Chapter XXV.

GENERAL ELECTION CASES, 1789 TO 1840.

756. The election case of the New Jersey Members in the First Congress.

In the First Congress an inquiry as to an election was instituted on a memorial of citizens of the State.

[1] Additional cases in this period, classified in different chapters, are:
First Congress: Smith, of South Carolina. (Sec. 420.)
Second Congress: Jackson *v.* Wayne, Georgia. (Sec. 708.)
Third Congress: White, Southwest Territory. (Sec. 400.)
Third Congress: Duvall, Maryland. (Sec. 565.)
Third Congress: Edwards, Maryland. (Sec. 567.)
Fourth Congress: Morris *v.* Richards, Pennsylvania. (Sec. 554.)
Seventh Congress: Hunter, Mississippi. (Sec. 401.)
Seventh Congress: Fearing, Northwest Territory. (Sec. 402.)
Seventh Congress: Van Ness. (See. 486.)

[2] Additional cases:
Eighth Congress: McFarland *v.* Purviance. (Sec. 320.)
Eighth Congress: Hoge, Pennsylvania. (Sec. 517.)
Ninth Congress: Spaulding *v.* Mead, Georgia. (Sec. 637.)
Tenth Congress: Key, Maryland. (Secs. 432, 441.)
Tenth Congress: McFarland *v.* Culpepper. (Sec. 321.)
Tenth Congress: McCreery, Maryland. (Sec. 414.)
Eleventh Congress: Turner *v.* Baylies, Massachusetts. (See. 646.)
Thirteenth Congress: Williams, jr., *v.* Bowers, New York. (Sec. 647.)
Thirteenth Congress: Kelly *v.* Harris, Tennessee. (Sec. 734.)
Fourteenth Congress: Willoughby *v.* Smith, New York. (Sec. 648.)
Fourteenth Congress: Root *v.* Adams, New York. (Sec. 650.)
Fifteenth Congress: Mumford, North Carolina. (See. 497.)
Fifteenth Congress: Earle, South Carolina. (See. 498.)
Fifteenth Congress: Hammond *v.* Herrick, Ohio. (Sec. 499.)

(See page 979 for notes 3 and 4.)

In the First Congress the House required its Elections Committee to hear testimony and arguments on both sides of the case, and to report facts only to the House.

On March 23, April 1 and 13, 1789,[1] the Members-elect from New Jersey appeared and took their seats. On April 8[2] all the Members of the House who had so far attended, including all but one of the New Jersey delegation, took the oath prescribed by a rule which had, with other rules, been adopted for governing the proceedings of this, the first House of Representatives.[3] No objection was made to swearing in the New Jersey Members-elect.

On April 28[4] the Speaker laid before the House a letter from Matthias Ogden, referring to sundry petitions annexed thereto, from a number of citizens of New Jersey, complaining of illegality in the late election of Representatives for that State. Other petitions of a similar purport were presented at various times. These petitions were referred on May 14 to the Committee on Elections, with instructions to examine the matter thereof, and report the same with their opinion thereupon to the House.

On May 25[5] the committee reported "that it will be proper to appoint a committee, before whom the petitioners are to appear, and who shall receive such proofs and allegations as the petitioners shall judge proper to offer in support of their said petition, and who shall, in like manner, receive all proofs and allegations from persons who may be desirous to appear and be heard in opposition to the said petition, and to report to the House all such facts as shall arise from the proofs and allegations of the respective parties."

The House agreed to this report and referred the matter to the Committee on Elections.

On August 18[6] Mr. George Clymer, of Pennsylvania, from the Committee on Elections, reported six facts which they had ascertained from the proofs. It

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(See p. 978 for references to notes 3 and 4.)

[3] Additional cases:

Sixteenth Congress: Guyon, jr., *v.* Sage, New York. (Sec. 649.)

Seventeenth Congress: Colden *v.* Sharpe, New York. (Sec. 638.)

Seventeenth Congress: Lyon *v.* Bates, Arkansas. (Sec. 749.)

Eighteenth Congress: Bailey, Massachusetts. (Sec. 434.)

Eighteenth Congress: Forsyth, Georgia. (Sec. 433.)

Eighteenth Congress: Biddle *v.* Richard, Michigan. (Sec. 421.)

Nineteenth Congress: Sergeant, Pennsylvania. (Sec. 555.)

[4] Additional cases:

Twenty-first Congress: Wright, jr., *v.* Fisher. (Sec. 650.)

Twenty-third Congress: Letcher *v.* Moore, Kentucky. (Sec. 53.)

Twenty-third Congress: Allen, Ohio. (Sec. 729.)

Twenty-fifth Congress: Doty *v.* Moore, Wisconsin, as to prima facie right, section 569; as to final right, section 403.

[1] First session, First Congress, Journal, pp. 5, 6, 12.

[2] Journal, p. 11.

[3] The House adopted rules, chose officers, and participated in the count of the electoral vote before the Members were sworn, Journal, pp. 6–10.

[4] Journal, pp 23, 33, 35.

[5] Journal, p. 41.

[6] Journal, p. 83.

appeared from these findings that the returns of the election were canvassed by the governor and council, a majority of whom decided to certify the election of the Members-elect already seated. Three members of the council protested against this act, offering their protest in writing. The grounds of this protest did not appear in the report, nor did the Committee on Elections make any recommendation or depart in any way from a statement of facts.

On July 14[1] the committee made a further report stating that certain allegations in the petitions required the testimony of some witnesses which the committee did not consider themselves authorized to collect; and that they requested the direction of the House in the manner of proceeding with respect to that testimony, and also with respect to the request of the petitioners that they might be heard by counsel on the floor of the House.

757. Case of the New Jersey Members, continued.

In the First Congress the House, after a committee had reported the facts, decided an election case without further hearing on the floor.

In the First Congress the House did not think it necessary to hear petitioners in an election case on the floor by counsel.

A returned Member, whose seat was contested in the First Congress, debated the question as a matter of right.

Reference to the force which should be given to the law of Parliament by the House of Representatives.

On July 15[2] the report was argued on the floor of the House. Mr. Elias Boudinot, one of the sitting Members from New Jersey, taking the floor without objection as to his right so to do, submitted that the certificate of the executive of New Jersey was not the best evidence that the nature of the case required, and that it would be unnecessary to send a commission to New Jersey to take testimony, which would have to be ex parte because of the inconvenience of having the opposite party attend to cross-examine. Furthermore the precedent would be dangerous because if followed as to more remote States,[3] like Georgia, commissions would have to be sent there, and the House would be precluded from viva voce testimony, which was the most satisfactory. It seemed that the evidence already before the House, and such as might be further advanced by the petitioners by viva voce evidence, would be sufficient for a decision.

Mr. Richard Bland Lee, of Virginia, urged that the report should be recommitted and that the committee be authorized to send for evidence, papers, and records, and report a special state of facts. He said it was the custom of the British House of Commons, upon similar occasions, to leave the whole business to a committee; and Mr. Lee further observed[4] that the experience of so old and experienced a legislative body could be followed with safety and propriety. On the other hand, Mr. Samuel Livermore, of New Hampshire, urged that the committee be discharged and that a day be appointed to hear the parties.

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[1] Journal, p. 60; Annals, p. 637.

[2] Journal, p. 61; Annals, pp. 638–642.

[3] The Congress at this time was sitting in New York City.

[4] Annals, p. 641.

A motion was made that the parties be permitted to be heard by counsel and was favored generally by those who favored a trial before the House. Mr. James Madison, of Virginia, favored the admission of counsel; but the motion was withdrawn without decision.

The report was considered again on September 1 and 2,[1] and on the latter day, without having heard counsel or taken other evidence, the House agreed to this resolution:

Resolved, That it appears to the House, upon full and mature consideration, that James Schureman, Lambert Cadwalader, Elias Boudinot, and Thomas Sinnickson were duly elected and returned to serve as Representatives for the State of New Jersey in the present Congress of the United States.

758. The Delaware election case of Latimer v. Patton in the Third Congress.

The State law having prescribed a form of ballot and voting, the House rejected ballots cast in different form.

The returned Member being unseated by rejection of informal ballots, the House seated the contestant.

Discussion in 1793 as to propriety of seating a petitioner after the unseating of the returned Member.

An early election case instituted by petition and tried before the House.

On December 4,1793,[2] the petition of Henry Latimer, of the State of Delaware, was presented to the House and read, complaining of an undue election and return of John Patton, to serve as a Member of the House from Delaware. This was later referred to the Committee on Elections.

On December 13 [3] Mr. Patton appeared and took the oath.

On February 10, 1794,[4] the committee reported. It appeared from this report that the law of Delaware provided "that every person coming to vote for a Representative, agreeably to the direction of the said act, shall deliver, in writing, on one ticket, or piece of paper, the names of two persons, inhabitants of the State, one of whom, at least, shall not be an inhabitant of the same county with himself, to be voted for as Representative."

The returns of the election gave John Patton 2,273 votes and Henry Latimer 2,243 votes, a majority of 30 votes for Patton.

It appeared from the evidence taken by the committee that in some voting places double votes were rejected, and in others single votes were received, which led the committee to this conclusion:

That, agreeably to the election law of Delaware, the 4 votes in Kent County containing the names of Henry Latimer and George Truit which were rejected ought to have been received and counted for Henry Latimer; and the 68 single votes in Sussex County which were received and counted for the said John Patton ought to have been rejected; that if the aforesaid 4 votes in Kent County had been received, and the aforesaid 68 votes in Sussex County had been rejected, as was required by law, the said Henry

[1] Journal, p. 95; Annals, pp. 834, 835.

[2] First session Third Congress, Journal, p. 9.

[3] Journal, p. 15.

[4] Journal, p. 59; Contested Election Cases (Clarke), p. 69.

Latimer would have had, after deducting the 9 single votes received and counted for him in Sussex County, a majority of 33 votes. The committee are, therefore, of opinion that John Patton is not entitled to a seat in this House; they are also of opinion that Henry Latimer is entitled to a seat in this House as a Representative of the State of Delaware.

This report, accompanied by certain written observations thereon by the sitting Member, tending to controvert the reasoning and conclusions of the report, was referred to the Committee of the Whole House, where it was considered on February 13,[1] after which the House agreed to the following:

Resolved, That the Committee of the Whole House be discharged from proceeding thereon, and that the hearing on the trial of the said contested election be now proceeded on in the House, Mr. Speaker in the chair.

The House then proceeded to hear the depositions and other exhibits, as well as the written observations of the sitting Member.

On February 14[2] the reading of the depositions was concluded, and the parties retired from the bar.

Thereupon the House agreed to this resolution, apparently without division:

Resolved, That John Patton is not entitled to a seat in this House.

The following resolution was then proposed:

Resolved, That Henry Latimer is entitled to a seat in this House as the Representative of the State of Delaware.

Mr. John Page, of Virginia, antagonized this resolution.[3] He said that in the case of Jackson *v.* Wayne, where corruption was shown, he had favored the seating of the contestant, who had a majority of sound voters, but the House had decided to keep itself free from partiality and had declined to admit the petitioner. In this case no corruption was alleged. If the 68 freemen of Sussex had violated the law, he nevertheless did not think that the violation was of such a nature as to deprive them of the right of suffrage. There was no doubt that the majority voted for Mr. Patton, and he should not vote to force on the electors a Representative for whom a majority did not vote. Hence he should oppose the pending resolution.

The resolution was agreed to, yeas 57, nays 31.

Mr. Latimer thereupon appeared and took the oath.

759. The New York election case of Van Rensselaer v. Van Allen in the Third Congress.

The major part of the votes in a district being honestly given and duly canvassed, the person having a plurality of such major part was held to be elected.

An early decision that corruption in a small fraction of the votes should not vitiate an election.

No fraud being shown, votes were counted, although the box was for a time irregularly in the custody of sitting Member.

A question as to whether the House should reject votes for irregularities not sufficient to cause their rejection under State law.

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[1] Journal, p. 62.

[2] Journal, p. 63.

[3] Annals, p. 454.

The committee in 1793 declined to permit a ballot to be impeached by the testimony of the voter after the act of voting.

On December 6, 1793,[1] a petition was presented to the House on the part of Henry K. Van Rensselaer, complaining of the undue election and return of John E., Van Allen, as a Member from the State of New York, and giving the following grounds therefor:

1. That in Stephentown, which is comprehended within the election district from which the said John E. Van Allen is returned, there were more votes actually given for the petitioner than appear, from the return of the committee who were appointed by law to canvass and estimate the votes, to have been canvassed and counted.

2. That in the town of Hosack, also included in the said district, the ballot box was not locked agreeably to law, but was only tied with tape.

3. That, at the time of the election, the said John E. Van Allen, who was not an inspector of the election, had in his possession the ballot box of the town of Rensselaerwick, which is also comprehended in the said district.

On December 9 and 18[2] the Committee on Elections reported the following:

It appears to your committee that the allegations in regard to Stephentown, viz, "that the petitioner had a greater number of votes in the said town than was returned to be estimated and canvassed," even if proved, would not, consistently with the law of the State of New York, be sufficient to set aside the votes given at the election in the said town; that even should the irregularities complained of with respect to the elections of the towns of Hosack and Rensselaerwick, be sufficient to set aside the votes given in the said towns, still it appears that the said John E. Van Allen has a majority of the remaining votes of the district composed of the counties of Rensselaer and Clinton.

On December 20,[3] Mr. Richard Bland Lee, of Virginia, speaking for the Elections Committee, stated the following summary of the questions arising:

1. Whether irregularities not deemed by the law of New York sufficient to nullify the votes given shall be regarded by the House of Representatives as having that effect? None of the irregularities were regarded by the law of New York as sufficient to vitiate the returns of votes made by the inspectors, who are sworn officers, and subject to pains and penalties for failure of duty. If the law of New York is to be observed as a sovereign rule on this occasion, the allegations do not state any facts so material as to require the interference of the House of Representatives.

2. Whether, setting aside this first principle, mere irregularities not alleged to have proceeded from corruption shall nullify the return of sworn officers; and whether the House of Representatives ought to countenance and inquire into the mere implications of such serious crimes as perjury and corruption, or should require such charges to be expressly and specifically made?

3. Whether it is or not an indispensable requisite to the existence of a representative government that at every election a choice should be made?

4. Whether, to insure such choice, it is not necessary that this principle should be established: That a majority of legal votes, legally given, should decide the issue of an election?

5. Whether, therefore, partial corruption should be deemed sufficient to nullify an election, or only sufficient to vitiate the votes given under such corruption, leaving the election to be decided by the sound votes, however few?

6. Whether, if partial corruption should [not] be deemed sufficient to nullify an election, such corruption should not extend to the major part of the votes given, and if the major part of the votes be deemed sound, the fate of the election should not depend on the plurality of votes in such major part?

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[1] First session Third Congress, Contested Elections in Congress, from 1789 to 1834, p. 73 Journal, p. 13.

[2] Journal, pp. 14, 17.

[3] Annals, p. 146.

Mr. Lee declared that the last was the opinion of the committee, and finding a major part of the votes duly given and canvassed, and that Mr. Van Allen had a plurality of such major part, they had determined that he was duly returned.

Objection was made that the House possessed the exclusive right to judge of the elections and returns of its own Members, and that the law of New York should not operate to exclude from the knowledge of the House the full amount of the number of votes given. The House should ascertain with precision the actual state of the polls. If the votes of citizens could, under any pretext, be suppressed the essential rights of suffrage were at an end.

On behalf of the committee it was stated that the action of the returning officers of towns in rejecting some votes given in for petitioners was in accordance with the law of New York. The petitioner stated that numbers of persons had sworn that they had voted for petitioner, although it appeared that their votes were not counted. The committee did not consider this allegation proper to engage their attention, and it was presumed that the House of Representatives would never institute an inquiry into such a species of evidence. It was extremely difficult for a man to swear that he had positively voted by ballot for a particular candidate, since it was well known that persons sometimes became confused and cast the wrong ballot. The law of New York justifying the rejection of the votes had been passed under the sanction of the Constitution.

It was also urged against the report that corruption should not be considered by weight and measure, and that admitted irregularities should vitiate an election.

The committee felt that, in a district of ten towns, irregularities in two towns should not vitiate the election, when the voters in those two towns did not amount to a majority of the whole number of votes in the district.

With respect to the deposit of a box containing a part of the votes in the house of sitting Member, the committee did not give it weight, since it had not been shown that the votes were tampered with, and the petitioner had not charged that sitting Member was accessory to any unfair practices.

On December 24,[1] the House refused to recommit the report, and then agreed to the following:

Resolved, That the allegations of the petition do not state corruption nor irregularities of sufficient magnitude, under the law of New York, to invalidate the election and return of John E. Van Allen to serve as a Member in this House, and that therefore the said John E. Van Allen is duly elected.

760. The Virginia election case of Trigg v. Preston in the Third Congress.

The House, overruling its committee, declined to invalidate a close election because of an interference, not shown definitely to have been effective, by a body of United States troops.

The negativing of a resolution declaring a sitting Member not elected left him undisturbed in his seat.

An early election case instituted by petition and tried before the House.

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[1] Journal, p. 20.

In 1794[1] the seat of Francis Preston, of Virginia, was contested by Abraham Trigg, whose petition was presented December 26, 1793,[2] and referred to the Committee on Elections.

The committee's examination of the case showed that the sheriff holding the election in one county had exercised a discretionary power, given him by the law of Virginia, of closing the poll at any time of day, after three proclamations and no voters appearing. In another county the sheriff exercised the same discretionary power, vested in him by the law of the State, to adjourn the election in consequence of rain.

These facts, which militated in favor of the sitting Member, were not, however, the portion of the case most in controversy. In Montgomery County the election had been disturbed by a body of United States troops, not shown to have been under arms, but marched about under command of Capt. William Preston, their officer and brother and election agent of the sitting Member, and who was armed with sword and dagger. The committee were unable to ascertain, from the conflicting testimony, that any voter was actually prevented from voting, yet there was reasonable ground to believe that some were, and that the election was unduly biased by the soldiers. As the petitioner lost his election by only 10 votes, the committee concluded that the result had been changed, and that Mr. Preston was not entitled to his seat. The committee stated that the soldiers were not disfranchised of the right of voting, but that their votes, which were for the sitting Member, were kept separately and afterwards were rejected by the returning officers.

After debate the House, without division, decided in the negative this resolution:

Resolved, That Francis Preston is not duly elected a Member of this House.

This decision confirmed the sitting Member, no question apparently being made as to the effect of the vote.[3]

This election case was tried before the House after the forms in the cases of Jackson *v.* Wayne and Latimer *v.* Patton.[4]

761. The Vermont election case of Lyon v. Smith in the Fourth Congress.

Notices of election having failed to reach two towns in a district, and no votes being cast in those towns, the House declined to affirm sitting Member's title without direct evidence as to the numbers of voters in the towns.

The House declined to reverse a return on the possibility, but not the probability, that the voters of two towns accidentally not included in the notice of election might have changed the result had they voted.

On December 8, 1795,[5] a petition was presented to the House from Matthew Lyon, complaining of an undue election and return of Israel Smith, to serve as a

[1] First session Third Congress, Contested Elections in Congress, from 1789 to 1834, p. 78.

[2] Journal, p. 21.

[3] Journal, p. 134; Annals, p. 613.

[4] Journal, pp. 133, 134.

[5] First session Fourth Congress, Journal, p. 369.

Member from the State of Vermont. This petition was referred to the Committee on Elections. On December 25[1] the Speaker laid before the House a letter from Matthew Lyon transmitting further testimony, which was referred to the Committee on Elections.

On January 27, 1796,[2] Mr. Abraham Venable, of Virginia, submitted the report of the committee, which showed that the first election in the district in question did not result in a choice. Thereupon a new election was ordered, and warrants were issued for a new election. The sheriff of the county of Addison failed to deliver the warrants to the towns of Kingston and Hancock, which in the first election had given votes as follows: Kingston, 12 for Israel Smith; Hancock, 3 for Matthew Lyon. At the second election in the district the vote returned was: For Israel Smith, 1,804; Matthew Lyon, 1,783. Therefore the committee concluded:

> That as it does not appear to the satisfaction of the committee that there was a sufficient number of freemen in those two towns to have altered the state of the election, fifteen only having voted on the first occasion, they are of opinion that Israel Smith is entitled to take his seat in this House.

On February 4[3] Mr. Uriah Tracy, of Connecticut, moved that the report be recommitted in order that the petitioner might have the opportunity to bring forward legal testimony. It appeared that all of petitioner's testimony had been taken ex parte, and therefore had not been considered by the committee, which had based its conclusions on the returned votes of the two towns at the preceding election.

On February 11, 12, and 15[4] the motion to recommit was debated at length. It was urged that the petitioner should have sent competent testimony, and that it was not the business of the House to hunt up evidence. On the other hand, it was urged that the House had adopted no regulations concerning the taking of testimony, and the petitioner had no power to take anything but ex parte testimony. It was also intimated that the sheriff acted with fraudulent intent. The consideration of the subject was finally postponed until March 29.

On February 16,[5] however, Mr. James Hillhouse, of Connecticut, proposed a rule for taking testimony in election cases, with a view to its applicability to the pending contest, but the matter was postponed.

On February 17[6] the House reconsidered its decision to postpone the case of the petitioner, and recommitted the report.

On March 29[7] the petitions of sundry electors and citizens of the towns of Kingston and Hancock, stating that they had been deprived of their right of voting, etc., were received and referred to the Committee on Elections.

On May 13[8] Mr. Venable submitted the second report of the Committee on Elections. This report was as follows:

> That it appears by the deposition of the town clerk of Hancock that there were 17 persons in the said town who were entitled to vote; 12 of whom are stated to have been admitted in that town and 5 in other towns
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> That, by a like deposition of the clerk of Kingston, it appears that there were in that town 19 persons, 17 of whom had been qualified in that town, and 2 in other towns.

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[1] Journal, p. 386.

[2] Journal, p. 429; Contested Election Cases, Clarke, p. 102.

[3] Annals, p. 295.

[4] Annals, pp. 315–328.

[5] Journal, p. 444; Annals, p. 331.

[6] Journal, p. 446; Annals, p. 338.

[7] Journal, p. 486.

[8] Journal, pp. 555, 597; Annals, p. 1497.

That it does not appear that the warrants were withheld from the said towns by the sheriff from any fraudulent intention, but the failure was accidental as to the town of Kingston, and the warrant was not sent to the town of Hancock because the sheriff believed they had not voted at the first meeting.

On May 31 [1] the following resolution was proposed:

Resolved, That as there appears to have been a sufficient number of qualified voters in the towns of Kingston and Hancock to have changed the state of the election, Israel Smith was not duly elected.

This was advocated on the grounds that there were voters enough in the two towns to have changed the election, and also because the principle should be established that every town should have notice of election.

On the other hand, the possibility, but not the probability, that the 36 voters in the two towns would have changed the election, was admitted. Against his, however, was balanced the vote in the previous election, and the fact that Mr. Lyon could only bring twenty to declare that they would vote for him. Had those twenty voted for him, and none for Mr. Smith, the latter would have a majority of one vote. But seven had made affidavit that they would have voted for Mr. Smith.

The House disagreed to the resolution, yeas 28, nays 41. Then it was:

Resolved, That Israel Smith is entitled to a seat in this House as one of the Representatives from the State of Vermont.

762. The Virginia election case of Bassett v. Clopton in the Fourth Congress.

The House having deducted from the returns the number of votes cast by disqualified persons, awarded the seat to the candidate receiving the highest number of votes cast by qualified voters.

On January 18, 1796,[2] the Committee on Elections reported as follows in the Virginia contested election case of Bassett *v.* Clopton, holding:

That, upon an estimate of all the polls taken at the several elections, John Clopton had 432 votes, and Burwell Bassett 422.

That, out of the number of persons who voted for John Clopton, 37 were unqualified to vote; and of those who voted for Burwell Bassett, 33 were also unqualified to vote.

Whereupon, your committee are of opinion that John Clopton, who has the highest number of votes, after deducting the before-mentioned defective votes from the respective polls, is entitled to a seat in this House.

In this report the House concurred.

763. The Massachusetts election case of Joseph Bradley Varnum in the Fourth Congress.

Instance of an election case instituted by memorial from sundry citizens and electors of the district.

In an election case where it is alleged that votes have been cast by persons not qualified, the names of such persons should be given in the notice of contest.

In an election case an allegation that a certain number of votes were

[1] Journal, p. 597; Annals, p. 1497.

[2] First session Fourth Congress, Contested Elections in Congress, from 1789 to 1834, p. 101.

cast by proxy was conceded sufficiently certain without specification of the names.

The House declined to assist sundry petitioners in a district to collect testimony in proof that the seat of a returned Member should be declared vacant.

Certain petitioners against the right of a returned Member to his seat having impugned his personal conduct in the election, the House rendered a decision thereon.

On February 25 and 26, 1796,[1] memorials were presented from sundry citizens and electors of the Second middle district in Massachusetts, whose names were thereunto subscribed, complaining of an undue election and return of Joseph Bradley Varnum, returned as a Member of the House from the said district, and praying, for certain reasons stated in the memorials, that the seat be declared vacant. These memorials were referred to the Committee on Elections. On March 9,[2] Mr. Theodore Sedgwick, of Massachusetts, presented certain testimony in the case, which was also referred.

On March 15[3] Mr. Abraham Venable, of Virginia, submitted the report of the committee. The report stated that Aaron Brown, a petitioner, had filed a paper making the following specifications:

1. That 185 votes were returned by the selectmen of Dracut, and counted by the governor and council.

2. That, of those, 60 were illegal and bad, 55 ballots or votes being received and certified by the selectmen or presiding officers, of whom Joseph Bradley Varnum, esq., was one, which were given by proxy; that is, from persons who were not present at the meeting, but from other persons who pretended to act for them; and 5 votes were received and certified by the said presiding officers, which were given by persons by law not qualified to vote at said meeting.

3. If Mr. Varnum does propose to examine the proceedings at the meetings of any other towns in the district, the petitioners wish to reserve liberty of showing that votes given for Mr. Varnum, in any other town in the district were illegal.

The petitioners expect to prove that the above 60 illegal votes were received by the selectmen, by showing that the whole number of legal voters was not more than 225, of which number 100 did not attend the meeting on the 23d day of March last; and a part of those who did attend and vote were not legally qualified to vote.

The committee also reported that there was a requisition of the sitting Member that the petitioners be held to a specification of the names of the persons objected to, and the objection to each, and a notification thereof to the sitting Member before he should be compelled to take evidence concerning the matters alleged, or make any answer thereto. Therefore, the committee asked the instructions of the House as to the kind of specifications to be demanded of the petitioners, and the manner in which the evidence should be taken.

This report was debated at length in Committee of the Whole. It was urged that as Mr. Varnum, had a majority of only 11 votes, the election would be invalidated if 23 of the 60 votes charged to be illegal were really proven to be so. It had been impossible to get the names of the illegal voters in Dracut, as the town clerk had

[1] First session Fourth Congress, Journal, pp. 450, 451.

[2] Journal, p. 468.

[3] Journal, pp. 471, 472; Contested Election Cases, Clarke, p. 112; Annals, p. 823.

refused to give certified copies of his records, and the inhabitants of the town would not give information against Mr. Varnum.

On the other hand it was argued that to give the power to take testimony would be to make the House a party to a search for testimony, a practice which would result in harassment to Members.

Mr. Varnum was heard as a matter of course during the debate.

The Committee of the Whole agreed to and reported the following resolutions, which were agreed to by the House on that day: [1]

Resolved, That the allegation of Aaron Brown, agent of the petitioners, as to 55 votes given by proxy is sufficiently certain.

Resolved, That the allegations of said Aaron Brown, as to persons not qualified to vote, is not sufficiently certain; and that the names of the persons objected to for want of sufficient qualifications, ought to be set forth, prior to the taking of testimony.

Mr. Sedgwick had proposed in Committee of the Whole a resolution providing that the Committee on Elections should prescribe a method of taking testimony in this case, but it was not acted on.[2]

On January 19, 1797,[3] at the next session, the committee reported:

That none of the petitioners or their agents have appeared at the present session to prosecute, nor have they transmitted any evidence to support their allegations.

That the sitting Member has produced evidence to show that the election in the town of Dracut, where the irregularities were suggested to have been committed, was conducted with the utmost fairness and propriety, especially as it relates to his conduct. That, although some little irregularity was practiced, it was in other towns, in favor of another candidate, and chiefly by those persons who have since been the active agents of the petitioners.

Your committee are therefore of opinion that Joseph Bradley Varnum was duly elected, and that the attempt to deprive him of his seat was rather the effect of malevolence than a desire to promote the public good.

On January 25,[4] by a vote of yeas 44, nays 28, the last clause of the last paragraph, characterizing the attempt as the effect of malevolence, was stricken out and the following inserted:

and that the charges contained in the said petitions against the sitting Member are wholly unfounded, and that the conduct of the sitting Member appears to have been fair and unexceptionable throughout the whole transaction.

On January 26 [5] the report as amended was agreed to.

764. The Pennsylvania election case of David Bard in the Fourth Congress.

A failure of the canvassing board to meet within the time required by law being satisfactorily explained, was held by the House not to affect the Member's title.

Instance of an inquiry into a Member's title to his seat by the Elections Committee under authority of general investigations.

In the earlier practice the credentials of Members were passed on by the Elections Committee (footnote).

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[1] Journal, p. 487.

[2] Annals, p. 823.

[3] Second session Fourth Congress, Journal, p. 650.

[4] Journal, pp. 659, 660.

[5] Journal, p. 661.

On March 18, 1796,[1] the Committee on Elections, who had investigated ex officio the credentials[2] of David Bard, of Pennsylvania, found that the Member's title was not invalidated by reason that the county judges, who were required by State law to meet November 15 to canvass the vote, had actually not met until May 1 following. This informality was occasioned by the delay of a return of the soldier votes of one county and by failure of one county judge to be informed as to a change of the law providing for the meeting of the judges. The committee sent for and canvassed the county returns on which the district return had been based, and reported to the House the result, showing the election of Mr. Bard.

The House agreed to the report, confirming the title of Mr. Bard.

765. The Virginia election case of Moore v. Lewis in the Eighth Congress.

The House having deducted from the returns the number of votes cast by disqualified persons, awarded the seat to the candidate receiving the highest number of votes cast by qualified voters.

The House in 1803 permitted a contestant in an election case to be heard by counsel at the bar of the House.

On February 24, 1803,[3] on the subject of the contested election of Moore *v.* Lewis, from Virginia, the Committee on Elections made a report containing the following summary:

> That all the persons who voted for Thomas Lewis in the several counties aforesaid, which compose the western district of the State of Virginia, were 1,004, and that all the persons who voted for Andrew Moore in the said counties were 832.
>
> It further appears, on a deliberate scrutiny, that of the above votes 355 persons voted for Thomas Lewis who were unqualified to vote and that 124 voted for Andrew Moore who were unqualified to vote; and that, by deducting the unqualified votes from the votes given for each of the parties at the elections, Thomas Lewis has 649 good votes and Andrew Moore has 708 good votes, being 59 votes more than Thomas Lewis.

Therefore the committee were of the opinion that Thomas Lewis was not elected and not entitled to his seat, and that Andrew Moore, who had the highest number of votes after deducting the unqualified votes, was duly elected and entitled to the seat.

The House on March 1 confirmed the first proposition of the committee by a vote of yeas 68, nays 39. The second proposition was also agreed to; yeas 64, nays 41.

Mr. Moore thereupon took his seat.[4]

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[1] First session Fourth Congress, Contested Elections in Congress from 1789 to 1834, p. 116; Journal, pp. 474, 475.

[2] The credentials of Members were referred and examined at this time by the Elections Committee under authority of a resolution usually adopted at the first of each Congress, and for this Congress in form as follows:

Resolved, That a standing Committee on Elections be appointed, whose duty it shall be to examine and report upon the certificates of election or other credentials of the Members returned to serve in this House, etc. (First session Fourth Congress, Journal, p. 366.)

[3] First session Eighth Congress, Contested Elections in Congress from 1789 to 1834, p. 128.

[4] Leave was granted to the memorialist and sitting Member to be heard by counsel at the bar of the House. (Journal, pp. 609, 615.)

766. The election case of Randolph v. Jennings, from Indiana Territory, in the Eleventh Congress.

The House, overruling its committee, declined to unseat a returned Delegate because in calling the election the governor had exercised doubtful authority.

On January 12, 1810,[1] the House came to a decision in the contested election case of Randolph *v.* Jennings, from the Territory of Indiana.

It was alleged in this case that there were informalities in the return of the vote, that two districts, by fault of a sheriff, did not vote, and finally that the authority under which the election was called by the governor was defective. The committee reported only on the last objection, which they conceived to be fundamental, and they found that, by reason of defective legislation of Congress, the governor did not have full authority to do what he had assumed to do. The committee state the case thus:

> If the governor of the Indiana Territory, instead of exercising the legislative authority of Congress on what he supposed a liberal construction of the law, had represented the case to Congress at the last session the defect would have been supplied and the Territory now legally represented in Congress. It can not be admitted that the governor of a Territory may, by his own authority, supply a want or defect of a law of Congress on his own opinion of a liberal construction, expediency, or necessity. To sanction such an assumption of power by a vote of this House would set a dangerous precedent. On this view of the subject the committee submit the following resolution:
>
> *Resolved,* That the election held for a Delegate to Congress for the Indiana Territory, on the 22d of May, 1809, being without authority of law, is void, and consequently the seat of Jonathan Jennings, as a Delegate for that Territory, hereby declared to be vacant.

A motion in the House to strike out the words "being without authority of law," was negatived, 51 to 45.

The House, after debate, nonconcurred in the report of the committee, by a vote of 83 to 30.

A resolution was then proposed declaring Mr. Jennings entitled to his seat.

The motion was withdrawn after debate.

Mr. Jennings therefore retained the seat.

767. The first election case of Taliaferro v. Hungerford, from Virginia, in the Twelfth Congress.

The House, overruling its committee, concluded to decide an election case as made up without giving sitting Member time for further investigation.

The House, having corrected the returns by an ascertainment of the qualifications of certain voters, seated the contestant in accordance with the findings.

On November 21, 1811,[2] the Committee on Elections reported on the Virginia contested election case of Taliaferro *v.* Hungerford. The committee found that according to the laws of Virginia the land list of the year prior to the election was prima facie evidence of all the freeholders in the county. A correction of the poll in accordance with the land list was made by the committee, and resulted in such

[1] Second session Eleventh Congress, Contested Elections in Congress from 1789 to 1834, p. 240; Journal, pp. 171, 172; Annals, p. 1199.

[2] First session Twelfth Congress, Contested Election Cases in Congress, from 1789 to 1834, p. 246.

changes that in the district the majority of six votes for the sitting Member was changed to a majority of 121 for Mr. Taliaferro.

The committee, however, conceived that a longer time should be given the sitting Member to investigate the facts, the land-list test not being considered conclusive. The contestant had filed notice of contest in ample time; but his purpose to follow up the notice with actual steps to contest had not, the committee thought, been developed in time to allow the sitting Member to complete his case.

The House, by a vote of 46 to 65, disagreed to the recommendation of the committee.

Then, by a vote of 67 to 29, Mr. Hungerford was declared not entitled to the seat; and by a vote of 66 to 19, Mr. Taliaferro was declared entitled to the seat. Mr. Taliaferro, thereupon appeared and qualified.

768. The second election case of Taliaferro v. Hungerford, from Virginia, in the Thirteenth Congress.

The House, overruling its committee, declined to reject returns because of irregular making up of poll books and returns, no fraud being charged.

On June 10, 1813,[1] the Committee on Elections reported in the second contest of Taliaferro *v.* Hungerford, from Virginia. The committee in this report found that the election was illegal and John P. Hungerford was not entitled to the seat, because of neglect on the part of certain election officers to comply with the law of Virginia, which directed that "the clerks of the polls shall enter in distinct columns, under the name of the person voted for, the name of each elector voting for such person." The law further directed that "the clerks of the polls having first signed the same and made oath to the truth thereof, a certificate of which oath, under the hand of the magistrate of the county, shall be subjoined to each poll, shall deliver the same to the sheriff," etc.

The committee found numerous deviations from this law, in one county the names of the voters being all entered in one column, while figures were placed under the names of the candidates to show for whom each person's vote was given. In another county the names of the voters were entered in the same way, straight marks instead of figures being carried into the columns under the names of the candidates. In other counties, four in all, no certificate was found of any oath administered to the clerks of the polls. In one county the Christian name of the candidate was not written on the poll, the initial only being given.

The sitting Member contended that these deviations were sanctioned by long practice.

The committee, however, were sensible that trivial errors of officers conducting elections should not deprive any class of citizens of representation. But "to preserve the elective franchise pure and unimpaired, the positive commands and requirements of the law, in respect to the time, place, and manner of holding elections, ought to be observed. To enter the names of the voters promiscuously in one margin of the poll book, when the law positively directs them to be 'entered in distinct columns' and 'under the name of the candidate voted for,' is as manifest a

[1] First session Thirteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 250.

departure from the law as the selection of another time or another place than that mentioned in the law. Nor can the committee conceive that the prefixing the initial only of the Christian name to that of the family or surname of the voter is a fair compliance with the spirit and intent of the law."

The House, by a vote of 78 to 82, refused to agree to the recommendation of the committee, and on June 16, the report was recommitted.

On June 28 the committee again reported, in this case their report dealing with the comparison of the poll with the land list; but the committee concluded that this land list was not a conclusive test of the legality of the poll under the Virginia law, and that testimony might be admitted to impeach it. Therefore they held that in this respect the petitioner had not sustained his contention.

On July 31, 1813, the case was postponed until the next session of Congress, when it was again referred to the Committee on Elections. On January 10, 1814, the committee reported that after mature consideration they had come to the conclusion—

> That this election is void, and ought to be set aside, because it was conducted in an irregular manner, contrary to the law of Virginia prescribing the manner of conducting such elections, as is more particularly set forth in the first report.

The committee therefore proposed that the "said election was illegal and ought to be set aside;" and "that John P. Hungerford is not entitled to a seat in this House."

On February 1, 1814, the Committee of the Whole reported their disagreement to these propositions, and on February 17 the House concurred with the Committee of the Whole. So Mr. Hungerford retained the seat.

769. The Virginia election case of Bassett v. Bayley in the Thirteenth Congress.

Form of resolution confirming the title of sitting Member to his seat.

A sheriff having adjourned an election for a reason not specified as a cause of adjournment, the Elections Committee rejected votes cast after such adjournment.

On February 11, 1814,[1] the House, in the contested election case of Bassett *v.* Bayley, of Virginia, agreed to the following resolution, reported from the Committee on Elections on February 2:

> *Resolved,* That the sitting Member is entitled to his seat.

The committee arrived at this result by deducting from the vote as originally returned those votes illegally given, a process which still showed a majority for the sitting Member.

The largest deduction was one of 53 votes from the total of the sitting Member. This deduction represented the votes cast on the second and third days of the election in Accomac County. The law of Virginia allowed the continuance of a poll by the officer in charge beyond the first days in cases where a rain had fallen, where there had been a rise of the water courses, or where more electors attended than could vote in one day. The committee found that none of these conditions

[1] First session Thirteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 254.

prevailed and that the action of the sheriff was illegal. Therefore they recommended the deduction of the votes cast on the second and third days. But such deduction was not sufficient to destroy the majority of the sitting Member.

This case had first been reported June 3, 1813, when a further examination of evidence was recommended. The House recommitted the report, with the result that the subject went over to the next session.

770. The Virginia election case of Porterfield v. McCoy in the Fourteenth Congress.

Having deducted from the poll all the votes illegally given, the House confirmed the title of sitting Member, who had a majority of legal votes.

In a report sustained by the House, the Elections Committee declined to reject testimony not taken according to the practice established by State laws.

No fraud or injury being alleged, the Elections Committee declined to reject a poll because of neglect of the election officers to take the required oath.

The Elections Committee, in a sustained case, declined to reject a poll because of informalities, in the poll books and return.

On February 19, 1816,[1] the Committee on Elections, to whom was referred the Virginia contested election case of Porterfield *v.* McCoy, reported that after deducting from the poll on both sides the votes illegally given, they found that the sitting Member had a majority of 75 over the petitioner.

In the determination of this case the committee made certain rulings, which they reported to the House.

The sitting Member had objected to the testimony of the petitioner on the ground that it had not been taken within the period limited for that purpose in contested elections for members of the Virginia legislature, and because the petitioner had made the unreasonable delay of four months in commencing investigation. The committee overruled these objections and admitted the testimony.

The petitioner objected that the clerks appointed by the sheriff to keep the poll were not sworn previous to the commencement of the voting, but on the next day examined and subscribed the poll and made affidavit to its truth and correctness. The committee overruled this objection, the testimony showing that the clerks conducted the election under the impression that they would be sworn at the close, in accordance with the custom of the county.

The petitioner further objected that the names of the voters were not written under the names of the candidates, but in a single column, with the votes carried forward and marked under the names of the candidates. The committee overruled this on the ground of prevailing custom.

771. The case of Porterfield v. McCoy, continued.

An agreement of parties, as to the admissibility of votes was overruled by the Elections Committee on the ground that the elective franchise might not be qualified by such agreement.

The Elections Committee, in a sustained case, ruled that all votes

[1] First session Fourteenth Congress, Contested Elections (Clarke), p. 267.

recorded on the poll lists should be presumed good unless impeached by evidence.

In a sustained case, the Elections Committee admitted as proof of his title to vote the voter's properly taken affidavit.

The committee also overruled the request of the sitting Member that he be allowed to avail himself of an agreement entered into with the petitioner as to the admissibility of certain votes, the committee being of opinion that an agreement of parties could not diminish or enlarge the elective franchise.

The committee further decided—

1. That all votes recorded on the poll lists should be presumed good unless impeached by evidence.
2. That certified copies of the commissioner's books or land lists should be read in evidence, and deemed satisfactory as to the qualification or disqualification of voters, unless corrected by other evidence; and
3. That the affidavit of the voter taken before competent authority in pursuance of regular and sufficient notice, should be read in evidence to prove his title to vote.

The committee reported these rules to the House with the case.

On April 19 the House confirmed Mr. McCoy in his seat.

772. The election case of Easton v. Scott, from the Territory of Missouri, in the Fourteenth Congress.

The House in 1817 held that it was competent to examine the qualifications of voters, although they had voted by a secret ballot and might be compelled to disclose their votes.

The House may investigate a contested election of a Delegate as of a Member.

The Elections Committee declined to favor giving a petitioner prima facie title to a seat because a partial investigation showed a majority for him.

In 1816 and 1817 the House considered at length the contested election case of Easton *v.* Scott from the Territory of Missouri, on which the Committee on Elections reported in favor of seating the petitioner. The charges of irregularities were numerous, and although the report of the committee was once recommitted, the House did not arrive at any conclusion as to the merits of the case as between the contestant and contestee; but adopted, on January 12, 1817,[1] a resolution that the election had been illegally conducted, and that the seat of the Delegate from the Territory was vacated.

During the examination of the case certain principles of procedure were discussed and determined, some by the committee alone and some by the committee and House.

The law of the Territory requiring "that, in all elections to be held in pursuance of this act, the electors shall vote by ballot" the committee held that a secret ballot was intended, and that there existed no authority to compel a voter to disclose for whom he voted. Therefore it would be impossible to inquire into the qualifications of electors with a view to purge the polls. But on January 3, 1817,[2] when the

[1] Second session Fourteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 272.
[2] Annals, pp. 414, 418.

report was considered in the House, Mr. Daniel Webster made the criticism that qualifications of the voters had not been considered, and moved that the report be recommitted to the Committee of Elections with instructions "to receive evidence that persons voting for either candidate were not entitled to vote on the election." On this motion a wide debate took place as to whether or not votes given by ballot, and of course secretly, could be afterwards ascertained, or the voter be required to declare for whom he voted. Other points were also touched on in this debate, which resulted, on January 4, in an affirmative action on the motion to recommit with the instructions, by a vote of 86 yeas to 50 nays.

On January 4,[1] also, the question was raised on the floor of the House that Delegates could not be considered Members of the House, and therefore, that the House could not be the judge of their election and return. Mr. Samuel R. Betts, of New York, who raised this point, moved, therefore, that the subject be indefinitely postponed. In opposition to this it was argued that in 1809 the House had considered such a case, and the people of the Territories were authorized under the law to have Delegates, and therefore had a right to be represented correctly. If the House could not examine in such a case, the returning officer became absolute judge; and the returning officer might return two Delegates. What would the House do then? The motion to postpone indefinitely was decided in the negative by a large majority.

In their first report the committee rejected the votes in the township of Cote Sans Dessein for a variety of reasons, including the fact that the result of the voting was sent to the governor in an irregular manner. The rejection of this township—which, however, was only one of many places yet to be examined where irregularities were charged—left a majority of 7 votes for the petitioner. Therefore Mr. Easton claimed that the rejection of the irregular return of Cote Saris Dessein would change the figures on which the governor's return had been made so as to require, under the law, the issuance of a certificate to himself instead of Mr. Scott. Thus he claimed that the decision of the committee showed that the prima facie right to the seat belonged to him rather than to Mr. Scott; and, citing the parliamentary law of England in support of his contention, asked that he be made the sitting Member, and that Mr. Scott be put in the place of contestant. The committee decided that this request should not be granted, and proceeded with the investigation.

773. The case of Easton v. Scott, continued.

When the law requires a vote by ballot, an election viva voce is not permissible and is a reason for rejection of the returns.

Where electors are objected to for want of qualifications, their names should be set forth in the notice of contest.

A requirement of law that the number of votes given shall be "set down in writing" I on the poll book is fulfilled by the use of numerals.

There being no time to collect the evidence needed to determine the right to a seat, the House, on a showing unfavorable to sitting Delegate, declared the seat vacant.

The seat of a Delegate being declared vacant, the Speaker was directed to inform the governor of a Territory.

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[1] Annals, pp. 415–417.

The committee, in rejecting the votes of Cote Sans Dessein, did so for a variety of causes, as: The election was held viva voce, when the law prescribed ballot; neither the judges (two where three were required) nor clerk were sworn as required by law.

The committee also ruled that a requirement of the law that "the number of votes given to each person shall be set down in writing at the foot of the poll book" was sufficiently complied with by the following entry: "For Rufus Easton, 16—For John Scott, 1072."

The committee also established the rule, taking for precedent the case of Joseph B. Varnum in the Fourth Congress, that the names of the electors objected to for want of sufficient qualifications ought to be set forth prior to the taking of testimony. The committee said in reference to this decision:

> If the House concur with the committee in this opinion, it follows that no evidence has been submitted by either party enabling the committee to investigate the qualifications of the electors. The committee are further of opinion that evidence can not be procured in season to enable the committee to investigate the qualifications of the electors during the present Congress.

Therefore they asked to be discharged from the consideration of the subject of qualifications.

On January 12, 1817, the House rejected an amendment declaring Mr. Easton entitled to the seat; and finally agreed to the following:

> *Resolved,* That the election in the Territory of Missouri has been illegally conducted and the seat of the Delegate from that Territory is vacant; that the Speaker inform the governor of that Territory of the decision of this House, that a new election may be ordered.

774. The Vermont election case of Mallary v. Merrill in the Sixteenth Congress.

The House is not confined to the conclusions of returns made up in strict conformity to State law, but may examine the votes and correct the returns.

No fraud being alleged, the House counted returns transmitted in an unsealed package, although the State law required the package to be sealed.

The House counted votes rejected by a State canvassing board because returned by error for persons not candidates for Congress.

The House counted votes duly certified but not delivered to the State canvassers because of negligence of a messenger.

On January 5, 1820,[1] the Committee on Elections, who had been considering the case of Mallary *v.* Merrill, of Vermont, reported that in their opinion Orsamus C. Merrill was not entitled to the seat, and that Rollin C. Mallary was entitled to it.

Under the law of Vermont the returns of the towns were transmitted to a canvassing committee chosen by the general assembly, and in accordance with the findings of that committee the governor of the State, in accordance with the law, executed credentials to Mr. Merrill.

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[1] First session Sixteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 328.

But the Committee on Elections, going behind the governor's certificate and the result ascertained by the canvassing committee, found the following facts:

That the canvassing committee had rejected the legally given votes of the town of Fairhaven because the election officers of that town had transmitted the certificate of votes to the canvassing committee in an unsealed packet, while the law required the packet to be sealed. The committee, holding that the House of Representatives had not been accustomed to allow votes legally given to be defeated by the mistake or negligence of a returning officer, were of the opinion that the votes of Fairhaven should be allowed to the contestant.

That the canvassing committee had rejected the legally given votes of the town of Plymouth because the certificate of the presiding officer, while complete and definite, was not in the exact form prescribed by the statute of the State. The Committee on Elections were of the opinion that the prescribed form had been substantially adhered to and that the votes should be counted.

That the canvassing committee had rejected the return of the town of Woodbury because the votes actually given for Congressmen had, through the mistake of the presiding officer, been returned for certain gentlemen who were candidates for State councilors, and in whose favor not one vote was given for Representatives in Congress. The record made in the town clerk's office, in accordance with law, showed the correct result. The Committee on Elections concluded that this error should be corrected and the legally given votes be recorded.

That the legally given votes of the town of Goshen were certified in due form, but the messenger provided by law to deliver the votes to the canvassing committee failed to do so. The Committee on Elections considered that this failure should not be allowed to keep from the poll the votes of the town.

These corrections gave a majority to the petitioner, Mr. Mallary.

The arguments of contestant and sitting Member, which were submitted in writing to the committee and published as part of the report, practically assumed the correctness of the committee's deductions, but joined issue as to the right of the House to go behind the determination of result arrived at by State authority.

The contestant argued that, as the House was the judge of the election of its own Members, State authority might not create an intervening obstacle. It would be unreasonable to say that the House should be bound by laws never intended to operate on its privileges, and if intended so to operate must be nugatory. It could not be inferred, because the canvassing committee were required to receive the certificate of a town clerk or constable as evidence, the Congress was to receive no other. The precedents of the House showed that the qualifications of the electors had been frequently examined by the House. In the Georgia case of 1804 the House had gone behind the State return.

The sitting Member contended that the settled order of business prescribed by the election law of a State was binding on the House regarding the election of its Members unless "the Congress, by law, have altered such regulations." If State laws were agreeable to the Constitution and the requisites of the laws were regarded, the proceedings of the freemen and the decisions of the State tribunes were in good faith to be recognized and accredited. While the Congress might modify a State law on this subject, the House alone could hardly assume to do so. The pro-

ceedings in a State, done conformably to law, were of more than prima facie effect. "I strenuously and boldly urge," he said, "that the power of the House of Representatives, and its committee, as judges of the election, returns, and qualification of its Members are limited to the law of the State and the Constitution; they are to inquire and decide whether either have been infringed, and whether all proceedings have been done in good faith. They are not authorized to step behind a constitutional statute, except to see whether its provisions have been regarded. The statute is the act of the freemen and is the expression of their will, and it is as vitally important to them as the deposit of their ballots. The House of Representatives, without the cooperation of the other branch of Congress, can not pass behind the law of Vermont, to alter or contradict it, without the exercise of unconstitutional and dangerous power."

The report of the committee was debated in the House on January 11, especially with reference to the issue joined in the arguments of the parties, and on January 13, by a vote of 116 to 47, Mr. Mallary was declared to be entitled to the seat.

775. The Maryland election case of Reed v. Causden, in the Seventeenth Congress.

The Constitution requires election of Representatives by the people, and State authorities may not determine a tie by lot.

The decision of elections officers that ballots were fraudulently folded was reviewed and reversed by the House.

The House reviewed and reversed the decision of elections officers in admitting a ballot not conforming to the State law.

Opinions of the Elections Committee as to investigating qualifications of voters who have voted by secret ballot.

The House, overruling its Speaker, held that a negative decision on a resolution declaring a contestant not elected was not equivalent to affirmative affirmation.

The Committee on Elections, on March 11, 1822,[1] reported in the contested election case of Reed *v.* Causden. This case involved both a question of the constitutionality of the act of the governor and council of Maryland, and a question of fact as to the votes actually given.

The returns of the election, as made to the governor and council, showed that the contestant and sitting Member had an equal number of votes, and that neither had the "greatest number of votes" as by the constitution of the State was required to constitute an election. In this situation, the governor and council of Maryland, acting under the State law of 1790, proceeded by lot to decide between the two candidates, and decided in favor of Jeremiah Causden. The Committee on Elections expressed the belief that the law of 1790 had been repealed by a subsequent law; but dismissed this point as unessential in view of the constitutional question involved. The Constitution of the United States provided that "the House of Representatives shall be composed of Members chosen every second year by the people of the several States," and that "each House shall be the judge of the elections, returns, and

[1] First session Seventeenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 353; House Report No. 64.

qualifications of its own Members." If the people of Maryland failed to make a choice, no other authority of the State could make good this defect. If the electors had failed to attend the election it would not be contended that the State executive authority could appoint a Representative in Congress for the district.

In relation to the question of fact the committee, after examination of testimony, concluded that two votes given for the contestant in one of the districts of Kent County, and rejected because folded together in contravention of law had been improperly rejected by the judges, and that a vote allowed to him in Cecil County should be deducted, as being illegal in form. These additions and the deduction left a majority of one vote for the contestant.

The law of Maryland provided:

> If upon opening any of the said ballots there be found any more names written or printed on any of them than there ought to be, or if any two or more of such ballots or papers be deceitfully folded together, or if the purpose for which the vote is given is not plainly designated as within directed, such ballots shall be rejected and not counted.

The report of the committee indicated a belief that the two ballots rejected because folded together were not "deceitfully folded together," evidence being quoted to show that the footing of the poll lists indicated this.

The illegal vote in Cecil County contained the name of the memorialist, together with the names of five other persons, without any other designation than the words for "Congress." The law of Maryland provided:

> Every voter shall deliver to the judge or judges * * * a ballot, on which shall be written or printed the name or names of the person or persons voted for, and the purpose for which the vote is given plainly designated.

Therefore the committee considered that the sitting Member could not, under the Constitution, retain his seat, and that the contestant was elected. The committee embodied their views in these resolutions:

> *Resolved,* That Jeremiah Causden is not entitled to a seat in this House.
> *Resolved,* That Philip Reed is entitled to a seat in this House.

On March 15 and 19[1] the report was considered in Committee of the Whole and the House.

The resolution that Jeremiah Causden was not entitled to the seat was agreed.

But over the second resolution there was a contest. The Committee of the Whole amended it by inserting the word "not" so as to provide that Philip Reed was not entitled to the seat. This amendment was concurred in by the House by a vote of 73 to 71. A motion to reconsider failed, as did also a motion to amend by inserting the explanatory words so the resolution would read:

> *Resolved,* That Jeremiah Causden and Philip Reed having an equal number of votes, Philip Reed is not entitled to a seat in this House.

The question recurring on agreeing to the second resolution as amended by inserting "not," there appeared yeas 75, nays 75. So the resolution was determined in the negative. The Speaker (Mr. Barbour) was one of those voting in the affirmative.

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[1] Journal, pp. 367–371.

The Speaker[1] decided[2] that, as the House had negatived a motion declaring Philip Reed not entitled to a seat, the converse of the proposition was affirmed, and that Philip Reed was entitled to a seat.

An appeal having been taken, the House overruled this decision.

Thereupon the following resolution was offered and agreed to—yeas 82, nays 72:

Resolved, That Philip Reed is entitled to a seat in this House as one of the Representatives from Maryland.

Mr. Reed thereupon qualified and took his seat.

The committee also comment on certain charges that illegal votes were given by certain named persons. The inference is that the votes were objected to because of alleged disqualifications of the persons casting them. "On the propriety of entering into an investigation of this kind, when elections are by ballot, the committee entertains serious doubt." The committee refers to the case of Easton and Scott, but doubts whether it should be viewed as establishing a precedent.

776. The New York election case of Adams v. Wilson in the Eighteenth Congress.

Instance wherein the House seated a contestant shown to be elected by a plurality of one vote.

Being unable to inspect a ballot the committee and House accepted the judgment of the election judges that it was intended for a blank.

The House followed a State law in rejecting ballots folded together; but considered evidence tending to show fraud before doing so.

On December 30, 1823,[3] the Committee on Elections reported in the New York contested election case of Adams *v.* Wilson, in which the face of the returns showed the following result: Isaac Wilson had 2,093 votes; Parmenio Adams had 2,077 votes.

The committee found from the testimony that in the town of China 22 more votes were returned for the sitting Member than he actually received.

They also found that in the town of Attica 5 votes were returned for the contestant more than he actually received.

These deductions being made the poll stood: For Isaac Wilson, 2,071 votes; for Parmenio Adams, 2,072 votes.

The sitting Member claimed further, however, that in the town of Middleboro the local inspectors had improperly rejected as a blank ballot a ballot whereon the name of the sitting Member had been impressed, but had been defaced by one stroke of a pen over the name without, however, affecting the distinctness and legibility of the letters. The committee reported that all the inspectors of election agreed in the opinion that it had been the intention of the elector who presented it to have it considered a blank. The Committee on Elections announce the conclusion that they could not with safety judge of the ballot from the description of it, and that the judgment of the board of inspectors—whom the law of the State constituted judges—should not be questioned.

The committee also disregarded the claim of the sitting Member that certain votes be counted for him in the town of Stafford. The law of the State provided

[1] Philip P. Barbour, of Virginia, Speaker.

[2] Journal, p. 369, Annals, p. 1322.

[3] First session Eighteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 373.

that "if any two or more ballots are found folded or rolled up together, none of the ballots so folded or rolled shall be estimated." The votes in question were folded together, and a reference to the poll lists showed that more ballots were received than there were names on the list.

The committee commended the honesty of the inspectors in the district so far as the inquiries extended, and expressed the opinion that their testimony was competent and ought to be received to correct any mistakes in the return.

On January 6, 1824, the House, concurred with the Committee on Elections, in adopting a resolution declaring Mr. Wilson not entitled to the seat.

To the other resolution, declaring Mr. Adams entitled to the seat, an amendment was offered declaring the seat vacant because of the doubt as to who should have been returned. This amendment was in form as follows:

It is doubtful, from the evidence, who ought to have been returned the Member to the present Congress from the Twenty-ninth Congressional district in the State of New York; and believing that no man ought to exercise the high and honorable station of Representative of the people by virtue of a vote short of a clear majority of those given at the polls; and believing also that the people of that district are competent and ought of right to judge of and correct the return, therefore—

Resolved, That the seat of Isaac Wilson, who was returned as the Member from the Twenty-ninth Congressional district of New York, is vacant.

Resolved, That a writ of election do forthwith issue to supply the aforesaid vacancy, occasioned by the improper return of Isaac Wilson to a seat in this House.

This proposition was decided in the negative, as was also an amendment to insert the word "not," so as to provide a declaration that Mr. Adams was not entitled to the seat.

The House then, by a vote of 116 yeas to 85 nays, agreed:

Resolved, That Parmenio Adams is entitled to a seat in this House.

Thereupon Mr. Adams took his seat.

777. The election case of Biddle and Richard v. Wing, from Michigan Territory, in the Nineteenth Congress.

A board of Territorial canvassers having heard evidence on the merits, the Elections Committee decided that neither party should be prejudiced thereby.

The Elections Committee declined to consider intimidation at a poll unless it seemed to have destroyed the fairness of the whole proceeding.

Where the election had been by ballot, the Elections Committee declined to investigate qualifications of voters to the extent of violating the secrecy of the ballot.

Instance wherein, without violating the secrecy of the ballot, the Elections Committee by computation rectified a poll.

On February 13, 1826,[1] the Committee on Elections reported in the contested election case of Biddle and Richard *v.* Wing the following resolution:

Resolved, That Austin E. Wing is entitled to a seat in this House as a Delegate from the Territory of Michigan.

[1] First session Nineteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 504; Journal, p. 368.

On March 20 the report was considered in Committee of the Whole, but not concluded. It does not appear to have been taken up again, and Mr. Wing continued in his seat. Therefore the reasoning of the committee did not receive the positive approval of the House, although a negative approval may be inferred.

The returns of the local inspectors of the Territory showed the following summary of results in the various polling places:

	Votes.
John Biddle	731
Austin E. Wing	724
Gabriel Richard	710

But the Territorial canvassing board, having met under the law to ascertain the aggregate of votes and determine the person elected, decided to hear evidence as to alleged corruption at Sault Ste. Marie, where the returns showed 3 votes cast for Austin E. Wing and 58 votes for John Biddle.

As a result of that investigation, and the return made by the canvassers to the governor, the certificate of election was issued to Mr. Wing, he having the greatest number of votes as required by the law for an election.

The committee expressed the opinion that the board of canvassers in holding this investigation exceeded the authority given them by law, and that neither party should be prejudiced thereby in an investigation by the committee of the original and intrinsic merits of the case. An illegal assumption of power by one description of officers could not justify an illegal assumption by another description. The testimony before the canvassers was ex parte, but the committee conceive that, as ex parte testimony was admitted in rebuttal also, no well-founded objection could be made by contestant.

Mr. Richard rested his claim on the charge that his vote had been affected by intimidation practiced by sheriffs at Detroit, but the committee conceive that they can not enter into an examination of such charges, especially when the return shows that Mr. Richard's friends were most numerous at Detroit, except the corruption appears sufficient to destroy all confidence in the purity and fairness of the whole proceeding. The inspectors being judges of election, the committee feel that they were required to do no more than examine who had the greatest number of legal votes actually given.

Mr. Richard's claim being thus dismissed, by the unanimous opinion of the committee, the committee proceeded to test the case between Messrs. Biddle and Wing. In this aspect of the case the committee reached a conclusion, although not with unanimity.

After examining the inspector's returns, and after adding to Mr. Wing's poll 4 votes which the committee considered wrongfully rejected, the poll stood:

	Votes.
For John Biddle	732
For Austin E. Wing	728

The committee refer to the fact that when an election turns on the reception of illegal votes given by ballot much difficulty exists, it not being proper to discover who threw the ballots by an investigation which would violate the secrecy of the ballot.

But in this case it was possible to reach a result, because the question turned on the poll at Sault de Ste. Marie, where the poll stood:

	Votes.
For Austin E. Wing	3
For John Biddle	58

The committee found the proceedings at Sault de Ste. Marie defective under the law. Thus, four persons, not qualified electors, presided as inspectors. Of the 61 votes cast 51 must be considered illegal by reason of nonpayment of required taxes; in addition to which 12 of the number were discharged soldiers (not citizens), 3 aliens, and 3 nonresidents. Without setting aside the whole election, the committee deduct from Mr. Biddle's poll the 12 soldiers, 3 aliens, and 3 nonresidents, 18 in all, leaving him 714 votes. They also deduct all of Mr. Wing's 3 votes on the supposition that they may have been illegal. This still left Mr. Wing 11 plurality on the poll.

Thus the committee arrived at their conclusion that Mr. Wing was elected.

778. The Tennessee election case of Arnold v. Lea in the Twenty-first Congress.

Although the allegations of the petitioner in an election case were vague and indefinite, the Elections Committee proceeded to examination.

Form of a petition in an election case deemed too general and indefinite in its charges.

No fraud being shown, irregularities in the receiving and custody of ballots were not held sufficient to justify the rejection of the returns.

Failure of election officers to be sworn, no fraud damaging to the petitioner being shown, was apparently considered not sufficient to justify rejection of the returns.

Participation of relatives of a contestant as election officers was not held fatal to the return, although the State constitution might seem to imply a prohibition of such participation.

Where the electors comply with the statutes the House should not reject their votes because returning officers have not been equally careful.

On December 29, 1829,[1] the Committee on Elections reported in the contest of Arnold *v.* Lea, from Tennessee. The contestant had petitioned, alleging:

> That perjury and subornation of perjury were resorted to; that bribery, direct and indirect, was resorted to; and, in short, to insure the defeat of your memorialist, the laws of Tennessee, which prescribe in a special manner the mode of holding elections, were completely prostituted and trampled under foot by the official authorities who conducted the election, and their own partial, prejudiced, and malignant passions substituted in place of the laws of the land.

Although the general and indefinite character of these allegations were objected to by the sitting Member, the committee decided to proceed to an examination.

They found no evidence of perjury or subornation of perjury, or bribery or corruption, so that part of the petition hardly figures in the case, except in so far as the proceedings had failed to comply with the law.

[1] First session Twenty-first Congress, Contested Elections in Congress from 1789 to 1834, p. 601.

No return of the votes in the district was made to the committee, the petitioner showing no evidence to impeach particular votes. The sitting Member's majority appeared to be 217.

The decision of the case turns on the question whether or not the conduct of the election was fatally at variance with the following provisions of the constitution and law of Tennessee:

> No judge shall sit in the trial of any cause where the parties shall be connected with him by affinity or consanguinity, except by consent of parties. (Sec. 8 of constitution.)
>
> That the sheriffs or returning officers shall, on the day and at the place for holding each respective election, be provided with one box for receiving the ballots for governor and members of the general assembly; the returning officer, or his deputy, shall receive the tickets in presence of the inspectors, and put each into the box, which box shall be locked, or otherwise well secured, until the election shall be finished. The returning officer shall, at sunset of the first day, and in the presence of the inspectors, put his seal on the place to be made for the reception of the tickets, which shall continue until the election shall be renewed the succeeding day; and it shall be the duty of the said inspectors to take charge of the box until the poll is opened the next day, and shall then be taken off in the presence of the inspectors.
>
> That the inspectors and clerks of every such election, as aforesaid, shall, in the court-house, before they proceed to business, swear (or affirm, as the case may be) faithfully to perform their respective duties at such election, agreeably to the constitution and laws of this State.

It appeared from the testimony that at Tazewell the inspectors, clerks, and sheriff were in favor of the election of Mr. Lea, and that some of them had made bets on the result; that on the evening of the first day the sealed ballot box was put in custody of the sheriff and not kept by the inspectors, as required by law, and under direction of the sheriff was locked up in a storehouse owned, the petitioner charged, by an enemy of himself. The friends of the petitioner complained at this conduct, and on the second day another box was used, the first remaining sealed until the count. Then it was found that the box contained the exact number of votes it should contain according to the poll lists. Petitioner objected that this did not prove that some tickets cast for himself might not have been abstracted and replaced by an equal number for sitting Member, the situation of the box rendering such a fraud practicable. But no proof was adduced to show this, and the committee decided, although it was in evidence that the sheriff had been anxious to have the custody of the box, that there was no evidence to prove fraud, especially as the persons concerned in the conduct of the election were men of high character.

At Knoxville there was testimony, which the committee consider far from conclusive, that one man had been bribed to vote for sitting Member and that another who had voted for the same candidate was a minor.

At one precinct in Granger County it appeared neither the inspectors nor the clerks were sworn. One of the three inspectors was a friend of the petitioner, and the votes returned for petitioner outnumbered those returned for the sitting Member. Certain illegal votes, not over eight in number, were deducted at this place, a greater number being taken from the vote of the sitting Member than from the vote of petitioner.

At one precinct of the county of Jefferson, a cousin of the sitting Member was one of the inspectors, and with the approval of the other inspectors, this cousin, with the sheriff, took custody of the ballot box after the first day's voting.

At a precinct of Blount County one of the three inspectors was a justice of the peace, and swore himself, the two other inspectors, and the clerk. After the first day's election the inspectors delivered the ballot box to the custody of an uncle of the deputy sheriff. A minor, whose vote was rejected in this county, loaned a horse of the petitioner and went to another polling place, where he voted. It appeared to the committee that the petitioner was privy to this violation of law.

The committee conclude that these irregularities are not fatal. In the precinct where the inspectors and clerk were not sworn a deduction of the votes cast would, if made, increase rather than diminish the majority of the sitting Member, and even if the whole vote taken should be given to the petitioner the sitting Member would still have a majority.

The committee therefore recommended unanimously the following:

Resolved, That Pryor Lea is entitled to retain his seat in the Twenty-first Congress of the United States as the Representative of the Second Congressional district of the State of Tennessee.

On January 12, 1830, an amendment declaring the seat vacant was offered and debated.

In the course of the debate Mr. William W. Ellsworth, of Connecticut, said:

The merits of the case are involved in two questions, and only two, viz, how the electors of this Congressional district complied with the requisitions of the statute law of Tennessee; and if they have, what is the result of their vote? A close adherence to these questions will strip this matter of much that is collateral and immaterial. As to the first question (the difficulty being that the ballot box has not been taken care of by the supervisors of the election), I observe that the States may prescribe the time, place, and manner of the election, and beyond that it is the ultimate province of this House to ascertain the result of the election. We only want to know what the electors have said by their votes. There may be some difficulty in ascertaining this fact where the supervisors of the balloting are irregular as to their duty; but if the electors have done all the State law requires of them, and all they can do legally to express their wishes, this is enough for us, if we can but satisfy ourselves of the result. If we can not, by reason of the conduct of the supervisors, ascertain what was the true state of the ballot box when the electors had deposited their votes, we must pronounce the election to be void. * * * We are to inquire after the voice of the electors, legally expressed; and if the agents who take and declare the votes do wrong, let them be prosecuted, but not punish the electors by rejecting their Representative. * * * The case stated from Missouri fully illustrates my views (Easton *v.* Scott). There the statute required the electors to vote by ballot; they voted, however, vive voce; but they could not so vote. The electors did not do their duty; they did not comply with the law as to the manner of election. So, too, the case of Allen *v.* Van Rensselaer, from New York, illustrates the distinction. The law of New York requires the ballot box to be locked; it was only tied with a string. In this case Congress decided the election to be good; the electors did all their duty, and Congress were satisfied as to the contents of the ballot box.

This amendment declaring the seat vacant was, according to the rule then prevailing, set aside by the previous question. The House then agreed to the resolution declaring the returned Member entitled to the seat by a vote of yeas 149, nays 20.[1]

779. The Maine election case of Washburn v. Ripley in the Twenty-first Congress.

Where a second and effective election was had because of apparent failure to choose at the first the House declined to be estopped from investigating the first.

The acceptance after election of a State office which was resigned

[1] Journal, pp. 159–161.

before the meeting of Congress was held not to destroy whatever rights a contestant might have.

Where ballots for different offices are cast in different boxes the intention of the voter is to be ascertained alone from the box in which the ticket is deposited.

Election officers are justified in refusing to count for a candidate for Congress ballots cast in a box other than the Congressional box.

Election officers should return all votes cast in the Congressional box, even though for persons not qualified.

On January 18, 1830,[1] the Committee on Elections reported in the contested election case of Washburn *v.* Ripley from Maine. The facts appeared as follows:

Under the laws of Maine the election was by ballot, a majority being required to elect, and the ballots for Congressman were deposited in a box by themselves at each polling place. The result of the poll was as follows:

Whole number of votes given	4,994
Necessary for an election	2,498
Ruel Washburn had	2,495
James W. Ripley had	2,180
Eleven men known and admitted to be candidates for the legislature at the same election had in the Congressional boxes a total of.	24
Three men known and admitted to be candidates for county treasurers had in the Congressional boxes a total of.	6
Enoch Lincoln, candidate for governor, in the same way had	2
Three candidates for State senator had a total of	3
A single ticket having on it the names of two candidates for State senate was found in the Congressional box and counted as one vote for each, making.	2
Scattering vote	282

The governor and council, acting under the law, found from this return that a majority of the whole number of votes was not given to any one candidate, and ordered a new election, which was held December 22, 1828, and at which James W. Ripley received a majority and took his seat in the House.

The sitting Member made the point that, as the governor and council had again referred the matter to the people, and as the people had determined the election on the second ballot, it was not competent for the House to go beyond the second election. The majority of the Committee of Elections, however, decided that they might examine the first election, and did so.

The sitting Member further contended that the said Washburn had waived whatever right he might have had to a seat in the House by accepting, after the date of the second election, the State office of councilor, an office incompatible, as the constitution of Maine disqualified a Member of Congress from being councilor. A majority of the committee concluded that the rights of Mr. Washburn, if he acquired any by the election of September, would not in this way be destroyed. Mr. Washburn had resigned the councilorship before the time of meeting of the Congress to which he claimed an election.

The case therefore proceeded to examination on its merits.

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[1] First session Twenty-first Congress, Contested Elections in Congress from 1789 to 1834, p. 679; House Report No. 88.

It was proven that several of the persons for whom votes were found in the Congressional box were not residents of the Congressional district, as required by law; that at least one vote intended for petitioner was put in the State senatorial box and counted as a vote for State senator and not for Congressman. It was evident and not seriously contested that the votes for State officers found in the Congressional box were deposited there by mistake.

One such ballot cast in the town of Canton contained two names, and was counted as one vote for each name. The committee found that this should have been counted as only one vote, and therefore deducted one from the total.

There was also a question whether or not in the town of Bridgton a single ballot containing three names had not been counted as three votes, and the committee, while not considering it proven, also suggested that two votes be deducted in Bridgton. These deductions, one in Canton and two in Bridgton, reduced the number necessary to a choice to 2,496, or one more than the votes received by Mr. Washburn.

It appeared that the voter who cast the double ballot in Canton discovered his mistake soon after and asked leave to rectify the error, but was refused by the selectmen. The minority of the committee believed that two votes should be deducted in Canton and three in Bridgton—a total of five—which would reduce the number needed for a choice to 2,495, the exact number received by Mr. Washburn.

The sitting Member professed ability to prove that illegal votes were given for the contestant; but the committee considered the evidence before them sufficient to settle the case, in accordance with the following rule, which they enumerated in their report:

> The committee are unanimously of opinion that when the votes are taken by ballot, and separate boxes used, after they are deposited in the box it is not competent or proper for the voter or selectmen to alter or change the ballot as delivered into the boxes, and that the intention of the voter is to be ascertained alone from the box in which his ticket is deposited, and that the selectmen conducting the elections at the places above specified acted correctly in making out their return to the governor and council of all the ballots they found in the box which was used for the reception of tickets for a Member of Congress, and in refusing to count the votes they found in other boxes with the name of Washburn on it and adding them to his list of votes given for him as a Member of Congress. The adoption of any other rule would be fraught with danger to the purity of the elective franchise.
>
> The committee are further of opinion that votes given for persons not residing within the district of Oxford ought to have been added to the number of votes given for a Member of Congress, as they were done by the selectmen.

Therefore the committee recommended the adoption of the following resolution:

> *Resolved,* That James W. Ripley is entitled to a seat in the Twenty-first Congress of the United States as the Representative of the Oxford district in the State of Maine.

On February 2, after a long debate, the House concurred in this report, yeas 111, nays 79, Mr. Ripley being thus confirmed in the seat.[1]

780. The Virginia election case of Loyall v. Newton in the Twenty-first Congress.

The House in an election case received testimony taken before an informal commission, the individuals of which were competent, and due notice being given.

[1] Journal, pp. 195, 209, 215, 224, 225, 230, 247, 249.

Instance of the methods of taking testimony in election cases before the enactment of the law.

Voting being viva voce, the testimony of the voter was admitted to prove his qualifications.

All votes recorded on the poll lists are good unless impeached by evidence.

Reference to rules governing counting of votes where freehold qualifications prevailed.

Instance wherein the Elections Committee waived the strict rules of law in receiving testimony.

Form of resolution seating a contestant without in terms unseating the sitting Member.

On February 19, 1830,[1] the Committee on Elections reported, in the contested election case of Loyall *v.* Newton, from Virginia, the following resolution:

Resolved, That George Loyall is entitled to a seat in the Twenty-first Congress of the United States as the Representative from the district in Virginia composed of the counties of Norfolk, Nansemond, Elizabeth City, Princess Ann, and the borough of Norfolk.

This case divides itself into three general branches:

1. The admissibility of testimony taken before a commission alleged to have been appointed without authority of law.

2. The legality of the action of the mayor of Norfolk under the law of Virginia in adjourning the poll after the first day.

3. The legality of certain votes under the law of Virginia, some cast for the contestant and some for the sitting Member.

In regard to the first branch, there was no law of the United States or of Virginia providing for taking testimony in contested election cases of Members of Congress. In contests for members of the Virginia legislature the law of that State provided for the appointment by local judges of commissioners to take testimony. Following this analogy, the petitioner had appointed by the judge of the Norfolk court commissioners to take testimony. The sitting Member objected to depositions so taken for the reason that there was no law authorizing their appointment or providing the pains of perjury for those swearing falsely before such commissioners. The committee found, however, that the commissioners, previous to their appointment as such and during the time in which the depositions were taken, were justices of the peace or notaries public, authorized under the laws of Virginia to administer oaths. So their capability in this respect was not dependent on the appointment as commissioners, and the committee allowed the testimony taken before them, as it did also testimony taken before justices of the peace authorized to administer oaths in behalf of the sitting Member.

As to the second branch of the inquiry, the legality of the action of the mayor of Norfolk in adjourning the poll depended on the construction of the language of the Virginia statute, and the committee decided that the language gave him such authority; also that the contingency requiring such adjournment existed.

[1] First session Twenty-first Congress, Contested Elections in Congress, from 1789 to 1834, p. 520.

The third branch of the case involved an examination of the qualifications of electors under the law of Virginia, which provided various qualifications, especially of property. Under the law of Virginia voting was viva voce, so the committee admitted the testimony of the voter himself to prove himself a freeholder in cases where the land books—also admitted in evidence—did not show the possession of the freehold. The testimony of other persons was admitted to prove the qualification of the voters in this respect. To the examination of the votes the committee applied the following rules, used also in the case of Porterfield and McCoy:

That all votes recorded on the poll lists should be good unless impeached by evidence.

That all votes not given in the county where the freehold lies be rejected.

That the votes of freeholders residing out of the district, but having competent freehold estates within the district, be held legal.

Acting under these rules and principles the committee found and reported a majority of 30 votes for George Loyall.

The committee further state that had the parties been confined to the strict rule of the law in requiring of them the best evidence the nature of the case admitted and by refusing to receive parol evidence as to the freehold qualifications of the voters, the majority of George Loyall would have been greatly increased.

On March 8,[1] after lengthy debate, a motion was made that "the said report be recommitted to the Committee of Elections, with instructions to report to the House the names of the voters which they find illegal, with a summary of the evidence upon which they found their decision."

This motion was removed from before the House by a motion that the main question be put. This motion for the previous question was agreed to without division.

Then the question was taken on the resolution reported from the committee:

Resolved, That George Loyall is entitled to a seat in the Twenty-first Congress of the United States as a Representative from the district in Virginia composed of the counties of Norfolk, etc.

And the resolution was agreed to—yeas 97, nays 84.

On March 9 Mr. Loyall took the oath.

It will be observed that no resolution specifically declaring Thomas Newton, the returned Member, not entitled to the seat was thought necessary. Mr. Newton had occupied the seat since the meeting of Congress.

781. The Virginia election case of Draper v. Johnson in the Twenty-second Congress.

Where payment of a tax is a qualification of the voter the tax may be paid by another than the voter.

A vote being given viva voce at an election for Congressman, the voter may not afterwards change it or vote for additional officers.

An election is not vitiated by failure to observe a directory law that the ballots shall be returned within a given time.

On April 13, 1832,[2] the Committee on Elections, through Mr. John A. Collier,

[1] Journal, pp. 386–388.

[2] First session Twenty-second Congress, Contested Elections in Congress, from 1789 to 1834, p. 702; House Report No. 444; House Journal, pp. 586, 807.

of New York, reported in the case of Draper *v.* Johnson, from Virginia. The contestant alleged that the election had not been conducted according to certain specified laws of Virginia, and that by reasons of these departures from the law he was deprived of the election to which he was entitled by receiving the greater number of votes given by voters legally qualified. The committee in their consideration of the case adopted certain principles of action which seem to have been approved by the whole committee.

The test principles laid down by the committee related in large part to the construction of the peculiar law of Virginia relating to the freehold qualifications of the voter. Some, however, of these principles are of less ephemeral interest, as the following:

That where a revenue tax is duly assessed, and the sheriff has paid the tax himself, and has not returned the party delinquent, as he has the right to do if he is insolvent, or the sheriff is not able to collect the tax, that this is to be deemed a payment by the party, so as to entitle him to a vote.

That where a voter is first polled, and his vote recorded for one candidate (the voting being viva voce), he is not at liberty afterwards to change it and have his vote transferred to another candidate; nor, if he first votes for the State officers only, has a right to come forward afterwards to vote for a Representative in Congress.

That the neglect to return the votes to the clerk's office within the time required after the canvass, the provisions being merely directory, will not vitiate the election, it appearing that the polls were afterwards returned and filed.

782. The case of Draper v. Johnson, continued.

The neglect of the officer conducting the poll to take the required oath is ground for rejecting the poll.

An election officer being presumed to do his duty, is presumed to have taken a required oath, and the burden of proving otherwise in on the objecting party.

Failure to file a required certificate that an election officer took the oath is sufficient to throw the burden of proof on the party claiming the votes received by the officer.

The law requiring two officers to officiate at a poll, votes taken by one officer acting in the capacity of the two required, were rejected.

An election officer having acted colore officii, without objection from any claimant, the Elections Committee declined to inquire if he had been appointed properly.

Early instance wherein the Elections Committee heard arguments of the parties on the evidence.

The committee also laid down additional test principles, as follows:

That the neglect of the sheriff or other officer conducting the election, to take the oath required by law, vitiates the poll for the particular precinct or county, and the whole votes of such precinct or county are to be rejected.

That the legal presumption is, that the oath required has been taken, every officer being presumed to have done his duty, and that the onus is thrown upon the party taking the objection to show the neglect or omission; but as the law of Virginia requires that the oath shall be returned and filed in the clerk's office, a certificate from the clerk that no such vote is filed will be sufficient prima facie (notice of the objection being previously served upon the opposite party) to throw the burden of proof on the party claiming the vote.

That the sheriff, or other officer conducting the election, and particularly at the court-house, where no other superintendents are associated with him, must appoint one or more "writers" to take the polls; and that the sheriff can not act solely, and in the double capacity of superintendent and clerk; and that the votes recorded by him, without the presence or aid of such clerk or writer, are to be rejected.

That the superintendent of a separate election, having been appointed by a court or other tribunal having the general appointing power for that purpose, which superintendents act as such, colore officii, no other person appearing or acting as conflicting claimants for the office, the committee will not inquire whether they were appointed at the particular term of the court contemplated by the act, or whether there was a "vacancy" within the meaning of the law.

783. The case of Draper v. Johnson, continued.

Votes cast at an election adjourned beyond the times permitted by law were rejected.

A vote received by election officers is prima facie good, and the burden of proof should be on the party objecting thereto.

The House does not permit an agreement of parties that votes are inadmissible to preclude examination.

An investigation showing for sitting Member a majority, the House declined to vacate the seat because certain irregularities (not frauds) suggested that further inquiry might change the result.

Instance in 1832 wherein a minority dissent was voiced in the report of the majority and not in separate "views."

An early instance wherein the House overruled the report of the majority of the Elections Committee.

The committee also decided that where the law of Virginia permitted the poll to be continued three days, that a continuance during the fourth day was not justified by the terms of the law and rejected the votes cast on the said fourth day, although it does not appear from the report that the votes given on the fourth day were otherwise than legal.

The committee note also in their report that they not only examined the documentary testimony produced, but heard the parties, who personally appeared before the committee.

A correction of the returns in accordance with the principles laid down by the committee would give to the sitting Member, Mr. Johnston, a majority of 123 votes.

But the committee found a further complication, set forth as follows:

As to the qualifications of the voters, the parties, in the outset, assumed a principle by which they have been governed throughout, different from what would have been adopted by the committee, and which has occasioned great trouble and delay. It was assumed that if a vote was objected to upon the ground that it was not by a person duly qualified, the party claiming the vote must take the burden of proving, affirmatively, that the voter possessed the required qualifications. This erroneous principle, as the committee deem it to be (for they would have taken a vote received by the board of inspectors as prima facie good), might and would have been reversed and corrected, were it not that the parties, acting upon this basis, proceeded to stipulate, in writing, that the votes thus objected to, and not, therefore, proved to be good, were to be deemed and considered bad, reserving, however, in the counties of Wythe and Grayson, the right to the party claiming the vote to prove it to be given by a person duly qualified; and in the other counties in the district * * * the written stipulation reserved no right to prove the votes to be good; but the specified votes were admitted, unconditionally, to be bad. The committee, however, were of opinion that, although there was no express reservation in the other coun-

ties, "yet, if affirmative and satisfactory proof should be offered, showing that the votes objected to were, in point of fact, given by persons duly qualified to vote, that the parties would have no right to stipulate that such votes should be disregarded; and that the stipulations would only be received as prima facie evidence of the want of the necessary qualifications of the voters."

Therefore the committee gave additional time to take testimony; but the new testimony did not cover all the votes, and the report says:

It will be perceived that from the erroneous principle assumed by the parties in the outset, disranchising by stipulation upward of 600 voters in a closely contested, election, many of whom are now proved to be duly qualified, and a majority of whom may have been, and by reason of the technical objections by which 185 votes have been rejected, exclusive of the votes polled on the fourth day in Washington County, giving the seat to either of the candidates might be doing injustice to the electors of the district, for it is impossible to determine which of the candidates did, in fact, receive a majority of the legal votes.

A majority of the committee have therefore come to the conclusion that it would be doing better justice to the parties, and to the electors of the district, to give them another opportunity of expressing their opinions upon the subject by a new election.

A minority of the committee,[1] while they are free to confess that, under the peculiar circumstances of this case, they would not only be reconciled to, but better satisfied with, such a result, if they could have felt themselves at liberty to unite in it, are nevertheless of opinion that the sitting Member, having received a majority of the legal votes, upon the principles assumed, is entitled to the seat, and are therefore constrained to dissent from the resolution proposed by the majority.

The resolution submitted by the majority was as follows:

Resolved, That the seat of Charles C. Johnson, the sitting Member from, etc. * * * be vacated, for irregularities in the election, and that the Speaker of the House transmit to the executive of Virginia a copy of this resolution, to the end that a new election may be ordered.

On May 26, 1832, when the resolution was considered in the House, and by a vote of 85 to 35,[2] all after the word resolved was stricken out, and the following was inserted: "That Charles C. Johnson, the sitting Member, is entitled to his seat." The amended resolution being agreed to, the majority of the committee were overruled, and the title of sitting Member was confirmed.

784. The North Carolina election case of Newland v. Graham in the Twenty-fourth Congress.

The State law preventing voters from testifying as to the ballots cast by them, the Elections Committee did not admit declarations as next best evidence.

A question as to the correction of the mistake when ballots for Congressmen are deposited in the wrong ballot box.

On February 24, 1836,[3] the Committee on Elections reported in the case of Newland *v.* Graham, from North Carolina. In this case the sitting Member was returned by a majority of seven votes, and the contest was based on the charge that illegal and unqualified votes had been given for the sitting Member, and that legal and qualified votes offered for the contestant had been rejected.

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[1] It is to be observed that the minority dissent is voiced in the report, and not presented separately as "minority views."

[2] The Journal does not show any division. The figures of the vote are given on p. 714 of Contested Elections (Clarke).

[3] First session Twenty-fourth Congress, Contested Elections (1 Bartlett), p. 5; Contested Elections (Rowell), p. 105; House Report No. 378.

In the first place the committee declined to accept as evidence declarations not made under oath of certain persons, alleged to be disqualified for voting, who declared after the election that they had voted for the sitting Member. The election was by ballot, and the State law provided that voters should not be compelled to give evidence for whom they voted. Hence the contestant urged that the declarations were the best evidence obtainable by him. The committee refused leave to admit the declarations.

The committee then proceeded to consideration of bad or illegal votes proven by other evidence than the declaration of voters. In this rectification of the vote the committee reversed the action of the election judges at Asheville, who struck from the poll three votes allowed by the judges at Henderson. The law of the State gave the judges at one place of election no such power to alter the return of judges at another place. The committee also passed upon certain votes legally offered at the election and illegally refused.

The result of the examination by the committee reversed the majority, and showed the election of the contestant.

The committee furthermore found a condition which they did not attempt to pass on. There were used separate ballot boxes, and in some cases ballots intended for the Congressional box were put into the legislative box, and vice versa. The judges, who seem generally to have received the ballots from the voters and put them in the boxes, corrected these errors. The committee did not ascertain the number of such corrections, and left the question to the House, saying:

> The committee found, on reference to the case of Washburn and Ripley, that the House had refused to interfere with a decision of the judges of election in that case, who declined correcting the mistakes made in that election by depositing the ballots in the wrong boxes. The judges of this election in Maine, it seems from this case, did not consider it to be in their power to correct such a mistake. They may have considered that they had no means of ascertaining whether it was a mistake or not. It appears, from that case, that the ballots were put into the boxes by the voters themselves, and it would seem, from several of the depositions in this case, that the ballots were usually handed to one of the judges or inspectors of the election, and by him deposited in the ballot box, as the law of North Carolina requires. In this case, then, the mistake having been made by one of the judges, and not by the voter, who had done' everything in his power toward the fair exercise of his privilege, the judges have considered it their duty to correct their own mistakes and give the voter his vote; and as they considered that they had the means of fairly correcting the mistake, they did so openly, and without objection of the friends of either candidate. Under such circumstances the committee leave it to the House to say whether their proceedings should not be respected.

The minority views called attention to the fact that after the correction by the judges the number of votes in the Congressional box exceeded the names on the poll list by five, and held that, irrespective of precedent, the five votes should be deducted from contestant.

785. The case of Newland v. Graham, continued.

Discussion as to the sufficiency of a notice of contest which did not give particular specifications.

Discussion as to the admissibility of testimony taken when one of the parties considered himself unable to attend.

A question as to whether the duties of sitting Member to the House excuse him for neglecting to attend on taking of testimony in an election case.

Without very strong reasons showing the necessity, the Elections Committee does not extend the time of taking testimony.

Under the old practice of the House testimony in election cases was taken according to State law.

The proceedings in taking testimony were conducted in accordance with the law of North Carolina, but the sitting Member having objected to the reception of the depositions, the committee decided that they had been taken conformably to the laws of North Carolina on the subject, and the usage being well established to allow depositions to be read which had been taken and sworn to according to the laws of the State, and it appearing reasonable that depositions thus taken on similar notices from both parties, and in the presence (with one exception) of both parties or their agents, decided that they were sufficient and should be received.

The minority views, presented by Mr. Nathaniel H. Claiborne, of Virginia, and signed by three other members of the committee (the report itself was presented by Mr. Linn Boyd, of Kentucky, and signed by four other members of the committee) went into this subject rather more fully. It seems that the sitting Member had at the outset objected to the reception of the depositions for the reason that the notices to take them, served on him, did not state the subject-matter about which the witnesses were to be examined, nor the names or residence either of the witnesses or of the persons whose votes were to be impeached. And for the further reason that a sufficient time was not allowed him to attend in person at the several places where depositions were to be taken.

In reply to this Mr. Boyd, chairman of the committee, said in debate [1] that the majority of the committee had decided in favor of the sufficiency of the notice. It was not so specific as the law of Virginia required in such cases, but was as specific as had been required by the practice of the committee. These were points the decision of which would affect the competency of all the testimony having an injurious bearing on the interests of the sitting Member. If decided in his favor it would obviate the necessity of any farther action on the subject. The minority further say that the committee, without deciding as to this objection, "provisionally adopted the rules of evidence which obtain in courts of justice. Subjected to these tests, much the greater portion of the depositions were rejected as illegal, as coming under the denomination of hearsay testimony." * * *As to the testimony taken in one instance, "the sitting Member was not present either in person or by counsel, or, in other words, that the depositions are ex parte. The sitting Member acknowledges that notice was served on him, but he alleges that a moral obligation, growing out of the relations in which he stood to his constituents, called him to Washington * * * and that a friend on whom he relied to act * * * for him was unavoidably absent. * * * The consequence of the nonattendance of his agent was that no cross-examination was had." The minority contend that as it was impossible for the sitting Member to be both in Washington and at the place of taking evidence, and as the option of attending in person or by attorney was virtually denied him, there was no just cause to impute laches to the sitting Member, and therefore the depositions in question should be rejected. In support of this view they cite the case of William Allen

[1] Globe, p. 231.

in the Twenty-third Congress. The minority recommend that if the House do not concur in this view further time should be permitted the sitting Member to take testimony.

The House debated at length the question whether or not the sitting Member could reasonably have been expected to be in attendance in person or by attorney at this place of taking testimony.[1]

The sitting Member then asked for a longer time to collect evidence. The committee decided that without very strong reasons to show the necessity of further proof (which the committee did not see in this case) they considered that the right of contesting a seat in Congress would be useless and nugatory, if such postponements and protracted appointments for taking additional evidence after the meeting of Congress should be allowed when the parties had already had the same time, and as it appeared a sufficient time to take testimony. The committee further say that "they could find no precedent in which an application of a similar kind, even if made at an earlier period, had been granted, but several in which, notwithstanding the existence of more favorable circumstances, such applications had been rejected, both by committees of election and by the House."

786. The case of Newland v. Graham, continued.

Evidence taken after the Committee on Elections had reported was not formally considered by the House in deciding the contest.

The committee having reported a conclusion in an election case, the House declined to pass judgment on the propositions leading to the conclusion.

The sitting Member, after this decision of the committee, went to North Carolina and took additional testimony. The petitioner, as appears from the debates, declined to appear and cross-examine. The depositions so taken were presented to the House after the report of the committee had been made.

The case coming up for debate in the House, a motion was made by the sitting Member on March 24[2] that these depositions which were on the Speaker's table be taken into consideration by the House in considering the report. Much of the debate in the case was on this motion. Mr. Henry A. Wise, of Virginia, contended that the practice of law and equity courts showed that this testimony should be considered. On the other hand, it was pointed out that it was unprecedented to consider testimony taken after the case was made up. The petitioner stated that he had declined to cross-examine during the taking of this testimony, believing the procedure to be unwarranted. Mr. Levi Lincoln, of Massachusetts, arguing in favor of the motion to consider the testimony, held that an election case was constitutionally a proceeding before the House, and that the House and not the committee were the triers.

The motion to consider the evidence on the table was made as an amendment to the resolutions reported by the committee, and on March 26 the sitting Member withdrew it.[3] But immediately Mr. Abraham Rencher offered the same proposition in connection with other propositions relating to details of evidence. This proposi-

[1] Globe, pp. 231, 240, etc.

[2] Globe, pp. 258, 259, 262.

[3] Journal, p. 566.

tion of Mr. Rencher was, after further consideration, set aside by the ordering of the previous question on the resolutions of the committee.[1]

The committee reported two resolutions:

Resolved, That James Graham is not entitled to a seat in this House.
Resolved, That David Newland is entitled to a seat in this House.

The report was the subject of long debate on questions relating to the appearance of sitting Member by counsel and a proposition to consider testimony presented to the House after the report was made; and then, on March 26,[2] Mr. Abraham Rencher, of North Carolina, moved to substitute for the resolutions reported from the committee a series of resolutions expressing the opinion of the House as to the various questions involved in the case, leaving the final result to be determined by the result of the decisions on the minor questions.

It was at once objected[3] that for the House to attempt to pass on these details would be to experience the perplexities caused by a similar procedure in the case of Moore v. Letcher.

On March 29[4] the previous question was ordered on the resolutions reported by the committee, Mr. Rencher's proposition being thereby set aside according to the practice at that time. The previous question was ordered by a vote of yeas 111, nays 88.

Then the resolution declaring Mr. Graham not entitled to a seat was agreed to—yeas 114, nays 87.

The resolution declaring David Newland entitled to a seat was disagreed to—yeas 99, nays 100.

Thereupon the following resolution was agreed to:

Resolved, That the election held in North Carolina in last August, for a Representative of the Twelfth Congressional district of that State in the House of Representatives of the United States, be set aside; and the seat of such Representative is hereby declared vacant; and that the Speaker of this House inform the governor of North Carolina of the fact.

In the course of the debate on this case the charge was made that party considerations were influencing the decision, as it was charged that they had in the case of Moore and Letcher.[5]

787. The Senate election cases of Smith, Winthrop, Phelps, and Cass. The question as to when the term of service of a Senator appointed by a State executive to fill a vacancy ceases.

Samuel Smith was Senator from Maryland from March 4, 1803, and on the expiration of his first term, viz, March 3, 1809, the legislature of Maryland not having elected his successor, and not then being in session, he was appointed by the governor on March 4 to fill the vacancy until the next meeting of the legislature, which would take place on the 5th of June next. Thereupon Mr. Smith addressed a letter to the Senate, setting forth these facts, and submitting to its determination the question whether the appointment would or would not cease on the first day of the meeting of the legislature. It was determined that he was entitled to hold his

[1] Journal, p. 595.
[2] Journal, p. 566.
[3] Globe, p. 263.
[4] Journal, pp. 595–598.
[5] Globe, p. 262.

seat in the Senate during the session of the legislature, unless the legislature should fill such vacancy by the appointment of a Senator, and the Senate be officially informed thereof. Under these credentials Air. Smith held his seat during the special session of the Senate March 4–7, 1809, and during the first session of the Eleventh Congress (May 22 to June 28, 1809). On the 16th of November following he was elected by the legislature, and on December 4, in the next session of Congress, he produced his credentials of election and the oath was administered.[1]

788. Robert C. Winthrop was appointed Senator from Massachusetts July 27, 1850, to fill a vacancy happening in the Senate by the resignation of Daniel Webster. February 1, 1851, Robert Rantoul was elected by the legislature to fill the unexpired term. February 4, Mr. Rantoul not having appeared to take the seat, Mr. Winthrop offered a resolution, which was agreed to, "that the Committee on the Judiciary inquire and report to the Senate, as early as practicable, at what period the term of service of a Senator appointed by the executive of a State during the recess of the legislature thereof rightfully expires." The committee reported that a person so appointed had a right to the seat until the legislature, at its next meeting, should elect a person to a the unexpired term, and the person elected should accept, and his acceptance appear to the Senate; that presentation of credentials implied acceptance; that these views were sustained by precedents. The report was debated, but no action taken, the whole subject being laid on the table. Mr. Winthrop vacated the seat February 7, 1851, when Mr. Rantoul's credentials were presented.[2]

789. On May 29, 1848,[3] Mr. Lewis Cass resigned his seat as a Senator from Michigan and on June 20, 1848, Mr. Thomas Fitzgerald, appointed by the governor of Michigan to fill the vacancy, appeared with his credentials and took his seat. The Michigan Manual[4] shows that Lewis Cass was elected Senator from Michigan on January 20, 1849; but Mr. Fitzgerald continued to serve until March 3, 1849, the last day of the Congress, as is shown by the fact that on that date he presented the credentials of Mr. Cass, who thereupon took the oath and his seat.[5]

790. Samuel S. Phelps,[6] Senator from Vermont, was appointed by the governor of Vermont January 17, 1853, during the recess of the legislature, to fill a vacancy in the Senate happening by the death of William Upham. His credentials were presented and he took his seat January 19. The legislature met in October and adjourned in December without electing a Senator to fill the unexpired term. Aft. Phelps had held the seat during the remainder of the second session of the Thirty-second Congress, ending March 3, and during the special session of the Senate March 4 to April 11. December 29 he again attended. January 4, 1854, the Senate resolved that the Committee on the Judiciary inquire whether he was entitled to retain his seat. January 16 the committee reported the resolution, "that the Hon. Samuel S. Phelps is entitled to his seat in the Senate of the United States." It was

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[1] First session Eleventh Congress, Annals, pp. 15–25.

[2] Second session Thirty-first Congress, Globe, pp. 425, 437, 459, 477, 478; Senate Report No. 269.

[3] First session Thirtieth Congress, Globe, p. 792.

[4] 1905, p. 218.

[5] Second session Thirtieth Congress, Globe, p. 681.

[6] First session Thirty-third Congress, Senate Report No. 34.

accompanied by a minority report adverse to the right of Mr. Phelps to a seat. March 16 the resolution reported by the committee was rejected by a vote of 12 yeas to 26 nays, and it was "*Resolved,* That the Hon. Samuel S. Phelps is not entitled to retain his seat in the Senate of the United States." [1]

[1] The power of the executives of States to fill vacancies in the offices of United States Senators, and the status and terms of service of Senators thus appointed, has been passed on many times by the Senate. See cues of Kensey Johns, Uriah Tracy, Samuel Smith, Ambrose H. Sevier, Robert C. Winthrop, Samuel S. Phelps, Charles H. Bell, Henry W. Blair, Horace Chilton, Lee Mantle, Ansel C. Beckwith, John B. Allen, Henry W. Corbett, Andrew T. Wood, John A. Henderson, Matthew S. Quay, and Martin Maginnis. (Senate Election Cases, special session Fifty-eighth Congress, Senate Document No. 11, pp. 1, 3, 4, 7, 10, 16, 26, 36, 48, 52, 85, 89, 103, 105, 107.)