as shown in the last prior contest alluded to.

[1] Second session Forty-seventh Congress, House Report No. 1886; 2 Ellsworth, p. 681.

The committee refer to what was proven in the prior contest for this seat, and conclude that it is due to the honest electors of the country to expedite the hearing. Accordingly the majority recommended the following resolution:

Whereas John W. Jones claims to have been elected as Representative from the Fourth Congressional district of Alabama, to fill a vacancy, and has instituted proceedings for a contest under the provisions of the acts of Congress relating to contested elections; and whereas there is not sufficient time to prosecute and conclude said contest under the provisions of said acts and in course before the expiration of the present term of Congress, and the contest must be abandoned unless some other more speedy mode of procedure be prescribed: Therefore,

Resolved, That a special committee, composed of three Members of the Committee on Elections, be appointed, with authority, and whose duty it shall be to proceed, without unnecessary delay, to the Fourth Congressional district of Alabama, and there take the evidence which may be adduced by either party in the matter of the pending contest, and report the same to the House as soon as may be. That the committee appointed is empowered to send for persons and papers and administer oaths, and also to employ stenographers, messengers, and a sufficient clerical force, at the usual compensation, the expenses to be paid out of the contingent funds of the House, upon the approval of the chairman of said committee.

The minority views, presented by Mr. F. E. Beltzhoover, of Pennsylvania, contended that the contestant, by beginning his testimony thirty days earlier, might have expedited his case; that the committee would not have time to take the evidence satisfactorily; that contestant's party had manipulated the returns fraudulently, and concluded that the ordinary modes should not be departed from on such insufficient cause shown. They say:

The report of the majority of the Committee on Elections recommending that a special committee be created with indefinite and arbitrary powers is as positive and dogmatic in its findings as if they were sustained by facts. The report rests solely on the mere ex parte statement, not under oath, of the memorialist, whom the contestee contradicts in every material allegation. What evidence is there in this memorial which any court would regard of the slightest weight? No chancellor would grant any relief on it without some verification of its allegations. No Committee of Elections or House of Representatives on such statements alone have ever characterized the citizens and sworn officers of any Congressional district as "evil-disposed persons," etc. No committee has ever based a finding on the fact that the returned candidate had received less than one-third of the votes cast at the previous elections or less than the voting population of the district. This kind of evidence, which is always incompetent, is still more unreliable when it is remembered that in this instance the election was to fill a vacancy of only a few months, and there was no general interest taken in the result, and no reason for a full vote being cast. But in order to support their report, the majority resort to "all advices which they get from reputable and honorable men of the district and who appear to be cognizant of the facts." What are these "advices?" Who are they from? Is Congress to solemnly adjudicate upon the right of a Member to a seat on the hearsay and rumor which Members gather in their private communications with persons unknown and unsworn and of whom and of which there is no public or verified knowledge?

The majority of the Committee on Elections further bolster their remarkable report by saying "that the facts alleged in the memorial, confirmed and rendered highly probable as they are by other well-known facts and from other sources outside, entitle the contestant to the relief which he asks," etc.

On January 25[1] the minority obtained leave to withdraw their views in order to make some additions to it.

Thereafter the subject does not seem to have again been taken up by the House.

[1] Record, p. 1580; Journal, p. 305.

715. The Missouri election case of Coudrey v. Wood, in the Fifty-ninth Congress.

Testimony in an election case being impeached by ex parte affidavits, the House gave the Elections Committee authority to send for persons and papers in order to investigate as to the integrity of the record.

On February 1, 1906,[1] Mr. Marlin E. Olmsted, of Pennsylvania, presented, as a privileged matter, the following resolution reported from the Committee on Elections No. 2:

Whereas in the contested election case of Coudrey *v.* Wood, from the Twelfth Congressional district of Missouri, which was referred to the Committee on Elections No. 2, a motion has been made to suppress the testimony of contestant on the ground, among others, that as forwarded to the Clerk of the House and printed it is not the testimony as given by the witnesses, but has been materially altered by leaving out certain parts thereof and by adding to and changing other parts so as to completely destroy the integrity of said testimony; and

Whereas, owing to the conflicting statements contained in ex parte affidavits filed in support of and in opposition to said motion, it is impossible to ascertain the truth of the matter: Therefore, be it

Resolved by the House of Representatives, That Committee on Elections No. 2 shall be, and is hereby, authorized and empowered to take such testimony as it shall deem necessary to the determination of questions of fact in the contested election case of Coudrey *v.* Wood, from the Twelfth district of Missouri, and shall have power to send for all such persons and papers as it may find necessary for the proper determination of said controversy and determine the time, place, and manner of taking said testimony, which may be taken before the said committee or any subcommittee or any person selected by said committee for such purpose, and that the expenses incurred in taking said testimony shall be paid from the contingent fund of the House upon the order of said Committee on Elections No. 2.

The resolution was agreed to without division.

In explanation, Mr. Olmsted said:

Mr. Speaker, the testimony in this case, as printed in a volume of 1,409 pages, has been submitted by the Clerk of the House to the committee, and also the originals from which the said publication was made. Upon the face of these papers the testimony appears to have been regularly taken, signed by the witnesses, and certified by the notaries public before whom it was taken, and to be regular in every respect. But the contestee has submitted a motion to suppress all the contestant's testimony for various reasons, most of which are technical, but one of which seems to the committee to be of importance, namely: That the testimony as returned to Washington and printed by the Clerk is not the testimony given by the witnesses, but that the same has been altered, some parts omitted, some things added, and some portions changed. There have been submitted ex parte affidavits of two stenographers who took the testimony, who state that under instructions of a certain gentleman they changed certain portions of the testimony. That gentleman makes affidavit denying their statements. The affidavits of ten witnesses were filed to the effect that when upon the witness stand they were cross-examined, but no cross-examination appears in the report of their testimony. Against that there is the affidavit of a female stenographer, who says that under the direction of the contestee she prepared a uniform style of affidavit—blank forms—in which these ten are all made, and that the persons who made them received small sums of money for making these affidavits.

That is denied in another affidavit on behalf of the contestee. Other ex parte affidavits of stenographers have been submitted to the effect that the contestee offered the affiants money to make false affidavits to the effect that the testimony as taken down by them had been changed. On the other hand, there are affidavits to the effect that the stenographers who made those affidavits offered to make affidavits on behalf of contestee, but demanded money for so doing. There is some testimony tending to

[1] First session Fifty-ninth Congress, Record, pp. 1891, 1892.

show that the contestee brought suit against certain persons for the purpose of coercing them and getting them to make affidavits; and one lady says, to use her own language, "He frightened me to death," after which she made an affidavit. There is also the testimony of one stenographer that under instructions he changed in various respects answers from "no" to "yes" in material parts of the testimony.

To make a long story short, these ex parte affidavits are so utterly conflicting in their character that it is impossible for them to ascertain the truth of the matter, and, believing it important that the question of the integrity of this testimony shall at the outset be determined, the committee has unanimously agreed to recommend the adoption of the resolution which has been read from the Clerk's desk.

On June 23, 1906,[1] Mr. Olmsted presented the report of the committee, which, without assigning reasons, recommended the following resolutions, which were agreed to by the House without debate or division:

Resolved, That Ernest E. Wood was not elected to membership in the House of Representatives of the United States in the Fifty-ninth Congress and is not entitled to a seat therein.

Resolved, That Harry M. Coudrey was elected to membership in the House of Representatives of the United States in the Fifty-ninth Congress and is entitled to a seat therein.

716. The Missouri election case of Knox v. Blair, in the Thirty-eighth Congress.

Instance wherein the returned Member presented evidence taken after the time prescribed by law and asked the House to consider it.

The House received but prevented the use of testimony taken in an election case in disregard of the law.

On March 11, 1864,[2] Mr. F. P. Blair, jr., of Missouri, as a question of privilege, presented testimony taken by himself, after the time limited by law, in the case of Samuel Knox, contestant, to the right of Mr. Blair to his seat; and Mr. Blair further moved that the evidence be referred to the Committee of Elections, to be considered by the committee with other evidence before the committee taken after the time provided by law.

It was stated that the testimony in question was not strictly ex parte, as the contestant had been notified so that he might be present, but it was taken without authority of law.

After debate the House, on motion of Mr. Thaddeus Stevens, of Pennsylvania, amended the motion by adding:

Provided, That this resolution shall refer only to affidavits or depositions, and that all such illegally taken shall not be considered by the committee.

The motion as amended was then agreed to.

On May 5, when the committee reported,[3] they stated that they had not considered the testimony referred on motion of Mr. Blair, as the terms of the reference precluded such consideration.

717. The first rule for the examination of an election contest before the Elections Committee.

The right of contestee to cross-examine and present testimony was conceded in the first election case.

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[1] Record, p. 9036; House Report No. 4999.

[2] First session Thirty-eighth Congress, Journal, p. 372; Globe, p. 1058.

[3] House Report No. 66, pp. 3 and 4.

In the first contested election case decided in the House, that of David Ramsay *v.* William Smith, of South Carolina, the Committee on Elections reported and the House adopted a resolution directing the course of procedure before the committee. This resolution, reported April 18, 1789,[1] provided that the committee take proofs, and that "Mr. Smith be permitted to be present, from time to time, when such proofs are taken, to examine the witnesses, and to offer counter proofs, which shall also be received by the committee, and reported to the House."

718. Illustration of a rule prescribed by the House for taking testimony in an election case before the enactment of a law prescribing a method.— On January 23, 1850,[2] on report from the Committee on Elections, the House agreed to the following:

Resolved, That the parties to the contested election from the First Congressional district of the State of Iowa be, and they are hereby, authorized to take the testimony of such witnesses as either of them may require, by depositions in conformity with the laws of the State of Iowa in force at the time of taking the testimony, before any judge of the supreme court or of the district courts of said State, who are hereby empowered to take depositions in any part of said State, or before a clerk or clerks of any of the district courts, or before any notary public, or before any justice of the peace of the said State within the county in which such clerk, or notary public, or justice of the peace may reside: *Providing,* That notice of the time and place of taking the depositions shall be given by the party taking the same to the opposing party, or his attorney, at least ten days prior to taking the same, and one day in addition for every thirty miles' travel from the place of taking the depositions to the place of residence of the person receiving the notice, or to the place where he may be when notice shall be received by him, if not received at his place of residence: *Provided, also,* That the parties may, by agreement in writing, regulate the mode of giving notice: *Provided, also,* That when such depositions shall have been taken they shall, together with the agreements and notice aforesaid, be sealed up by the officer taking the same and be directed to the Speaker of the House: *And provided further,* That all the testimony in the case, to be taken or presented by either party, shall be returned to this House within one hundred days from the passage of this resolution.

On January 29[3] the House agreed to a similar but not identical resolution prescribing the method of taking testimony in the Pennsylvania contested-election case.

At the next session of this Congress[4] a law was enacted prescribing the mode of taking testimony, one object being to prevent delay in the presentation of cases.[5]

719. The South Carolina election case of Stolbrand *v.* Aiken in the Forty-seventh Congress.

Instance wherein the House dismissed an election case because the testimony was taken before an officer not specified by law.

While not bound by the law governing procedure in election cases, the House does not unnecessarily disregard them.

On April 6, 1882,[6] Mr. G. W. Jones, of Texas, from the Committee on Elections, submitted the following report in the South Carolina case of Stolbrand *v.* Aiken:

All the testimony in the case was taken in behalf of the contestant before E. W. Stoeber, United States commissioner. The contestee, at the threshold, excepted to the competency of the officer.

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[1] First session First Congress, Contested Elections in Congress from 1789 to 1834, pp. 23, 24.

[2] First session Thirty-first Congress, Journal, pp. 393. 394.

[3] Journal, p. 426.

[4] Second session Thirty-first Congress, Journal, p. 324; Globe, p. 110.

[5] This law, known as the law of 1851, is the foundation of the present system as to election contests.

[6] First session Forty-seventh Congress, House Report No. 932; 2 Ellsworth, p. 603.

The following are the statutory provisions applicable to the question raised by the exception.

Revised Statutes, page 19:

"Sec. 110. When any contestant or returned Member is desirous of obtaining testimony respecting a contested election, he may apply for a subpoena to either of the following officers who may reside within the Congressional district in which the election to be contested was held:

"First. Any judge of any court of the United States.

"Second. Any chancellor, judge, or justice of a court of record in the United States.

"Third. Any mayor, recorder, or intendent of any town or city.

"Fourth. Any register in bankruptcy or notary public.

"Sec. 111. The officer to whom the application authorized by the preceding section is made shall thereupon issue his writ of subpoena, directed to all such witnesses as shall be named to him, requiring their attendance before him at some time and place named in the subpoena, in order to be examined respecting the contested election.

"Sec. 112. In case none of the officers mentioned in section one hundred and ten are residing in the Congressional district from which the election is proposed to be contested, the application thereby authorized may be made to any two justices of the peace residing within the district; and they may receive such application and jointly proceed upon it.

"Sec. 113. It shall be competent for the parties, their agents or attorneys authorized to act in the premises, by consent in writing, to take depositions without notice; also, by such written consent, to take depositions (whether upon or without notice) before any officer or officers authorized to take depositions in common law, or civil actions, or in chancery, by either the laws of the United States or of the State in which the same may be taken, and to waive proof of the official character of such officer or officers. Any written consent given as aforesaid shall be returned with the depositions."

The officers authorized to take testimony are specially designated. It is, however, specially provided that "by written consent" testimony may be taken before certain other officers mentioned. United States commissioners are not mentioned in the fast class, and, if included in the latter, can not act without the written consent of the parties.

It is apparent that the exception is well taken and must be sustained.

It is insisted that the House of Representatives, in judging of the elections, qualifications, and returns of its Members, is not bound by the rigid rules of judicial procedure. This is true, but applies, only to exceptional cases, not provided for by the "rules prescribed." It would be worse than idle to, prescribe rules if they may be willfully and unnecessarily disregarded.

This view is decisive of the case and renders unnecessary further statement of it.

We recommend the adoption of the following resolution:

Resolved, That C. J. Stolbrand have leave to withdraw his papers.

The resolution was agreed to without division or debate.[1]

720. The Alabama election case of Goodwyn v. Cobb in the Fifty-fourth Congress.

A question as to the validity in an election case of testimony taken before a notary public outside the county in which he was empowered to act.

A question as to the introduction during an election case of evidence in chief during time of rebuttal.

The official certificate of a State officer giving the returns may be introduced at any stage of the proof in an election case.

A question as to whether certain copies of election papers certified to by public officers were actually evidence or not.

Discussion as to the effect of an alleged unconstitutional registration law in an election case.

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[1] Journal, P. 989.

On April 4,1896,[1] the Committee on Elections No. 1 reported in the case of Goodwyn *v.* Cobb, from Alabama. This case involved, besides the merits, certain preliminary questions:

(1) The sitting Member, sustained by the minority of the committee, urged that a notary public might not take testimony in a county other than that in which he was empowered to act by the law of the State. The majority of the committee overruled the objections on the same grounds that were adduced in the case of Aldrich v. Robbins.

(2) The sitting Member, sustained by the minority of the committee, objected that important testimony was taken in Montgomery County before a notary public who resided in another Congressional district, whereas the laws of the United States confined the power to take testimony to an officer who resides in the district of the witness. The majority of the committee admit:

> The notary should not have taken evidence beyond the limits of the * * * district without consent. But as to the five witnesses whose testimony was taken in Montgomery County, the objection of want of authority was only made to the witness Lynch, and his evidence has not been considered on this occasion. As to the others, the absence of objection warrants the inference of consent, and their evidence is legally before the House.

(3) It was objected on the part of the sitting Member that during the time allowed the contestant under the law for rebuttal only he had introduced evidence in chief. The minority of the committee contended that this evidence, alleged to be introduced improperly, was of great importance, and that the case of the contestant depended on it. The majority of the committee overruled this objection for reasons as follows:

(a) A portion of this evidence in question was introduced to show that persons whose names were on the poll list did not in fact vote. The minority objected that this constituted a case where the trial court made up its judgment on rebuttal evidence, entirely cutting off from hearing the party against whom the judgment was rendered. The majority of the committee, on the other hand, declare that "similar proof had been previously taken, and there can be no reason for supposing that the contestee, Mr. Cobb, was specially prejudiced by the order of this evidence, for it seems to have been beyond his power of contradiction." In debate it was further explained that he could have rebutted it only by the election officials and the returns, which were already discredited.[2]

(b) A second portion of this evidence in chief taken during the time for rebuttal testimony only was the certificate of the secretary of state as to the officially returned vote of the district. The minority objected that this was a vital part of the case, and that it was improperly presented at this time. The majority of the committee insisted[3] that where papers of this kind were introduced it was a matter of no consequence where they were introduced as to the order of proof, quoting in support of this principle the case of Vallandigham *v.* Campbell.

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[1] First session Fifty-fourth Congress, House Report No. 1122.

[2] Record, p. 4239.

[3] Record, p. 4237.

(4) The contestant had introduced as evidence the copies of the registration lists and the poll lists certified by the judges of probate of the respective counties. The sitting Member objected that the registration copies were no more than copies of copies, and that the probate judges had no power to certify the copies of registration and poll lists so as to make them evidence. The law of Alabama required the registrars to forward true copies of their lists to the judge of probate of the county, who, from such lists, was required to make a correct alphabetical list of the voters so registered, by precincts and wards, and certify copies of these alphabetical lists to the precinct inspectors for use on election day. The majority of the committee find that when the judge of probate "certified to a copy of that registration list it was to a copy of his own list, which remains in his office as a part of its permanent papers or records." The committee quote the law of Alabama which make "presumptive evidence in any civil cause" of bonds, instruments, or papers "required to be kept by any sworn officer of the State." The sitting Member denied the pertinency of this section because the law had not declared that the list should be kept in the office of the judge of probate. But the committee ruled that an express direction to that effect was not necessary, it being sufficient that the statute by implication contemplated that one of the lists should remain in the office. For the law provided for the probate judge to deliver to the inspectors one of the lists made by him, and as no other disposition had been made of the other, it must remain where it was found, and that was in the custody and office of the probate judge as one of the public papers or records. The inspectors of election were also required to send the poll list of the election to the judge of probate, for the obvious reason that it was to be the basis of the final and official canvass of the votes; and that in like manner became a paper, in the language of the statute, to be kept in his office, and a copy of which he could make presumptive evidence by his official certificate.

(5) A certified statement of the secretary of state as to the final result of the canvass was objected to for the same reason, that the secretary of state was without authority to make the certificate evidence. The committee, however, overrule this objection on the ground that "it is the manifest purpose of the law that all these returns [which are forwarded to the secretary of state in requirement of law] shall become records in these public offices, to be preserved and maintained as evidence of the titles of the various officers found to be elected; and as such the certificate of the custodian thereof that it is a true copy of the original has the same legal effect as if the original were produced and proved."

(6) It was urged by the sitting Member that the secretary of state's certificate was formally defective, and that, after the committee had caused the contestant to procure certain transcripts from the secretary of state, the fact was made apparent that the vote of one whole county should have been disregarded because the returns were not signed by all the board of supervising canvassers. Therefore the minority of the committee held that the sitting Member should have been allowed to go into an examination of the votes behind this county return, if the whole return was not to be excluded. The majority of the committee held that the objection to the original certificate did not require its exclusion; and that, being record evidence, it was competent for the committee to have produced further and more formal statements to correct informalities in the proof previously made. The committee further

found that the county returns which were not signed by all the board of canvassers, were yet sufficient, since they were signed by a majority.

(7) The sitting Member objected that the registration law of Alabama was unconstitutional, and therefore that the evidence touching the registration, on which contestant much relied, should be suppressed. While the majority of the committee do not in express terms admit the unconstitutionality of the law, yet it seems evident that the registration law required the completion of the lists of each precinct about five months before election day, whereas the constitution provided that the legislature should not require a residence of longer than three months in the precinct. The law prohibited the voting of any person not registered, unless he should become 21 years of age after the completion of the registration. The committee make the point that the prohibition could therefore affect only persons becoming residents after the close of the registration and before the beginning of the three months before election; and that the testimony failed to show any such persons as affected. In the debate[1] it was urged that the constitutional question was of no effect, since the only use of the lists was to determine who were legal and honest voters, and for this purpose it was not essential to determine the constitutionality of the law.

(8) An objection by the minority of the committee that certain testimony came before the committee without proper certificate of the notary public before whom it was taken, was in the debate,[1] shown to be based on a mistaken reading of the record of the case. Such certificate did in fact exist.

721. Election case of Goodwin v. Cobb, continued.

The returns of a county being wholly unreliable, and the conduct of the election unfair, the returns were rejected.

Certain votes in a county being evidently cast, were counted according to the known opinions to the voters, although there was evidence generally of great frauds.

Unfair representation on the election board of a precinct and disorder at the polls were held not to justify rejection of the return of the precinct.

Passing from the preliminary questions to the merits of the case, it appeared that the corrected official returns gave to the sitting Member a majority of 508 votes. The majority of the committee held—though not with the assent of the minority—that three of the nine counties of the district were distinctively "black" counties, inhabited largely by colored voters, and that the remaining six counties were distinctively "white" counties. The returns from the so-called white counties gave contestant a majority of 3,612 votes, while the majority for sitting Member in the three "black" counties was sufficient to overcome the majority for contestant in the "white" counties and give to sitting Member a majority of 508 in the district.

The contestant attached the returns of twelve precincts in the "black" counties, claiming that they were false and fraudulent, and that they returned a much larger number of fraudulent votes than the majority reported for the contestee.

The majority of the committee, as the result of their examination of the testimony relating to the twelve precincts, rejected entirely the polls of five of them, reduced the return for the sitting Member in six of them, and in one precinct allowed the return to stand as made.

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[1] Record, p. 4219.

(1) As to the five rejected polls, it appeared to the committee that the returns were so false and unreliable that there was no way of determining the actual vote. In three of these precincts the contestant had no representatives at all on the boards of election officers, and in the others his representatives were incompetent. The poll lists showed many more voters than were seen to go to the voting places; in one precinct names had been added to the registration lists to an extent manifestly absurd; men appeared as voters whose names were not known in the precinct, and who could not be found by an officer with a subpoena; others appeared as voting who testified that they did not vote; and some men who appeared as voting were shown to be dead.

(2) In six precincts there was evidence generally of great frauds, but the testimony in most of them indicated that a certain number of men, generally known to be Democrats, had actually voted. Therefore the majority of the committee assumed that these had voted for the sitting Member and allowed them on his poll, striking off the fraudulent surplus.

(3) In one precinct, Day's Beat No. 5, the contestant had no representative on the election board and the proceedings were disorderly in the extreme. "But these facts," say the committee, "alone will not justify a reduction in the vote, although there is a probability that it was not genuine."

In all these precincts the minority denied the sufficiency of the testimony to produce the results reached by the majority.

On April 21 and 22[1] the resolutions of the committee, unseating the sitting Member and seating the contestant, were debated and a decision was reached. By a vote of ayes 47, noes 109, the proposition of the minority to confirm the title of the sitting Member was disagreed to. Then by a vote of yeas 60, noes 131, the House disagreed to a motion to recommit the report with instructions to the Committee on Elections "to report a resolution authorizing the contestee to take further testimony in rebuttal of evidence in the record taken by contestant, which is evidence in chief, during the last period of ten days in which testimony was taken."

The resolution declaring sitting Member not entitled to his seat was agreed to without division.

Then, on April 22, the resolution seating the contestant was agreed to—yeas 145, nays 55. The oath was then administered to Mr. Goodwyn.

722. The Pennsylvania election case of Hudson v. McAleer in the Fifty-fifth Congress.

A contestant may not be granted more time to take testimony on the mere declaration, without proof, that he has been impeded by violence from procuring evidence.

To procure an extension of time for taking testimony a contestant should show that the testimony is newly discovered.

On February 5, 1898,[2] Mr. Lemuel W. Royse, of Indiana, from the Committee on Elections No. 2 presented a report in the Pennsylvania case of Hudson *v.*

[1] Journal, pp. 413, 414, 417; Record, pp. 4217–4243, 4271.

[2] Second session Fifty-fifth Congress, House Report No. 354; Rowell's Digest, p. 558; Journal, p. 173.

McAleer. The contestant had received a small minority of the votes cast at the election, according to the official returns. The committee summarize the question presented to the House as follows:

On the 3d of December, 1896, contestant served upon contestee his notice of contest, and on the 31st of the same month contestee served on the contestant his answer to said notice.

On the 19th and 20th of January, 1897, testimony was taken on behalf of contestant, when the taking of further testimony was abandoned on the grounds, as alleged by the contestant, that he was prevented from proceeding further because of the riotous and violent conduct of certain citizens of the district.

Contestant comes before your committee and asks for further time in which to take testimony in support of his notice of contest, and that a subcommittee be sent to said district for the purpose of procuring said further testimony. In support of said motion he files with us his own affidavit, in which he sets forth various irregularities and frauds in the holding of said election, and in counting the votes, and in making returns thereof, and that witnesses and other evidence can be procured which sustain all these charges.

It is nowhere averred in the affidavit that these facts and the evidence to sustain them have been discovered since the time provided by the statute for taking testimony has expired. On the contrary, the affidavit carries upon its face a very strong inference that all these facts were known to the contestant at the time he filed his notice of contest, and that all his evidence tending to support the same was then known and accessible to him.

As we understand contestant's application, it is not based upon the ground that the evidence he now desires leave to take has been discovered since the time expired, but upon the reason that he made every possible effort to procure it, but was prevented by the riotous and violent behavior of certain citizens of the district at the place where he was compelled to take the same.

If such a case were made out, we would have no hesitancy in recommending that contestant's application be granted. The honest election of each Member of this House is a matter of the highest importance, both to this body and to the people at large. When a question is raised as to the election of one of its Members, this House should stand ready to make a thorough investigation, and promptly expel the Member whose seat was obtained by fraudulent or dishonest methods. No one should be permitted to prevent or impede such investigation. Any attempt of this kind should be promptly and vigorously rebuked. It can not be assumed that such an investigation has been hindered or prevented. Until the contrary appears, it must be presumed that the authority of Congress and the agencies provided to make such inquiry have been respected and obeyed.

If contestant has been prevented by riot and violence from procuring his testimony, such fact should be shown in some satisfactory way, and that contestant was in no way to blame for it. Upon this subject the affidavit is entirely silent. We are furnished no proof of this but the unsworn statement of contestant's counsel, which is denied by counsel for contestee; and we do not feel that this is sufficient. We therefore recommend that the application to take further testimony be denied. Contestant admitted before the committee that he was not elected to the Fifty-fifth Congress from this district. The utmost of his contention was that contestee also was not elected. It is not insisted by contestant that this is shown by the evidence already taken; and even if it were we could not agree with him.

The committee therefore recommended resolutions declaring the sitting Member elected and entitled to his seat, and the same were agreed to by the House without debate or division.

723. The Pennsylvania election case of Kline v. Myers in the Thirty-eighth Congress.

It was held in 1864, although by a divided committee, that a contestant must show probable fraud in order to have the House order a recount of votes.

On June 22, 1864,[1] the Committee on Elections reported in the case of Kline *v.* Myers, of Pennsylvania. The committee recommended resolutions declaring contestant not entitled to the seat and declaring Mr. Myers entitled to the seat.

The committee make this statement of facts and reasons—

The contestant, by his own acknowledgment, has failed to substantiate the specifications or charges contained in his notice of contest by any evidence he has been able to lay before the committee, and it is therefore unnecessary to make any statement of the facts in the case. He, however, furnishes satisfactory evidence that he had made an unsuccessful effort to procure a recount of the ballots within the sixty days allowed for the taking of depositions, and before the officers selected for that purpose. And upon his showing this fact, and upon his further suggestion that the result of a recount might possibly differ from the first, he bases an application for an order from this House to send for the boxes and recount the votes.

The committee were of the opinion that such an application should be founded upon some proof, sufficient, at least, to raise a presumption of mistake, irregularity, or fraud in the original count, and ought not to be granted upon the mere suggestion of possible error. The contestant failed to furnish such proof. On the contrary, so far as appeared by the evidence presented to the committee, the election was conducted with perfect good order and fairness throughout the day, and at the close the votes were carefully and accurately counted, the officers participating therein being nearly equally divided in their political alliances. The list of voters, tally papers, and returns were properly made out and disposed of according to law. There is nowhere in the evidence a reasonable suspicion of wrong. To adopt a rule that the ballot boxes should be opened upon the mere request of the defeated candidate would occasion more fraud than it could possibly expose.

* * * * * * * *

It should be remembered that the fact sought is not what the ballot boxes contain six months or a year after the election, but what they did contain after the last vote was deposited on the day of election. Certainly an impartial, accurate, and public count, then, by the sworn officers of the law, would be better evidence of that fact than any subsequent count not more impartial and not presumed to be more accurate than the first, and after boxes had been long exposed to the tampering of dishonest partisans. The adoption of such a practice would be equivalent to setting aside the first count altogether, and it ought on that principle to be dispensed with, and the ballots sent to this house instead of certificates.

The rule adopted by the committee is in accordance with the universal practice of courts of justice, where a new trial or a rehearing is never granted except upon proof of probable error in the first, in accordance with the rulings in several contested election cases decided in the courts of the State from which this contest comes, and believed not to be in conflict with any precedent of this House.

Messrs. Henry L. Dawes, of Massachusetts, and Charles Upson, of Michigan, at the time the report was made[2] announced that they did not concur with the majority of the committee in the ruling by which the contestant was denied process to summon witnesses to prove certain allegations, but that they were of opinion that when a party had confined his allegations to the statute he was entitled, as of right, to the production of any legal testimony that would tend to prove such allegations. Neither the law nor the usage of the House required him to first show probable cause to believe that his allegations were true.

On June 24, 1864,[3] the House considered the report and agreed to it without division, although in debate there was dissent from the decision of the committee denying the contestant the right to have the boxes opened, the only means whereby fraud could be proven.

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[1] First session Thirty-eighth Congress, House Report No. 127; 1 Bartlett, p. 574; Rowell's Digest, p. 196.

[2] Globe, p. 3179.

[3] Journal, p. 891; Globe, p. 3242.

724. The Virginia election case of Hoge v. Otey in the Fifty-fourth Congress.

No sufficient reasons being shown, the House declined to reopen an election case for the taking of further testimony.

On April 29, 1896,[1] Mr. David A. De Armond, of Missouri, from the Committee on Elections No. 3, submitted the following report in the case of Hoge *v.* Otey, from Virginia:

> According to the returns, contestee received 2,346 more votes than contestant.
>
> The record contains but a few pages of testimony, and it would be impossible to give to such testimony any effect by which the seat in controversy could be awarded to the contestant or could be taken from the contestee.
>
> Contestant has asked that the case be opened for the taking of further testimony, but he has failed to show any sufficient reason for such course. Not only is there no apparent reason for making an exception in this case to a fair and long-established statutory rule fixing the time for the taking of testimony in contested election cases, but, from contestant's own showing, it appears that if the case were opened the result of the contest would not be different.

Accordingly, the usual resolutions confirming sitting Member's title to the seat were presented, and, on May 15,[2] were agreed to by the House.

725. The Alabama election case of Mabson v. Oates in the Forty-seventh Congress.

The appeal of a contestant for extension of time to take testimony should show that all diligence has already been used in the quest.

Review of the precedents governing the granting of extension of time to the parties to collect evidence in an election case.

An application for extension of time to take testimony in an election case should be accompanied by an affidavit specifying as to the testimony.

The Elections Committee declined in 1882 to reopen a case to enable a contestant to correct his procedure.

On April 7, 1882,[3] Mr. William H. Calkins, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Alabama case of Mabson *v.* Oates.

This case was examined first by a subcommittee, and the report of this subcommittee, which was presented to the full committee by Mr. Gibson Atherton, of Ohio, narrated the steps taken by contestant to get evidence and the reasons given by him for asking an extension of time; and then gives reasons for not granting the extension:

> The first question presented for consideration is the preliminary one of granting time to the contestant to take further testimony, or of appointing a commission to take the same.
>
> Touching the first proposition, has the contestant shown such degree of diligence as to induce the House, under well-established precedents, to grant an extension of time; or has he been guilty of such want of diligence that his application should be denied? In the report of the contested election case of Boles *v.* Edwards, prepared by Mr. Hazelton, it is said:
>
> "To say nothing of the terms of the law * * * touching the extending of the time fixed to allow supplementary evidence, which clearly relates to cases in which the applicant has taken some evidence—that is to say, has made some use of the time given him—the policy of the House has been

[1] First session Fifty-fourth Congress, House Report No. 1530; Rowell's Digest, p. 537.

[2] Journal, p. 494.

[3] First session Forty-seventh Congress, House Report No. 938; 2 Ellsworth, p. 8.

adverse to granting extensions. Procrastination in these cases diminishes the object of investigation and cheapens the value of the final decision. The law is intended to furnish ample opportunity for taking testimony. Parties should be held to a rigid rule of diligence under it, and no extension ought to be allowed where there is reason to believe that had the applicant brought himself within such rule there would have been no occasion for the application." (Smith's Cont. El. Cas., 18.)

In Giddings *v.* Clark the Committee on Elections, in a report prepared by Mr. McCrary (among other things), say:

"That no such extension should ever be granted to a sitting Member unless it appears that by the exercise of great diligence he has been unable to procure his testimony, and that he is able, if an extension be granted, to obtain such material evidence as will establish his right to the seat, or that by reason of the fault or misconduct of the contestant he has been unable to prepare his case." (Smith's Cont. El. Cas., 92–93.)

In the contested election case of Vallandigham *v.* Campbell it was held:

"That the fact that the sitting Member was a Member of the previous Congress, and attended to his duties as such during a part of the time when by law the testimony should be taken, furnishes no reason why further time should be granted." (1 Bartlett, p. 223.)

As to rule that great diligence is required to be proved to entitle the party to an extension of time, see the case of Howard *v.* Cooper (1 Bartlett, p. 275).

Is diligence, within the rule, shown by contestant? He allowed almost a month to elapse after the answer was served before he took any depositions. He applied to an officer or two to take his deposition, who refused to act, and he neither tried to procure others nor to have an officer of his own political party appointed by Federal authority. He went away from Washington to attend to affairs not so important as his contest, and left the same for a considerable time, without giving attention thereto. Were it necessary to put the refusal to grant an extension on that ground, the committee believe that the contestant has been guilty of such laches as to preclude him from the right to take further testimony.

But in order to entitle himself to an extension of time after taking testimony, the contestant must state what witnesses he desires to examine, give their names, their residence, and what they will swear to, or a sufficient reason why the same is not done. In the language of the able report in Giddings *v.* Clark (1 Bartlett, 91–94):

"The affidavits relied on are fatally defective in this, that they do not state the names of the witnesses whose testimony is wanted, nor the particular facts which can be proved by their testimony."

It is also laid down as a rule, in the same case, that an applicant "should produce the affidavit of some of the witnesses themselves * * * stating what facts are within their own knowledge." (Same, p. 93.)

But in this case the affiant makes general statements, alleges facts not within his personal knowledge, does not state the names of witnesses, their residence, or what particular facts he proposes to prove by any of them. He alleges fraud and unfairness in general terms, and does not pretend it is the same fraud alleged in his notice of contest, and the committee think that the affidavit is fatally defective, and no extension should be granted by reason of anything therein stated.

The report of the Senate Committee on Privileges and Elections in the Forty-third Congress is not evidence. It relates to a period long anterior to 1880.

It is not a judicial determination, and is not to be considered in determining the application.

In Boles *v.* Edwards (Smith El. Cas., 58), the contestee submitted in evidence the report of a joint select committee, appointed by the senate and house of representatives of Arkansas to investigate election frauds, and it was rejected as simply "views of certain members of the legislature of Arkansas." So this report, if it related to the very election in question, would be simply the views of certain Members of the Senate of the United States, and could not bind the House or furnish evidence for its consideration. It would be to us simply hearsay and inadmissible, as laid down in the report of Speaker Keifer in the case of Donnelly *v.* Washburn, in the Forty-sixth Congress.

The committee concede the right of the House to investigate the title of Oates to a seat, even if Mabson has been guilty of such negligence and laches as to preclude him from contesting for the seat, as a party and litigant. But does his affidavit make a case calling on the House to institute an inquiry and investigation for its own vindication, or to purge itself of a Member unelected, in fact?

The charges of fraud and illegality are general. At what precincts committed, or in what counties even, is not alleged. Of what particular acts they consisted is not stated. No witness is named who will furnish testimony of particular acts. In fact, no witnesses are named at all.

The committee are not put in possession of a single fact of fraud or illegality or furnished with the medium of evidence by which the same may even seem susceptible of proof. No case is therefore made for invoking the jurisdiction of the House to investigate in order to protect its own rights and dignity.

After this report had been submitted to the hill committee, the contestant filed a supplemental affidavit covering some of the objections pointed out in the report to his former application and asking for further time to take testimony in the district. The report thus deals with this application:

The affidavit having been read to the full committee, it was held by a majority thereof that the application came too late; that it would be dangerous to establish a precedent allowing a contestant or contestee, after finally submitting their cases, to ascertain from the report of the committee the grounds upon which he had been overruled, and to then supplement his application by a new affidavit, avoiding the decision, and thus open up the case again. Such a practice your committee think would lead to interminable delays, and would transform the committee into mere advisers of the parties. The committee are of opinion that parties should be bound by a reasonable degree of diligence, and that there should be a time fixed beyond which the doors for the reception of ex parte affidavits or evidence should be shut. Inasmuch as there was no application to file additional affidavits before the subcommittee until after its report was made, the committee are of opinion the last affidavit came too late, and should not be considered.

The minority of the committee held that contestant had used due diligence in endeavoring to procure testimony, and that justice demanded that he be given further time to pursue an investigation, and recommended a resolution granting an extention of time for not over forty days.

The majority of the committee, in accordance with their conclusions, but with some doubts as to the form of resolution, recommended the following:

Resolved, That the contestant, A. A. Mabson, have leave to withdraw his papers without prejudice.

On May 6 [1] this resolution was agreed to, without debate or division.

726. The Ohio election case of Vallandigham v. Campbell in the Thirty-fifth Congress.

The returned Member was denied an extension of time to take testimony, although he pleaded that he had been detained by his duties in the House.

The law for taking testimony in an election case does not preclude both parties from proceeding at the same time.

A discussion as to the power of the House to disregard the provisions of the law governing election contests.

On January 27, 1858,[2] the Committee on Elections reported on the application of the sitting Member for leave to take further testimony in the contested election case of Vallandigham *v.* Campbell, from Ohio. This application, made under a section of the act of 1851, involved also a construction of the terms of that act. The majority of the committee reported a resolution declaring it inexpedient to grant the request of the sitting Member, saying:

The grounds upon which the sitting Member seems to rest his application for leave to take supplemental testimony seem to reduce themselves to two, viz:

1. That the sitting Member, having been a Member of the last Congress during a part of the time, when by law the testimony should have been taken, and having been attending to his duties as such

[1] Journal, p. 1200; Record, p. 3687.

[2] First session Thirty-fifth Congress, 1 Bartlett, p. 223; Rowell's Digest, p. 151; House Report No. 5 Globe, p. 452.

Member, he should be exempted from the operation of the law so far as to allow him time for taking supplemental testimony.

2. That the contestant, by notices served upon the sitting Member, occupied, or proposed to occupy, the entire sixty days after the answer of the sitting Member to the notice of contest was served, and that he is therefore entitled to a period of time outside of the sixty days to complete his taking of testimony.

Upon the first point your committee are clear that the fact of one of the parties being a Member of Congress for the time being can in nowise affect his obligations to comply with the law. In all the relations of life, both private and public, circumstances are constantly occurring which are quite as imperative in their operation as those connected with a seat in Congress; and were this to be deemed a sufficient reason for a noncompliance with the law it would at once take from its operation one-half the cases which arise. The fact that the law expressly provides for taking testimony by the parties or "their agents" It excludes the construction that it was intended to apply only when the parties could attend in person.

Upon the second ground your committee are equally clear, that however extensive the time covered by one party in proposing to take testimony, it in nowise precludes the opposite party from proceeding at the same time to take it in his own behalf. There is no limitation to this power by the act of 1851, except "that neither party shall give notice of taking testimony in different places at the same time, or without allowing an interval of at least five days between the close of taking testimony at one place and its commencement at another." Under this provision, your committee believe full power is given to each one of the contesting parties to proceed with taking testimony, but limits each to one place at a time.

Your committee are of opinion that if either party to a case of contested election should desire further time, and Congress should not be then in session, he should give notice to the opposite party and proceed in taking testimony, and present the same and ask that it be received, and, upon good reason being shown, it doubtless would be allowed; but it seems too much to grant, in this case, for either of the reasons stated. It is now upward of fifteen months since the election, and nearly one-half of the term of service has elapsed, and it is due to every interest concerned that the rights in dispute should be settled.

The minority argued in favor of granting the request of the sitting Member, alleging that the contestant had violated the law in taking testimony at different places at the same time, and also had declined to make a mutual agreement for taking testimony after the time allotted by law. It was further charged, but denied by contestant, that the latter had declined to attend the taking of testimony by sitting Member, alleging that the dates conflicted with his own appointments.

The report was debated on February 3, 4, and 5.[1] In the course of this debate[2] Mr. Israel Washburn, jr., of Maine, said:

Sir, I do not believe in the binding authority of the law of 1851 upon this House in all cases. I believe, sir, that it is directory, and not absolutely binding. I do not believe that the Senate of the United States, in conjunction with the House of Representatives in one Congress, can make a law which is to bind future Houses of Representatives. Not so. By the Constitution of the United States, each House is made the judge of the returns, qualifications, and elections of its own Members, and each House can and must judge for itself upon those questions. The law of Congress of 1851 is nothing but the advice or suggestion of reasonable and intelligent and just men, as to the proper course to be taken-advice given when no particular case was before them, and which may be presumed to be good and sound advice and counsel in reference to the matter. It is nothing more. The law is not binding upon us; and if in any case it is oppressive, and there is reason for stepping outside of it, I hold that we have a right to do it.

On May 5[3] an amendment, proposed by the minority, to allow both parties to take supplementary evidence was disagreed to, yeas 100, nays 113.

Then the resolution declaring it inexpedient to allow further evidence to be taken was agreed to, yeas 113, nays 101.

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[1] Globe, pp. 558, 585, 591.

[2] Globe, p. 562.

[3] Journal, pp. 302, 303.

727. The Pennsylvania election case of Kline *v.* Verree in the Thirty-seventh Congress.

Instance wherein an extension of time was granted for taking rebutting evidence in an election case.

On December 3, 1861,[1] the House, by resolution, allowed to the sitting Member in the contested case of Kline v. Verree, from Pennsylvania, twenty days' additional time to take rebutting testimony, and "that said testimony be taken before the recorder of the city of Philadelphia, and that the sitting Member give ten days' notice to the contestant of the time and place of taking said testimony and the names of witnesses to be examined."

The above permission was given because the contestant had occupied nearly the whole time allowed by law for taking testimony.

On December 4 a further time of ten days was granted the contestant after the expiration of the additional time allowed sitting Member, "said testimony to be confined to such as may rebut the testimony taken under said resolution, and to be taken before the same magistrate and in all respects in the manner provided by said resolution."

Both resolutions were recommended by the Committee on Elections.

728. The election case of Gallegos v. Perea, from the Territory of New Mexico, in the Thirty-eighth Congress.

A contestant having neglected to appear during the taking of testimony, the House declined to grant an extension of opportunity.

On April 6, 1864,[2] the Committee on Elections reported in the case of Gallegos v. Perea, from the Territory of New Mexico. This case involved a question as to extension of time for taking testimony. The contestant, in his notice, stated he would take the testimony of witnesses before Hon. Kirby Benedict, chief justice of the supreme court of New Mexico, or, in the event of his absence, before Miguel E. Pino, probate judge of the county of Santa Fe. To this notice of contest the sitting Delegate replied, and, after notice to that effect, proceeded to take testimony. The contestant omitted to take any evidence, but in lien thereof petitioned the House for a further time to examine witnesses. He alleged, as a reason for his failure to take testimony, that Judge Benedict was a violent political opponent. The other judge of the district or supreme court, Joseph G. Knapp, resided in a part of the Territory inconvenient because of distance and hostile Indians. No reason was alleged why the contestant might not have proceeded before the judge of probate named in his notice. The contestant also had failed to appear before the committee, either in person or by attorney. The committee therefore recommended that further time be not granted to Mr. Gallegos to take testimony.

On April 6 the House, without debate or division, agreed to the report.[3]

729. The Ohio election case of William Allen in the Twenty-third Congress.

Testimony having been taken ex parte, the Elections Committee concluded that it should not have weight and reported that the sitting Member should not be disturbed therefor.

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[1] Second session Thirty-seventh Congress, Journal, pp. 27, 28, 31.

[2] First session Thirty-eighth Congress, 1 Bartlett, p. 482; Rowell's Digest, p. 188.

[3] Journal, p. 494; Globe, p. 1453.

Notices of taking testimony in an election case having specified such times and places as to make it impossible for the returned Member to attend, the Elections Committee held the testimony taken to be ex parte.

Instance wherein an election contest was instituted by various citizens of a district, presentation to the House being by memorial.

On December 11, 1833,[1] the Speaker presented a memorial of Abraham Hegler and John Mace, on behalf of themselves and others, residents of the Seventh Congressional district, in the State of Ohio, complaining of illegality in the election and return of William Allen as a Member for said district; and declaring that Duncan McArthur received a majority of the legal votes in said district, and praying that said Duncan McArthur may be declared entitled to the seat now held by said William Allen. This memorial was referred to the Elections Committee.

On December 31,[2] Mr. Nathaniel H. Claiborne, of Virginia, submitted the report of the committee, which found that the returns of the election in question had been examined as required by law, that William Allen had been declared elected by a majority of 1 vote, and that a certificate had been issued to him. The report then continues:

> It appears to your committee that, on the 26th day of October, 1832, a notice was served on said William Allen that, "in the event he should be declared elected," his election would be contested, on grounds specifically set forth in said notice, and that depositions to establish the objections to his election would be taken.

The notice further specified the times and places for taking the depositions. This notice was served by Charles Martin, who also served other notices, and proceeded to take testimony.

William Allen, the sitting Member, did not appear in person or by attorney in response to any of these notices. In reference to this the report says:

> It could not escape the notice of the committee that the taking of the depositions spoken of in the notices was dependent upon a contingency, to wit, the declaration of the election of said Allen by the functionary whose duty it is bylaw to examine and count the votes and give a proper certificate to him who is elected; and it struck the committee as being both novel and irregular to notify a candidate that in the event of his future election his right to a seat will be contested, and that depositions will be taken before all the votes have been counted and the result of the election officially proclaimed. Yet the committee would have proceeded to the examination of the testimony had it not appeared to their entire satisfaction that the objects of requiring notice to be given were totally defeated by the course pursued by those citizens who contested the return of Mr. Allen. The notices aforesaid set forth sufficiently the grounds of objection, but the periods of time and the distance of places from each other, selected at which the testimony was taken on notices signed by different persons, were so arranged as to render it morally and utterly impossible for Allen to attend and cross-examine the witnesses however disposed so to do.

Therefore the committee concluded the testimony offered as ex parte, and agreed unanimously to these resolutions:

> *Resolved,* That the memorial * * * is not sustained, and that the testimony they have exhibited can not be admitted, because it was taken under such circumstances as to make it ex parte and of no effect, as it was impossible for Allen to have attended and cross-examined the witnesses.
>
> *Resolved,* That William Allen has been returned a Member to the House of Representatives of the United States, in the manner and form prescribed by law and is entitled to his seat, unless it should hereafter be shown by competent testimony that he has not received the majority of qualified votes.

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[1] First session Twenty-third Congress, Journal, p. 49.

[2] Journal, p. 146; House Report No. 110.

The report was ordered printed and laid on the table. It does not appear that it was acted on, Mr. Allen of course retaining his seat.[1]

730. The North Carolina election case of O'Hara v. Kitchin in the Forty-sixth Congress.

Testimony of contestant being taken after the legal time and against contestee's protest, the committee reported that it should not be considered and that sitting Member's title should be confirmed.

A condemnation by the Elections Committee of oral arrangements between parties to an election case for taking testimony out of time.

All agreements by parties to an election case in contravention of the provisions of law should be in writing, properly signed, and made a part of the record.

On February 17, 1881,[2] Mr. Walbridge A. Field, of Massachusetts, from the Committee on Elections, submitted the report of the committee in the North Carolina contested election case of O'Hara *v.* Kitchin.

In the record of the case there appeared no return of the service of notice of contestant, but the sitting Member, in April, 1879, served his answer wherein he objected that he ought not to be called upon to answer, because no lawful or sufficient notice had been served upon him. The contestant stated orally to the committee that he sent seasonably a notice, and was informed by the messenger that he had left the same at the place of business of the contestee, but no affidavit or deposition of the messenger was presented to the committee. The law provided that a contestant should serve his notice within thirty days after the determination of the result. There was no evidence before the committee to enable them to determine when the result of the election was determined. Certain legal proceedings in the. State courts relative to the election (O'Hara *v.* Powell, 80 N. C., 103) had been brought to the attention of the committee, and made uncertain the date from which the thirty days should be computed. The committee say:

> The contestant, therefore, has not proved that he served his notice of contest within thirty days after the result of the election was determined, or that he ever served it at all.
>
> A copy of the answer of the contestee was served upon the contestant on the 29th day of April, 1879.
>
> Section 107 of the Revised Statutes is as follows:
>
> "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 during the remaining ten days of said period."
>
> Section 2, chapter 119, of the statutes of 1875 is as follows:
>
> "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 earliest testimony taken by the contestant was taken on the 7th day of November, 1879, which was one hundred and ninety-four days from the day on which the answer of the returned Member was served upon the contestant; and-the contestee objects now, as he objected through his counsel at the time the testimony was taken, that the ninety days for taking testimony had expired before the testimony was taken.

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[1] This case was before the enactment of the law which now prescribes the method of taking testimony in election cases.

[2] Third session Forty-sixth Congress, House Report No. 263; 1 Ellsworth, p. 378.

The contestant sets up an oral argument, as he alleges, to the effect that within the ninety days prescribed by law, the exact time of which he does not fix, he and the contestee agreed—

"That as to the matter alleged in contestant's complaint as to the votes thrown out and not counted for contestant in the counties of Edgecomb and Craven, it would not be necessary to take evidence, as he, said Kitchin, agreed to make a case without taking testimony."

And on the 23d day of April, 1880, he filed an affidavit to that effect, as a foundation for a motion that the time for taking testimony be extended. The contestee denies that any such oral agreement was made, and filed his affidavit on the 26th day of May, 1880.

The committee had taken no action to extend the time; and the report condemns the practice of permitting parties by agreement among themselves to extend the time of taking testimony without previous authority of the House of Representatives. "It may happen, indeed," says the report, "that from unforeseen causes an extension of time may be necessary, and the House of Representatives may not be in session, and therefore no previous application can be made to it, but in such cases, if the parties agree to an extension of time, the agreement should be in writing, signed by the parties, or their attorneys, and application should be at once made to the House of Representatives, when in session, for a ratification of such agreement." The report, continuing on this subject, says:

In any case, if such agreements are to be regarded, they should be in writing, and signed by the parties or their attorneys. This is the practice of courts generally, and is founded on sound reasons. If oral agreements are recognized, then if they are denied by either of the parties at the hearing, testimony must be taken, and this collateral issue be first determined, and as the decision may be such as one of the parties did not expect, he may be put to the greatest disadvantage after the testimony on the merits of the case has been all taken. The misunderstandings that often honestly arise from oral agreements are alone sufficient to justify courts in insisting that none but written agreements will, if questioned, be recognized. We think it of great importance in election cases that parties should understand absolutely that all agreements in contravention of the statutes of the United States, in regard to the taking of testimony, to be considered at all, should be in writing, properly signed, and made a part of the record itself. Even then the policy of the law requires that they should not be regarded unless it appears that they were bona fide entered into for an adequate and reasonable cause to be determined by the House of Representatives, either before or at the time of deciding the election case.

On this ground the committee decline to determine on the affidavits the question whether or not any such oral agreement as the contestant sets up was ever made, and consider the case as if there was no such agreement. The committee might, indeed, in a case where testimony had been taken out of time, but with full opportunity to the other party to cross-examine the witnesses and exhibit evidence in reply, and where it was evident that this had been fully done, recommend to the House, if they find sufficient reason therefor, that the testimony be considered as if taken in time; but such is not this case, and the only alleged ground for the delay in this case is that the dwelling house of Mr. O'Hara was destroyed by fire, as well as all memoranda, facts, and information in writing that he had procured necessary to be used in the contest. The time when the dwelling house was destroyed by fire is not stated in any of the papers, but it is said to have happened in March, 1879, and before the answer of the contestee was served on the contestant. This does not seem to the committee a sufficient ground for admitting testimony taken one hundred and ninety-four days after the service of the answer.

The committee, therefore, are of opinion that this contest should be dismissed, on the ground that the testimony was not taken in time.

The committee say, however; that, even if considered, the testimony was insufficient to establish contestant's case, and conclude:

It has been stated that the number of votes received by Mr. Kitchin and Mr. O'Hara, as canvassed by the State canvassing board, is not in evidence. In the Congressional Directory, which is not evidence, Mr. Kitchin is put down as having received 10,804 votes, against 9,662 votes for Mr. O'Hara. If this statement be true as a statement of the votes as canvassed by the State board of North Carolina, it

will be seen that Mr. Kitchin's plurality is 1,142, which is greater than the plurality of 925 received by Mr. O'Hara in the precincts mentioned in Edgecombe County, which were not counted by the county canvassing board. So that if these were all admitted, upon which, for the reasons given in the case of Yeates *v.* Martin, the committee do not agree, there is no reason to suppose that Mr. O'Hara would be elected; certainly there is no evidence that he would be. The burden of proof is on the contestant, and if all the testimony he has taken were admitted and considered it is not sufficient to enable the committee to determine that he was elected Representative.

No testimony has been taken by Mr. Kitchin whatever. He relied on his objection that the time for taking testimony had expired when Mr. O'Hara began to take testimony. He had a right to rely on this objection at that time, and even if the House should determine to consider testimony in this case it would be unfair to Mr. Kitchin to do so until after an opportunity were given him to take his testimony.

It is manifest from the notice of the contest and the answer that there were very grave and important questions in dispute in this election, and that the matters in dispute concerned a far greater number of votes than the plurality of the sitting Member, as given in the Congressional Directory; but on most of these questions there is no testimony whatever, one way or the other, and the little testimony that has been taken either has no significance at all, by reason of a want of testimony to connect it in any intelligent manner with the questions at issue or from some other cause, or the testimony taken which is intelligible and can be applied to the case does not establish the case of the contestant. The committee repeat that in their opinion the evidence in this case should not be considered.

Therefore the committee reported resolutions confirming the title of sitting Member to the seat.

On February 17 the report was presented to the House for printing.[1] It does not appear that it was acted on by the House.

731. The California election case of Kahn v. Livernash in the Fifty-eighth Congress.

Instance wherein the House directed the issue of a subpoena duces tecum to procure the ballots for examination in an election case.

Instance wherein the House authorized a subpoena duces tecum. by registered letter.

Instance wherein the House authorized the Elections Committee to send for persons and papers in an election case already made up.

Form of resolution authorizing the Elections Committee to procure ballots and other evidence.

Discussion as to what constitutes a distinguishing mark on an Australian ballot.

Discussion of the doctrine that the House should follow decisions of the State courts construing the election laws of a State.

On December 18, 1903,[2] Mr. Joseph H. Gaines, of West Virginia, from the Committee on Elections No. 1, submitted the following report with a resolution, which was agreed to by the House:

The Committee on Elections No. 1, to which was referred the contested election case of Julius Kahn, contestant, against Edward J. Livernash, contestee, from the Fourth Congressional district of California, respectfully reports to the House the following resolution, approved by said committee, for approval and adoption by the House, with the recommendation that it do pass:

Resolved, That Thomas J. Walsh, registrar of voters for the city and county of San Francisco, or any successor of his in said office, be, and he is hereby, ordered to be and appear before Elections Committee No. 1 of the House of Representatives forthwith, then and there to testify before said com-

[1] Record, p. 1754.

[2] Second session Fifty-eighth Congress, Record, p. 389.

mittee or such commission as shall be appointed touching such matters then to be inquired of by said committee in the contested election case of Julius Kahn *v.* Edward J. Livernash, now before said committee for investigation and report; and that the registrar of voters for the city and county of San Francisco bring with him all the ballots and packages of ballots cast in every precinct in the said Fourth Congressional district of California at the general election held in said district on the 4th day of November, 1902; that said ballots be brought in the packages in which the same now are; that said ballots be examined and counted by or under the authority of such Committee on Elections in said case; and to that end, that proper subpoena be issued to the Sergeant-at-Arms of this House, commanding him to summons said registrar or his successor in office, if any, to appear with such ballots as a witness in said case; that service of said subpoena shall be deemed sufficient, if made by registered letter, and such service shall be so made unless otherwise directed by said Committee on Elections No. 1; and that the expenses of said witness and all other expenses under this resolution be paid out of the contingent fund of the House; and that said committee be, and hereby is, empowered to send for all other persons and papers as it may find necessary for the proper determination of said controversy; and also be, and it is, empowered to select a subcommittee to take the evidence and count said ballots or votes, and report same to the Committee on Elections No. 1 under such regulations as shall be prescribed for that purpose; and that the aforesaid expenses be paid on the requisition of the chairman of said committee after the auditing and allowance thereof by said Elections Committee No. 1.

On March 18, 1904,[1] Mr. James R. Mann, of Illinois, on behalf of Mr. Joseph H. Gaines, of West Virginia, presented from the Committee on Elections No. 1 a report in the California election case of Kahn *v.* Livernash. This report, which was concurred in by the entire committee, was as follows:

At the last general election the official returns show that in the Fourth Congressional district of California Edward J. Livernash received a plurality of 146 votes. The total number of votes returned for Livernash was 16,146, and there were returned for Julius Kahn, the contestant, 16,005 votes.

There is no allegation of fraud in the case, or of illegal voting. The whole claim of contestant is that a large number of ballots were illegally marked and improperly counted under the California laws and decisions. Contestant concedes that of the 16,146 votes returned for Livernash 13,809 were properly returned, but claims that 2,337 votes were improperly counted and returned for contestee.

The contestee, in his turn, objected to a large number of votes returned for contestant. The case of both contestant and contestee is exceedingly technical, both sides having been induced thereto by the unusual and peculiar strictness with which the supreme court of California has, in the language, at least, of the decisions, held that all provisions relating to the marking of a ballot by the voter must be complied with.

The case involves only the question what ballots were lawfully marked and should be counted, and what ballots were not lawfully marked and should not be counted, under the laws of California.

The laws of California provide for an official ballot, upon which are printed the various tickets, with squares after the names of the candidates whose names are printed on it. There is also a special blank column, with a space in which to write the name of any person for any office, when the name of such person is not printed on the ticket. There were also at this election in California several constitutional amendments submitted for the vote of the people; and there were squares for ratification and squares for rejection opposite every such amendment. The method prescribed by statute for the voter to designate his choice is to place a cross (X) in the square immediately following the name of each candidate for whom he wishes to vote. If he desires to vote for some one for an office whose name is not printed upon the ballot as a candidate for that office, the voter must write the name of such person in the space on the blank column immediately above the title of that office as printed in the blank form. In voting upon the constitutional amendments the method prescribed is to place a cross (X) in one of the two squares following the amendment, according as he desires to vote for or against the amendment.

[1] Second session Fifty-eighth Congress, House Report No. 1739; Record, p. 3430.

Section 1205 of the California Code prescribes the method in which the voter shall prepare his ballot. It is as follows:

"He shall prepare his ballot by marking a cross after the name of the person or persons for whom he intends to vote, or by writing a name or names in the 'blank column,' and in case of a constitutional amendment or other questions submitted to the vote of the people, by marking in the opposite margin a cross (X) against the answer which he intends to give. Such marking shall be done only with a stamp, which, with the necessary pads and ink, shall be provided by the officers."

Section 1211 declares that certain ballots shall not be counted, and is in the following language:

"1. In canvassing the votes any ballot which is not made as provided in this act shall be void and shall not be counted. 2. If a voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office."

Section 1215 relates to identification, and is as follows:

"No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him."

The California statute also provides that a candidate's name shall be printed but once upon the ballot, and that where a candidate is nominated by more than one party he must make his election under which party designation his name shall appear upon the ticket, or, if he fails to elect, his name shall be printed thereon as of that party which has first certified his nomination; and, further, that on the ticket of any other party by which such candidate is nominated there shall be printed in the space for that office the words "No nomination."

But the contestee having been nominated by the Union Labor party and by the Democratic party also, this last provision was held by the supreme court of California, in the case of Murphy *v.* Curry (137 Cal., 479), to be invalid, and by mandamus the proper officers were directed to print the name of Edward J. Livernash as a candidate upon the ballot in the Democratic column and also in the Union Labor column, and the ballots were so made up.

This was the first time the same name had appeared twice on a ballot in California. Thereupon on October 28, 1902, the board of election commissioners met in the office of Thomas J. Walsh, registrar of voters of the city and county of San Francisco, and took the following action, as appears from the minutes of the meeting:

The matter of the instructions of the election officers in relation to the counting of ballots where candidates' names appear more than once on the ballot came up for discussion.

T. D. Riordan, esq., and Charles Gildea, esq., appeared before the board.

After deliberation Commissioner Deasey moved that where crosses were marked after the name of the same candidate for the same office in two different columns upon a ballot it shall be counted as one vote for such candidate, and that the election officers be so instructed.

Adopted by the following vote: Commissioner Boyle, aye; Voorsanger, aye; Deasey, aye; Everett, aye; Kellogg, aye.

This action of the commissioners was widely published in the district.

Attorneys for contestant and contestee relied solely upon the defects in marking the ballots. Their plan of procedure in making up the case for consideration of the committee was to offer the ballots themselves in evidence, the attorney offering each ballot stating at the time of the offer that it was marked in such a way that it should not have been counted. The attorney on the other side denied that the ballot was marked in any such way. No testimony whatever was taken as to the condition of the ballots. The validity of the marking of the ballots being the only question, your committee were compelled either to send for the ballots or not to try the case at all. The committee entertained great doubts as to the propriety of sending for the ballots, but because some of the objections made might well have brought the ballots to which they related within the operation of the peculiar and unusual strictness of the California decision and were such that they could not have been determined without a personal inspection of the ballots, the committee decided to send for all the ballots. Having obtained them, your committee examined every one of the ballots objected to by both sides, amounting in all to—ballots.

Examination disclosed the fact that there were 752 ballots which had been voted for Livernash by placing a cross (X) in the square after the name of Livernash printed in the Democratic column, and also a cross (X) in the square after the name of Livernash printed in the Union Labor column. This objection to the ballots was the one principally relied on by counsel for the contestant, and one which could not be met by similar objections on behalf of the contestee to any ballots voted and counted for contestant.

To sustain this objection the case of the People ex rel. Bledsoe *v.* Campbell was relied on. In that case the ballot had a candidate's name printed in a party column. The voter had marked a cross (X) in the voting square after the name, and had written the same candidate's name for the same office in the blank column. The supreme court of California held that this unnecessary writing of the candidate's name in the blank column was an identifying mark not authorized. The California statute says:

"No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him."

We are asked to say that where the election officers, by direction of the supreme court of the State, printed the candidate's name in two columns, and the voter placed a cross (X) after his name in both columns, and after general notification from the election officers that ballots so marked would be counted, a case is presented on all-fours with one where the voter marked a cross in the voting square after the candidate's name and also, in the voter's handwriting, wrote the candidate's name in the blank column. This view has been, perhaps, induced by the distinction made by the supreme court of California between identification in law and identification in fact.

Your committee recognizes no such distinction. Either marks on a ballot identify it as the one voted by a particular voter or they do not. Your committee are aware that all identifying marks do not invalidate a ballot, as, for instance, where the voter writes in his own handwriting the name of a candidate not printed on any ticket. Where this is done in good faith it is an identifying mark, but it is one authorized by law and does not invalidate the ballot. Whether such writing on the ballot not done in good faith would invalidate the ballot, and how far speculation upon good faith may be indulged in in such cases, are questions which do not arise.

An actual examination of these 752 ballots shows that as a matter of fact this manner of marking did not and could not identify the ballots. They were honestly cast, so far as any evidence in this case disclosed. They were honestly cast by qualified electors and honestly counted by the returning officer for the contestee. And your committee is of the opinion they were properly counted for the contestee.

If your committee were disposed to follow in all their apparent technicality the California decisions, it would even then see no reason for rejecting these ballots. In the case of Lynch *v.* Chalmers, decided in the Forty-seventh Congress (Rowell, p. 376), the committee, while upholding the undoubtedly safe general doctrine that decisions of the highest courts in a State, interpreting the statutes of that State, when well considered and long acquiesced in, should be followed, uses the following language:

"Where decisions have been made for a sufficient length of time by State tribunals construing election laws, so that it may be presumed that the people of the State knew what such interpretations were, would furnish another good reason why Congress should adopt them in Congressional election cases. But this reason would be of little weight when the election had been held in good faith before such judicial construction had been made, and where there was a conflict of opinion respecting the true interpretation of a statute for the first time on trial."

In regard to these 752 ballots marked with a cross after the name of Livernash in the Democratic column and also in the Union Labor column the supreme court of California had recently by mandamus directed the election officers to make up the ballot by printing the name of Livernash in both columns, and the election officers themselves had given the widest publicity to their official action, declaring that ballots marked for Livernash in both columns should be counted. The action of the supreme court itself, supplemented by the action of the board of election commissioners, might well have induced this number of persons to believe that marking a cross after the name of Livernash in both columns was a permissible way to mark the ballot, and even that it was the necessary way to insure the counting of their ballot for Livernash for Congress.

It was claimed that 285 ballots should be rejected which had been counted for the contestant because there were more than two cross marks in the square opposite his name; and it was claimed that 1,555 votes which were counted for contestant should have been rejected for the same reason. An inspection of these ballots satisfied the committee that the objections taken were not well founded, but were trivial and supertechnical in the extreme.

The committee reserved for personal inspection 294 ballots voted and counted for Livernash and 558 voted and counted for Kahn.

Personal inspection of all the ballots heretofore mentioned convinced your committee that the manner in which they were marked did not identify and could not identify the ballots.

In addition to the 3,444 ballots already mentioned there were laid aside—which both sides agreed should be rejected under the California decisions. Those so agreed by the parties to be rejected, which had been counted for Livernash, exceeded those counted for Kahn by 49. If all these votes should be rejected, it would still leave a majority for Livernash of 97.

It has been already stated that the language of the decisions of the supreme court of California was extremely technical and insisted upon a very strict compliance by the voter with the provisions of the statutes of California relative to the preparation of his ballot. It does not appear, however, that the supreme court of California, in the application of the law to the facts before it, has rejected ballots in a wholesale manner in which this committee has been urged to reject ballots in this case, nor can it be said that such strictness of construction as the supreme court of California has adopted in language or in fact has been so acquiesced in as to become a settled rule of law in that State. The committee can not possibly know all the circumstances of the cases before the California court. It has not been made positively to appear to the committee that the supreme court of California, applying its own rules, would have rejected such a vast number of ballots. The apprehension caused in the State of California by the language of the decisions of their highest court has led, since the last election, to a modification of the California statute with respect to the marking of ballots.

Your committee therefore recommends the adoption of the following resolutions:

Resolved, That Julius Kahn was not elected a Member of the Fifty-eighth Congress from the Fourth Congressional district of California, and is not entitled to a seat therein.

Resolved, That Edward J. Livernash was elected a Member of the Fifty-eighth Congress from the Fourth Congressional district of California, and is entitled to retain his seat therein.

The House agreed to these resolutions without debate or division.

732. The election case of Cross v. McGuire, from the Territory of Oklahoma, in the Fifty-eighth Congress.

Instance wherein the Elections Committee declined to order the production of ballots and decided the case as made up under the general law.

On April 1, 1904,[1] Mr. Michael E. Driscoll, of New York, presented the report of Elections Committee No. 3 in the election case of Cross *v.* McGuire, from the Territory of Oklahoma.

The report is as follows:

The said election took place on the 4th day of November, 1902. Thereafter the votes cast at said election for the office of Delegate in Congress from the Territory of Oklahoma were counted and canvassed, and as a result of said count and canvass Hon. Bird S. McGuire, the contestee, was declared to have received 45,803 votes, and in like manner the Hon. William M. Cross, the contestant, was declared to have received 45,409 votes; and in pursuance of said count and canvass Hon. Bird S. McGuire received his certificate of election by a plurality of 394 votes.

A notice of contest was served by the contestant on the contestee within the time specified by law, and sets forth the charges and allegations on which this contest is based, and which, very briefly stated, are substantially as follows:

That gross frauds, errors, and mistakes were made in the manner and conduct of holding said election; that illegal votes to the number of about 1,100 were cast for the contestee by various persons who were not naturalized citizens of the United States; that legal votes to the number of about 3,958 which were cast for the contestant were thrown out as mutilated ballots, and that gross frauds were perpetrated in voting precincts of the Territory of Oklahoma by various election officials thereof, in that the tally sheets and abstracts of the votes cast in said various election precincts were fraudulently duplicated, changed, altered, and falsified, so that said tally sheets and abstracts were fraudulent

[1] Second session Fifty-eighth Congress, Record, p. 4130; House Report No. 2094.

and contained false and fraudulent reports of the votes cast at said election. The notice concludes with a prayer, that—

"If the evidence hereafter to be taken supports the allegations contained in the foregoing specifications, then the House of Representatives of the Congress of the United States shall award to him the right to a seat as the Delegate from said Oklahoma Territory."

In due time the contestee filed an answer to the notice of contest, which contains a general denial of the material allegations in the notice and several countercharges of bribery, corruption, etc., in the interest of the contestant.

At the first hearing before your committee the contestant filed a notice of motion for an order and proper process, requiring the county clerks of certain counties in Oklahoma Territory to deliver up packages of so-called mutilated ballots and to produce the same before the committee for examination as part of the evidence and record in this case, to the end that it may be determined whether the contestant or the contestee was elected to the office of Delegate to Congress from said Territory of Oklahoma by the legal voters participating in said election. That notice of motion was not accompanied or supported by any affidavits.

The motion was denied by your committee, Mr. Frank A. McLain, Mr. C. B. Randell, and Mr. Joseph T. Johnson, dissenting.

Your committee unanimously find that the record before it fails to establish the allegations contained in the notice of contest, and recommends the adoption of the following resolutions:

Resolved, That Hon. William M. Cross was not elected Delegate to the Fifty-eighth Congress from the Territory of Oklahoma.

Resolved, That Hon. Bird S. McGuire was duly elected Delegate to the Fifty-eighth Congress from the Territory of Oklahoma and is entitled to a seat therein:

The resolutions were agreed to without debate or division.

733. Form of resolution returning to State authorities ballots that had been examined in an election case.—On April 20, 1904,[1] Mr. Frank D. Currier, of New Hampshire, from the Committee on Elections No. 2, submitted a report on the resolution of the House No. 306, which provided for returning to Colorado the ballots in the case of Bonynge *v.* Shafroth. The report says:

The law of Colorado requires that each voter desiring to vote a straight party ticket shall, upon receiving from the proper election officer an official ballot, retire to the booth and there in his own proper handwriting insert in the blank space at the head of the ballot the name of the political party whose straight ticket he desires to vote.

A few of the packages were opened in the presence of this committee, and it became at once apparent that the party designation upon many of the different ballots was in the handwriting of the same person. As the ballots from the 29 precincts numbered over 8,000, it was found impossible for the whole committee to examine them, and thereupon, by vote of the committee, a subcommittee was appointed for that purpose, said subcommittee consisting of Messrs. Miller, of Kansas; Currier, of New Hampshire, and Sullivan, of Massachusetts. Subsequently, in pursuance of authority conferred by resolution adopted by the House, Mr. David N. Carvalho, a noted expert in handwriting, was employed to examine and report upon the handwriting upon all the ballots and in all the poll books.

The respective reports of the subcommittee and of the expert are appended and made part hereof. From them it appears that the greater number of the ballots from the 29 precincts are in the handwriting of some eight or ten different persons, and that some of the poll books were filled out, not by the election officers, as the law required, but by outside parties.

After considering these reports and a personal investigation of some or all of the ballots and poll books by himself and counsel, the contestee, while disclaiming any participation in or knowledge prior to the institution of the contest of the frauds committed in connection with the ballots and Poll books, frankly acknowledged that their extent was such as to show the contestant entitled to his seat, from which he, the contestee, voluntarily retired without any action whatever by the committee.

[1] Second session Fifty-eighth Congress, House Report No. 2705.

Your committee is advised by the author of this resolution that one of the judges of the second judicial district of Colorado, embracing the city of Denver, has summoned a special grand jury, and directed, inter alia, an inquiry into the frauds perpetrated in connection with this election, and that the presence of the ballots and poll books are desirable and necessary for the purposes of such inquiry.

These ballots and poll books are in the possession and custody of the Clerk of the House. There is no occasion for retaining them here and there can be no objection to their being returned to Colorado for such use as the interests of justice may require. It seems that under the law of Colorado ballots are required to be preserved for one year only from the date of the election, and that, more than that period having elapsed since the Congressional election of 1902, there is no designated officer whose duty it would be to preserve these ballots and poll books intact should they be returned direct to them.

Your committee thinks it would be proper for the Clerk of the House to hold them subject to the order of the prosecuting attorney or judges of the court, and to notify them promptly that they are at their service.

The committee also submitted in this connection the report of the subcommittee who examined the election case and the conclusions of the expert who examined the ballots.

The resolution was reported amended to read as follows:

Whereas in the contested election case of Bonynge against Shafroth from the First Congressional district of the State of Colorado certain ballots and poll books purporting to have been cast and used, respectively, at the election held in said district on November 4, 1902, were under stipulation of the parties to said contested election case, submitted to the Committee on Elections No. 2 of the House of Representatives as part of the record in said case and for the purpose of examination and inspection by said committee; and

Whereas the examination of the said ballots and poll books by a subcommittee of said Elections Committee and by an expert in handwriting, employed under authority of a resolution of this House, established the fact that gross frauds and crimes were committed at and in relation to the said election and in connection with the said ballots and poll books; and

Whereas the said ballots and poll books are now in possession of the Clerk of this House; and

Whereas the House is informed that one of the judges of the second judicial district of Colorado has directed a grand jury to inquire into frauds committed at and in relation to said election, in the prosecution of which inquiry the presence of the said ballots and poll books may be necessary; and

Whereas the said ballots and poll books are no longer necessary for the use of the said Elections Committee or of this House: Now, therefore, be it

Resolved, That the Clerk of the House be, and he hereby is, authorized and directed to hold the said ballots and poll books subject to the order of the district attorney of the second judicial district of Colorado, or any of the judges of the court of the said district, to promptly notify the said district attorney and judges that he does so hold the said ballots and poll books, and upon receipt of a request to that effect from the said district attorney or any of the said judges to forward the said ballots and poll books by express in a sealed package or in sealed packages to the said district attorney or judges, as the case may be.

On April 21[1] the resolution was called up in the House by Mr. Martin E. Olmsted, of Pennsylvania, as a matter of privilege.

After debate had proceeded, Mr. John S. Williams, of Mississippi, made the point of order that the resolution was not privileged.

The Speaker[2] held that the point of order came too late.

After debate the resolution was agreed to.

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[1] Record, pp. 5277–5281.

[2] Joseph G. Cannon, of Illinois, Speaker.