HINDS' PRECEDENTS

OF THE

HOUSE OF REPRESENTATIVES

OF THE

UNITED STATES

INCLUDING REFERENCES TO PROVISIONS
OF THE CONSTITUTION, THE LAWS, AND DECISIONS
OF THE UNITED STATES SENATE

By
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Clerk at the Speaker's Table

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Chapter XXVIII.

GENERAL ELECTION CASES, 1860 TO 1870.

845. The Maryland election case of Preston v. Harris in the Thirty-sixth Congress.

The House declined to reject the poll for riot which did not interrupt the election or prevent an ascertainment of result.

[1] Additional cases in this period, classified in different chapters, are:

Thirty-sixth Congress—
- Love, California. (Sec. 314.)
- Chrisman, *v.* Anderson, Kentucky. (Sec. 538.)

Thirty-seventh Congress—
- Foster, North Carolina. (Vol. I, sec. 362.)
- Pigott, North Carolina. (Vol. I, sec. 369.)
- Segar, Virginia. (Vol. I, sec. 363.)
- Upton, Virginia. (Vol. I, sec. 366.)
- Beach, Virginia. (Vol. I, sec. 367.)
- Wing, *v.* McCloud, Virginia. (Vol. I, sec. 368.)
- Grafflin, Virginia. (Vol. I, sec. 371.)
- McKenzie, Virginia. (Vol. I, sec. 372.)
- Beach *v.* Upton, Virginia. (Vol. I, sec. 686.)
- Rodgers, Tennessee. (Vol. I, sec. 370.)
- Hawkins, Tennessee. (Vol. I, sec. 373.)
- Flanders and Hahn, Louisiana. (Vol. I, sec. 379.)
- Byington *v.* Vandever, Iowa. (Vol. I, sec. 490.)
- Shieb *v.* Thayer, Oregon. (Vol. I, sec. 613.)
- Morton *v.* Daily, Nebraska. (Vol. I, secs. 615, 687.)
- Kline *v.* Verree, Pennsylvania. (Vol. I, sec. 727.)

(For footnotes 2, 3, 4, and 5 see page 2.)

On February 27, 1861,[6] the Committee of Elections reported in the case of Preston *v.* Harris, of Maryland. No decision in this case was reached by the House. The report of the committee was in favor of the sitting Member, who remained undisturbed in his seat.

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[2] Additional cases in the Thirty-eighth Congress:
McKenzie, *v.* Kitchin, Virginia. (Vol. I, sec. 374.)
Chandler and Segar, Virginia. (Vol. I, sec. 375.)
Fields, Louisiana. (Vol. I, sec. 376.)
Bonanzo, Fields, Mann, Wells, and Taliaferro, Louisiana. (Vol. I, sec. 381.)
Bruce, *v.* Loan, Missouri. (Vol. I, sec. 377.)
Knox, *v.* Blair, Missouri. (Vol. I, sec. 716.)
Henry, *v.* Yeaman, Kentucky. (Vol. I, sec. 378.)
Johnson, Jacks, and Rogers, Arkansas. (Vol. I, sec. 380.)
Jayne *v.* Todd, Dakota. (Vol. I, sec. 619.)
Carrigan *v.* Thayer, Pennsylvania. (Vol. I, sec. 712.)
Kline *v.* Myers, Pennsylvania. (Vol. I, sec. 723.)
Gallegos, *v.* Perea, New Mexico. (Vol. I, sec. 728.)

[3] Additional cases in the Thirty-ninth Congress:
Koontz *v.* Coffroth, Pennsylvania. (Vol. I, sec. 556.)
Fuller *v.* Dawson, Pennsylvania. (Vol. I, sec. 556.)

[4] Additional cases in the Fortieth Congress:
Hamilton, Tennessee. (Vol. I, sec. 315.)
Butler, Tennessee. (Vol. I, sec. 455.)
Jones *v.* Mann and Hunt *v.* Menard, Louisiana. (Vol. I, sec. 326.)
Blakely *v.* Golladay, Kentucky. (Vol. I, sec. 322.)
The Kentucky Members, Kentucky. (Vol. I, sec. 448.)
Smith *v.* Brown, Kentucky. (Vol. I, sec. 449.)
McKee *v.* Young, Kentucky. (Vol. I, sec. 451.)
Symes *v.* Trimble, Kentucky. (Vol. I, sec. 452.)
Casement, Wyoming. (Vol. I, sec. 410.)
Wimpy and Christy, Georgia. (Vol. I, sec. 459.)
McGrorty *v.* Hooper, Utah. (Vol. I, sec. 467.)
Chaves *v.* Clever, New Mexico. (Vol. I, sec. 541.)
Hunt and Chilcott, Colorado. (Vol. I, sec. 599.)
Stewart *v.* Phelps, Maryland. (Vol. I, sec. 739.)

[5] Additional cases in the first session of the Forty-first Congress:
Rodgers, Tennessee. (Vol. I, sec. 317.)
Hunt *v.* Sheldon, Louisiana. (Vol. I, secs. 328–336.)
Sypher *v.* St. Martin, Louisiana.
Kennedy and Morey *v.* McCranie, Louisiana. (Vol. I, secs. 328–336.)
Newsham, *v.* Ryan, Louisiana.
Darrall *v.* Bailey, Louisiana. (Vol. I, secs. 328–336.)
The Georgia Members. (Vol. I, sec. 388.)
Ziegler *v.* Rice, Kentucky. (Vol. I, sec. 460.)
Tucker *v.* Booker, Virginia. (Vol. I, sec. 461.)
Whittlesey *v.* McKenzie, Virginia. (Vol. I, sec. 462.)
Grafton *v.* Connor, Texas. (Vol. I, sec. 465.)
Covode *v.* Foster, Pennsylvania. (Vol. I, sec. 559.)
Hoge and Reed, South Carolina. (Vol I, sec. 620.)
Wallace *v.* Simpson, South Carolina. (Vol. I, sec. 620.)
Boyden, *v.* Shober, North Carolina. (Vol. I, sec. 456.)

[6] Second session Thirty-sixth Congress, House Report No. 89; 1 Bartlett, p. 346; Rowell's Digest, p. 169.

The objection of the contestant that certain judges of the election were not qualified the committee dismissed as not sustained by the evidence.

Upon the objection that a condition of riot, lawlessness, and intimidation prevailed in the seven city wards that gave heavy majorities for the sitting Member, the committee found that there was no such disorder as to bring the case within the recognized ruling of the law of election as to riots. The committee say:

> The only cases in which elections have been set wide for this cause are where there was riot at the polls, or such tumult as interfered with the election, and prevented an ascertainment of the result.
>
> This rule is laid down in 2 Hayward on County Elections (pp. 580, 581, 582, 584). This was a case where a riot occurred at the polls that led to the assault of the high sheriff in the execution of his duty, and was of such a character as led to the closing of the poll, and the election was set aside upon this ground and the illegal conduct of the high sheriff.
>
> Another case will be found in 1 Rowe on Elections (p. 334), where there was such riot and tumult as to interrupt the election.
>
> And another case, in Sheppard on Elections (pp. 105, 106), where it was held that if riots are carried to a great extent, accompanied with personal intimidation, so as to exclude the possibility of a fair exercise of the franchise, they will avoid the election; as where, in this case, the returning officer, being alarmed by the mob, offered to return whoever the sitting Member chose to name; and he indicating himself, the sheriff returned him.
>
> And it is further laid down in 4 Selden (pp. 93 and 94) that, "should a gang of rowdies gain possession of the ballot box before or after the canvass of the votes, and destroy the whole or a portion of the ballots, or introduce others into the box surreptitiously, so as to render it impossible to ascertain the number of genuine ballots, the whole should be rejected."
>
> Also, in 1 Peckwell (p. 77), which was a case of "the most enormous and unexampled riots;" and it was proved that the mayor was applied to to bring in the military to quell them, and the poll was stopped, and not resumed until quiet was restored. The same law is laid down in Haywood on Elections (pp. 580, 581, 582, 584); also in Rowe on Elections (p. 334); also in Sheppard on Elections (pp. 105 and 106); also in the celebrated Westminster cases and the Pontefract case.
>
> Now, it is very clear, from the evidence, that no such condition of things existed in the case under consideration. At every one of the polling places in the district of the sitting Member the election was uninterrupted; the votes were all quietly canvassed; the judges signed the returns; they were transmitted, as the law requires, to the governor of the State; the governor made proclamation of the result, and transmitted to the sitting Member a certificate of his due election. He is, therefore, in his seat under all the observed solemnities of the laws of Maryland.

846. The Oregon election case of Shiel v. Thayer in the Thirty-seventh Congress.

The House held valid an election called on a date fixed by a State constitution, although the legislature had had an opportunity to fix the times, etc.

May a State constitution fix the times, etc., beyond control of the legislature?

On July 26, 1861,[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee of Elections, made a report in the Oregon contested case of Shiel *v.* Thayer.

In this case the sitting Member based his claim to the seat on the undisputed fact that he had a majority of all the votes cast for Congressman on the 6th of November, 1860, the day of the Presidential election. The legislature of Oregon had fixed no time for the election of Congressman, but on the first Monday of June,

[1] First session Thirty-seventh Congress, House Report No. 4; 1 Bartlett, p. 349; Rowell's Digest, p. 171.

1860, an election had been held at which Mr. Shiel undisputably had a majority of the votes cast for Congressman.

It is evident, therefore, that the question on which the case turned was the legality of the June election.

The committee unanimously concluded that the June election was legal. Oregon, on February 14, 1859, was admitted to the Union on a constitution adopted on November 9, 1857. That constitution provided in the body of it that "general elections shall be held on the first Monday of June, biennially," and in a schedule adopted as part of the constitution:

> If this constitution shall be ratified, an election shall be held on the first Monday in June, 1858, for the election of members of the legislative assembly, a Representative in Congress, and State and county officers; and the legislative assembly shall convene at the capital on the first Monday in July, 1858, and proceed to elect two Senators in Congress, and make such further provisions as may be necessary to the complete organization of a State government.

The committee discuss the case as follows:

> The constitution having been, as before stated, adopted by the people in November, 1857, in pursuance of the foregoing provision, an election was held on the first Monday of June, 1858, at which a Representative in Congress, the honorable Mr. Grover, was elected, and a legislative assembly, which met at the capital on the first Monday in July, 1858, and chose two United States Senators, Messrs. Lane and Smith. On the admission of the State into the Union, February 14, 1859, Mr. Grover took his seat in the House of Representatives, and Messrs. Lane and Smith theirs in the Senate, by virtue of these elections. Mr. Grover's term of office expired on the 4th of March following.
>
> By another provision of the same schedule, section 7, it is provided that "all laws in force in the Territory of Oregon when the constitution takes effect, and consistent therewith, shall continue in force until altered or repealed." It was enacted by the territorial legislature in 1845 that "a general election shall be held in the several election precincts in this Territory on the first Monday of June in each year, at which there shall be chosen so many of the following officers as are by law to be elected in each year—that is to say, a Delegate to Congress, members of the Territorial council and house of representatives, judges of probate, district attorneys," etc.
>
> The committee are of opinion that the "general election" provided for in the constitution, to be held once in two years, on the first Monday in June, was designed to embrace at least all such officers as were to be voted for by the people of the whole State, including a Representative in Congress; and that, inasmuch as the same constitution provided for the first of those elections, including by name a Representative in Congress, on the first Monday in June, 1858, an election should be held at the next general election in 1860 for a Representative to the Congress next to be held after said election—that is, to the present Congress—and that the contestant, having at that time received a majority of the votes cast, is duly elected.
>
> The committee would have bad no difficulty in coming to this conclusion had it not been for the action of the legislature of Oregon upon this subject. Notwithstanding this constitutional provision that general elections shall be held on the first Monday of June biennially, the legislature of Oregon seems to have believed that it had power to fix another time for the election of Representative in Congress. On the 1st day of June, 1859, a law was enacted providing for the election of a Representative in Congress on the 27th day of June, 1859. By virtue of an election on that day the honorable Mr. Stout received a certificate of election to the Thirty-sixth Congress, and served during the term as such. At the session of the legislature in September last both branches acted upon the idea that, notwithstanding this provision in the constitution of Oregon, the legislature had the power to fix another day for the election of a Representative in Congress. A bill passed each branch fixing the day of the Presidential election, for an election of a Representative in Congress once in four years, and for such election at the general election in the alternate years. But the two branches of the legislature differed upon the question whether it should apply to the election of a Representative to the present Congress, and so the bill never became a law. Various reasons have been given for this action of the legislature, about which the contestant and sitting Member widely differ. The committee have

not deemed it necessary to determine what those reasons are, for, with all due respect to the opinions of the gentlemen composing that legislature, they are of opinion that this House must nevertheless be the final judge of the meaning of this clause of the constitution of Oregon, so far as it touches the question under consideration. And for the reasons stated, the committee have no doubt that the constitution of the State has fixed, beyond the control of the legislature, the time for holding an election of Representative in Congress at the general election to be held biennially, and that at such election so held in pursuance of the constitution the contestant was duly elected to the Thirty-seventh Congress. They therefore report the following resolutions:

Although the report of the committee was unanimous, opposition developed when the question was discussed in the House on July 30.[1]

Mr. Thaddeus Stevens, of Pennsylvania, offered as a substitute for the proposition of the Committee on Elections an amendment declaring that neither Mr. Shiel nor Mr. Thayer was entitled to the seat. He admitted that the constitution of a State might fix the time for the first election, but contended that after the first election the time should "be prescribed in each State by the legislature thereof," in the words of the Constitution of the United States.

Mr. Dawes replied that if there were a conflict between the legislature and the constitution of Oregon there might be ground for the amendment proposed. But the legislature, by passing no law, had acquiesced in the provision of the State constitution. In the opinion of Mr. Dawes, the provision of the United States Constitution which used the word "legislature" meant that the time should be fixed by the constituted authorities of the State. Most of the Members from new States had come to the House by virtue of elections fixed by their constitutions.

On the question of adopting Mr. Stevens's amendment there appeared, yeas 37, nays 77;[2] so the amendment was rejected.

The resolutions of the committee declaring Mr. Shiel, the contestant, entitled to the seat and declaring sitting Member not entitled to it, were then agreed to without division.

847. The Pennsylvania election case of Butler v. Lehman in the Thirty-seventh Congress.

The House having passed on the prima facie title to the seat, the Elections Committee declined to reopen that question.

The House being of opinion that votes were cast as returned, declined to reject the return because not signed by the election judge as required by law.

The House, overruling the committee, declined to find the return of the election officers fraudulent on the strength of an impeached recount of the votes.

In order for a recount of votes to rebut the presumption in favor of the election officers it must be shown that the boxes have been kept inviolate.

On January 7, 1862,[3] the Committee on Elections reported in the Pennsylvania case of Butler *v.* Lehman.

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[1] Globe, pp. 352–357.

[2] Journal, p. 178.

[3] Second session Thirty-seventh Congress, House Report No. 6; 1 Bartlett, p. 353; Rowell's Digest, p. 172.

The prima facie title to the seat had by the House been given to Mr. Lehman, and while this portion of the case presented unusual features, the committee did not consider it proper to reopen the question of prima facie right after the House had decided it.

The sitting Member, on the face of the corrected returns on which the certificate had been issued, had a plurality of 132 votes.

The contestant denied the correctness of these returns, and attacked them on two grounds.

The committee dismiss the first ground, saying:

> It is shown that the return from the eleventh division of the Second Ward, which gave Mr. Lehman 210 votes and Mr. Butler 31 votes, was never signed by the judge, as required by law. (See Brightly's Annual Digest, sec. 33, p. 1096.) If this return should be rejected on account of said informality it would make a difference in favor of the contestant of 179 votes, and would elect him. But the committee are of opinion that the votes as returned were really cast for the parties named, and that the objection is a mere technical one that ought not to prevail.

The second objection urged by the contestant is the one on which the issue was joined and on which the decision of the case turned.

The objection was that in certain wards and divisions of wards in the district, by reason of fraudulent action of the election officers, the returns did not give a true statement of the actual votes cast; and the contestant asked a recount of the ballots. The law of Pennsylvania provided for such a recount, as follows:

> As soon as the election shall be finished the tickets, list of taxables, one of the lists of voters, the tally papers, and one of the certificates of the oath or affirmation taken and subscribed by the inspectors, judges, and clerks shall all be carefully collected and deposited in one or more of the ballot boxes, and such box or boxes being closely bound round with tape, shall be sealed by the inspectors and the judge of the election, and, together with the remaining ballot boxes, shall, within one day thereafter, be delivered, by one of the inspectors, to the nearest justice of the peace, who shall keep such boxes containing the tickets and other documents to answer the call of any person or tribunal authorized to try the merits of such election.

The recount took place in the presence of both parties to the contest, and showed a gain of 167 votes for the contestant, thus giving him a plurality of 35 votes. This gain was found in the boxes of three divisions—one in the Third Ward, another in the Second Ward, and the third in the Fourth Ward. The changes in no two of these three divisions were large enough to destroy the plurality of the sitting Member. It was therefore necessary to establish the verity of the recount in all three divisions.

The sitting Member objected to the validity of the recount on two grounds:

> First. That the ballot boxes were not sufficiently identified as belonging to the divisions alleged.
> Second. That the boxes had been opened and contents changed before the recount took place.

The minority of the committee urged in behalf of this contention of the sitting Member that the primary returns of votes made under State authority were prima facie evidence of their legality, of the number of votes cast, and the rights of the respective candidates. It was necessary to inquire whether the testimony presented by the contestant was sufficient to overcome the legal effect of the returns. The rule as to presumptive evidence was that no person in the absence of criminative

proof should be supposed to have committed any violation of the criminal law. The minority say:

It seems, then, as we understand the law, that the contestant might be justly and properly held to prove the truth of his charges against the election officers, not merely by the weight of evidence, as in civil cases, but beyond a reasonable doubt. The only testimony, as we have seen, that tends to establish their guilt is the recount of the ballots. Taking into view the difficulty of identifying the boxes, the manner in which they were kept, the time that had elapsed before they were opened, had those officers been on trial under an indictment for the offense, with no other testimony against them, it is a matter of grave doubt if this evidence, standing unsupported as it does, would have been sufficient to have put them upon their defense. The testimony is circumstantial, and only one circumstance, unsupported in any way. It may be well questioned whether this circumstance, standing as it does alone, can justly be regarded as affording evidence of higher nature than what is technically known as "a slight presumption of guilt," which, it is said, "may excite suspicion, but is not proof; nor does it change the burden of proof." In order to a successful prosecution of those persons in the case supposed, the testimony against them should not only be such as to countervail the presumption of innocence, which the law itself makes evidence for the accused in all prosecutions for crime, but also the still stronger presumption with which it fortifies and guards the official doings of its own officers. It is not enough, in such cases, that the testimony tends even strongly to establish the guilt of the accused, but that guilt must be shown to be inconsistent with any reasonable supposition of innocence.

The minority of the committee also dwelt upon the abuses and evil consequences which must result from the reopening of ballot boxes, except under stringent and well-understood rules.

As to the first objection of the sitting Member, the majority of the committee admitted that, so far as identification was concerned, there was much difficulty in identifying to what division a ballot box belonged until it had been opened. Then the papers directed by law to be placed in the ballot box would identify it as to the division to which it belonged, while the ballots themselves would show at what election they had been cast. But such tests, as well as a process of excluding the rem.g.remaining boxes in each ward, which were identified, convinced the majority of the committee as to the identity of the boxes containing the ballots which were recounted.

The minority of the committee made the point that the election officers, whose testimony as to the question of identity would have been the best in the case, were not called at all by the contestant and afterwards when called by sitting Member were unable to identify them, and further testified that if the boxes were the same the votes taken from them on the recount were not those put in them by the officers on the night of the election. The minority strongly contended that the facts did not show a sufficient identification of the boxes.

As to the second objection, that the boxes had been opened and the contents changed before the recount, the majority of the committee say:

The contestant produced these boxes from their legal and rightful custodians, sealed up, and in the same apparent condition they were in when left with the alderman. Under these circumstances the burden of proving them to have been tampered with properly rests on the respondent; but no proof upon this point was submitted, except some testimony showing that some of the boxes were left in such a situation that it was possible for some unauthorized person to have meddled with them.

But there is no proof to render it probable that such was the case.

The respondent attempts to rebut the evidence afforded by the recount of the ballots, by calling the election officers who made the division returns to testify that those returns were correct; but in the opinion of the committee this testimony neither impairs the case of the contestant nor strengthens that of the respondent.

Officers who had declared upon their official oaths that returns made by them were true would not be likely to come into court afterwards and swear that they were false.

The committee have not deemed it necessary to determine whether the errors in the division returns, before mentioned, were the result of deliberate fraud or mistake on the part of the election officers, for the motive which actuated them is immaterial. It is enough that the returns in the divisions specified were false in fact, and that the contestant was thereby deprived of votes fairly and legally cast for him, enough to have elected him; of this the committee are fully convinced.

The minority, in accordance with the principle announced by them as to the character of evidence required to prove fraudulent acts on the part of the election officers, urged that the contestant had by no means shown, as they thought he should show, that the boxes had been so kept as to rebut any reasonable presumption that they had been tampered with. The minority quote, testimony to show that the boxes were not by any means kept with the care essential to preclude opportunity for fraud.

On January 16,[1] the report was debated at length, and on January 17,[2] the House, by a vote of yeas 77, nays 67, amended the resolutions proposed by the majority of the committee so as to declare the contestant not entitled to the seat and declaring the sitting Member elected and entitled to the seat.

The resolutions as amended were then agreed to without division. So the report of the majority of the committee was overruled.

848. The Pennsylvania election case of Kline v. Verre in the Thirty-seventh Congress.

Example of a general specification in a notice of contest which does not meet the requirements of the law.

Instance wherein the Elections Committee, after ruling a notice of contest insufficient, permitted contestant to specify orally.

The custody of the ballot boxes being suspicious, the House declined to set aside the returns on the strength of a recount.

On February 27, 1862,[3] the Committee on Elections reported on the Pennsylvania case of Kline *v.* Verre.

This case involved two questions: A preliminary one as to the sufficiency of the notice given by the contestant, and a question relating to the truthful ascertainment of the number of votes cast.

As to the preliminary question, the law of 1851 required of the contestant that he should "specify particularly the grounds upon which he relies in the contest." The committee say:

Did this notice specify particularly the grounds of this contest? It is proper to state that the contestant waived before the committee all grounds of contest, except such as may be found in the last clause of the tenth specification. The attention of the House is therefore called to this specification, and to the particularity of the grounds of contest which that clause in it contains. It is in the following words:

"10. The examination of the tally papers relating to said Congressional election, and deposited in the office of the prothonotary of the court of common pleas, and deposited in the several ballot boxes in said Congressional district, together with a recount of all the ballot boxes in said district at said election, will show that you were not elected, and that I was elected."

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[1] Globe, pp. 365–375.

[2] Journal, p. 196; Globe, p. 379.

[3] Second session Thirty-ninth Congress, House Report No. 40; 1 Bartlett, p. 381: Rowell's Digest., p. 175.

Without subjecting this specification to the criticism that the last clause is inseparably connected with the first, so that the whole must be taken together and constitute but one allegation quite different in its meaning from any just interpretation of the last clause, if standing alone, suppose it were a simple allegation, standing alone, that "a recount of all the ballot boxes in said district will show that you were not elected, and that I was elected," in what just sense could it be said that such an allegation is a compliance with that provision of law which requires of the contestant to "specify particularly the grounds upon which he relies in the contest?"

The committee concluded unanimously that the notice was "in no just sense a conformity with the requirement of the statute." They say:

The question was thereupon presented to the committee, Shall parties contesting seats in the House of Representatives be held to conduct that contest according to the requirements of the statutes of the United States, or be permitted, without expense, to depart from and disregard the plainest provisions of those statutes in this regard, founded in the plainest principles of justice and fair dealing? Long before the statute was enacted parties to contested elections, both in England and this country, were held to a compliance with the same rule.—(Leib's case, Clark & Hall, 165; Luttrell *v.* Hume, 4 Doug. Elect. Cases, 25; Skerret's, 2 Pars., 509; Carpenter's case, 2 Pars., 537; Kneass's case, 2 Pars., 553.) Several of the cases here cited are from the State of Pennsylvania, and, so far as the local law of the State where this contest has arisen forms a rule for the guidance of the parties, are clear and decisive against the sufficiency of this notice of contest.

Therefore the committee unanimously came to the conclusion that the notice was in "no just sense a conformity with the requirements of the statute, or the well-settled rules which should govern in all contests of this kind."

To avoid all injustice, however, the committee allowed the contestant to specify and particularize orally. This was done by specifying precincts wherein mistakes were alleged to have been made and particularizing the effects of such mistakes in numbers of votes.

As to the second branch of the case, there was a question as to the recount of votes. The returned majority of the sitting Member was 22 votes. Contestant's allegations were that in certain precincts there was sufficient wrong counting of votes actually cast to overcome the majority returned. The law of Pennsylvania provided as follows:

As soon as the election shall be finished the tickets, list of taxables, one of the lists of voters, the tally papers, and one of the certificates of the oath or affirmation taken and subscribed by the inspectors, judges, and clerks, shall all be carefully collected and deposited in one or more of the ballot boxes, and such box or boxes, being closely bound round with tape, shall be sealed by the inspectors and the judge of the election, and, together with the remaining ballot boxes shall, within one day thereafter, be delivered by one of the inspectors to the nearest justice of the peace, who shall keep such boxes containing the tickets and other documents to answer the call of any person or tribunal authorized to try the merits of such elections.

The committee found the case dependent on two considerations:

Were the ballot boxes produced the ones actually used at these precincts at the election contested? And did they contain untouched the ballots so cast? Indeed, it must be apparent to everyone that unless the committee could be satisfied of both identity and security they could not control and correct the sworn return by any subsequent count.

Upon the question of identity the committee have had little or no difficulty. It was testified in respect to each of the boxes under consideration by the alderman of the ward who resided nearest the precinct that he received the box from the election officers of that precinct on the night of the election as and for the ballot box used at that precinct, and each was so labeled when received. There was other

evidence tending to strengthen this. And the committee were left without doubt that the boxes produced were those actually used at these precincts.

Upon the question of security, whether these ballot boxes, when opened and recounted before the magistrates, were in the same condition as when sealed up by the election officers and delivered to the alderman on the night of the election, there was much conflicting testimony and much doubt.

An example of the doubt is shown by the following conditions developed in the testimony. The ballot box of one precinct had been at times in the custody of a man of bad reputation, a constable who had been convicted of extortion, and had been pardoned by the governor. This constable had let the box go into the possession of a person whom he did not know, the pretext being that it was to be taken to the magistrate. The committee therefore thought that ballots kept in such custody were not trustworthy evidence after three months, especially when the number of votes did not agree with the sworn return. In another precinct the box had been left in an unfastened closet, with no one to care for it, for three days and showed exterior and interior signs of having been tampered with, the condition of the tickets being especially suspicious. In a third precinct the box had never been sealed according to law or had been subsequently tampered with, and the ballots were in a suspicious condition.

The contestant claimed the benefit of 54 votes gained for him by the recount of the ballots in these three suspicious boxes, these votes being necessary to show his election.

The committee were unanimously of the opinion that he was not entitled to these votes, and reported resolutions to that effect and declaring the sitting Member entitled to the seat.

On March 4,[1] after some debate, the resolution declaring contestant not elected was agreed to, yeas 105, nays 13. The resolution declaring the sitting Member entitled to the seat was agreed to without division.

849. The Massachusetts election case of Sleeper v. Rice in the Thirty-eighth Congress.

Discussion as to the validity of an amended return under the law of Massachusetts in 1864.

A recount by the election officers at their own instance, and unimpeached by anything showing fraud, was sustained by the House.

A declaration of result in open ward meeting, under a State law, was held prima facie evidence of the result, but controllable by evidence.

On February 17, 1864,[2] the Committee on Elections reported on the Massachusetts case of Sleeper *v.* Rice. The title to the seat depended on the true number of votes cast in Ward 12 of Boston, there having been two counts, one of which showed 85 plurality for Mr. Sleeper and the other a plurality of 28 for Mr. Sleeper, a change sufficient to change the result in the district. The committee, whose report seems to have been unanimous, say:

It is necessary to a correct understanding of the merits of this controversy that the method of conducting elections in Massachusetts be known. Polls are opened in cities in each ward, and the election is there conducted by a board of ward officers, consisting of a warden, clerk, and five inspect-

[1] Journal, pp. 397, 398; Globe, pp. 1054–1062.

[2] First session Thirty-eighth Congress, House Report No. 23; 1 Bartlett, p. 472; Rowell's Digest, p. 187.

ors. The voting is by ballot, and every voter's name is found upon a check list. A part of these ward officers has charge of the ballot boxes and others the check list. When a voter approaches to vote, his name is fast found and checked on the check list, and he then casts his ballot in the box. At the close of the poll the result, after having been ascertained by the ward officers mentioned, is certified in blanks prepared for the purpose by a majority of those officers, publicly declared there before the adjournment in open meeting, entered upon the records of the board, and certified copies thereof delivered by him forthwith to the city clerk, who shall immediately enter them upon the city records. Certified copies of this record, after examination and other proceedings, which will be hereafter alluded to, and transmitted in the case of Representative in Congress within ten days to the secretary of the Commonwealth, and by him laid before the governor and council, who, as a board of canvassers, canvass the returns from the entire district, declare the result, and give a certificate of election to the person appearing to them to be elected.

In the present case the ward officers on the night of election, November 4, 1862, sent to the city clerk a certificate showing a plurality of 85 votes for Mr. Sleeper. And the mayor and aldermen certified the result in the wards of the district.

On November 11, seven days after, the ward officers of Ward 12 sent to the city clerk an amended certificate showing a plurality of only 28 for Mr. Sleeper. Thereupon the mayor and aldermen transmitted an amended certificate to the secretary of the Commonwealth. The committee say:

The governor and council received the amended return and gave the certificate as required by it to Mr. Rice. Upon the legality and truth of this amended return hangs this contest. In respect to it Mr. Sleeper claims, first, that it is illegal, because there is no law authorizing the ward officers to make an amended or additional return of this nature.

The law requires the result to be declared in open ward meeting, and this result never has been so declared, and can not therefore be accepted as the result; and because the mayor and aldermen have never, as required by law, passed upon this amended or additional return, or determined anything one way or the other based upon it, but only transmitted the same to the governor and council, with a hypothetical certificate of their own, of no force in law, and, secondly, that the amended return is not true.

Although the last proposition of Mr. Sleeper is the most important of all, lying at the foundation of all investigations of the committee, who entertain no doubt that the seat should be awarded to that candidate for whom the greatest number of legal votes were cut, however officers may have conformed to or disregarded the requirements of law in Massachusetts in declaring, certifying, or canvassing the votes after they have been so cast, yet the committee, before proceeding to a discussion of the evidence bearing upon the question of how many votes were actually cast at that poll, embraced in the second proposition of Mr. Sleeper, stop for a moment to consider the soundness of his first proposition. Is there any law authorizing the ward officers to make an amended or additional return of the nature of the one here made? The duty of the ward officers, as well as of the mayor and aldermen, in the premises is prescribed in chapter 7, section 16, of the general statutes of Massachusetts in these words:

"The mayor and aldermen and the clerk of each city shall forthwith, after an election, examine the returns made by the returning officers of each ward in such city, and if any error appears therein they shall forthwith notify said ward officers thereof, who shall forthwith make a new and additional return, under oath, in conformity to truth, which additional return, whether made upon notice or by such officers without notice, shall be received by the mayor and aldermen or city clerk at any time before the expiration of the day preceding that on which by law they are required to make their returns, or to declare the result of the election in said city; and all original and additional returns so made shall be examined by the mayor and aldermen and made part of their returns of the results of such election. In counting the votes in an election no returns shall be rejected when the votes given for each candidate can be ascertained."

In this clear and comprehensive section is comprised the whole law of Massachusetts upon the subject. By it a new or amended return is not only authorized, but required in certain cases—its language being: "Who shall forthwith make a new and additional return." Of course the new return

is to be different from the one already made, or it would be useless. It must, therefore, be different from the original declared result, for that is what the law requires, and is in the first return, excepting always the possible case of a clerical mistake in transcribing a declared result into a certificate, which can not embrace the whole scope of the section. This disposes of the objection that the result included in the second return has never been declared in open ward meeting, for if it had been so declared there would have been no occasion, except in the one improbable case stated, for a new return. The last clause in the statute renders immaterial also any defects of form in the first return, holding it sufficient when the true number of votes can be ascertained from it, and consequently requiring a new return only when the true number of votes had not been declared and certified already.

The committee therefore concluded that a "result declared in open town meeting" might be amended, and that the statutes of Massachusetts contained ample provision for the proceedings of the ward officers and mayor and aldermen of Boston in respect to this new and amended return.

The committee considered, however, that the most important branch of the case yet remained, viz: Did the new return "conform to the truth?" The committee therefore proceeded to go back to the return, and examine what was the actual vote cast in Ward 12 for Representative in Congress. It appeared that the count on election day showed a difference of 60 votes between the aggregate of votes for Representative to Congress and for governor and other officers. Inquiry as to this discrepancy induced the ward clerk to examine and compare the memoranda of the count. Finding certain discrepancies—

the ward clerk conferred with the former clerk of the ward and other friends, and then returned and examined by himself alone, and unbeknown to anyone else, the bundle of votes in his attic. Taking off the paper wrapper, but without untying the string around the middle of the bundle of packages, or removing the packages, he examined the votes in each package, took off the number of votes for Representative in Congress on each of the packages, and then restored them to their former place in the closet. In consequence of the conviction that an error bad been committed in counting, which this examination produced on his mind, he then procured a meeting of all the ward officers at his house on the following evening, when the votes were by them there recounted with great care, and the result as thus ascertained was embodied in the new or amended return, signed by all the ward officers, seven in number, four of them voting themselves for Mr. Rice, and three of them for Mr. Sleeper, sworn to by them all, forwarded to the mayor and aldermen, and by them transmitted to the governor and counsel within the time prescribed by law. In counting the votes at this time the ward officers took each of the small packages upon which the number of votes was marked, recounted it carefully, and checked the corresponding numbers upon paper K.

The committee say of this second count:

That this was the correct count of the ballots on the second count the Monday night after the election, no one disputes, and an examination of the evidence, with a sworn return of the seven ward officers, does not leave room for doubt. If, therefore, the ballots had not in the meantime been tampered with, the proof could not be made stronger that the true result had been reached. Upon this point there is not the slightest evidence calculated to awaken suspicion. The clerk of the ward, whose testimony is uncontradicted, and whose character appeared to be above reproach, testifies positively that the bundle recounted on Monday night contained all the votes cast on the day of election, and none others, in precisely the same condition as when tied up at the close of the polls; that he took them that night home with him, and put them in a trunk in a closet in his attic; that the trunk shut with a spring lock, the key remaining in the lock; that no person, to his knowledge, knew they were there but himself; that his own family consisted of a wife, confined all this time to her bed with sickness, an infant child, a nurse, an aunt visiting the family, and himself.

The committee present as part of their report facsimiles of two of the memoranda of the count, and show that, unless they are forged, they sustain the result of the

recount. The committee conclude that not only the corroborative testimony, but "the very sight of the original papers" shows how preposterous is the claim that they have been changed to produce the result.

The committee therefore concluded that "in the absence of a particle of testimony calculated to cast suspicion upon the fairness and truth of this recount," Mr. Sleeper was not entitled to the seat, and that Mr. Rice was entitled to it.

When the case was debated in the House on March 4,[1] the contestant, who was heard at length, impugned the integrity of the ward clerk and charged that he had prepared the memoranda and ballots to produce the results.

As to the doctrine that the result declared in open town meeting was res adjudicata, and past any examination by the House, Mr. Henry L. Dawes, of Massachusetts, chairman of the Committee on Elections, said:

> The Committee on Elections were of the opinion that no such rule exists in Massachusetts, or should govern us in the House of Representatives; that while they would put great reliance on that open declaration and regard it as prima facie evidence of the actual result, not to be controlled by any slight or suspicious evidence, nevertheless it is controllable, and to be controlled by evidence that will not admit of any reasonable doubt, so that the truth may be arrived at satisfactorily to fair and candid minds as to the actual result of the legal vote.

The House, without division, agreed to the resolutions reported by the committee.[2]

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

The pleadings in both the notice and answer being bad, the committee condemned them but examined the case.

The judges of an election having joined in partisan and irregular conduct and testimony showing evidence of extensive fraud, the entire return was rejected.

The committee considered an issue covered by testimony admitted without objection, although not specified in the pleadings.

On May 5, 1864,[3] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, submitted a report in the case of Knox *v.* Blair, of Missouri.

The report, at the outset, after noting the specifications of the contestant and the answer of the sitting Member, says:

> The House will not fail to notice the extraordinary character of many of the allegations of both contestant and sitting Member, as well in the matter as in the manner of their presentation. For vagueness, uncertainty, and generality they are, in the opinion of the committee, without example, and seem to have been drawn in studious disregard both of the act of Congress and of all precedent. But as neither contestant nor sitting Member was in a situation to take exception to the substance or mode of the other's pleading, the committee were not called upon for a decision upon this point, but present the case as they find it upon the record. They do not feel at liberty, however, to permit these pleadings to pass into a precedent without recording the opinion that many of the allegations on both sides are bad both in substance and form.

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[1] Globe, pp. 942–949.

[2] Journal, p. 346; Globe, p. 949.

[3] First session Thirty-eighth Congress, House Report No. 66; 1 Bartlett, p. 521; Rowell's Digest, 190.

The minority, calling attention to the above criticism, used it as an argument against the conclusion of the majority, as to the Abbey precinct, saying:

The first section of the act of 1851 (9th Statutes, p. 568) requires that the grounds of contest shall be specified particularly in the notice of contest.

This is but the reenactment of the parliamentary rule; and the practice has been uniform under this to restrict the contest to the points presented in the notice; and the ninth section of the act declares all evidence illegal which does not bear on the specifications of the notice, by restricting the evidence to be taken to the specifications made in the notice. The only ground presented by the contestant, in connection with this precinct, is contained in his first specification, which is in the following words:

"First. That at least 400 illegal votes were cast for you at a precinct known as the Abbey precinct, in said district. That the persons voting had not been citizens or inhabitants of the State of Missouri for one year previous to said election; nor had they been residents of said district for three months previous to said election. Many of said voters were minors under the age of 21 years. A list of the voters whose votes are contested is annexed to and made a part of the notice."

It will not be pretended that this notice declaring the intention of the contestant to contend meant merely that the individuals named were not qualified voters, for one or the other of the reasons mentioned contains, either in form or substance, notice that it would be "contended by the contestant that the voting at this precinct was of such a grossly fraudulent character as to involve all concerned in it either in participation or passive permission, and to render it impossible to sift and purge the poll"—which the committee report to be the present ground taken by the contestant.

But in debate Mr. Dawes expressly stated [1] that the specification in regard to the Abbey precinct was more particular than usual. It actually set forth the names of the voters objected to, thus setting out the facts more precisely than any case occurring to his recollection under the law of 1851.

As to the merits of the contest, the most important issue arose as to this precinct of Abbey. The return from this precinct gave Mr. Blair 424 votes, Mr. Knox 41, and Mr. Bogy 11 votes. In the two Congressional elections before the one in question and in a judicial election since, the total vote had not in any case exceeded 140 votes.

There had been little if any change in the population of the precinct. Furthermore, of the 480 who voted at this election in 1862, 19 only voted in 1858, only 13 in 1860, and only 36 in 1863. Persons acquainted with the voters belonging in the precinct visited the polls during the day, but saw scarcely a person known to them among the hundreds crowding the place. By the law voters were allowed to vote in precincts where they did not live, the requirement of an oath being provided to prevent repeating. It was in evidence that soldiers, including paroled prisoners, voted in large numbers illegally. The committee say of this precinct:

The judges of the election at this precinct were (p. 69) Mr. Price, B. Hamerler, and Mr. Carpenter. Yet Carpenter, without authority of law, substituted in his place (p. 70) one Jerry Millspaugh during a portion of the day, who acted as judge while he electioneered for the sitting Member, and vice versa. The other two judges also forgot their duty as judges in their zeal for the sitting Member (p. 70). The polls at this precinct seemed to have been under the control of one Charles Elleard, an active partisan of the sitting Member, the owner of a race course near by, who destroyed the tickets for the other candidates (p. 70), put one man out of the room because he would not vote for the sitting Member, declaring "We have it our own way here to-day, "and, as he tore up the tickets, "Damn it, we don't want any such tickets around here" (p. 70).

Upon this proof of the manner of voting at the Abbey—the conduct of the judges in admitting illegal voters to cast their ballots in a body, without any evidence that they even administered to a single one the oath required by law of nonresidents of the district, themselves acting as partisans of the

[1] Globe, p. 2959.

sitting Member, and, against law, exchanging places with other partisans not authorized to act as judges; surrendering the control of the voting place to a violent partisan of the sitting Member, and at last achieving the astonishing result of polling nearly four times as many votes as were ever before or since polled at that precinct, from voters all strangers to long residents of the district—the contestant claims that the poll itself should be rejected.

When the result in any precinct has been shown to be "so tainted with fraud that the truth can not be deducible thereform," then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction but call for the rejection of the entire poll when stamped with the characteristics here shown.

The majority, in support of this action, cite the case of Blair *v.* Barrett.

The minority of the committee, as already indicated, raised the point that the action of the judges was outside of the pleadings, and that therefore the committee were going outside the specifications for the benefit of the contestant, although on a question of the admissibility of testimony the sitting Member had been held to the strict rule. In reply, it was argued during debate that the question of the conduct of the judges was properly considered, since it had been covered by testimony regularly presented and admitted without objection as a part of the case. The minority further denied the conclusions of fact by the majority, and the application of the precedent of Blair *v.* Barrett.

851. The case of Knox v. Blair, continued.

The Elections Committee held copies of muster rolls of a regiment prima facie evidence of the age of soldier voters.

Persons intending to vote fraudulently must be shown to have done so at some poll to justify corrections on their account.

The House revised the action of certain canvassers who had rejected polls for want of an abstract of votes.

The second question considered by the committee in their report related to two companies of the Thirty-second Regiment of Missouri Volunteers, who under the law voted in their camps. To prove illegal votes of minors and others the contestant offered copies of the muster rolls of the two companies for comparison with the poll booths to prove that minors and persons not qualified had voted for sitting Member.

The disposition of the votes affected by this comparison depended on a question as to the admissibility of the muster rolls as evidence. On this point the committee say:

The contestant offered what he alleged were copies of the muster rolls of these companies (pp. 200–203). The sitting Member objected to these muster-rolls and to all others offered by contestant, 37 in all, found between pages 199 and 297, for the following reasons: Because, first, they "are neither certified copies nor sworn copies, in any true sense of the word;" that the papers from which those copies purport to have been taken were not in the proper place of deposit, nor in the hands of the legal custodian, and that they are, in many instances, copies of copies. The testimony shows (p. 90) that the papers are copies of muster rolls found in the adjutant-general's office of the State of Missouri, made by the witness, and sworn to as true copies by him. The committee are of opinion that, inasmuch as these are muster rolls of regiments raised by the State of Missouri, and afterwards mustered into the service of the United States, the rule of the military service requiring one copy of these rolls to be deposited with the Adjutant General of the United States at Washington does not make either the copy deposited with the adjutant general of Missouri or that kept with the regiment copies of the one so deposited in Washington any more than that is a copy of either of them, but that either and each of them may be treated as an original, and the muster roll of the regiment for all purposes for which it is to be consulted as such, and the adjutant-

general of Missouri a proper custodian thereof. "Sworn copies" of papers are expressly recognized in the act of Congress providing for taking testimony in contested election cases. (Brightley's Dig., p. 255.) The committee, therefore, deemed these papers as properly authenticated. It was claimed by the contestant that these muster rolls were evidence of the following facts, viz, who were members of the regiment to which the rolls belonged, and what was the age and residence of the soldier enlisting. While, on the other hand, it was objected by the sitting Member that, if properly authenticated, still the rolls would be evidence of nothing except the facts required by law to be recorded in them, and that neither the age nor the residence of the soldier was required to be inserted upon the muster roll, and could not therefore be proved by it. The committee were of opinion that the law requires that the age of a soldier must be made known at the time of his enlistment; that by act of Congress (Stat. 12, p. 502) the oath of enlistment is conclusive against the soldier as to his age; and that the record of age made from the oath of enlistment upon the muster roll by the proper officer at the mustering in should be taken as prima facie evidence of the age of a recruit by third persons, especially by those who seek to avail themselves of the vote of such soldier. But the committee are of opinion that the muster roll is not evidence of the residence before enlistment of the soldiers whose names it bears. It is not of the slightest consequence to the recruiting service to know the residence of the recruit. The law does not require it to be ascertained, nor does the muster roll purport to give it, but only the place where the recruit "joined for duty and was enrolled." But it is known that recruits are constantly going from all parts of a State and from different States to favorite places of rendezvous, and there enlisting, so that the place where a recruit enlisted is no evidence of his residence.

While, therefore, the committee admit the muster rolls as evidence of what men compose a regiment, and of their age, they are still only evidence of those facts at the time the muster roll is made out.

But the committee are of opinion that a muster roll made out a long time before the day of election (November 4, 1862) is not evidence of the "true state" of a regiment at that time. Regiments are constantly changing. With many of them recruiting is all the time going on, and men are every day discharged. It can not, therefore, be safe to say that because a name is not found on a muster roll made out in 1861, that that person was not a member of the regiment November 4, 1862, when the election took place. They therefore rejected all the muster rolls offered as evidence of who did and who did not belong to the respective regiments on the day of election, excepting the following, viz, Company B, Thirty-second Regiment (p. 200), dated December 8, 1862; Company K, same regiment (p. 203); same date; Naughton's company, Twenty-eighth Regiment (p. 206), dated September 12, 1862; Company L, Tenth Cavalry (p. 209), dated October 28, 1862; Company B, Thirty-first Regiment (p. 212), dated August 28, 1862; and Captain Cain's company, Tenth Cavalry (p. 292), dated October 31, 1862. All these muster rolls, made so near the time of the election, were held by the committee to be prima facie evidence of what persons belonged to the respective regiments enumerated. So that if the name of a voter was not found upon these muster rolls it was incumbent upon the party claiming the vote of such a person as a member of one of these regiments to show that fact. But all the other muster rolls, bearing date from one year to a year and a half prior to the day of the election, were not deemed by the committee safe evidence of membership sufficient to be taken as prima facie. But all these muster rolls show the age of the soldier when he enlisted and the time of enlistment, and therefore of age one is as good evidence as another, and all are admitted as evidence to that extent, leaving each party at liberty to controvert them by other evidence.

In accordance with the principles enunciated above the majority purged the polls of various other regiments.

Another principle was involved in testimony offered by contestant to show that crews of men working on gunboats at Carondelet, a place 10 miles below St. Louis, had by direction of Mr. Eads, their employer, been led to vote illegally for Mr. Blair. The committee say:

But although these men set out for the avowed purpose of casting fraudulent votes, and were furnished with tickets by the foreman of their employer, and were carried from the poll in one district where the judge had become too particular for dishonest voters into this district under the guidance of the employer of Mr. Eads, who distributed among them votes for Mr. Blair as they went, yet these men are traced to no poll in St. Louis. Their names are not given, so that no examination of the poll list will

enable the committee to detect them. However strong the tendency of this testimony, it lacks this link, and the committee can not say how many of them voted, nor at what poll they voted, nor for whom. The committee have, therefore, rejected no votes from any poll on account of gunboat men from Carondelet.

Another principle was discussed in connection with certain poll books rejected by the official canvassers. The committee held as follows:

In the opinion of the committee, all of the polls which were rejected for want of "an abstract of votes" were erroneously rejected. The abstract is simply a computation or casting up of the votes, not required by law, and, if erroneously done, to be corrected. The name of each voter and the person for whom he voted is given in each case, and the computation left to be made is not only perfectly easy, but is what is being done all the way through this investigation. The committee have therefore taken into the count all polls rejected for this reason.

The majority of the committee, acting in accordance with the above principles, purged the polls, finding a plurality of 49 votes for the contestant. Therefore they reported resolutions that Mr. Blair was not elected, and that Mr. Knox was elected.

The minority dissented from the conclusions of the majority, contending that the evidence failed to overcome the title of the sitting Member.

On June 10, 1864,[1] the report was debated, though not at great length, the debate developing inaccuracies in the minority views.

The resolution declaring Mr. Blair not entitled to the seat was agreed to, yeas 82, nays 32. The resolution seating the contestant was then agreed to without division.[2]

852. The election case of Todd v. Jayne, from the Territory of Dakota, in the Thirty-eighth Congress.

By answering a notice of contest served before the declaration of the result the sitting Member was held to have waived the informality.

Testimony taken before justices of the peace was admitted, although the sitting Delegate had protested that they were not legally authorized and had declined to attend.

The House declined to receive a deposition taken in violation of the law of 1851, although bearing vitally on the turning point of the contest.

On May 24, 1864,[3] the Committee on Elections reported on the question as to the final right to the seat in the case of Todd *v.* Jayne, of Dakota Territory. The question of prima facie right had been disposed of in a preceding report.

In the question as to final right certain preliminary questions were passed on by the committee, of such importance that the final decision may be said to rest on one of them to a large extent.

The result turned on the vote of Kitson County. An affidavit tending strongly to impeach that vote was presented by sitting Member. The committee say in regard to that affidavit:

Technical objections were raised at the outset, on both sides, that the proceedings had not conformed to the statute of 1851 concerning contested elections. The contestant insisted upon the exclusion

[1] Globe, pp. 2854–2861.

[2] Journal, p. 781; Globe, p. 2861.

[3] First session Thirty-eighth Congress, House Report No. 99; 1 Bartlett, p. 555; Rowell's Digest p. 193.

of the deposition of Joseph L. Buckman (p. 154), because taken after the time prescribed by the statute for closing testimony. By the statute, sixty days from December 15, 1862, the time of the answer, is allowed for taking depositions, which in this case would be February 15, 1863, and they are to be taken in the Territory by some magistrate named in the statute and resident of the Territory. This deposition was taken March 11, 1863, in the District of Columbia, before one of the judges of the orphans' court of this District. The law is explicit, that, while the House can authorize the taking of depositions after the expiration of the time fixed by statute, yet without such authority the evidence must be excluded. The House has heretofore, in another case, that of Knox *v.* Blair, instructed the committee to exclude deposition—that of N. S. Constable, taken in this city under similar circumstances—and this deposition was therefore excluded.

The minority of the committee call attention to the fact that technical requirements had been waived in respect to other features of the case, and say:

Can it be that the House, adhering to the letter of the law as to the time and officer before whom testimony shall be taken, when the act itself is only declaratory and does not forbid the taking of testimony at another time and before another officer, will exclude testimony which exposes this fraudulent and fictitious Pembina vote, and then admit the contestant to take his seat under it? Has not every Member at all acquainted with the Red River country a general knowledge that there could be no such vote there as has been certified to? Without this fraudulent vote the contestant has no claim to the seat, as the report of the majority admits, and not only admits this but shows by the computation of the majority, as given therein, that the sitting Member is entitled to retain his seat.

As to the second preliminary question the majority say:

While the statute requires the contestant to serve his notice of contest upon the sitting Delegate within thirty days after the result of the election has been declared by the board of canvassers, the notice in this case was served upon him before the result was declared. The notice was served November 17, 1862, and the result proclaimed November 29, 1862. The answer of the sitting Delegate, which was upon the merits, and without notice of this objection, was served upon the contestant December 15, 1862. And the committee are of opinion that this was a defect which the sitting Delegate could waive, and that by answering after the result had been proclaimed, and within the time when a new notice of contest could have been served, without availing himself of the objection and proceeding to take the testimony, he had waived the right to object to it at the hearing.

The minority objected to this:

At the outset the question arises, Is there any law prescribing the mode of obtaining evidence in the case of contested elections of Delegates from Territories? Manifestly not, if the act of February 19, 1851, is to receive a strict construction, for it applies only in terms to the "contest of an election of any Member of the House of Representatives." That a Territorial Delegate has no vote, and is not, strictly speaking, a Member of the House of Representatives, is known to all. If, however, the act of February 19, 1851, is by analogy to be held as governing in the contest of a seat by a Territorial Delegate, the provisions must be complied with. That they were not complied with by the contestant in this case is admitted by the majority report, which states, "that while the statute requires the contestant to serve his notice of contest upon the sitting Delegate within thirty days after the result of the election has been declared by the board of canvassers, the notice in this case was served before the result was declared." The report, however, proceeds to state that "the committee are of opinion that this was a defect which the sitting Delegate could waive, and that by answering after the result had been proclaimed," etc., "he had waived the right," etc. Without controverting this position it is difficult to perceive why, if the contestant is to be permitted to avail himself of a notice not strictly in accordance with the statute, the sitting Delegate should not have the like liberality extended to him in relation to a deposition taken on notice to the contestant, when the contestant was present listening to the examination and consenting to an adjournment for the purpose of completing it.

The third preliminary question is thus disposed of by the majority of the committee:

The sitting Delegate further objected that the testimony of contestant was not taken before magistrates authorized by the statute to take testimony. The depositions appear to have been taken before

two justices of the peace, residents of the Territory, who are only authorized to take them when there are none of the other officers mentioned in the statute in the Territory. The statute requires that whoever takes the depositions shall be a resident of the Territory, and the only persons before whom the sitting Delegate claims the depositions should have been taken were the Chief justice of the Territory, P. Bliss, and associate justice, J. L. Williams. Of their residence in the Territory, the evidence is (pp. 15, 19, 21, 27, 37, 82), that their families have never been domiciled in the Territory, but, since their appointment at Sioux City, in Iowa, their post-office matter is sent to that city, where they reside, only coming into the Territory to hold their courts, and then returning to their families in Sioux City. Judge Bliss, who was in the Territory when the notice to take the first deposition was given, which was given to take them before him, "or before some other person duly qualified to take said testimony," on Friday, the 6th day of January, 1863, writes to the attorney a note (p. 10), in which he says, "I will open the examination and remain as long as I can—at least till Friday evening." The committee were of opinion that the two justices of the peace, residents of the Territory, were competent to take the depositions.

Against the above the minority urged:

There is, however, a more serious objection to all the contestant's testimony. It is all ex parte, and taken before justices of the peace. By the third section of the act of Congress, the party wishing to take testimony may apply to "any judge of any court of the United States, or to any chancellor, judge, or justice of a court of record of any State, or to any mayor, recorder, or intendant of any town or city in which said officers shall reside, within the Congressional district; "and by a subsequent section, the twenty-third, it is provided that in case no such magistrate as is by the third section authorized to take depositions shall reside in the Congressional district, it shall be lawful to apply to two justices of the peace. In this instance the contestant gave notice of his intention to take testimony before the chief justice of the Territory, but subsequently went before two justices of the peace. The sitting Delegate protested against the right of the justices of the peace to take the testimony, and never appeared before them. The contestant seeks to show, by testimony, that Judge Bliss, the chief justice of the Territory, resided at Sioux City, Iowa, and not within the Territory of Dakota; but the notice which he gave to take the testimony states: "It is my intention to examine witnesses before Hon. P. Bliss, chief justice of Dakota Territory, the said chief justice being a resident within and for the Congressional district, Territory of Dakota, thereby admitting his presence and competency to act. A copy of said notice is hereto annexed. Besides, the papers show that Judge Bliss, at the instance of contestant, issued subpoenas for witnesses, was present at the time the testimony was about to be taken, and proposed in writing to the contestant to enter upon the examination. The contestant, however, preferred, contrary to law, to proceed before two justices of the peace. That Judge Bliss was, in contemplation of law, a resident of the Territory is manifest from the fact that he had been in the Territory holding the courts, and was then present.

853. The case of Todd v. Jayne, continued.

Professional men within the precinct because of work on contract and not having homes therein were held not to be residents.

It being impossible to ascertain the true vote because of fraud on the part of the officers, the returns were rejected.

These preliminary questions being determined by the committee, the questions as to the election itself caused a division of the committee only as to the vote of Kitson County, which determined the result.

In Yankton County the committee rejected 9 votes, indisputably cast for the sitting Member, because cast by nonresidents, principally surveyors employed under contract and leaving the State when the contract expired, their return depending on new contracts and not on homes in the Territory. The committee did not deem such residents within the meaning of the law.

In Bon Homme County the vote had been rejected by the Territorial canvassers, and the committee approved this rejection. The United States marshal had arbitrarily excluded from the polls a man who had been appointed judge; the board

of election officers had manifestly been constituted to favor fraud, and when watchers at the polls confronted them with evidence of fraud they rushed from the poll room, abandoning the election papers to the crowd, who proceeded to hold a new election.

In Charles Mix County the returns were rejected by the Territorial canvassers. The committee decided that of the rejected votes 62 should be allowed to the sitting Delegate and 7 to the contestant. The rejected votes were cast by Iowa soldiers and half-breeds not entitled to vote.

At Brule Creek precinct, as admitted by one of the election judges in his testimony, the judges met on the night preceding the election at a place not the legal place of election, and received the votes of persons not qualified voters. They took this box, with the fraudulent votes in it, to the regular place of election, and there received the legal votes. A clerk of election who refused to add the fraudulent votes with the legal ones, resigned and another was put in his place. The committee say of these returns:

> The committee are of opinion that it would be a disgrace to receive a return of votes from persons assuming to act as judges and guilty of such practices in office as the testimony and the foregoing unblushing confessions disclose, and submit whether such "judges" have or not added to their other crimes that of perjury in taking the following oath, which they have certified that they have taken:
>
> "We do solemnly swear that we will perform the duties of judges according to law and the best of our ability; that we will studiously endeavor to prevent fraud and deceit in conducting the same."
>
> The committee, therefore, reject the entire vote thus returned from this precinct.

The return of Kitson County was received at the office of the Territorial secretary, after the canvass had been completed, and was sufficient to change the result proclaimed after that canvass. The committee say:

> The committee were of opinion that the arrival of these returns in the secretary's office a few days after the canvass was completed was not of itself sufficient ground for their rejection. The sitting Delegate objects to the counting of this return for two reasons. First, that the vote is fraudulent and fictitious. Second, that the territory included in the precinct at which this vote was cast "is situated wholly in the Indian country; and though within the geographical, it is, by the act of Congress organizing the Territory of Dakota, without the political limits of said Territory."

The objection that the precinct was in the Indian country the committee find not sustained by law. As to the charge that the vote was fraudulent and fictitious the committee found it sustained by only one witness, whose testimony had not been admitted for reasons already stated. Therefore the committee counted the vote of this county, 125 for contestant and 19 for sitting Member, and thereby found a majority of 99 votes for the contestant. Accordingly they reported resolutions that sitting Member was not elected, and that contestant was entitled to the seat.

On June 10 and 11[1] the report was debated at length in the House. There was a strong feeling that the Kitson County vote would have been impeached had the excluded testimony been admitted, and the following substitute amendment was offered to the resolutions of the committee:

> That the election in the Territory of Dakota for Delegate was attended with so much illegality and fraud that neither William Jayne nor J. B. S. Todd is entitled to a seat in this House as such Delegate, and the seat of the Delegate from that Territory is declared vacant.

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[1] Globe, pp. 2861, 2882–2892.

This amendment was disagreed to,[1] yeas 57, nays 66. Then, after dilatory proceedings, the resolution declaring Mr. Jayne, the sitting Member, not entitled to the seat was agreed to, yeas 92, nays 1; and then the resolution seating Mr.Todd, the contestant, was agreed to, yeas 64, nays 31.

854. The Missouri election case of Lindsay v. Scott in the Thirty-eighth Congress.

The law of the State requiring a voter, on pain of disqualification, to take an oath of loyalty, votes cast by unsworn voters were rejected.

Where a State law declared that "no ballot not numbered shall be counted," the House sustained the rejection of ballots not numbered.

Ballots being regularly numbered and counted and the vote entered on the poll book the return stood, although the ballots were afterwards destroyed.

On June 20, 1864,[2] the Committee on Elections reported in the case of Lindsay *v.* Scott, of Missouri. In this case, the committee being unanimous, the poll was purged by the committee in accordance with the following conclusions:

The State of Missouri having been torn by civil dissensions incident to the war, on June 10, 1862, the State convention had adopted an ordinance prescribing an oath of loyalty as a qualification for voters and the judges and clerks of all elections. The contestant alleged that in numerous precincts the oath was not administered. The committee say:

> A neglect or refusal to take the oath disqualified the voter by the express language of the ordinance; and hence wherever it appears that the election was conducted by the judges without having the oath administered to the voters, or wherever the voters were permitted to vote without having first taken the oath, the committee have felt bound, by the express provisions of the ordinance, to reject all such votes as illegal and void, no matter for whom they were cast.

The committee state thus a second rule by which they proceeded:

> By an act of the general assembly of the State of Missouri, approved March 23, 1863 (Laws of Missouri, 1863, p. 17), certain amendments were made to the laws of that State in regard to elections, and among other things ordering the elections to be by ballot and to continue for one day only. It also provided that the judges of election should "cause to be placed on each ballot the number corresponding with the number of the voter offering the same" and that "no ballot not numbered shall be counted." The contestant in his notice alleges that in several of the townships and election precincts this provision of the law was wholly disregarded, and therefore that the votes so cast should be rejected.

The committee comment on the fact that the statute in this respect is clear and explicit, expressly prohibiting the counting of such votes by the judges of elections.

In Cape Girardeau County the county clerk omitted from his abstract which he certified to the secretary of state the votes of certain soldiers which had been given viva voce. The clerk certified that he omitted the votes because he was uncertain as to their legality. The committee found that the votes were legally cast and counted them.

Contestant objected that the votes of Iron Township, in Iron County, were illegal because the ballots were destroyed; but as they were regularly numbered

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[1] Journal, p. 790; Globe, p. 2891.

[2] First session Thirty-eighth Congress, House Report No. 117; 1 Bartlett, p. 569; Rowell's, Digest, p. 195.

and counted, and the vote indorsed on the poll books before the destruction of the ballots, the committee declined to reject the votes.

The committee also say:

> The sitting Member has raised numerous objections to the sufficiency of the allegations in contestant's notice, both as to matters of form and substance and to the admission of testimony under the specifications, some of which are obviously informal and frivolous; but the committee have not deemed it important to examine or decide the points thus made, or to consider the objections raised by the sitting Member to some of the votes cast for contestant, as the conclusion to which the committee have come on the case made by the contestant renders it unnecessary.

Purging the polls in accordance with the principles set forth the committee found that there still remained to Mr. Scott, the sitting Member, a plurality of 61 votes. Therefore the committee recommended a resolution declaring Mr. Scott entitled to the seat.

On June 24,[1] without debate or division, the House agreed to the report.

855. The Missouri election case of Boyd v. Kelso in the Thirty-ninth Congress.

In 1865, in a case wherein sitting Member had, by reason of absence on military duty, failed to receive notice of contest, the House gave further time for taking testimony.

A contestee by answering without taking exceptions waives objections to the sufficiency of the notice of contest.

A second notice of contest served after the expiration of the time fixed by law was disregarded.

Objection having been made by contestee to evidence on points not put in issue by contestant's notice, the evidence was rejected.

The contestant must overcome contestee's prima facie right, invalidate the latter's title, and show himself entitled to the seat.

On December 19, 1865,[2] Mr. John R. Kelso, of Missouri, rising to a question of privilege, asked for an extension of time in taking testimony in the contest for his seat instituted by Mr. S. H. Boyd. Mr. Kelso explained that in his absence on military duty he had not received notices of contest, and had failed to take testimony within the time limit prescribed by the law. On motion of Mr. Henry L. Dawes, of Massachusetts, the subject was referred to the Committee on Elections.

On December 20[3] the committee reported that they had not examined the question particularly because there had been an agreement between the parties. Therefore the committee reported the following resolution, which was agreed to by the House:

> *Resolved,* That in the matter of the contested-election case of Hon. Sempronius H. Boyd against Hon. John R. Kelso, it is hereby ordered that the sitting Member be allowed fifty days from and after the passage of this resolution for the purpose of taking testimony, and the contestant, if he choose, thirty days thereafter for the purpose of taking testimony in reply thereto; and that in all things, except the extension of time herein prescribed, both parties be required to conform to the provisions of the statute of February 19, 1851, in relation to contested elections in this House.

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[1] Journal, p. 889; Globe, p. 3241.

[2] First session Thirty-ninth Congress, Journal, p. 88; Globe, p. 81.

[3] Journal, p. 96; Globe, p. 98.

On June 25, 1866,[1] the Committee on Elections reported on the final right to the seat.

The most definite principles presented in this case arise in relation to preliminary questions. These are set forth in the statement of the case in the report:

The election here contested was held on the 8th day of November, A. D. 1864. It appears that the said Fourth district is composed of some 21 counties. The contestant, on the 9th day of January, A. D. 1865, served on the sitting Member a notice of intention to contest his right to the seat as a Representative of the said Fourth Congressional district, and setting forth the grounds of contest.

The said specifications are very general, vague, and indefinite, but, so far as can be gathered from them, they raise some objections to the regularity of the election, and the legality of some of the votes at some of the election precincts in the counties of Barry, McDonald, Newton, Jasper, Dade, and Polk, which are included in said district, but state no objections to the election or the votes cast at the election precincts in any of the other counties of the district. The vote, however, of Capt. Stephen Julian's company, of the Second Regiment Missouri Artillery, stationed at St. Louis, was also objected to or questioned in said notice.

The sitting Member filed his answer to said notice of contest, denying the several specifications and allegations of contestant, and alleging certain objections to the election, and to the legality of the votes cast for contestant at various precincts in different counties of the district.

A further formal notice of contest appears * * * purporting to have been given by the contestant, and accompanied by a certificate of a deputy sheriff setting forth that he served it on the wife of the contestee on the 21st day of March, 1865, of which notice, however, no other proof of service appears, and no notice seems to have been taken of it by the contestee, and he, on the hearing, objected to its consideration in the case, it not having been given within the time prescribed by the act of February, 1851; and also objected to the first, second, ninth, tenth, eleventh, and twelfth specifications in the original notice of contest for insufficiency in not specifying with particularity the grounds of contest, as required by said act. But as no objection to the sufficiency of the first notice appears to have been taken in the answer of the contestee, it is probable that, according to the precedents in such cases, the objection to the sufficiency of the fast notice, so far as the contestee is concerned, may be considered to have been waived.

The second notice not having been given in time, and not appearing by any proof to have been served as required by law had it been given in time, and no application having been made or leave granted to the contestant to amend his notice after the expiration of the time fixed by the law for serving the same on the contestee, it is not properly in the case, and can not therefore be considered in this investigation; though, from a casual examination of its contents, the committee think that if it had been admitted and considered it would not probably have materially affected the result.

The contestant not having raised any objection in his notice to the election at any of the precincts in the several counties of the district, other than in the counties of Barry, McDonald, Newton, Jasper, Dade, and Polk, any evidence he may have submitted as to the votes cast at the several election precincts in such other counties is manifestly irrelevant and inadmissible; and the contestee having also objected to such evidence on that account, it is not considered in the case. The evidence, however, is in itself very defective, so that its rejection can not work any serious prejudice.

As to the merits of the case, the report says:

The sitting Member having the certificate of election, prima facie has been legally elected, and it is for the contestant to overcome this prima facie right, invalidate the contestee's right to the seat, and show himself entitled thereto.

The report thereupon proceeds to analyze the testimony, showing it to be inadequate to the requirements of the above-mentioned principle. There was, for instance, no evidence before the committee to show what votes or returns were included in the final canvass in the office of the secretary of state of the votes for

[1] House Report No. 88; 2 Bartlett, p. 121; Rowell's Digest, p. 206.

Representative to Congress in this district. The committee go on to examine in detail various specifications of the contestant, finding so much insufficiency in testimony that they came to the conclusion without dissent, that Mr. Kelso, the sitting Member, was entitled to his seat.

On June 28,[1] without debate or division, the resolution reported by the committee was agreed to.

856. The Michigan election case of Baldwin v. Trowbridge in the Thirty-ninth Congress.

May a State legislature, in fixing times, etc., for elections, disregard the requirements of the State constitution?

Extent to which the House, in an election case, should defer to decision of a State court that a State law is void.

The State legislature, in fixing the place of election, may condition the place on the movements of soldier voters.

Discussion of the meaning of the word "legislature" in the clause of the Constitution relating to fixing the place, etc., of elections.

On February 5, 1866,[2] Mr. Glenni W. Scofield, of Pennsylvania, from the committee on Elections, reported in the case of Baldwin *v.* Trowbridge, from Michigan. This case arose out of the following facts:

> The constitution of Michigan contained the following provision: "No citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he shall be above the age of 21 years, and has resided in the State three months, and in the township or ward in which he offers to vote ten days, next preceding such election."

A law passed by the Michigan legislature February 5, 1864, provided:

> That every white male citizen or inhabitant of this State, of the age of 21 years, possessing the qualifications named in article 7, section 1, of the constitution of the State of Michigan, in the military service of the United States or of this State, in the Michigan regiments, companies, or batteries, shall be entitled to vote at all the elections authorized by law, as provided in this act, and every such citizen or inhabitant shall thus be entitled, in the manner herein prescribed, whether at the time of voting he shall be within the limits of this State or not.

Under this act many votes were cast by soldiers outside the State. If these votes were legally counted Mr. Trowbridge was elected and entitled to his seat. If they were not legally cast and counted, Mr. Baldwin, who had a majority of the home vote, was entitled to the seat.

The power of the legislature, to act in conflict with the organic law of the State was derived, if at all, from Article I, section 4, of the Constitution of the United States:

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, etc.

Mr. Scofield, in the report, argues that the word "legislature" as here used does not mean the legislative power, but "the legislature eo nomine, as known in the political history of the country," since if the framers of the Constitution had meant

[1] Journal, p. 920; Globe, p. 3460.

[2] First session Thirty-ninth Congress, Globe, p. 814; 2 Bartlett, p. 46; Rowell's Digest, p. 200; House Reports Nos. 13 and 14.

State organic conventions, they would have chosen a word less liable to misconstruction. The report goes on—

> It is also apparent, from the manner in which this word is used in other parts of the instrument, that its framers recognized a wide difference between a continuing legislature and a convention temporarily clothed with power to prescribe fundamental law. Article V provides that Congress "shall call a convention for proposing amendments * * * on application of the legislatures of two-thirds of the several States." Also, that amendments shall be valid when "ratified by the legislatures of three-fourths of the several States, or by conventions of three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress." Article VII provides that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same."

The report calls attention to the fact that the convention closed its labors with a resolution which still further bears out this idea, as also is seen by other instances cited in the report:

> In Article I, section 2, the words of the Constitution are "the electors in each State shall have the qualifications requisite for the most numerous branch of the State legislature." Did anybody ever hear of a constitutional convention, in the history of this country, composed of two houses? Article I, section 3, provides that "the Senate shall be composed of two Senators from each State, chosen by the legislature thereof." In Article II, section 1, it is said "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, etc. In section 8 of Article I, "the consent of the legislature of a State" is required before the United States can purchase places for forts, etc. Again, in Article IV, section 4, is said that, "on application of the legislature, or the executive (when the legislature can not be convened), Congress shall protect each State against domestic violence." It will hardly be claimed that a constitutional convention could perform the duties thus conferred upon the legislature; much less that it could forbid the legislature eo nomine from discharging them after its own dissolution.
>
> But the legislation of Michigan may be sustained as against the constitution of that State, even if the word legislature is to be taken in its most enlarged sense. Whatever power the convention of that State possessed to prescribe the places of holding elections for Representatives in Congress was derived, not like its other powers, from the people, but from the Constitution of the United States, and that, too, because it was a constructive legislature. The power conferred is a continuing power. It is not used up when once exercised, but survives the dissolution of the convention. The words of the Constitution are as potent then as before, and if there is any legislative body in the State that can be properly called a legislature, they appertain to it as strongly as to any prior legislative body. They do not authorize any convention or legislature to tie the hands of its successors. The people authorize a convention to do that where they (the people) have power; but certainly the people of Michigan had no power to enlarge or restrict the language of the Constitution of the United States. This view of the case entirely harmonizes what was at first supposed to be a partially adverse precedent in the case of Shiel *v.* Thayer, from the State of Oregon.

The report further controverted the position that a question of the qualification of voters was involved, since the place of holding elections was not one of the electoral qualifications.

In the course of the debate [1] Mr. Henry L. Dawes, of Massachusetts, chairman of the committee, stated that he agreed in the conclusion that Mr. Trowbridge was entitled to the seat, to which the committee had arrived, but did not wish to indorse the reasoning of the report. It seemed to him that the legislature, in fixing the place, must act in accordance with its organic restrictions. But it did not seem to him that the law of Michigan was antagonistic to the Constitution, since the latter

[1] Globe, P. 821.

instrument nowhere provided that the voter must be personally present in the township or ward of which he was a resident. The mode and manner of his depositing his vote might be prescribed by the legislature without violation of the Constitution.

Mr. S. S. Marshall, of Illinois, submitted minority views, in which Mr. William Radford, of New York, concurred. The minority views, after stating the case, say:

> The supreme court of Michigan, in a case arising out of the identical election out of which this contest has arisen (the case of The People ex rel. Daniel S. Twitchel *v.* Amos C. Blodgett) have construed this provision of their constitution to mean that the elector shall be personally present, in the township in which he resides, on the day of election, and there in person present his ballot at the place of voting, and that the act of the legislature of February 5, 1864, "is in direct conflict with the constitution, and for this reason void." This cue was very thoroughly discussed and considered by the court, the judges all giving separate opinions, and it seems to me impossible to read the case without arriving at the same conclusion. This is the highest and most authoritative exposition of that provision of the State constitution that can be given. The supreme court of Michigan is the most authoritative expounder of the constitution and laws of the State, and all other tribunals, including even the Supreme Court of the United States itself, are bound to follow and abide by the construction which the State court has placed upon their own constitution.

In the debate it was contended that this decision of the supreme court was rendered in the case of a State officer, and had no reference to the election of members of Congress.

The minority further argue against the definition of "legislature" contained in the report:

> The "legislature" of a State, in its fullest and broadest sense, signifies that body in which all the legislative powers of a State reside, and that body is the people themselves, who exercise the elective franchise, and upon their power of legislation there is no limitation or restriction, except such as may be found in the Federal Constitution, or such as they may themselves provide by the organic law of the State. When they assemble in convention, which in large communities is from necessity done by the agency of delegates or representatives of the people, the whole legislative power of the State is then vested in such convention. It can abolish, or in whole or in part abrogate, the proceedings of "the general assembly" or "legislative council" or "general court," or whatever may be the designation of that subordinate body in which is usually lodged a portion or residuum of the legislative power of a State. Indeed, the people of a State might provide for the periodical assembling of their convention, which would exercise and perform all legislative powers and duties without the intervention of that body of limited and restricted powers, popularly called a "legislature," but which in the constitutions of most of the States is called by some other name. It is variously designated a "general assembly," a "legislative council," a "general court," and the like, and is nowhere understood to hold in its grasp all the legislative powers of a State. * * * This secondary or subordinate body is the creature of the organic law of the State, owes its existence to it, and can rightly do nothing in contravention of its provisions. * * * Indeed, from the adoption of the Federal Constitution until this time, it was never before contended, as far as I am informed, that the clause in question conferred upon that body in a State in which wan reposed that residuum of legislative power, not exercised by the State convention, power to act utterly independent of, and in utter disregard of, the State constitution, by virtue of which alone it has any existence. The people have everywhere supposed that they had the power to fix a limitation upon the action of their legislature, in determining the times, places, and manner of holding elections for all offices.

The minority views further cite the cases of Shiel *v.* Thayer and Farlee *v.* Runk, in support of the contention.

The minority views further assail the law of Michigan in its relations to the Federal Constitution:

But the act of the Michigan legislature (by virtue of which the votes were cast outside of the State that it is proposed to count for the sitting member) does not prescribe the place or places of voting, and consequently the votes were not cast in pursuance of any competent authority. The provision of said statute is as follows:

"SEC. 7. At the elections herein provided for a poll shall be opened at every place, whether within or without the State, where a regiment, battalion, battery, or company of Michigan soldiers may be found or stationed, and at such election all persons may vote who are thereto entitled by law and by the provisions of this act."

Now, will anyone pretend that that prescribes a place or places of election? What place or places? Would a law which provided that any elector of Michigan should vote at any place, within or without the State, where he might happen to be on the day of the election, prescribe a place of voting? This is too clear, I submit with all deference, to admit of argument. If Congress or the legislature can prescribe places of election outside of the State, I insist that the places must be named in the act, and that it is no compliance with the Constitution to provide that a man, or company of men, may vote at any place where they may happen to be on the day of election, and that such a law does not prescribe a place of election at all.

Therefore the minority concluded that Mr. Baldwin had been duly elected and was entitled to the seat.

The question was debated at length and decided on February 13 and 14.[1] The motion to substitute the resolutions of the minority for that of the majority declaring Mr. Trowbridge entitled to the seat, was decided in the negative, yeas 30, nays 108. Then the majority resolution was agreed to without division.

857. The Indiana election case of Washburn v. Voorhees, in the Thirty-ninth Congress.

As to the authority of a mayor to administer oaths in taking testimony under the law of 1851.

A discrepancy between the votes cast and the returns and evidence of tampering with the ballot box justified rejection of the poll.

Returns being rejected, the vote may be proved aliunde.

On February 19, 1866,[2] the Committee of Elections reported in the case of Washburn *v.* Voorhees, of Indiana.

At the outset in this case a preliminary question was raised by the sitting Member, who alleged that contestant's testimony had not been taken before a person authorized to take the same. The report says:

It was taken before Albert Lange, mayor of the city of Terre Haute, in the county of Vigo, in said district, but was not taken in the city of Terre Haute, but in the towns of Sullivan, Sullivan County, Cloverdale, Putnam County, Carlisle, Sullivan County, and Lockport, Riley Township, Vigo County. The statute of the United States under which these proceedings are conducted contains (Stat. L., vol. 9, p. 568) the following provision:

"That when any such contestant or returned Member shall be desirous of obtaining testimony respecting such election, it shall be lawful for him to make application to any judge of any court of the United States, or to any chancellor, judge, or justice of a court of record of any State, or to any mayor, recorder, or intendant of any town or city in which said officer shall reside, within the Congressional district in which such contested election was held, who shall thereupon issue his writ of subpoena. * * *"

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[1] Journal, pp. 268, 272; Globe, pp. 814, 839–845.

[2] First session Thirty-ninth Congress, House Report No. 18; 2 Bartlett, p. 54.

But the statutes of Indiana confer authority to administer oaths upon a mayor of a city only within the city of which he is mayor; and it is contended by the sitting Member that the oath administered by the magistrate in taking these depositions was administered by virtue of his office of mayor, and therefore when administered outside of the city of Terre Haute was administered without authority. But the committee were of opinion that the authority to take these depositions was derived, not from the statutes of Indiana, but from the statute of the United States already cited, the mayor of a city being one of the persons designated in that statute to take such depositions, and that he would have been authorized as such designated person to take these depositions had the statutes of Indiana conferred upon him no power to administer oaths. Indeed, the power to administer oaths within their respective cities was not conferred by the statutes of Indiana at all upon mayors till the year 1861. Yet during all the time since the passage of the United States act of 1851, before cited, the mayor of any city within the district has been a person designated to take depositions in a case of contested election. The committee, therefore, denied the motion to reject the testimony.

The minority in their views dissented briefly from this ruling. Later in the debate [1] Mr. S. S. Marshall, of Illinois, who presented the minority views, insisted that the law of 1851, by giving authority to a mayor in the "city in which said officer shall reside" to administer oaths, circumscribed the authority of the mayor of Terre Haute as effectually as did the statutes of Indiana.

As to the merits of the case, it appeared that in the eight counties of the district the official majority for Mr. Voorhees, the sitting Member, was 534.

The issue was joined on the polls of four precincts, in three counties, where contestant alleged that the ballots were tampered with after they were cast and before they were counted. The precincts were:

Hamilton: In this township the official return gave Mr. Voorhees, the sitting Member, 498 votes and Mr. Washburn 143. The contestant asked that the return be set aside as "so tainted with fraud that the truth can not be deduced therefrom," alleging that the ballot box had been tampered with so that the return did not state the true poll. Two kinds of evidence were offered in support:

First, to show how many voters actually cast their votes at this precinct for the contestant; and, secondly, evidence tending to show an actual tampering with the ballot box after the close of the polls and before the count was completed. The evidence satisfies the committee that 170 men at least voted for the contestant at this precinct. One hundred and sixty-four witnesses testified to their own votes for him, and as to the remaining 6 not present, the testimony of witnesses that they knew the vote of each to be also for the contestant left the committee entirely satisfied that this number at least had so voted. There was testimony tending to the same result as to several others, but not sufficiently positive to satisfy the committee. Here is thus shown a discrepancy between the official return for the contestant and the proof of the vote actually cast for him at this precinct alone of 27 votes. There was no attempt to show the discrepancy between the vote actually cast for the sitting Member and the vote returned for him, nor was any attempt on the part of the sitting Member made to explain this discrepancy in the vote for the contestant.

As to the tampering with the ballot box, the contestant showed that his friends had been denied representation on the board of election officers; that the board had adjourned for supper, leaving the partly counted ballots in the box, those counted being strung on a string and laid on top of the uncounted ballots; that the contents of the box, which was left without a custodian, was found disarranged when they returned, the counted ballots being beneath the others, and finally, that the election

[1] Globe, p. 992.

officers, in a published card, admitted that the box must have been opened and the ballots handled in their absence. The report says that these facts:

All compel to the conviction that "the truth can not be deduced from this return," and it is accordingly rejected.

But the rejection of a return does not necessarily leave the votes actually cast at a precinct uncounted. It only declares that the return having been shown to be false shall not be taken as true, and the parties are thrown back upon such other evidence as is in their power to show how many voted and for whom, so that the entire vote, if sufficient pains be taken and the means are at hand, may be shown, and not a single one be lost, notwithstanding the falsity of the return. (See Blair *v.* Barrett, Bartlett's Contested Election Cases, pp. 313, 321; Clark *v.* Hall, ibid., 215.) It was proved, as has already been stated, that 170 votes were cast at this precinct for Mr. Washburn. There was also the testimony of four persons that they voted for Mr. Voorhees.

In the course of the debate [1] this principle that a return having been set aside, it was allowable to show aliunde the real state of the vote was contested, and Mr. Henry L. Dawes, of Massachusetts, chairman of the Elections Committee, reenforced the position of the report by citing the case of Knox *v.* Blair in the House and the cases of Reed *v.* Kneass and Mann *v.* Cassidy in the courts.

The minority views assailed the conclusion as to Hamilton Township by assailing the testimony as to the number of votes received by contestant. Twenty men who swore they voted for contestant could not themselves write their own names. One man's vote was not sworn to himself, but by another person. The voting was by ballot, and ignorant men might be mistaken as to the vote they actually cast, and a person who testified as to another's vote was especially liable to be deceived.

858. The case of Washburn v. Voorhees, continued.

Discussion of the kind of evidence required to prove aliunde a vote at a precinct whereof the returns are rejected.

As to the competency of a voter as a witness to prove for whom he cast his ballot.

In a simple case of discrepancy between the vote returned and the vote proven by testimony of voters, the return was corrected, not rejected.

The election officers being shown to be unreliable so that the truth is not deducible from their returns, the returns are rejected.

Cloverdale: The proceedings were similar to those in the case of Hamilton. The votes were not counted until the day after election. The ballot box was kept on the night preceding the count in the house of a friend of the inspector. That house was visited during the night by a man named Scott, a friend of the sitting Member. The report says as to Scott's visit:

The owner of the house testified that he did not know at what time he came, what he came for, and what he did. And his purpose and business, as well as the success which attended it, only appear from the testimony of a witness who overheard him afterwards relate it. But this was hearsay evidence, which the committee rejected. The case against this ballot box therefore rests upon the great discrepancy between the return (58) and the number (91) proved to have voted for Mr. Washburn, the temptation in the close vote in the county, the opportunity for tampering with the ballot box during the night, and the suspicious visitation of Scott from the county seat during the night, together with such inferences as it is fair to draw from the fact that no witness is contradicted, no testimony is controverted, no suspicious

[1] Globe, pp. 969, 970.

circumstance explained, so easy of explanation by the calling of Scott or the inspector, if the truth permitted it. But as the result to which the committee arrived upon the whole case, as hereafter stated, would not in any aspect be changed, whether this return be rejected or corrected, they did not determine to reject it entirely, however much confidence in it must be shaken in every fair mind by the evidence here adduced. They, instead, gave the contestant the benefit of the discrepancy proved—viz, 33 votes.

The minority attack the testimony as to this township, showing that 10 persons who swore to their votes for contestant could not write their own names, and that the votes of 12 others were testified to by other persons, the voters themselves not being produced and sworn. The minority condemn this secondary evidence as weak and unsatisfactory.

Jefferson: The report says:

The official return from this township was for Mr. Voorhees, 236 votes; for Mr. Washburn, 24 votes. The evidence relied on to show fraud in this return consists wholly in a discrepancy proved between the vote actually cast and that returned for the contestant. It is shown in this record, by the testimony of the voters themselves and those who knew how others absent voted, that 36 instead of 24, the returned number, voted for Mr. Washburn. There was no other testimony to show fraud in this ballot box as the testimony was left by the parties. The committee had the evidence furnished them of correcting all the errors shown, however that might have arisen. They therefore did not reject but corrected this return, giving to the contestant the benefit of the 12 votes here proved and not counted.

The minority make the same criticism of the testimony as in the two preceding cases.

Riley: In this township the testimony showed 108 persons who voted for contestant, while the official return gave him only 88. In addition it was shown that on the day of the voting, during the noon adjournment, the ballot box was taken to the inspector's home and placed in a room adjoining the dining room. The inspector went into this room alone after dinner, remaining there about fifteen minutes. The next morning the servant found "a quantity of republican votes" under the carpet. When the votes in the ballot box were counted a discrepancy between the total and the tally paper was rectified by counting loose votes off the table, to the number of four or five. The sitting Member neither explained nor counteracted the above testimony. Therefore the committee were "compelled to the conclusion that this box also had been opened and votes, no one could tell how many, abstracted therefrom, and that other votes never in the box had been counted, no one could tell for whom, and consequently there existed fraud in this return to such a degree that the truth could not be deduced therefrom. They therefore rejected it. One hundred and eight persons, as before stated, were proved to have voted at this precinct for the contestant, and were counted for him by the committee."

The minority attack the evidence in this case, as in the other precincts.

The majority report, made by the chairman of the committee, Mr. Henry L. Dawes, of Massachusetts, gives this argument as to the principle of law which should govern the disposition of the case:

There was little dispute before the committee as to the law which should govern this case. It is laid down as a general principle by Cushing, in his treatise on "The law and Practice of Legislative Assemblies," page 72, that "if returning officers act in so illegal or arbitrary manner as to injure the freedom of election, the whole proceedings will be void." In a late case in the courts of law—that of Mann *v.* Cassidy, for the office of district attorney in the city of Philadelphia—the court, in giving its opinion, says: "As the case now stands before us, we should be derelict in our duty did we not unhesitatingly express our conviction that the officers in the election divisions to which we have referred, in the receipt

and recording of votes, are so utterly and entirely unreliable that the truth can not be deduced from any records or returns made by them in relation thereto." * * * "The entire proceedings were so tarnished by the fraudulent conduct of the officers charged with the performance of the most solemn and responsible duties that it would have been not only abundantly justified, but it would have been our plain duty to throw out the returns of every division to which we have referred."

The same doctrine has been repeatedly laid down by Committees on Elections in the House of Representatives. (See Blair *v.* Barrett, Bartlett Contested Elections, p. 308; Knox *v.* Blair, ibid, p. 520, and cases there cited. See also Kneass's case, Parsons's Select Cases, p. 553, and Howard *v.* Cooper, Bartlett, p. 275.) Indeed, the rule laid down in the latter case at page 526 was accepted by both parties as the law which should govern this case, and they took issue upon the facts. The rule is in these words:

"When the result in any precinct has been shown to be 'so tainted with fraud that the truth can not be deducible therefrom,' then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction but call for the rejection of the entire poll when stamped with the characteristics here shown."

Indeed, the proposition is too plain to admit of dispute. To hold as true that which is so false and fraudulent that the truth can not be deduced therefrom is to hold to an absurdity. The rule here laid down is none other than the postulate that that which is false can not be true. In adopting this rule the committee do not lose sight, however, of the danger which may attend its application. Wholesome and salutary, not less than necessary, in its proper use, it is extremely liable to abuse. Heated partisanship and blind prejudice, as well as indifferent investigation, may under its cover work great injustice. It is not to be adopted if it can be avoided. No investigation should be spared that would reach the truth without a resort to it. But it is not to be forgotten or omitted if the case calls for its application. If the fraud be clearly shown to exist to such an extent as to satisfy the mind that the return does not show the truth, and no evidence is furnished by either party to a contest, and no investigation of the committee enable them to deduce the truth therefrom, then no alternative is left but to reject such a return. To use it under such a state of facts is to use as true what is shown to be false.

The report also comments on the loose provisions of the Indiana law, which permitted the ballot box to be taken about without careful custody before the count.

The minority generally criticised the evidence of the contestant as unreliable or "hearsay," and urged that fraud should be actually proved, and not be presumed from mere suspicious circumstances.

The majority of the committee, in conclusion, found a majority of at least 52 for the contestant on the least favorable construction of law.

The report was debated in the House on February 21 and 23,[1] when the House, by a vote of yeas 30, nays 96, disagreed to an amendment declaring Mr. Voorhees, the sitting Member, elected and entitled to his seat. The resolution of the majority declaring him not elected and not entitled to the seat was then agreed to without division.

The resolution declaring Mr. Washburn entitled to the seat was agreed to—yeas 87, nays 36.

859. The New York election case of Dodge v. Brooks in the Thirty-ninth Congress.

The Elections Committee may consider a case, although the pleadings do not all meet the requirements of the law as to specifications.

The allegation that "sundry" disqualified persons in the district voted for contestee was permitted in a notice of contest, although criticised.

Omission to specify definitely in the notice of contest a district alleged to be illegally constituted was not held fatal.

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[1] Journal, pp. 318, 322; Globe, pp. 967, 991–1005.

On March 26, 1866,[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, reported in the case of Dodge *v.* Brooks, from New York.

At the outset the report raises a question of pleading—

The allegations of contest are long, and some of them very vague and uncertain, conforming in no sense to the provisions of the statute requiring a contestant to "specify particularly the grounds upon which he relies in the contest." The answer of the sitting Member, pages 1 to 5, is quite as vague and uncertain.

The committee, however, find four precincts as to which they conclude—

In the opinion of the committee, there is contained in the several allegations of the contestant respecting these four precincts a distinct allegation of fraud in the election and error in the return sufficiently specific to require an answer from the sitting Member and to form the basis of a fair trial of the facts involved in the issues thus made up.

[The allegations for these four precincts are given below in connection with the examination of the precincts.]

The minority criticised in their views the specifications as to one of the four precincts—the seventh of the Twenty-first Ward—saying:

The allegation here is—

"That sundry persons voted for Mr. Brooks who were not legal voters or residents in the district, viz, one hundred and upward."

The act of Congress (first section, statute of 1851) regulating notice as to the contest of election, reads, in conclusion, thus:

"And in such notice shall specify particularly the grounds upon which he, the contestant, relies in the contest."

The sitting Member at the start protested against the illegality of such a notice and argued throughout that its generality was not only in violation of the statute, but of such a nature that it could not be traversed, save by a denial as "sundry" broad as the sundries alleged; thus substituting in lieu of a plea "a stump speech on both sides." The object of the act of Congress forbidding such sundry generalities, and prescribing therefor a particularity, was to prevent a surprise upon the sitting Member (Leib's case, C. T. E., p. 165) and not to give uneasiness to a sitting Member upon slight grounds (Varnum's case, C. T. E., p. 272). Courts acting upon contested elections require the parties complaining to specify, because otherwise they would be converted into a mere election board (Littell *v.* Robbins, C. T. E., Bartlett, 138). It is obvious that in a contested case like this, where the contestant is a man of immense wealth, who it is proven has lavished large sums illegally upon the election, a sitting Member, unless equally wealthy, has no chance of meeting him in a contest, if, after the election, the election can be gone over again under some of the forms and protection of the State law, under the pretense of such a "sundry" notice as to sundry persons, "one hundred and upward." The Committee of Elections, and through their chairman, Mr. Dawes (Kline *v.* Verre, Bartlett, p. 383), is emphatically committed not only against these generalities, but against this particular word "sundries" in the notice.

As to the fifteenth district of the Eighteenth Ward the minority say:

The twelfth allegation of the contestant is—

"That the fifteenth district was not legally created and established (with a general averment of frauds)."

But not specifying the fifteenth district of the Eighteenth Ward, and thus leaving the sitting Member to guess that was the district meant. In all the other allegations of the contestant the ward where the district is contested is specified. Objection was taken to this at the start (B., 3) and persisted in throughout, and the sitting Member did not know what district was meant till contestant, a very few days before the closing of the testimony, disclosed what he meant.

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[1] First session Thirty-ninth Congress, House Report No. 41; 2 Bartlett, p. 78; Rowell's Digest, p. 203.

860. The case of Dodge v. Brooks, continued.

Testimony taken without the notice required by the law of 1851 was excluded.

Hearsay testimony is not admitted in the determination of an election case.

Where an election return is so tainted with fraud that the truth can not be deduced therefrom, the same must be set aside.

As to the merits of the case, it appeared that the official return gave the sitting Member 8,583 votes, the contestant 8,435, and a third candidate, Thomas J. Barr, 4,544 votes. Thus Mr. Brooks was on the face of the returns elected by a plurality of 148 votes.

As this election turned very largely on the question as to how far violations of a registry law should be allowed to have weight in nullifying an election, the committee explain at length the registry law of New York:

The law of New York under which this election was held required a previous register of all the votes in each precinct, and, with one exception, based on particular and specific proof, no one could lawfully vote whose name was not found when he came to the polls upon the register, together with his street and number, if he had any. To effect this register the statute required the appointment annually, in each election district, by the board of supervisors, of "three inspectors, to be known as the board of registry for the election districts in which they are appointed; such inspectors to hold their offices for one year, and to be residents and voters in the district in which they are so appointed." These inspectors are required to meet annually, "at the place designated for holding the poll of said election," on Tuesday, three weeks preceding the general election, and organize themselves as a board for the purpose of registering the names of the legal voters of such district; choose one of their number as chairman; swear each other into office; appoint a clerk, if necessary, who shall take the oath required by law of clerks of the polls or of elections; and shall have power to continue in session, for the purposes of this meeting, viz, the making of said list, for two days if at the annual election next prior to said meeting the number of voters in the district of which they are inspectors exceed four hundred. This board is at this meeting to make a list of all persons qualified and entitled to vote at the ensuing election in the election district of which they are inspectors, which, when completed, shall constitute and be known as the registry of electors in said district. The list is to contain the names, alphabetically arranged in one column; "the residence by number of the dwelling, if there be any number; and the name of the street or other location of the dwelling place of each person." It is made out, in the first place, by putting upon it the names of all persons residing in their election districts whose names appear on the poll list kept in said district at the last preceding general election, taken from the copy of that list required by law to be deposited after such election with the county clerk. In case of the formation of a new election district since the last election, the list is to be made up by taking from the said poll list of the old district of which the new one formed a part the names of those on the same entitled to vote in the new district. The list is to be completed, as far as practicable, on the day of meeting; four copies are to be made and certified to be, as far as known to them, a true list of the voters in said district. Within two days the original from which the four copies are taken, together with the old list taken from the county clerk's office, shall be placed by said inspectors in said office. One of the certified copies shall be, immediately after its completion, posted in some conspicuous place in the room in which said meeting shall be held; that is, in the room designated for holding the election, accessible to any elector who may desire to examine or copy the same. The other three copies are to be kept for future use by the three inspectors. This closes the first duty of the board of registers. A further duty is also required of them by law, and that is to meet again on the Tuesday week preceding the day of general election in their respective election districts, "at the place designated for holding the polls of election, for the purpose of revising, correcting, and completing said list," at 8 o'clock in the morning, and remain in session till 9 o'clock in the evening of

that day and the day following, in open session, where every legal voter in said district shall be entitled to be heard by said inspectors in relation to corrections or additions to said register. One of said copies is to be used by the registers in making the corrections and additions.

The law further provides for copies of the registry list for use at the polls, and then contains a provision explained as follows in the report:

No person can vote at the election if his name is not upon the register thus prepared, unless he shall furnish to the board of inspectors his affidavit giving his reasons for not appearing on the day for correcting the alphabetical list, and also proves by the oath of a householder of the district that he knows such person to be an inhabitant of the district, giving his residence within the district. Any person whose name is on the register may be challenged, and an examination into his qualifications shall then and there be had, such examination being conducted in a manner prescribed by law, which need not here be set out.

This provision was considered as having an essential bearing on the case and in the House during the debate [1] the position was taken that the result of the election might not be set aside because of the informality in the preliminary registration, which, by its own terms, was not conclusive on the rights of the voter. It was admitted on behalf of the committee that a fraudulent registry was not conclusive of itself, but was one of the steps in the proof that the poll was fatally defective.

Passing to the attacked precincts:

Fifteenth district of the Eighteenth Ward: The direct allegations of the contestant touching this district are as follows:

That the fifteenth district was not legally created and established; that it was not known to bona fide residents of the district; that the inspectors of election themselves ascertained the same only by persistent inquiry on the morning of election day; that the register was fraudulently and irregularly filled with the names of your partisans, most of whom do not reside in the district; that the majority of the names therein were copied from lists handed in by a barkeeper on the premises, an ardent Democrat; that the clerk who acted for the board of registry was neither sworn nor appointed; that the district, only a portion of the original twelfth district from which it was separated, gave more votes than the whole of the twelfth district at the election last year; that the population of the district had not during the twelve-month increased materially; that of these votes then cast for you one-third and upward were given by parties not qualified to vote.

And the general allegation is in these words:

That other irregularities, defects, and illegalities were permitted or occurred in conducting said election, whereby my rights as a candidate were prejudiced.

The majority of the committee were satisfied from the testimony that the allegations were sustained, although they found it necessary to exclude the testimony of contestant's principal witness, named Dean, because the sitting Member objected that the ten days' notice required by law for the taking of this deposition had not been given.

It appeared that the witness's name was omitted from the notice by a clerical error; but the committee declined to admit the testimony.

The contestant then sought to prove the same thing by another witness who had obtained his knowledge of the fact from Dean himself. This was objected to by the sitting Member as hearsay testimony, and the objection was sustained by the committee.

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[1] Record, pp. 1748, 1791, 1814.

The committee reached this conclusion:

The committee are of the opinion that there was no registry at this district; that neither of the persons appointed as registers was competent to hold the office; that the man acting as clerk acted without authority; that the mode of making up the registry itself was a fraud upon the registry law, and in no manner a compliance with its provisions; that the use of such registry at the polls as a guide to the inspectors of election contributed directly to the polling of fraudulent votes, and that the large and unaccounted for increase of votes at this poll is directly attributed to these departures from and violations of plain provisions of law, and that to accept the result of such poll so taken and so counted as the true account of legal votes only, is to sanction most inexcusable violations of important provisions of law, essential to the purity of the ballot box. The committee are therefore of the opinion that this return falls within the principle found in cases heretofore adjudicated and which was laid down in the case of Washburn *v.* Voorhees, lately sanctioned by this House, namely: "Where an election return is so tainted with fraud that the truth can not be deduced therefrom, the same must be set aside."

The committee are, however, of the opinion that it was competent for either contestant or sitting Member to prove the casting of legal votes at this poll, even without a register; but, in such cases, the voter must make special proof of his qualification to vote in a manner particularly pointed out in the statute; and that it would have been the duty of the committee to have counted all votes so proven, but that no presumption of the legality of any vote would arise from any of the proceedings or returns founded upon so illegal and fraudulent transactions as have been here shown to exist. No proof of any such votes was offered by either contestant or sitting Member; nor was it claimed by either that this provision of law was complied with; but, on the other hand, it was totally disregarded. The statute of New York is express, that no vote shall be received except after a compliance with these provisions. For the committee to count votes thus cast would be for them to set up a poll in defiance of the statute provisions of the State, as well as in disregard of well-established precedents in this House. On the other hand, in conformity with those statutes and precedents, they have set aside this return altogether as fraudulent and false, as well as in conflict with express provisions of law.

The minority in their views contend that the committee erred in throwing out the whole precinct when only a portion of it was impeached by contestant's testimony; that the registration officers were officers de facto; that a majority of the registrars and inspectors of election belonged to the party of the contestant; and that there had been bribery in behalf of the contestant.

As the throwing out of this precinct was of itself sufficient to change the official result and give a plurality to contestant, the principles and facts in this connection were examined at length in the debate. Whether the action of the registry officials was in law part of the election, whether votes legally cast should be thrown out in the rejection of the whole poll, were questions considered at length, and were made the subject of a vote in the final decision.

Seventh district of the Twenty-first Ward: In this ward the registry seemed to the committee to be proven to be fraudulent, and the vote itself showed a suspicious increase over the vote of former years, although the places of residence had rather diminished than increased. The registry list was shown to contain large numbers of fraudulent names, on which persons not residents of the precinct were allowed to vote. The principal witness for the contestant was one of those who committed the fraud, and as particeps criminis was admitted by the committee to be a poor witness; but his testimony was corroborated by others to the satisfaction of the majority, who concluded as to the precinct:

It will be observed that the whole poll for Member of Congress in this district was only 389, and of this number the committee are of opinion that 116, at least, are fraudulent. There are no means of determining for whom these fraudulent votes were cast, beyond the 30 which is the number one of the

witnesses testified that he was certain he succeeded himself in getting to vote for the sitting Member, and beyond the further fact that one at least of the parties most actively engaged in the affair, at whose shop the election was held, and who had the greatest facility for carrying it out, testified that he was laboring in the interest of the sitting Member; still, 86 of these fraudulent voters can not by any safe evidence be charged to the count for either of the three candidates. They are, however, in the count, as well as 30 traced to the sitting Member, and must have been counted for one of the three. What is the duty of the committee and the House with such a return? It must stand as it is, or be set aside altogether, for the means are not at hand by which the return can be purged of the fraud. Thirty might be taken from the account for the sitting Member, but 86 as fraudulent would still be left, and the return thus corrected would contain in it one vote in every four a fraudulent one.

The committee see no alternative but to accept the return and thus sanction the fraud, or set it aside altogether. They can not doubt that the latter course comes within the precedents of former Congresses and of this committee and of the present House, and they therefore reject the return altogether.

The minority attack the testimony offered by the contestant as unreliable; and that he had failed to call the registrars, a majority of whom belonged to the contestant's party.

In the debate, Mr. Dawes discussed[1] the disposition of a poll where one in four votes was shown to be fraudulent, but where it was impossible to show for whom the fraudulent votes were cast. The committee were not strenuous for casting out the whole poll, since it did not change the result.

861. The case of Dodge v. Brooks, continued.

While conduct of election officers may justify their punishment for misdemeanor, it may not justify rejection of the returns made by them.

Testimony as to statement of a voter a considerable time after the act of voting was not admitted to prove how he voted.

An invalid registry, election officers improperly appointed, large and unexplained increase of the returned vote, and inexcusable violations of law justified rejection of the return.

Thirteenth district of the Eighteenth Ward: In respect to this district the contestant alleged:

That in the thirteenth district of the Eighteenth Ward the voting was of such a grossly fraudulent character as to involve all concerned in it, either in participation or passive permission, and to render it impossible to sift and purge the poll; that one of the inspectors, already a partisan of yours, was bribed to break every law intended to preserve the purity of the ballot box to accomplish your election; that this said inspector exchanged places with another partisan of yours who, unsworn, acted as inspector; that another partisan of yours, unsworn and unappointed, acted as poll clerk; that one of the inspectors snatched Republican ballots from the hands of his associates and changed them to Democratic amid the applause of disorderly sympathizers in the polling room; that he refused to receive divers votes intended for me, and all soldier votes, menacing with oaths and imprecations those who offered them, so that his threats and those of his sympathizers prevented, after a certain hour of the day, any citizens from offering soldiers' votes; that during the day persistent attempts were made to bribe to infidelity to his trust one of the Republican inspectors; that the same inspector was, on the evening at the close of the election day, for his fidelity, assaulted, struck down, and grievously injured; that in canvassing the votes the greatest frauds were perpetrated, partisans of yours unsworn acted as canvassers, double votes were counted as two each for you, incorrect ballots were counted as correct, and when neither poll list, tally, nor ballots agreed, two or more of your partisans rushed within the inclosure, and with the pen and pencil labored successfully to conceal and correct the same after the Republican canvassers had, under their threats, withdrawn; then in this same district sundry persons were permitted to vote once for you, and others were permitted to vote twice, who were not qualified voters, to wit, 200 and upward.

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[1] Globe, p. 1751.

The committee, after examining the testimony, concluded that it did not show, beyond a reasonable doubt, that any actual fraud was committed, and that the conduct of the election officers, while it might justify their punishment for misdemeanor, did not justify the rejection of the poll.

Third district of the Twenty-first Ward: The contestant alleged:

> That in the third district of the Twenty-first Ward 188 votes were cast for me, 137 for you, and 206 for Thomas J. Barr; but that, through the fraud or negligence of the canvassers, the votes correctly counted were incorrectly credited and entered upon one of the returns; that the other correct return was lost from the office of the county clerk; that under threats and intimidations on the part of your agents, and a writ of mandamus issued on motion of your attorney, after the board of county canvassers had been already a week in session, the board of canvassers for the district was forced to sign, and file a return with the county clerk, the duplicate copy of that in the hands of the supervisors of the county.

The committee were of opinion that this allegation permitted only of proof that there was error in the returns. Suspicious circumstances attended the making of the returns, and the contestant attempted to show the fraud by proving individual votes. The report says:

> From a careful examination of the testimony offered, to prove for whom voters cast their votes, it appears that several of the 159 claimed by the contestant to be proved to have cast their votes for him, 13 at least are so proved only by proving the statements of the voter made to third persons, not at the time he cast his vote, but about the time the deposition was taken, which was four months after the election. The committee are of opinion that no precedent can be found for receiving such testimony, and they decline to recommend one. This reduces the discrepancy between the return and the number proved to 9 votes, admitting that there can be no doubt as to the proof in relation to the vote of each one of the remaining 146.

Therefore the committee, considering the liability to mistakes after so long a time, did not feel justified in disturbing the returns by adding the nine votes.

The majority of the committee therefore found that the contestant had been elected, and was entitled to the seat.

The report was debated at length from the 3d to the 6th of April,[1] and on the latter day the question was taken first on an amendment proposed by Mr. James A. Garfield, of Ohio, but later modified and presented by Mr. S. S. Marshall, of Illinois:

> That the invalidity of the register of the Fifteenth election district of the Eighteenth Ward of the city of New York would not of itself justify the rejection of the official returns of the canvassers of that district.
>
> *Resolved,* That this case be recommitted to the Committee on Elections to report upon supplementary proof, to be made as provided in the next resolution.
>
> *Resolved,* That either party be authorized to take supplementary testimony respecting the election in the fifteenth district of the Eighteenth Ward only, before the 10th day of May next, complying with the statutory regulations applicable to the case: *Provided,* That five days' notice of any proposed examination of witnesses shall be sufficient.

The House disagreed to this amendment, yeas 53, nays 80.

The House then, by a vote of yeas 54, nays 78, disagreed to an amendment declaring William E. Dodge, the contestant, not entitled to a seat.

Then, by a vote of yeas 85, nays 45, the resolution of the majority declaring contestee not entitled to the seat was agreed to; and, finally, by a vote of yeas 72, nays 53, the contestant was declared elected.[2]

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[1] Journal, pp. 493, 498, 506, 513; Globe, pp. 1746, 1768, 1791, 1812–1820.

[2] Journal, pp. 513–516.

862. The Ohio election case of Follett v. Delano in the Thirty-Ninth Congress.

It was held in 1866 that proof of notice of service of contest might not be by affidavit of the o1ficer serving the notice.

It was held in 1866 that under the law of 1851 notice of contest must be served upon the returned Member personally.

Decision as to what is a determination of result within the meaning of the law providing for serving notice of contest.

On May 14, 1866,[1] the Committee on Elections reported in the case of Follett *v.* Delano, from Ohio. The sitting Member was returned by a majority of 239. Several questions were involved in the inquiry of the committee:

1. As to what is legal evidence that a notice of contest has been served.

The sitting Member having contended that no notice of contest had been served on him, the contestant presented affidavits of James T. Irvine, a notary public, who deposed that he served notice on sitting Member by leaving it at his residence, and later personally saw him and requested him to accept service as of the date of service at the residence. The sitting Member contended that the affidavits, not being depositions taken on notice to the opposite party, were not legal evidence. The committee concluded as follows in relation to this aspect of the case:

> The question raised by the first objection made by the sitting Member is, can service of notice be proved by affidavit, or must the testimony of a witness to the fact of service be obtained, like all other testimony, from witnesses, by deposition taken on notice to the opposite party, in conformity with the statute? The statute does not provide in what manner the fact of service shall be proved, but makes the general provision already cited for taking testimony. It may be noticed that this statute provision does not require the testimony of witnesses to be taken in the manner prescribed—only "it shall be lawful", to take it in the way therein specified. Therefore, in the absence of any statute requirement as to the mode of proof of notice of contest, is the affidavit of a third person sufficient? This is the first case since the enactment of the law of 1851 where the question has been raised, so far as the committee knows, or where it could, in practice, have been well raised; for though affidavits have been resorted to in almost every case as proof of the service of notice of contest, yet in every instance till the present case there has been an answer from the sitting Member admitting the service of notice or waiving proof of it. The sitting Member made no answer in this case, and neither admitted nor denied, but left the contestant to prove that he had served the notice at all, and within the time prescribed by law.
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> The committee are of opinion that such proof, to be admissible, must be authorized by statute or some rule established by the tribunal before which the testimony is to be used, and that in the absence of these an affidavit could not be admitted according to the principles which govern in the course of all judicial proceedings. To admit an affidavit of a third person, unknown in character to the sitting Member, taken without his knowledge, at a time and place and under circumstances wholly kept from him, is to open a door through which great fraud might be practiced if occasion required. It is a fact, too, as easy of proof in the manner pointed out in the statute for taking testimony as any other fact in the case, and it is deemed by the committee the safer way to require its proof in that mode, if the answer of the sitting Member does not sufficiently admit the fact or waive the proof of it. This answer, if made, must by law be in possession of the contestant before he can proceed to the taking of testimony under the statute, and therefore he will always have the means of determining the necessity of proof.
>
> The committee did not, however, close their hearing of the case with their conclusion upon this point, for the reason that they could not know that the House would agree with this conclusion, and in that event it would become ultimately necessary for them to pass upon the merits of the case. The committee were also desirous of reaching the merits of the case, if possible, and therefore, reserving their decision upon all preliminary points, they heard the parties upon the entire proof submitted.

[1] First session Thirty-ninth Congress, House Report No. 59; 2 Bartlett, p. 113.

2. As to whether or not the notice must be served on the contestee personally. The report finds:

The second point raised by the sitting Member was, that "if the recitals of the affidavits of notice be taken as proved, still the contestant had failed to 'give' him the notice required by the statute." The sitting Member claimed that the statute required personal notice. By the first affidavit of Mr. Irvine it appears that notice was served upon the sitting Member "by leaving it at his residence in Mount Vernon, Knox County, Ohio, on the 29th of December, A.D. 1864." The statute provision is, that "the contestant shall give notice in writing to the Member whose seat he designs to contest." Is leaving a copy at the residence "giving" the sitting Member such notice as the statute requires? Serving of notice by leaving a copy at the residence is not unusual in judicial proceedings, but it is believed by the committee that such service is never legal unless authorized by statute, and can never be substituted for actual notice unless thus sanctioned. In the law of 1851 there is an express provision for leaving a notice of taking depositions at "the usual place of abode" of the opposite party, but none for such service of notice of contest. A reference to the debate in the House at the passage of this act will show that this omission was designed in order to secure actual notice.

3. As to the time prescribed by the law of 1851 for the service of notice: The committee found that the law of Ohio provided that the result of the election should be determined "within ten days after the first day of December," but the certificate might be given to the successful candidate at any time thereafter. The law of the United States, statute of 1851, required the notice of contest to be served "within thirty days of the time when the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same." As the law of Ohio provided for no proclamation of the determination of the result, and as the statutes provided no way for ascertaining on what day within the specified limit the determination had been made, the committee were of the opinion that the contestant had thirty days from, the last of the "ten days after the first day of December." Therefore the 5th day of January, the date when an effort was made to have Mr. Delano accept service as of previous date, was held to be within the limit.

863. The case of Follett v. Delano, continued.

Failure of returned Member to answer notice of contest may not be taken as a confession of the truth of the allegations.

The electors are interested parties to a contest and may not be precluded by any laches of contestant or returned Member.

It being possible to ascertain the result with certainty from tally lists returned with the ballots, these returns are sufficient, although not strictly in accordance with law.

4. As to whether or not the contestee, by failing to answer the notice, may be considered to confess the truth of the allegations: The law of 1851 requires the sitting Member, "within thirty days after the service, to answer such notice, admitting or denying the facts alleged therein, and stating specifically any other grounds upon which he rests the validity of his election." The contestant claimed that the sitting Member, by failing to answer, must be taken to have confessed the truth of the allegations in the notice. The committee say that this might be so were the contestant and sitting Member the only interested parties, and continue:

The electors of the district, each and every one of them, have a vital interest in that question, and no one of them can be precluded, by any laches not his own, from insisting that the choice of the

majority shall be regarded. No confession of the sitting Member, however it might bind him personally, can place the contestant in the seat, unless he is the choice of the majority, nor deprive that majority of its rightful representation. The sitting Member may well be deprived, by his neglect to answer, of reliance upon "any other grounds upon which he rests the validity of his election," for he has never given notice of any such grounds; but the committee are of opinion that the House should require proof that the sitting Member has not, and that the contestant has, a majority of the legal votes before unseating the one and admitting the other, however the sitting Member may have seen fit to conduct his own case in a contest.

5. The question on the merits of the contest: The contestant claimed that enough votes should be deducted to leave a majority of 84 for himself. These deductions were claimed because the canvassers had counted "soldiers' votes" from returns so defective in form and substance as to make them wholly illegal and void, viz, that certain poll books were not certified to by officers of the election, as required by the Ohio law; that there was on certain poll books no certificate of the oath as required by law; that in another case the poll book did not show when, where, or by whom the election was held, the heading being left blank.

After quoting the law of Ohio in relation to soldiers' votes, the report refers to the papers required by law to accompany the poll books, and says:

A reference to the statute cited will show what these papers are which come up with the poll book, and what use they serve. From this reference it appears that there are to be kept two poll books, two sets of tally sheets, the form of which is given in the law, and the ballots themselves counted and strung on a string. The tally sheet gives the time and place of holding the election, the persons by whom it was conducted, the number of votes cast, and for whom; and the ballots show with equal certainty for whom and how many votes were cast. The poll book should show when and by whom the election was held, and the names and number of the voters. The law requires one set of tally sheets to be sent to each county having officers voted for; the other full set of the tally sheets and one set of poll books are to be sent to the State auditor; the other poll books and the ballots are to be sent to the secretary of state. Upon the day specified in the law the board of canvassers are required, in the manner therein specified, to take and canvass these returns and "declare and certify the number of votes shown by the tally sheets to have been cast for each candidate therein named, respectively." From these provisions it appears that the result is to be declared from the tally sheets alone—not from the poll books at all.

If, therefore, the "tally sheets" are complete, the means of ascertaining accurately the result are at hand. Indeed, the result could not be determined at all from the poll books, for they do not disclose for whom a vote was cast. The tally sheet is the only paper which shows that result. By counting the ballots anew that result may be verified; but the poll book would render no such aid. That contains only the number and names of the voters in the aggregate. Now, the law requiring the canvassers to declare and certify the number of votes shown by the tally sheets, and there being no proof or allegation that the tally sheets were not correct in form and substance, the return made from the tally sheets which shows a majority for the sitting Member, must prevail. It is competent to overthrow that return by proof, but not without it. Prima facie in the first instance, it remains sufficient until evidence in conflict with it shall be introduced satisfying the committee and the House that it is not true. Nothing has been introduced at all conflicting with the result declared from these tally sheets. Defective poll books do not conflict with the tally sheet. They may fail from this defect to corroborate, but do not, therefore, tell a different story. But the law does not require that the tally sheets shall be corroborated. They stand alone, unless overthrown by positive, not negative, evidence. This view of the law is entirely sustained in a recent case before the supreme court of Ohio, so nearly like this in the particulars here referred to as to be hardly distinguishable from it. It is the case of Howard *v.* Shields, decided at the December term of that court, A.D. 1865, and not yet published.

The committee say further that there was no allegation or complaint that the tally sheets were not perfect, and therefore the majority for the sitting Member could not be set aside.

On May 18,[1] the resolution reported from the committee declaring. Mr. Delano, the sitting Member, entitled to his seat, was agreed to without debate or division.

864. The Ohio election case of Delano v. Morgan in the Fortieth Congress.

Sitting Member consenting to contestant's application for further time to take testimony, the House agreed thereto.

Sitting Member waived objection as to the specifications of the notice by not making it when the testimony was taken.

The specifications of the notice of contest should be sufficient merely to put the opposite party on his guard.

On March 8, 1867,[2] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, presented a report on the petition of contestant in the case of Delano *v.* Morgan, of Ohio. Mr. Delano asked for an extension of the time for taking testimony because sitting Member's notices of contest "consume all the time allowed by law for taking testimony," and "for that the official duties of your memorialist as a Member of the Thirty-ninth Congress have prevented him from taking testimony in his case to the present time." The report of the committee says that for these reasons and for "the further reason that sitting Member consents thereto," the petition should be granted. The House thereupon adopted a resolution that the time be "hereby extended to each party for the period of seventy-five days from and after the passage of this resolution, said testimony to be taken in all other respects in conformity with existing law."

On May 25, 1868,[3] Mr. Glenni W. Scofield, of Pennsylvania, submitted the report of the majority [4] of the committee as to the final right to the seat, with resolutions providing for seating the contestant.

A preliminary question arises in this case as to the sufficiency of the notice of contest. The minority sustain the objection of sitting Member to two specifications, as follows:

2. Six hundred and twenty-five persons not legally entitled to vote were improperly and illegally allowed to vote at said election, and did cast their votes.

18. Illegal votes were cast for you at said election as follows: In Clinton Township, Knox County, 25 votes. [Here follows an enumeration of other townships in a similar way.]

The minority discuss these specifications as follows:

The sufficiency of those specifications was submitted for determination to the committee by the sitting Member, both in his printed brief and his oral argument before the committee. It is therefore the obvious duty of the committee to consider and decide that question. It is exceedingly material to the proper and just determination of the whole case and to the legal and substantial rights of the parties. We inquire, then, do the second and eighteenth specifications comply in terms or spirit with the express requirement of the law? Do they "specify particularly the grounds upon which he relies in the contest?"

Substantially the allegation in each specification is that illegal votes were cast for the sitting Member. It can not be said without doing most manifest violence to the intention of the law that such general and vague allegations can put the sitting Member in possession of the grounds of contest. They

[1] Journal, p. 718; Globe, p. 2678.

[2] First session Fortieth Congress, House Report No. 1; Journal, p. 23; Record, p. 33.

[3] Second session Fortieth Congress, House Report No. 42; 2 Bartlett, p. 174; Rowell's Digest, p. 213.

[4] Minority views were submitted by Mr. Michael C. Kerr, of Indiana.

do not aver in what the illegality of the votes consists. They do not state facts from which the illegality results as a conclusion of law. They only state the conclusion of law itself and entirely omit the recital of the reasons or facts that are indispensable to sustain the conclusion. This is a violation of most obvious principles of correct pleading and ought not to be approved. There is nothing in the nature or circumstances of this case to prevent or even render inconvenient a fair and full compliance with this law in the statement by the contestant of his grounds of contest. The object of all pleading, whether in ordinary actions at law or in contested elections or in any cases required to be subjected to judicial or even quasi judicial determination, is to limit, to restrict, to narrow, as much as practicable, the range and scope of the investigation, to exclude unnecessary latitude of inquiry, to disclose at the outset the difficulties to be overcome by testimony, or the specific conclusions intended to be established by proof, to the end that such litigation may be simplified and cheapened, not made interminable and unnecessarily expensive, and especially that no advantage shall be taken or injustice done, against which it is impossible to guard by reason of the uncertainty and vagueness in the statements of the grounds of controversy. The importance of these principles has been well illustrated in this case. The contestant wholly fails to specify the grounds of contest in his notice and then proceeds in his own order to make his proofs; but in reference to a large number of voters (alleged to have been deserters) takes his testimony at so late a day in the time allowed as to absolutely preclude the taking of counter testimony by the sitting Member. It was the intention of the law of Congress to prevent such results by requiring reasonable definiteness and certainty in the statement of the grounds of contest.

These principles have been repeatedly declared and sustained both in the English Parliament and in Congress.

The minority then cite the cases of Michael Leib, Easton *v.* Scott, Wright *v.* Fuller, White *v.* Harris, and Kline *v.* Verree, and conclude:

This reasoning seems to us conclusive and unanswerable. We conclude, therefore, that the specifications referred to are too vague and uncertain to satisfy the imperative requirements of the law, and that they did by reason thereof work undue prejudice to the sitting Member in his defense, and that the testimony taken under them ought not to be considered by the committee or House.

The majority of the committee do not discuss this in their report; but during the debate[1] the argument of the minority was answered at length, it being contended (1) that sitting Member had waived the objection by not making it when the testimony was taken, this rule being laid down in the case of Otero *v.* Gallegos, and (2) that the specifications were in fact sufficient. These specifications were not to be judged according to the law of pleading, but rather according to the law of notice. And under the law of notice only so much is required as is necessary to put the opposite party on his guard. From the very nature of the case notices could not be as specific as the minority contended, since they must be made within a limited time and often related to widely separated localities. The authorities cited by the minority are discussed, and also the cases of Washburn *v.* Voorhees and Vallandigham *v.* Campbell.

865. The case of Delano v. Morgan, continued.

When an illegal vote is cast by secret ballot the committee endeavor to ascertain from circumstantial evidence for whom, the vote was cast.

Discussion as to the kind of evidence required to show how the elector votes when he declines to disclose his ballot.

The State constitution making citizenship of the United States a requisite of the elector, persons deprived of citizenship by a Federal law for desertion were held disqualified.

[1] Speech of Mr. William Lawrence, of Ohio, Globe, p. 2784, second session Fortieth Congress. Mr. Kerr also debated this question. See p. 2776.

Discussion of the right of Congress by legislative declaration to deprive citizens of a State of their rights as electors.

Another question general in nature is discussed before proceeding to the points in issue. The majority say:

For whom a vote is given, by the laws of Ohio, is a secret properly known only to the voter himself, and he is never required to disclose it. This fact must therefore be often determined upon circumstantial evidence alone. To what political party a voter belonged, whose partisan he had been, whose friends claimed for him the right to vote at the time, what he said of his intention before and his act after voting, are circumstances which each claimant has endeavored to prove, and which the committee have considered in making up their verdict. In this action they are governed by precedent as well as principle. The same ruling obtained in the celebrated case from New Jersey, decided in 1840, and known as the "broad seal" case; and also in Vallandigham *v.* Campbell, decided in 1858. (See Bartlett's Contested Elections, pp. 28 and 233.) If it is not to be inferred, from this kind of evidence, for whom an illegal vote was cast, it can not, except in a few instances, be ascertained at all. Any number of illegal votes, once placed in the ballot box, either by the deception or connivance of the board, can never after be excluded unless the whole poll is rejected or the fraudulent voters voluntarily confess their crime. When, therefore, an illegal vote is shown to have been cast, the committee have endeavored to ascertain from circumstantial evidence, when positive proof could not be given, for whom it was cast, and deduct it from his count.

The minority say:

With some diversity in the rulings of the courts and of Congress on the subject, the better opinion seems to us to be, that the highest and best evidence, outside the record, for whom any elector intended to vote, is the testimony of the elector himself; but where the voting is by the secret ballot the elector can not be required to testify for whom he voted, and if he declines so to testify, it is then competent to show by other evidence for whom he voted. But in the latter case the evidence should be in character of the highest order attainable under the circumstances, and, in legal effect, so clear and strong as to preclude any reasonable doubt as to the fact.

Proceeding to the several questions on the issue of which the decision depended—

1. The majority thus state the first and most important question:

The contestant claim that 201 deserters from the Army and Navy of the United States voted for the sitting Member, and that this number of votes should be deducted from his count. Citizenship of the United States is one of the qualifications for an elector by the constitution of Ohio. By the act of Congress passed March 3, 1865, it is provided that "all persons who have deserted the military or naval service of the United States, who shall not return to said service, or report to a provost marshal, within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens." Under this law and the constitution of Ohio a deserter is not a legal voter in that State. In the argument before the committee by the counsel for the sitting Member this inference of the law was not disputed, nor the constitutionality of the law denied, but it was claimed that neither the election boards nor this House could pass upon the charge of desertion. This fact, it was claimed, must be first settled by trial and conviction in a court; in other words, that the disqualification did not consist in desertion, but in conviction of desertion. But the law does not so provide. Conviction is not required nor mentioned. It is the duty of an election board to pass upon the facts that constitute a disqualification, such as nonage, nonresidence, idiocy, insanity, color, race, bribery, etc. Why should they not pass upon the fact of desertion? Because, it is said, that is a crime. So is bribery, and yet the sitting Member asks that a considerable number of votes, alleged to have been cast under corrupt influences, should be thrown out, although there was no conviction or even trial, and the committee have complied with his demand. It makes no difference that the same facts which constitute a disqualification would, if heard before a court, constitute a crime. There are many instances where the law makes conviction in a court the ground of exclusion from the franchise, and then, of course, exclusion can only follow conviction. But when it makes the existence of a fact, as in this case, the ground of exclusion, that

fact must be passed upon by the officers of the election in the first instance, and by this House upon a contest. In the further argument of the case by the sitting Member himself it was claimed that the law was unconstitutional and void.

The majority proceed to say that the Supreme Court alone can declare void the law, which was passed by Congress and had the approval of the President. The House might override the law, but the committee did not recommend it.

The minority take issue on this question:

We hold in reference to all of the alleged deserters that they are legal electors, and that there is a signal failure, by legal evidence, to establish disqualification against any of them, because—

There is no proof of the trial and conviction of any of them for desertion by any court or tribunal of competent jurisdiction, civil or military, under the acts of Congress, March 3, 1863, or March 3, 1865, or any other laws. Without such conviction, even admitting the validity of those laws, their right to vote remains entirely unimpaired. It involves a violation of the most obvious rules of law, and principles of justice, and guaranties of liberty, and rights of the States, to deprive a citizen of so precious and sacred a franchise upon a vague charge, without due process of law, or a fair and impartial trial, with opportunity to the voter to make his defense. There is nothing in the acts of Congress that gives any countenance to the assumption that it is the intention of those acts to work any such results. The authors of them were not ignorant of the prohibitions and guaranties contained in the fifth and sixth articles of amendments to the Federal Constitution and other pertinent provisions of that supreme law. It is not competent for Congress to inflict punishment by the deprivation of rights upon the citizens of a State by mere legislative declarations. Neither can Congress, without usurpation, regulate suffrage in the States, by direct legislation to that end, or under the pretext of punishing men for alleged desertion. The regulation of suffrage belongs exclusively to the States, and this doctrine has been repeatedly affirmed by Congress in election cases and otherwise. It is also clearly established that Congress has no rightful authority to confer Federal judicial power in such matters upon the judicial tribunals of a State, and still less upon the quasi judicial tribunals organized under the mere municipal regulations of a State, such as election boards, none of whose duties can scarcely be said to be judicial at all.

The minority then go on to quote the decision of the supreme court of Pennsylvania in the case of Huber *v.* Riley, which arose under the act of Congress of March 3, 1865. The minority then proceed:

But it is claimed that, because under the constitution of Ohio no An can be a legal elector who, in addition to the other qualifications, is not also a citizen of the United States, therefore, Congress having control over citizenship of the United States, may decitizenize or withdraw citizenship of the United States from whom it pleases by mere legislative declarations, without due process of law, and that all persons thus deprived of citizenship of the United States at once cease to be citizens, or legal electors, of the State of Ohio. This doctrine is deemed most dangerous, if not monstrous, and violative of most valuable and fundamental principles in our Government. That provision in the constitution of Ohio was undoubtedly designed to prevent aliens from becoming electors in Ohio until they had first become, by naturalization, citizens of the United States. This was required on grounds of local State policy. But it is a perversion of terms to say that any person acquires the right of suffrage in Ohio by virtue of the laws of Congress. Naturalization does not confer the right of suffrage. That right is only conferred by the constitution and laws of Ohio. Persons are allowed to vote there because they possess all the qualifications thus prescribed. The right of suffrage at a State election is a State right, a franchise conferrable only by the State, which Congress can neither give nor take away. If, therefore, the act now under consideration is in truth an attempt to regulate the right of suffrage in the State, or to prescribe the conditions on which that right may be exercised, it would be held unwarranted by the Federal Constitution. In the exercise of its admitted powers, Congress may doubtless deprive an individual of the opportunity to enjoy a right that belongs to him as a citizen of a State, even the right of suffrage. But this is a different thing from taking away or impairing the right itself. Congress may also impose upon the criminal forfeiture of his citizenship of the United States—that is, of what Justice Story denominates his general citizenship; but that does not legally or necessarily deprive him of his

citizenship of the State, which is secured to him by the State constitution and laws, and is to be held on the terms prescribed by them alone. It is an integral part of the State government.

But we claim that the act of March, 1865, is unconstitutional in so far as it may be designed, by its terms, to work the disfranchisement of any of the persons alleged to be deserters in this case, because, to that extent at least, it is an ex. post facto law, and a bill of pains and penalties. In support of these objections, waiving further argument here, we refer to the luminous and conclusive judgments of the Supreme Court of the United States in the cases of Cummings *v.* The State of Missouri, and exparte Garland, 4 Wallace Reports, pp. 277, 333, which ought to be familiar to every Member of the House.

But it is attempted to evade the effect of these decisions by assuming that the failure to report, in some of these cases, after the President's proclamation, converted the previous desertion into a sort of continuing crime, for which continuance the elector may be disfranchised. It is not, and will not be, denied that the offense of desertion had been committed before the proclamation, if committed at all. It was therefore complete, and punishable in the manner prescribed under the previous laws. But the effect of the act of March 3, 1865, is to enlarge, extend the offense, to increase it by declaring it a continuing crime, which it was not before, which is the very definition of an ex. post facto law:

"An ex. post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different, testimony is sufficient to convict than was then required."

During the debate [1] this feature of the case was much discussed, and Mr. Henry L. Dawes, of Massachusetts, replying to the arguments of the minority, enunciated the view that the act of the deserter in not returning was a renunciation of citizenship.

866. The case of Delano v. Morgan, continued.

One of the election judges being disqualified by law to act as judge, the returns were rejected.

Although the State law forbade temporary closing of a poll on penalty of vitiating the election, yet the harmless act of suspending voting while the officers dined was overlooked.

Temporary absence of a portion of the election officers for purpose of dining was not considered ground for rejecting the poll.

A neglect of the law prescribing the boundaries of voting districts being sanctioned by eighteen elections, the House refused to reject the returns therefrom.

The parties, in proving fraud, having proved the votes actually cast, the House corrected the poll instead of rejecting it.

2. The majority of the committee thus discuss the second objection:

The contestant asks that the returns from Pike Township, Knox County, should be rejected because Salathiel Parrish, one of the judges of the election, being a deserter from the draft of 1864, was incompetent to act in that capacity. The constitution of Ohio provides, "that no person shall be elected or appointed to any office in this State, unless he possesses the qualifications of an elector;" and the statutes of that State further provide that "three persons to be elected township trustees, to have the qualifications of electors, shall act as judges of the elections." Under the act of Congress approved March 3, 1865, and the constitution and laws of Ohio, a deserter has not the qualifications of an elector, and is therefore incompetent to act as a judge of election. In the case of Howard *v.* Cooper (Contested Elections, vol. 2, p. 282) the returns of Van Buren Township were rejected because there were only two judges, when the law required three. If a return is untrustworthy when one of the judges is

[1] Globe, p. 2807.

absent, it is certainly more so if the vacancy is filled by a person disqualified to act. Two competent judges are certainly more reliable when acting by themselves than when advised, directed, and in part overruled by a third, pronounced by the law unfit for the trust. This principle is decided in Jackson *v.* Wayne (Contested Elections, vol. 1, p. 47). Whether the selection of this judge was intentional or unintentional can make no difference in the enforcement of the rule, but the committee are not authorized to conclude, from any of the surroundings of this case, that it was purely accidental. This law of the United States was very much criticised by those who were opposed either to the war or the mode of conducting it. Many persons insisted that it was unconstitutional and void, and might be safely disregarded by the judges of elections. Indeed, it was disregarded in many parts of this district. In this very precinct, as appears from the evidence, eleven deserters were allowed by the board, thus illegally constituted, to cast their votes. Whatever may be thought of the propriety or constitutionality of this law by individuals, it was certainly binding upon the electors of Pike Township until repealed by Congress or pronounced unconstitutional by the Supreme Court.

It is worthy of note in this connection that the required form of certificate to the poll book was essentially changed in this case. The special fact required by law to be given is altogether omitted. It certifies only to the number of votes cast, while the law requires that it should certify that they were cast by electors. The number is not so important, because that is also in the certificate to the tally papers, but that it should appear affirmatively that the persons casting these votes were qualified voters, is pointedly required by the statute of Ohio. There is great propriety in the law, and it ought in all proper cases to be enforced. The committee, mainly for the reason first stated, have rejected these returns.

The minority do not admit either the facts or law of the majority, but declare that even if Parrish was incompetent for the reasons alleged, he was still a de facto officer and the election was valid. In debate it was urged by the majority[1] that the de facto principle did not apply in the case of a man who had not the legal capacity to act.

3. The sitting Member claimed that the returns from certain townships should be rejected, because the voting was suspended for a short time while the officers were dining. The law of Ohio provided that after the polls were once opened in the morning they could not be closed for any purpose without rendering the election void. The majority say that while they can not sanction the custom of temporary adjournment, yet as no one appears to have been deprived of his vote, they say:

They do not feel warranted in depriving so large a number of electors of their votes on account of this unintentional and, in these cases, harmless errors of their officers.

The sitting Member also claims that the returns from the First Ward of the city of Zanesville should be rejected on account of the temporary absence of one of the judges and one of the clerks. The polls opened in this ward a few minutes after 6 o'clock in the morning and closed at 6 o'clock in the evening. The counting out immediately followed, making a continual session of thirteen or fourteen hours. Instead of closing the polls, as was done in the townships before referred to, the officers took turns in going out to their meals. They were absent for this purpose about thirty minutes each. However reprehensible this temporary absence may be, it does not appear to be brought within the case of Howard *v.* Cooper, cited by the sitting Member. In that case one of the judges was absent all the time, and his place was not supplied, as it might and ought to have been, by the voters present, and the returns are signed by less than the number of judges required by law. In this case the proper number of officers officiate at the election, count the votes, and sign the returns. A few votes may have been taken in the absence of one of the officers, but a list of them was kept, and subject to his inspection and criticism on his return. There being no proof or suspicion of unfairness or illegal voting in the ward, the committee are of the opinion that the votes should be counted.

[1] By Mr. Dawes, Globe, p. 2808.

The minority also concur:

The chief violations of the letter of the law consist in closing the polls for short periods during the dinner hour and in the too frequent absence of one or another of the officers from his place at the polls while open. The fact of such unlawful closing of the polls or of such occasional absence of an officer of the election, without proof of bad faith, fraud, corruption, or actual injury, we deem insufficient to call for the rejection of the polls in question.

4. The majority state a fourth question as follows:

The sitting Member further claim that the returns from Clinton Township, Knox County, should be rejected for the reason that the city of Mount Vernon and said township voted at one and the same precinct. The city of Mount Vernon was incorporated by a special act of the legislature in 1845. It lies in the center of Clinton Township, from whose territory it was taken. Under this special charter the township and city were authorized to hold all county, State, and national elections together, and from that time to this all such elections have been so held. In 1852 a general act was passed by the legislature "to provide for the organization of cities and incorporated villages," which makes each ward of a city an election district, and provides that the election shall be held at such places as the councilmen for such ward shall direct. Under this act no places for holding general elections in the city of Mount Vernon have ever been fixed. The law was not supposed to apply to this city so as to overrule its special charter. The city and township continued to hold their general elections together as before. Up to and including the election of 1866, fifteen State and four national elections had thus been held since the act of 1852. It is claimed now for the first time that the general election in the city of Mount Vernon, under the law of 1852, should be held separate from the township, in its own wards, and that the 1,100 voters of this precinct must be disfranchised as the penalty for so long misconstruing the law. The committee are inclined to think that the sitting Member is right in his construction of the law, considered as an original proposition, but as eighteen different elections preceding that of 1866 have been held since the act of 1852 without question, they do not feel justified in setting aside an election held in pursuance of a construction so long sanctioned by the authorities of the State.

The minority urged reasons of alleged fact why these returns should be rejected, and on the question of law argued:

No elections were held in the wards of the city. Their ballots were confused with those of the citizens of the township outside. It is no answer to say that the proper officers neglected to organize election boards in the city, and that the people therefore might vote at the township poll, because, in such case, it was the right and duty of the citizens at the time to select other officers and proceed to hold the election according to law. The citizens of the city had no right to vote at all out of their respective wards, and to do so was to commit crime under the laws of Ohio. If all these things can be done without vitiating elections, then election laws become useless and inoperative.

5. The majority say in relation to a fifth question:

The contestant also claims that Linton and Monroe townships, in Coshocton County, should be rejected. In each of these townships the ballot box was tampered with, and the number of votes returned for the sitting Member was larger than the number of votes cast for him, while the contestant's vote was proportionally diminished. In Linton the judges refused to allow certain friends of the contestant to be present while the votes were being received, as required by law; and in Monroe the township clerk refused to allow the friends of contestant to examine the retained poll book and ballots as the law requires, and the poll book returned to the clerk of the court was afterwards stolen. It is further objected to the returns from these townships that there is no certified poll book.

The majority further say that either the frauds proven to have been practiced on the ballot boxes or the absence of all certificates to the poll book might be considered a good reason for rejecting the returns altogether, but in proving the fraud the parties had proved the number of votes and for whom they were cast. Therefore the committee corrected the returns and did not reject the poll altogether.

The minority say as to Linton Township:

The law of Ohio requires that the names of the voters shall be entered upon the poll books, and that after the poll books are closed the poll books shall be signed by the judges and attested by the clerks, and the names therein contained shall be counted and the number set down at the foot of the poll book. At the election in question this was done, except the signing. The statute further requires that after the examination of the ballots shall be completed, the number of votes for each person shall be enumerated, under the inspection of the judges, and be set down opposite to their names, and that the judges of the election shall certify to the same, which certificate shall be attested by the clerks, all of which was done. (I Swan & Critch, pp. 533, 534, 535.) The object of the election law is to require the officers to certify the result of the election. That they have explicitly done in this case, and we submit have thus substantially, although not technically, complied with the law.

As to Monroe the minority say:

But the contestant alleges fraud in the officers of this election. The officers, of whom two were Republicans and three were Democrats, were all examined, and all testified that there was no fraud committed by them or with their knowledge. There was other testimony tending to excite suspicion as to the conduct of one of the officers, but it is, in our judgment, entirely insufficient to justify the rejection of the vote of the township, as established by the evidence and the admissions of the parties. It is impossible for us to perceive on what ground of law, or political or moral ethics, votes should be refused to any candidate for whom, by legal evidence, they are shown to have been cast. To reject such votes upon legal technicalities violates every precedent in Congress, and makes Congress assume the odious responsibility of electing Members of Congress.

6. As to Blue Rock Township the majority and minority disagreed as to the facts shown by the testimony.

The returns on their face had shown a majority of 271 for sitting Member. The majority of the committee, as a result of their conclusions, found this obliterated, and that contestant had a majority of 81. They therefore reported resolutions to carry this conclusion into effect. The minority found a legal majority of 742 for sitting Member.

The report was debated at length in the House on June 2 and 3, 1868,[1] and on the latter date a resolution of the minority declaring sitting Member entitled to the seat was disagreed to, yeas 37, nays 39. Then the resolutions of the majority were agreed to, yeas 80, nays 38.

Thereupon Mr. Delano appeared and took the oath.

867. The Missouri election case of Switzler v. Anderson in the Fortieth Congress.

A canvassing officer may not reject returns which are regular on their face because the registration law may have been violated in the district in question.

As to the degree of intimidation required to justify a decision that a registration is void.

Entries on a registration list made by an officer not authorized by law to note the qualifications; of voters thereon are not evidence as to qualifications of persons registered.

On March 22, 1867,[2] the House by resolution extended for sixty days from the time prescribed by law the time for taking testimony in the Missouri contest of Switzler *v.* Anderson.

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[1] Journal, pp. 790, 791; Globe, pp. 2773, 2804–2809.

[2] First session Fortieth Congress, Journal, p. 93.

On March 23, 1868 [1], the report of the majority of the committee was submitted by Mr. Luke P. Poland, of Vermont, and on April 2 Mr. Joseph W. McClurg, of Missouri, submitted the minority views.[2] The case turned on the vote of the county of Callaway, which returned for contestant 1,463 votes and for sitting Member 163. The secretary of state of Missouri had declined to open and cast up the votes of Callaway County on the ground that there had not been a proper registration, and the certificate was issued to sitting Member, who had a majority of 178 votes in the remaining counties.

The provisions of the registration law are thus set forth in the report:

The governor of the State is to appoint a supervisor of registration in each county, who is also the president of the board of appeals and revision. The supervisor of registration in each county is to appoint an officer of registration in each election district. The officers of registration in each election district are required to attend on certain days prior to each general election for the purpose of registering the voters of such district. Every person applying to such officer of registration to be registered as a voter must first take and subscribe the test oath prescribed by the constitution of that State. Such officers of registration are also empowered to examine, on oath, every person applying for registration, and it is made their duty to diligently inquire and ascertain that such person has not been guilty of any of the disqualifying acts specified in the constitution. Such officers may also take other evidence as to the qualifications of the applicants, and also act upon their own knowledge. If he is satisfied that the applicant is duly qualified, and can honestly and truthfully take the test oath of the constitution, then he registers such person as a qualified voter. If the officer is not satisfied that the applicant is qualified, he is to enter his name upon a separate list of persons rejected as voters, and he is also to enter the grounds of the rejection, and note an appeal, if one be taken.

The superintendent of registration and the several district officers of registration constitute a board of registration, and are required to meet on certain days prior to the election to hear appeals from the several district registrars and generally to revise the registration in the several election districts in the county, and act upon objections to any who may have been registered as accepted voters.

After this action by the board of revision each distinct registrar is required to make out and certify two copies of the revised registration of his district, and deliver one to the clerk of the county court and one to the election judges of the district. No person is allowed to vote as "a qualified voter" unless his name appears as such upon the certified copy thus furnished the judges of the election.

All these provisions of the law in relation to the duties of registration and election officers are enforced by severe penalties for their violation; and all attempts to impede registration by threats, intimidation, or violence are similarly punishable.

By a supplemental registration act it is provided that the supervisors of registration in the several counties shall "make out and forward to the secretary of state, immediately after the completion of the registration in their respective counties and districts, a certified copy of the registration thereof, which shall contain the names of all registered voters; which certified copy shall be evidence of the facts therein stated, and may be used as such in any contested-election case, or other legal proceedings."

The governor appointed the registering officers in accordance with the above law. It appeared from the debate that the governor, the superintendent of registration for Callaway County, and the district registrars belonged to the party of the sitting Member.[3] The district registers made the registration, and each certified the copies of the registration as required by the law. The copies were duly delivered to the clerk of the county court and the judges of the several election districts as the

[1] Second session, Journal, pp. 561, 606; 2 Bartlett, p. 374; Rowell's Digest, p. 219; House Report No. 28.

[2] In this case it is worthy of notice that the sitting Member belonged to the majority party in the House and contestant to the party represented by the minority.

[3] Globe, p. 4085.

law required. The election was held November 6, 1866, but not until December 12, 1866, did Thomas, the county superintendent of registration for Callaway County, certify the registration of the county to the secretary of state. The copy which he then returned had attached to the registration of each district or township the certificate of the district registrar. He also attached a certificate of his own, wherein he set forth that the letter and spirit of the law was not carried out in any one of the election districts; that such widespread intimidation existed in the county that the law "was not carried out, as the certificates hereto appended show." The charges herein set forth were substantiated by certificates from three district registrars, who each certified that by reason of intimidation disloyal men not entitled to vote had been registered. Thomas also made entries against the names of 730 registered persons, such entries alleging disloyalty.

As to whether, on the state of facts as presented, the secretary of state had any right to refuse to cast up the votes given in the county of Callaway, the report says:

It does not distinctly appear that the secretary of state knew that these entries on the copy of registration had been placed there by Thomas, but it seems highly probable that he did, as it does appear that before Thomas made any certificate upon the registration, it was a matter of consultation and discussion between him and the secretary whether he could make such a certificate as he did make, and the effect of it, the secretary saying that if Thomas could make such a certificate, he thought it probable the whole thing could be thrown out.

Thomas had no legal right to make any such entries upon the copy; it was not in the performance of any legal duty that the laws of the State devolved upon him; his duty was only to make out and deliver to the secretary of state a copy of the registration of the county, containing the names of all registered voters, and to verify it by his official certificate. He had no right to interpolate other facts or statements into the copy, and he had no power to make his certificate evidence to any greater extent than to verify the copy as a true copy of the official registration. But assuming that the secretary of state did not know that these entries on the registration had been made by Thomas, and that he supposed they were made by the district registrars, or were made by the board of appeals, still, in the judgment of the committee, he had no right to regard them, and upon them set aside the vote of the county. The copy of registration shows that each of the persons against whose name such entry had been made was registered as a qualified voter, and that such registration had been sanctioned and approved by the board of appeals. If he had the right to suppose that they had this evidence before them, or that such charge was made against these persons, he must also see that notwithstanding this, they had been allowed to remain upon the register as qualified voters. The law nowhere authorizes the secretary of state to review the action of the registration officers and overrule their action. But it is not necessary to enlarge upon this view of the case, as the committee is satisfied that the secretary knew that these entries were made by Thomas with a view to support what he stated in his certificate, and that he ought to have treated them as a mere nullity, as much as if Thomas had entered against the same persons that they were minors or nonresidents.

Nor had the secretary any right to regard the facts stated by Thomas in his certificate, except so much as verified the copy. The law is entirely settled that statute-certifying officers can only make their certificates evidence of the facts which the statute requires them to certify; that when they undertake to go beyond this and certify other facts, they are unofficial, and no more evidence than the statement of any unofficial person. The statements or certificates of Turner, Turley, and Yount can not be regarded as having any legal validity whatever. The district registrars had exhausted their legal power of certifying when they had certified the registration of their respective districts; they were not officers to certify the county registration to the secretary of state, so that their statements are of no more force than any private persons. The law is equally clear that the secretary of state had no legal power to go behind the returns that were certified to him by the county clerks of the votes in the respective counties, or behind the returns of the registration officers. He was a mere canvassing officer, to open and count the votes that upon the face of the returns appeared to have been regularly cast.

The committee therefore concluded that the action of the secretary of state in rejecting the vote of the county was wholly illegal and unauthorized.

But the sitting Member further claimed that, even if the secretary of state might not reject the vote of Callaway County, the House might nevertheless do it, on the ground partly that the district officers of registration voluntarily neglected their duty and the requirements of the law, but mainly on the ground that the public and general sentiments of the people were so hostile to the proper enforcement of the registry law, and that such open threats were made against those who should attempt it, that the registrars were intimidated and prevented from doing their duty, and that loyal men were prevented from interposing objections against the registration of their disloyal neighbors. After weighing the evidence the committee conclude:

From the mass of conflicting opinion on this subject, and from the character of the threats proved, the committee comes to this conclusion, that there was no just and reasonable ground to fear personal violence or injury in consequence of appearing to make and support objections to registration; but that it was against the general and public opinion of the county that persons who had not committed disloyal acts should be disfranchised merely on the score of opinions and sympathies, and that probably many persons did refrain from making objections rather than encounter this general sentiment.

The committee does not regard this as any such unlawful interference with or obstruction of the law as furnishes ground to invalidate the registration. Nor does the committee regard any threats to seek redress against refusal of registration, by resort to legal tribunals by suit, as unlawful, so as to produce that effect.

The committee, upon all the evidence, can not find that there was any such misconduct or disregard of the law by the district registrars, or any such fear or intimidation excited, either upon the registrars or upon loyal men generally, as to preclude a fair and legal registration of this county, or to justify a total rejection of its vote for any such cause.

As to another feature the report says:

The committee does not understand that it is claimed for the sitting Member that if the vote of this county is to be counted, except so far as he shows the contestant received illegal votes, that his evidence shows a sufficient number to prevent the election of the contestant. Even striking out all those who had entries made against them by Thomas, more than enough are left to give the contestant a majority.

But those entries are not, in the judgment of the committee, any evidence of the disqualification of the person registered.

As has before been shown, Thomas had no authority to make them, and could give them no additional force by spreading them upon this copy of the registration of the county.

Thomas, upon inquiry as to the evidence upon which he acted in making these entries, says:

"In cases of bonded persons I took it from a list furnished me from the adjutant-general's office; those under the head of remarks, who were designated as enrolling disloyal, were taken from an enrollment made by Colonel Kerkel in 1862; under the head of other remarks, there were very few of them. The remarks made of this last class were made upon my own knowledge."

We have been cited to no law by which these lists of persons, as under bonds, or enrolled disloyal, are made evidence for any purpose beyond the specific one for which the lists were made; and upon what authority or evidence the lists were made is not shown. It is left altogether in doubt whether Thomas had the original enrollment made by the military authorities, or had only an unauthenticated copy. But however much weight the enrollment itself might be entitled to if produced in evidence here, the common principle of requiring the production of written evidence, and not receiving its contents from a witness, is a sufficient answer to bringing them in this manner. The attempt of Thomas to make facts "within his own knowledge," or "facts generally admitted," evidence, by thus entering them upon this copy of registration, is a still wider departure from all proper rules of evidence. The

evidence in the case shows that a few persons who had actually been engaged in the rebellion were registered as qualified voters; and giving full credit to the opinions of the witnesses of the sitting Member as to the number of persons in the county entitled to be registered under the law, it would appear that a large number must have been registered who were disqualified by reason of having sympathized with those engaged in rebellion.

The committee has already had occasion to express its judgment (which was sanctioned by the House) of the insufficiency of such general estimates for the purpose of proving either the qualification or disqualification of voters, and when such estimates are founded upon the sentiments and opinions of others, instead of tangible causes, they are still more dangerous as evidence.

Therefore the majority of the committee recommended resolutions declaring contestant elected and unseating sitting Member.

The minority, after reviewing the testimony as to intimidation, conclude:

Sufficient testimony has been quoted to satisfy the House that such a state of fear existed in Callaway County that there was not a proper enforcement of the law, but such a disregard that it is impossible to ascertain what should have been the legal vote in regard to numbers; disloyalty being triumphant, the loyal intimidated, registrars powerless, witnesses awed into silence, "a quiet election," and even "a quiet registration," because the disloyal controlled all as they desired.

Loyalty and justice demand that the election in that county (Callaway) be regarded as a nullity; that treason be thus rebuked, and those who failed in their efforts to destroy their government by the bullet be taught that, if permitted to control it by the ballot, they shall not be permitted to do so in open and flagrant violation of the law.

868. The case of Switzler v. Anderson, continued.

The House recommitted a report in an election case for inquiry as to a newly made charge of disloyalty against both parties.

The House, overruling its committee, held void an election in a county because of the intimidating influence of a preponderating disloyal element.

Instance wherein the House declined to follow its committee in awarding the seat of a Member of the majority to a Member of the minority party. (Footnote.)

The report was debated in the House on July 15 and 16, 1868.[1] On the latter day Mr. John F. Benjamin, of Missouri, in the course of debate, presented charges against the qualifications of the contestant as to loyalty.

It was objected that the pleadings made in accordance with the law had contained nothing affecting the loyalty of contestant, and that branch of the subject had not been investigated by the committee.

But the House voted, yeas 93, nays 46, to recommit the case with instructions to inquire into the charges of disloyalty made against the contestant, and also charges of disloyalty made by contestant against sitting Member.

On January 14, 1868,[2] the committee reported again, stating that files of a newspaper edited by contestant had been presented tending to show disloyalty, especially an editorial justifying the shooting of Colonel Ellsworth at Alexandria. The report cites the conclusions in the Kentucky case, and announces that the committee adheres to the conclusions of the former report. While many of the articles published in contestant's newspaper were mischievous in their tendency, yet

[1] Globe, pp. 4084, 4124–4133; Journal, pp. 1087–1089.

[2] Third session, House Report No. 7.

there was no such proof of disloyalty as to require his exclusion under the rule laid down in the Kentucky cases. The article relating to Ellsworth was repudiated by contestant, who declared that it was published without his knowledge.

On January 21[1] the second report was debated at length in the House. The opponents of the majority report urged that the House itself should reject the vote of Calloway County because the testimony abundantly showed that by far the larger part of the registered persons in that county were disloyal and not entitled to vote under the law of Missouri. This testimony was urged to be sufficiently conclusive, although this was vigorously disputed by those supporting the majority report.

A test vote was taken on the resolution unseating sitting Member. This was disagreed to, yeas 55, nays 89. Thereupon the resolution declaring contestant entitled to the seat was laid on the table. So the majority report was disapproved, and sitting Member retained the seat.

869. The Missouri election case of Birch v. Van Horn in the Fortieth Congress.

Extension of time of taking testimony in an election case.

Suffrage is a political right or privilege which, after it is granted, may be restricted or enlarged.

A new State constitution withholding suffrage from persons not able to take an oath of loyalty was held valid and not in the nature of an ex post facto law.

On March 22, 1867[2] by unanimous consent, the House agreed to a resolution presented by Mr. Joseph W. McClurg, of Missouri, providing that the time for taking testimony in the Missouri contested-election case of Birch *v.* Van Horn be extended for sixty days after the expiration of the time prescribed by law.

On December 18, 1867,[3] Mr. Luke P. Poland, of Vermont, from the Committee on Elections, submitted the report of the committee in this case. The sitting Member had been returned by an official plurality which in corrected form amounted to 525 votes.

(1) The principal contention by which the contestant strove to overcome this plurality related to a large number of rejected votes, of which 2,501 were for contestant and 9 for sitting Member. The constitution of Missouri, which had been in force since July 5, 1865, disqualified as voters all persons who had manifested adherence to or sympathy with the cause of the so-called Confederacy. This constitution also provided for a system of registration, and that as a prerequisite to such registration and to voting the citizen should take an oath proving his loyalty. The taking of this oath did not of itself insure registration, but the registration officers might institute inquiry, and if this inquiry were not satisfactory, might place the name on the rejected list. Persons on this rejected list might cast their ballots, but such ballots were marked and certified as rejected. The examination of this question of rejected voters divided itself into several branches.

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[1] Journal, p. 191; Globe, pp. 502–518.

[2] First session Fortieth Congress, Journal, p. 93; Globe, p. 289.

[3] Second session Fortieth Congress, House Report No. 4; 2 Bartlett, p. 205; Rowell's Digest, p. 215.

(*a*) A question as to the constitutionality of the provision, in view of the fact that another portion of the State constitution had been impeached. The report says:

The ninth section of the same article provides that, after sixty days from the time the constitution takes effect, no person shall be "permitted to practice as an attorney or counselor at law, nor after that time shall any person be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach or preach, or solemnize marriages, unless such person shall have first taken, subscribed, and filed said oath."

Under this ninth section of the constitution arose the case of Cummings *v.* The State of Missouri (4 Wallace, 277), in which it was held by a majority of the Supreme Court of the United States that this provision, having the effect to deprive persons of the right to practice professions and pursue avocations lawful in themselves, in consequence of acts done prior to the adoption of the constitution, could only have been intended as punishment for such acts, and was therefore in essence and substance an ex post facto law, and therefore forbidden by the Constitution of the United States.[1]

The contestant claims that the same application of principles requires the same decision in relation to voters; that the virtual disfranchisement of persons who were voters under the previous constitution and laws of the State, but who are prevented from voting under the new constitution by reason of their inability to take the oath it requires, can only be regarded as a punishment for the act which stands in the way of taking the oath, and that the Constitution of the United States prohibits the infliction of punishment by subsequent legislation.

If such disfranchisement must be regarded as established for the purpose of punishing the persons thus deprived of the right of voting, it must be admitted to come entirely within the reasoning by which the above-cited judgment of the court is supported.

Your committee believe that the provisions of the new constitution of Missouri may be supported, so far as they require this oath of voters, without at all trenching upon the decision of the Supreme Court.

Each of the States of the Union have hitherto regulated suffrage within their own limits for themselves, and in such a manner as the people of the State deemed most conducive to their own interests and welfare. Suffrage is a political right or privilege which every free community grants to such number and class of persons as it deems fittest to represent and advance the wants and interest of the whole. No State grants it to all persons, but with such limitations as the interests of all and the interest of the State require.

When once granted it is not a vested, irrevocable right, but it is held at the pleasure of the power that gave it, and the State may, by a change of its fundamental law, restrict as well as enlarge it. When, therefore, the State of Missouri, in changing its constitution, saw fit to declare that the interests of the State and of the people of the State would be promoted by withholding the right of voting from all persons who could not take the prescribed oath, they exercised no greater or higher power than exists in every State.

870. The case of Birch v. Van Horn, continued.

4. A new State constitution being recognized by State authorities and by Congress in the reception of Representatives, the House will not question it in an election case.

Persons being denied the privilege of voting because of disqualification, their votes may not be counted by the House on general testimony as to their qualifications.

A registration officer who could not properly take the oath he did take as such officer was held a good de facto officer.

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[1] Although the whole committee concurred in the conclusions of the report, Mr. Michael C. Kerr, of Indiana, argued in debate in support of the objection that this provision of the State constitution was in the nature of an ex post facto law. (See Globe, p. 401.)

(*b*) The committee also conclude:

On the 1st day of July, 1865, the governor of the State issued his proclamation declaring the constitution adopted, and in force from and after the 4th day of the same July. Since that time the new constitution has been regarded by all the departments of the State government as the fundamental law of the State; all the legislation of the State has been conformed to it; all the officers of the State, and of all municipal subdivisions of the State, have been elected and held office according to its requirements, and the State has been represented in both Houses of Congress without question as to the validity and binding obligations of this constitution.

The contestant now claims that this State constitution, so far at least as it affects elections of Members of Congress, should be held a nullity, and as if it had never been adopted by the people of the State.

This is claimed upon the ground that the convention by whom it was framed exceeded their powers given by the legislative act by which the convention was called, and that this was not cured by its subsequent adoption by the people, because, in submitting it to a vote of the people, those only were allowed to vote who could take the oath prescribed in the second article of the constitution, the effect of which was to preclude large numbers from voting who had been previously allowed to vote. The committee have not deemed themselves at liberty to enter upon this inquiry.

It being conceded that by every department of the State government of Missouri this constitution is recognized and acted upon as the fundamental law of the State, and by Congress in the reception of Representatives from the State, it is in our judgment too late for this House to inquire as to the regularity of its formation or adoption by the State.

(*c*) Contestant also claimed that even if the State constitution were valid, the persons whose ballots were rejected were nevertheless legal voters under all the requirements of the new constitution. In support of this he produced general testimony. Thus, taking the list of rejected voters at a certain place, a witness would be introduced to swear that he did not know any one of them "who was disloyal within the meaning of the terms of the new constitution of Missouri."

The committee say:

The evidence of the contestant tends to show that the restrictions and disqualifications created by the new constitution were very rigidly enforced, and some instances of partisan unfairness are shown, but to what extent this operated to exclude lawful voters from registration, and who such voters were, is left wholly vague and uncertain. The only evidence in the case is that taken by the contestant, and it is probable that much of the appearance of unfairness would have been dispelled if evidence had been taken by the sitting Member.

If the class of evidence introduced by the contestant had been the only means within his reach to establish the right of the persons rejected to be registered and vote as qualified voters, there would be very plausible ground to claim that enough ought to be presumed from it to at least vacate the election, unless what is proved by the contestant was rebutted by evidence from the other side. But the contestant was not confined to this proof or evidence of this general nature at all. The provisions of the constitution and laws of Missouri furnished him peculiar facilities to establish his case, if he relied upon proving that legal voters were excluded from registration and voting as qualified voters, in as much as the rejected list of the registers and the rejected votes furnished the names of the persons and the candidates for whom they voted.

Under these circumstances the committee consider they have no right to rely upon such vague and general evidence as has been furnished, or to draw presumptions and conclusions from it when it was clearly within the power of the contestant to have established the facts; he asks us to presume by dear and exact proof if such facts exist.

The committee consider, also, that in order to unseat a Member of this House who has the regular certificate of election, and who is conceded to have received a majority of several hundred votes of the votes received and counted, they should be able to report whose votes were excluded that ought to have been counted; that it would not do for the committee or for the House to say that out of 2,500 rejected voters, all of whose names are unknown, they are satisfied that enough were legal voters and ought to have been counted to give the contestant a majority.

(2) The committee thus discuss a question relating to an irregularity of certain poll books:

The contestant also claims that all the votes cast in the county of Clinton, except in the township of Concord, should be excluded by reason of the insufficiency of the poll books returned by the judges and clerks of election in the several townships.

The statutes of Missouri require that the judges and clerks of election, before entering upon their duties, take the oath required by the constitution, and also an official oath prescribed by the statute. The statute gives a form for a poll book, in which form it is stated that the judges and clerks were duly sworn previous to entering upon the duties of their offices. The committee regard this as a statute requirement that should appear upon the poll books returned.

Jeremiah V. Bassett was clerk of Clinton County at the time this Congressional election was held. He testifies that the poll books from the townships of Jackson, Shoal, Lafayette, Hardin, and Platte contained no evidence that the judges and clerks of election therein had taken the required oaths. Robert W. Musser, who was deputy clerk during the same time, testifies to the same fact.

These townships gave 375 votes for Van Horn and 189 for Burch. The committee are satisfied that this defect existed in the poll books of these townships, as stated by these witnesses (provided it be admissible to show such fact by paxol evidence), and if for that cause they ought to have been excluded from the count, then the above number of votes should be deducted from the votes of both candidates, respectively, making a difference of 186 votes in favor of the contestant.

(3) As to the competency of an officer of election:

The contestant also introduced two witnesses whose testimony tended to prove that Francis D. Phillips, supervisor of registration for Clinton County, induced men to enlist in the rebel army, and so could not truthfully take the oath required by the constitution of Missouri to entitle him to vote or hold office. As these witnesses are not contradicted, the committee are compelled to find the fact proved, if it be of any legal value.

The supervisors of registration for each county are appointed by the governor, and are to be qualified voters. These county supervisors appoint registers in each election district in the county, who are also to be qualified voters.

There is no evidence but that Phillips was in every way legally competent to hold this office, except his inability to take the oath; nor is any question made but that he had, in fact, taken all the necessary oaths and other legal steps to make him a qualified voter; that he was duly appointed to this office by the governor, and had taken all the oaths required by his official station, and had actually assumed and performed the duties of supervisor. The committee are of opinion that his acts as such supervisor can not be regarded as void, so as to affect the legality of the votes given at the election; that, having come into the office under all the forms and requirements of the law, he is at least a good officer de facto, whose acts are not to be questioned in a collateral proceeding, but only by some proceeding bringing his title to the office directly in question.

The contestant's evidence tends to establish that Anthony Harsel, supervisor of registration in Clay County, in 1861 was a friend and sympathizer with the Southern rebellion; and, uncontradicted, the committee think it sufficient to establish the fact; but, as in the case of Phillips, we regard him as being a good de facto officer, whose acts can not, in a collateral proceeding, be held invalid by reason of any defect in his official title.

During the debate Mr. Poland said[1] it would be going a great way, in consequence of this defect in the supervisors, to vitiate the appointment of the deputy registrars, and thus vitiate the entire election, and stated that the committee were unanimous on this point.

The report was debated on January 8, 1868,[2] both contestant and sitting Member being heard, and the resolution confirming sitting Member's title to the seat was agreed to without division.

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[1] Globe, p. 389.

[2] Journal, p. 159; Globe, pp. 389–403.

871. The Missouri election case of Hogan v. Pile in the Fortieth Congress.

The use of an unofficial compilation of a registration list to aid in reference during the voting was held not to vitiate the poll.

Registration being a condition of voting, the House declined to reject a precinct whereof the registration list was not shown to have been returned as required by law.

On June 18, 1868,[1] Mr. Burton C. Cook, of Illinois, from the Committee on Elections,[2] submitted the report of the majority of the committee in the Missouri case of Hogan *v.* Pile. The questions arising in this case were largely of fact arising from the workings of the registration law of Missouri; but a few questions arose involving principles.

The sitting Member had been returned by a majority of 218 votes, which the contestant assailed as produced by frauds and irregularities. The questions involving the determination of principles were:

(1) The law of Missouri required each voter to be registered, and that no voter who had not been registered should vote. The law further provided:

SEC. 12. Immediately after the closing of such register the officer of registration shall make and certify two fair copies, alphabetically arranged, of the names of the qualified voters, as ascertained and determined by said board, one of which he shall deposit with the clerk of the county court on or before the next ensuing Saturday, and the other he shall deliver at or before the hour of 10 o'clock a. m. of that day, to some one of the persons who shall have been appointed to act as judges of the next ensuing general election in the election district for which the list was made, and shall take his receipt therefor. * * * The person to whom the said list shall have been delivered shall produce the same at the place of voting, and deliver it into the possession of the judges of the election at the time of opening the polls on the day of the ensuing general election.

* * * * * * *

SEC. 17. When any person shall have voted the judges of election shall, at the time, write opposite his name on the list the word "voted."

In one election precinct the provisions of this law were carried out as described in the report:

The registry lists certified by the officer of registration were alphabetized simply by the first letter of the name. In some instances more than a hundred names were recorded under a single letter. To remedy the inconvenience occasioned by the imperfect manner in which the list was arranged, and the consequent delay finding the name of the voter and receiving the vote, the judges of election of the thirtieth election precinct, on the day and night prior to the election, caused the certified list to be copied, and in the copy made the names were alphabetized by the first two letters, so that the name could be more easily and readily found; the names were numbered on the certified list and the numbers were transcribed on to the copy, so that where the name was found on the copy, by the aid of the number it could be more readily found on the certified list. (Testimony of John Green, Mis. Doc. 37, p. 138.) Both the certified list and the copy made by the judges were present, and were used by the judges and clerks during the election. There is no evidence before the committee showing that the copy made by the judges was used to the exclusion of the certified list; the returns were made on the certified list. (See testimony of G. Sessingham, p. 139, also the testimony of Charles P. Gould, p. 137, and of Milton H. Wash, p. 57.)

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[1] Second session Fortieth Congress, House Report No. 62; 2 Bartlett, p. 281; Rowell's Digest, p. 216.

[2] Minority views were presented by Messrs. John W. Chanler, of New York, and Michael C. Kerr, of Indiana.

The committee are of opinion that the use of a more perfectly arranged copy of the certified registration lists by the judges, in connection with the original, for the purpose of facilitating the finding of the names of voters on the certified lists, and consequently making it possible to receive a much larger number of votes, did not render void the election, and if done in good faith was no more a violation of the law of Missouri than it would have been to have employed an expert clerk to have found the names of voters upon the certified list without delay, and thus have expedited the voting.

The minority criticise the secondary list as made up by a partisan of sitting Member who was not a sworn officer, and not properly supervised by sworn officers. They say:

This new list got up by Green, etc., is said to have been a "true copy" of the original book or "list" furnished by the registrar, yet no one testifies to any examination and comparison thereof, except, as Mr. Green says, by counting the names on both lists and finding them to agree in number. Can the committee sanction this method of comparison? Would counting the words verify the copy of a bill, a deed, or any legal instrument? Surely the members of the committee will not try to legalize a list of voters compared by merely counting the names. Further, the list used was not authenticated. The law requires the registrar "shall certify to the list of voters;" this is its authentication. Could it be a legal copy, if even every name on the original was on it, without this authentication? Did any court ever admit as evidence a copy of a deed, even though containing every word of the original, when there was no authentication thereof?

More than this, did ever court admit as evidence a paper purporting to be a copy of an original one, made evidence, which not only was not authenticated, but was proven never to have been compared with the original of which it purported to be a copy? Nay, more, when the purported copy has been challenged as fraudulent, but is not then produced for comparison with the original, would any court or jury substitute such copy? Assuredly they would not. But the evidence is clear that this official record was substituted by another, claimed to be a copy, but by no one examined and compared, not even certified by any one as true. To admit such would be to ignore all the practice of the past.

The minority and majority then join issue as to whether or not the facts showed the secondary list to have been made and used for purposes of frauds. There were certain discrepancies, but the majority insisted that they were explained by errors arising innocently from writing foreign names by sound. The minority combated this theory, pointing out that the party friends of sitting Member controlled the registry.

(2) Contestant also assailed the returns from the thirty-seventh election precinct. The report says:

It is claimed by contestant that the return from this precinct should be rejected, because the original registry list was not returned to the office of the county clerk. The law requires that the officers of registration shall, "as soon as may be," deposit with the clerk the original books of registration. The only evidence before the committee that the original registry list was not returned is as follows: "No. 21 registration book not returned to clerk's office. James C. Moody, judge." This certificate is without date, and there is no proof before the committee when it was made.

The next paper is a copy of poll book of the same election precinct, certified by S. W. Eager, clerk of the county court, which certificate is dated January 3, 1867. The election was held on the 6th day of November, 1866. Even if there was any proof before the committee that the original list had not been returned to the county clerk by January 3, 1866, the committee are not prepared to say, in the entire absence of proof of the circumstances of the case, that there was such violation of the law as would render the election void.

In support of this position the report cites the case of Brockenborough *v.* Cabell.

The minority cite the law:

SEC. 14. The officers of registration shall, as soon as may be, deposit with said clerk the original books of registration, which shall be kept and preserved among the records of the court, except when otherwise disposed of, as hereinafter directed.

After stating the facts, the minority say:

Now, we ask, upon what evidence does the majority of the committee act in receiving as legal votes these 164 from district No. 37? There is none, for there can be no legal vote without registration, and there is absolutely no evidence of registration in that district. This conduct is in most noticeable contrast with the rejection by the majority of the committee of certain precincts in Kentucky, in the case of McKee *v.* Young, where the grounds of objection in no way touched the merits or fairness of the election.

The sitting Member, in his verbal argument before the committee, admitted that he had no doubt that when Eager, clerk, made the certificate the book had not then been returned; but, when asked by the chairman of the committee if he knew it had been returned since, he said he did not know whether it had or not.

If it had been returned, he could have procured a copy, and thus refuted the allegation. Failing to supply the lack, and especially when his own party friends, the registrar and the county clerk, are the only ones that could supply the list, the case on all principles of justice must be given against him, and this precinct ought to be thrown out.

In the case of Blair *v.* Barrett the contestant alleged the absence of evidence on the record that the judges had been sworn. It was held by the committee and the House that it was the duty of the contestee to supply this evidence, failing in which this precinct was thrown out and Barrett lost his seat. This ruling has been since affirmed. This has frequently been held a necessary part of the return. The Missouri law makes the evidence of registration essential to the right to vote, and the preservation of this evidence in a given office an imperative requirement. Can the committee set aside this provision?

The majority of the committee have held in the recent case of Delano *v.* Morgan that while the the law of Ohio specifically required the return should show that all who voted were "electors;" and as this designation was omitted in the certificate of return, the omission was fatal. The Missouri law requires registration, requires the evidence thereof to be filed with the clerk, requires the voter's name to be marked "voted" on the list, and this list to be returned. None of these absolutely mandatory provisions are complied with, and yet the majority of this committee fail to see this fatal omission, which practically shields a party friend.

Presuming the attention of the majority had not been directed to the peculiar reasons of this requirement, we have given to it this examination, and, in accordance with all analogous precedents, reject the poll, and shall therefore, in our summary of result, deduct it from each of the parties. The vote at that precinct was: Pile, 94; Hogan, 69.

872. The case of Hogan v. Pile, continued.

Evidence taken ex parte is not considered in an election case even when given by electors as to their votes.

The State law requiring the polls to be open from "sunrise to sunset," and the polls being closed at sunset and then reopened, the votes cast after sunset were rejected.

(3) As to certain evidence taken ex parte the report concludes:

During his concluding argument before the committee the contestant presented the affidavits of 42 persons showing that they voted for him, and it is insisted that the poll books show that each of these persons were counted for the sitting Member.

The committee can not consider these affidavits as evidence, because it was admitted by contestant that the affidavits were wholly ex parte and taken without any notice whatever having been given to the sitting Member and because the same were taken without any order having been made for that purpose after the time allowed by law for the taking of the proof had expired. * * * If, however, the testimony was admissible, it would be very far from conclusive.

The minority admit that this evidence is not strictly legal, but contend that from its nature it should be admitted.

The clerk, being by law the custodian of election returns, ballots, etc., on the mandate of the circuit judge, in accordance with the law of Congress, examined and certified the numbers on the ballots counted for each candidate as returned by the judges of election, and by comparing these numbers with corresponding numbers on the poll list, it is readily perceived for whom each party voted. Many well known and influential citizens are by this comparison found apparently voting for the sitting Member, their ballots being counted for him. Publication was made in the newspapers of St. Louis of this fact, and these gentlemen, to the number of about 100, sent their affidavits to the contestant to same him of the fact that they did not vote for the sitting Member, but did vote, each and all of them, for contestant.

This is simply a question of fact. The tickets were printed; party lines were very closely drawn; these gentlemen are vouched for as intelligent lawyers, bankers, merchants, doctors, mechanics, of well-known political proclivities. When they swear they knew for whom they voted, and when the official certificate of the clerk of the county court certified to the numbers as counted for the sitting Member, and numbers corresponding to each of these names are found to have been counted for the sitting Member, and hence made fraudulently to increase his apparent vote, cross-examination could not change these facts.

(4) The election law of Missouri required the polls to be opened from "sunrise to sunset." In precinct No. 26 certain votes were taken after sunset. The majority decline to decide whether these should be counted or not, but as to two other precincts they say:

The committee are of the opinion that the votes which were given at precincts Nos. 27 and 28 after sunset ought not to have been returned or counted, because in each of those precincts the polls were regularly closed at sunset. (See testimony of John Conzelman, pp. 132, 133; Henry Gambs, p. 135; George B. Stone, p. 157.) After the polls were once regularly closed at sunset it is obvious that they could not be legally opened again during the evening with only partial notice to the voters; such a course would open the door to any fraud that might be attempted.

The minority contend for the rejection of all these returns:

The majority do not undertake to settle the legality of this vote, nor indeed to express any opinion upon it, yet retain the return for the twenty-sixth precinct, because there only the voting was continued without any formal closing of the polls. We are unwilling to unite in this acquiescence, believing it would make a very bad precedent, and lead to injurious consequences. The election law of Missouri requires the polls to be opened "from sunrise to sunset." The question of the legality of votes taken after sunset, as far as our knowledge goes, has never been adjudicated in that State; indeed we do not find that any after-sunset vote had ever before been counted in the State. When the return was made from the twenty-sixth precinct of a night vote, the clerk and judges, passing on, or rather footing up, the returns from the precincts, heard an argument from one gentleman on the subject; after which the clerk and one county judge agreed to receive this return and certify it up to the secretary of state. The other county judge united in the certificate to the general return, but refused to certify the "after-sunset vote," and entered his protest against its reception. (See testimony of John F. Long, county judge, p. 33.) The other election judges generally refused to count and certify the night vote, but when at last they did send it up to the clerk from the twenty-eighth precinct he refused to receive and include it in returns. The secretary of state, in his official certificate filed with the committee, evidently does not regard the night vote as of equal validity with the day vote, for he enumerates them separately, and specifically presents the former in red ink, in contradistinction with the latter, thus:

William A. Pile received 6,587 votes before sunset; 141 votes after sunset; total vote before and after sunset, 6,728.

John Hogan received 6,417 votes before sunset; 93 votes after sunset; total votes before and after sunset, 6,510.

Assuredly if he deemed after-sunset vote as legal as the day vote, he would have made no such distinction. The undersigned deem the argument in contestant's brief on this subject conclusive; but are unwilling, even tacitly, to admit the legality of such votes.

We state freely, if the night vote is to be counted at all it should all be counted, and the evidence is clear to our minds that the contestant would have a large majority; but, unwilling to open such a door to fraud, we, without any hesitation, reject the whole after-sunset vote, and trust the majority will, on further examination; adopt our conclusion.

(5) There was also a sharp difference between the majority and minority as to certain names on the voters' lists that were not found on the registry list, the majority contending that this was the result of innocent errors and the minority charging an intention to commit fraud.

As a result of the examination the majority found that sitting Member's majority had not been assailed successfully, while the minority contended that contestant had been elected by 469 majority.

The report was debated on July 22 and 23, 1868,[1] and on the latter date the resolution of the minority declaring contestant elected was disagreed to, yeas 32, nays 90. Then the resolution of the majority confirming the title of sitting Member to the seat was agreed to without division.

873. The Missouri election case of Switzler v. Dyer in the Forty-first Congress.

Discussion as to authority of a secretary of state, whose duties are ministerial only, to reject returns because of violations of registration laws.

Returns being tainted by obvious fraud and the custodian of the ballots having refused to show them, the returns were held valueless and rejected.

The returns being rendered untrustworthy by action of acting judges chosen in places of judges kept from the polls by intimidation, the poll was rejected.

The House, overruling the committee, declined to count the vote of a county wherein by fraudulent registration many disqualified persons had been put on the voting lists.

On March 4, 1869,[2] at the organization of the House, the name of David P. Dyer, of Missouri, appeared on the Clerk's roll. As soon as the roll had been called a question was raised as to Mr. Dyer, but on March 5 the House voted, yeas 163, nays 4, that he be sworn in, there being no question as to his prima facie right.

On June 29, 1870,[3] Mr. John C. Churchill, of New York, from the Committee of Elections, submitted a report in the case of Switzler *v.* Dyer, of Missouri. The official majority of the sitting Member in the district as finally established was 432 votes. But of the votes as actually cast the contestant received a majority of 710 votes. The transactions bringing about this change are thus described:

The secretary of state of Missouri, upon affidavits attacking the registration in the county of Monroe, rejected the returns from that county, and a majority of 432 votes being thereby shown for the sitting Member, he gave the latter a certificate of election, upon which he was admitted to his seat in the Forty-first Congress, pending the contest, notice of which had been served upon him by Mr. Switzler. The duties of the secretary of state, under the laws of Missouri, in respect to certifying the election of Mem-

[1] Journal, pp. 1146, 1158, 1159; Globe, pp. 4335, 4381–4382.

[2] First session Forty-first Congress, Journal, p. 10; Globe, pp. 3, 10.

[3] Second session Forty-first Congress, House Report No. 106; 2 Bartlett, p. 777; Rowell's Digest, p. 250.

bers of Congress, are as follows: The judges of election at each voting precinct are required, within two days after the election, to transmit one of the poll books kept by them (and which is required to contain the names of the voters, of the persons voted for, the office, and the number of votes given to each candidate, duly certified by the judges of election) to the clerk of the county court, who, within eight days thereafter, publicly, in the court-house, and with the assistance of two magistrates of the county, is required to examine and cast up the votes given to each candidate, and in the case of Members of Congress and of the State legislature and other State officers, within two days thereafter, to send by mail, closely sealed, and not to be opened until the day fixed for the counting of the votes, an abstract of the votes given for those officers to the secretary of state.

Thereupon, "within fifty days after such general election, and as much sooner as the returns shall all have been made, the secretary of state, in the presence of the governor, shall proceed to open the returns and to cast up the votes given for all candidates for any office, and shall give to the person having the highest number of votes for Member of Congress from each district certificates of election, under his hand, with the seal of the State affixed thereto." (General Statutes of Missouri, 63, secs. 24–32.)

It will be seen from the language of the statutes above quoted that the duties of the secretary of state are ministerial only, and not judicial, and they are so held by the supreme court of Missouri—in accordance with the general current of authority, both in this country and in this House—in the case of the State ex rel. Charles C. Bland *v.* Francis Rodman, secretary of state.

The majority of the committee further conclude:

It is true that in at least two cases beside the present (Butler *v.* Lehman and Morton *v.* Daily, Bartlett's Contested Election Cases, 353, 402), both of which arose in the Thirty-seventh Congress, where municipal officers assumed to act judicially and to reject returns believed by them to be affected by fraud and thereupon issued certificates to persons who would not have been otherwise entitled to them, such certificates were held sufficient, as in this case, to entitle the holder to the seat, prima facie, and pending the contest. But such action being without authority of law has no weight in deciding the contest upon the merits, when, if necessary, we go back of all certificates and inquire into the action and right of the individual voter at the polls; and it has been referred to here only as a part of the history of this case and to explain how the contestant, having a majority of the votes cast, happens to occupy the position he does in this contest.

The minority views, presented by Mr. John Cessna, of Pennsylvania, say:

It is not necessary to discuss the power or authority of the secretary of state to reject the vote, because it is admitted by the majority of the committee that this question does not enter into the case. But it appears from a letter of the secretary of state, filed by the contestant himself as evidence (p. 62 of the record), that the secretary of state awaited the action of the people's representatives in the legislature before he refused to open and cast up the vote of Monroe County (p. 61):

"The letter from Colonel Switzler is received. I have left the whole matter of Monroe and other counties to the legislature for decision. I have not thrown out any county, but simply refuse to cast up until the legislature decides that I shall do so. Not until the legislature has acted upon this matter can I give out copies of documents relating to this subject.

"Respectfully,

"FRANCIS RODMAN, *Secretary of State.*"

It can not well be denied that if the case of Switzler *v.* Anderson, in the Fortieth Congress, was correctly decided, then the conclusions of the majority of the committee in this case are wrong. The same contestant was here in that case claiming admission on the ground of the rejection of the vote in Calloway County for reasons similar to those now urged for the rejection of Monroe County in 1868.

The case turned, therefore, on the question whether or not the vote of Monroe County should be counted. The majority report says:

The reasons given why it should not be counted are that the superintendent of registration of the senatorial district of which that county is a part corruptly agreed, as is alleged, with the political friends of the contestant that he would appoint registering officers in his district who would register all white male citizens over the age of 21 years without regard to their qualifications, as fixed and prescribed by the constitution and laws of Missouri, on condition and in consideration that he should receive the

support of the political friends of the contestant for the office of sheriff * * *; and that, in pursuance of this agreement officers of registration were appointed who would be likely to carry out this agreement; and a large number of persons, disqualified under the law, were permitted to register and to vote in the county of Monroe.

The state of facts in this county was examined at length and carefully to determine whether the registration was fraudulent, the majority contending that it was not, and the minority that it was.

Both the majority and the minority concurred in rejecting the polls at two places:

(*a*) At Salt River Township in Adrian County:

The place designated by the county court for holding the election in this township was the tobacco factory on the public square. Being unable to get in here, the sheriff made proclamation that the election would be held at Ricketts's office, on the square, to which place the people present went; and the judges of election not being present, the voters present chose judges, to whom the sheriff delivered the ballot box and poll books, and also a list of qualified voters, certified by the clerk of the county court (pp. 50, 63, 77). Thus far the proceedings seem to have been regular, although there is evidence to show that it was the intention to have held such an election by judges other than the legal judges, had the latter been present in time to open the polls at 7 a.m., as required by law (p. 205).

The list of qualified voters for this township will be found on pages 201–203 and contains 217 names; but the poll list kept at this election, which is found on pages 192–194, shows that 519 votes were received. The judges further, in making this return, certify that the contestant received 146 votes, the sitting Member 71, or the precise number of qualified voters. It would be very unusual, although possible, that the entire list of persons registered as qualified should have been present to vote; but it is made the duty of the judges of election (Laws of Missouri, 1868, p. 136, sec. 17) to write the word "voted" after the name of each person on the list who shall vote, and on producing the list used at this poll (pp. 203–205) it is found that 74 names have no entry against them (p. 81), showing that they did not vote on that day. Three of those whose names are on the qualified list are called as witnesses—Alfred Hambleton, p. 72; W. W. Cedon, p. 70, and Miles J. Burns, p. 76—and swear that they were not present and did not vote at this poll on that day. There was still a method by which the real vote of the qualified voters of that township could have been ascertained. The ballots themselves were yet in the hand of the clerk of the county court, and so marked, if the law had been complied with, as that the ballot of each qualified voter who voted could be identified. The clerk of the county court, who was the political friend of the contestant, and of the sheriff, who seems to have manipulated affairs at that poll was summoned as a witness by the sitting Member and produced the ballots, but refused to open them or permit their examination. The returns themselves we think so tainted by obvious fraud and violation of law as to be valueless, and, not being permitted to be corrected by the means which the law of Missouri provides, should be rejected.

(*b*) In Wilson Township:

On the morning of the day of election in this township word was sent to two of the judges of election appointed by the board of registration that it would be dangerous for them to go to the election. The circumstances attending the receipt of these messages were such that they thought it advisable not to go to the polls until they could gather some of their friends to accompany them armed. They did so, and were thereby so delayed that when they reached the polls the time for opening them was passed, and other judges had been chosen by the voters present. The circumstances are such as seem to show that this result was one object of the messages they had received (pp. 65, 80). The list of qualified voters in this township will be found at pages 204–205, and numbered 78. But the poll list shows that the acting judges of election at this poll received 151 votes, of which they marked 93 as accepted, and they returned 91 votes as cast for Member of Congress, 49 for the contestant and 42 for the sitting Member. But a comparison of the list of qualified voters with that of persons who voted shows that 15 of the former did not vote, so that while only 63 qualified voters in the district have voted, 91 votes are returned as having been cast by qualified voters for Members of Congress.

The clerk of the county court in this county having already, in the case of Salt River Township in the same county, refused to produce and open for inspection the ballots cast at this election, it was

not necessary to renew the attempt to get access to the ballots in this case, and the vote of this township, for the same reasons as in the case of Salt River, should be rejected, reducing thereby the vote of the contestant to 6,091, and of the sitting Member to 5,463, and the majority of the former to 628.

The majority of the committee reported resolutions to unseat sitting Member and seat the contestant.[1]

The report was debated on July 7,[2] the question of fraud on the part of the registration officer entering into the decision largely. On behalf of the minority of the committee resolutions were offered declaring sitting Member entitled to the seat and contestant not elected. The resolutions of the minority were substituted for those of the majority by a vote of yeas 109, nays 55.

So the recommendations of the majority of the committee were overruled, and the sitting Member retained the seat.

874. The Pennsylvania election case of Myers v. Moffet in the Forty-first Congress.

Reference to a discussion as to the validity of certain naturalization papers.

Where election officers receive illegal votes with a guilty knowledge that they are illegal the entire poll is rejected.

Votes taken before the legal hour for opening the polls, by officers having fraudulent intent, are valueless.

Instance wherein the Elections Committee, in passing on the intent of election officers accused of fraud, took into account the conduct of those officers at a subsequent election.

Disturbance at the polls, incident to the removal of a contestant for the office of election judge, does not vitiate the poll.

On April 6, 1869,[3] Mr. Job E. Stevenson, of Ohio, from the Committee on Elections, submitted the report in the case of Myers *v.* Moffet, from Pennsylvania.

The official returns gave sitting Member a majority of 159. The majority of the committee found frauds and irregularities sufficient to overturn this majority and produce a majority of 647 for the contestant.

A question as to the validity of supreme court naturalization papers was entertained at considerable length in both the report and the minority views, but did not enter into the decision of the contest.

The issues bearing on the result were three:

(1) The majority of the committee decided that the polls of the seventh division of the Seventeenth Ward of Philadelphia should be rejected because the election officers disregarded certain provisions of law claimed to be mandatory. The report says:

Two hundred and forty votes might have been illegally cast for either candidate in a large district without causing the loss of more than that number to either, when proved, but 200 or more votes can not be received by election officers with a guilty knowledge that they were illegal, or in gross violation of the election laws, which they were bound to consult, without entailing a stronger penalty. In such cases not only State courts but legislatures and Congress have not hesitated to declare the whole poll void and of no effect, except as to such votes as either party chooses to save by proof of their legality.

[1] It should be noted that sitting Member belonged to the dominant party in the House and contestant to the minority party.

[2] Journal, p. 1172; Globe, pp. 5305–5313.

[3] First session Forty-first Congress, House Report No. 9; 2 Bartlett, p. 564.

It appears in Pennsylvania, and particularly in Philadelphia, where these wrongs are of frequent occurrence, the courts have uniformly declared such to be the law.

The contestant's brief quotes the acts of assembly governing elections.

That of the sitting Member does not pretend to set up a different standard of action.

Here there is and can be no dispute. Under the act of 1839, where a person is not assessed, in order to entitle himself to vote he must answer certain questions under oath, as to tax, age, residence, etc., and in addition prove his residence by the oath of a qualified voter of the division, and in all such cases it is "the duty of the inspectors" to require such proof whether the vote be challenged or not.

Even if assessed, in case of a challenge they must require the proof. Where the vote is taken, the inspectors must add to the list of taxables furnished them by the commissioners, note of the fact, and of the name of the voucher or person making such proof for the voter. The judges have said, in a number of contested election cases, that nothing can dispense with these requirements. The committee has stated that the law is not disputed. Now, contestant proves that in the sixth division of Seventeenth Ward 98 such unassessed persons were permitted to vote, and in the seventh division of same ward 72 without being sworn themselves or producing a voucher. That in the sixth the list of taxables, which is the index and test of the conduct of an election, was missing from the box. In the seventh it was found, and corroborated contestant's witnesses, as it failed to show that any proof had been required of any unassessed voter. If incumbent denied this there might be some dispute to settle; but his only reply is, "This is an unreliable objection. * * * Among nine election officers at the window, one or more would know the voter personally, and in such cases voters are continually recognized."

If "in such cases voters are continually recognized," it must be in just such election districts as the sixth of the Seventeenth Ward, which, it appears, was discarded by the court of common pleas, only last year, for that very cause. Congress can certainly never lend its sanction to such a shameful breach of law.

The act of 1939 fines any election officer who knowingly takes 1 such vote without proof, $200; and the act of April 16, 1866, inflicts a penalty of $1,000 and an imprisonment of two years for knowingly taking 10 such votes or upward without proof.

With these laws before us, your committee can not fail to pronounce these polls violated by such a crime against the rights of the citizens.

Incumbent's counsel reply that in the sixth division of the Seventeenth Ward 5 of these votes were cast for Mr. Myers, and in the seventh that it is not fully proved for whom they were cast. Were this true it would not alter the matter. On the contrary, the very uncertainty of the result caused by the fraud would tend to destroy all the returns. But it is not true. In the sixth division, Seventeenth Ward, 55 votes were returned for Mr. Myers. He was able to prove 51 of them. Except the remaining 4, and the 5 of those unassessed who voted for him, the 87 unassessed, and all others proved to be illegal, must have been cast for Mr. Moffet.

The report went on to show that challenges in these divisions were disregarded, and other circumstances showed a fraudulent intent.

The minority views [1] do not admit that the evidence as to these wards shows a fraudulent intent, and say:

It is a well-settled principle of law that no citizen shall be deprived of his vote or be disfranchised by reason of any neglect on the part of an officer of the election; hence from the evidence we conclude there is neither reason nor justice in throwing out the entire vote of this division, and in the absence of testimony showing that the 87 who were unassessed and voted were fraudulent, should either invalidate the entire poll or be deducted from either candidate.

That same state of facts exists as to the seventh division of the Seventeenth Ward, except that the contestant made effort to prove his entire vote as cast for him in this division. In this he failed, being able to show but 40 out of 85 given in by the election returns. Seventy-two unassessed votes are again impugned in this division; and it is manifest they were as likely to have been given to one as the other of the candidates.

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[1] Minority views presented by Messrs. Samuel J. Randall, of Pennsylvania, and A. G. Burr, of Illinois.

(2) In the sixth division of the Seventeenth Ward at the beginning of the day there appeared several vacancies on the board of election officers. The law of Pennsylvania required a delay of an hour before opening the polls where there were vacancies in the board of officers. In this ward the Democratic inspectors sent out the only Republican officer in search of others, telling him to "stay out the first hour." This he did, but the poll was opened, and that hour resulted in 69 votes for Moffet and 8 for Myers. The committee conclude all the votes cast in that hour are illegal on both sides. "Votes taken after the time of closing the polls are all illegal on both sides (4 Pennsylvania Law Journal, p. 341), and any taken before the proper hour are equally valueless," say the committee. That there may be no doubt of the criminal intent in this case, the committee claim the right to bring in reference to the conduct of these same officers at an election a few weeks later, when they manifestly connived at election frauds.

(3) On behalf of the sitting Member it was objected that the poll of the tenth division of the Nineteenth Ward should be thrown out because of riot. The majority of the committee find the following facts and conclusions:

The misunderstanding arose from the subdivision of the tenth precinct of the Nineteenth Ward, part being still called the tenth and the rest the fourteenth. By this action of councils, Mr. Addis, who had been elected judge of the old tenth division, became a resident of the new one-the fourteenth. In such cases the law is explicit.

By the act of April 28, 1857, section 1, Pamphlet Laws, page 329, it is provided—

"That whenever a new election division or divisions has been or shall be created in any of the wards of the city of Philadelphia by the councils of said city, the officers to conduct the election next thereafter occurring shall be chosen as follows: If such division shall be formed entirely out of an old division, the officers elected to conduct the election in said division shall appoint the officers for the new division, the judge appointing the judge and each of the inspectors appointing an inspector."

Addis, not aware of this law, had given authority to Hooper to act in the old, but on ascertaining that his appointment would have to be for the new division, he and two of the other legally chosen officers of the old division presented themselves at that poll demanding to act. This was refused by Hooper, whereupon Addis read the law to him, stating that he only desired to do what was right, and after a second refusal Simpson also read the law to him. Unless Hooper should leave, the whole poll might really have been invalid. The police were accordingly summoned, and the violence complained of was no more than necessary to remove Hooper. The others left, Brower among them, and after waiting an hour the citizens chose officers to supply the vacancies.

The committee is compelled to decide that Addis was the legal judge, and that the officers who acted with him were all legally chosen.

It is urged with some force in the brief for the sitting Member that he lost many votes in that division by these occurrences.

It is certain that a number of Democratic voters, apparently in the hope that the whole vote would be declared illegal, some of whom were dissuaded from voting (see p. 193), absented themselves from this poll. Two witnesses guess at the number thus lost, and one other (p. 195) states that the Democrats in November polled 82 more votes there. Ignorance of the law on the part of citizens will not operate to throw out a poll. There was no fraud here. No citizens were deprived of the opportunity of voting. On the contrary, Democrats who wished to vote were furnished tickets or told where they could get them. (See p. 189.)

Suppose your committee should undertake to rectify the error of those who failed to vote; by what standard of law shall it be done? Fraud of the officers it has been shown may disfranchise even those who voted honestly; but to reject this poll for the purpose of correcting the error of some of the citizens would disfranchise 173 Republicans, because, at the farthest, 82 Democrats had been dissuaded from voting, who it appears deposited their ballots in November and might or might not have done so in October under other circumstances.

The majority of the committee reported resolutions declaring sitting Member not entitled to the seat and that contestant was elected and entitled to the seat.

The report was debated April 8 and 9, 1869,[1] and, on the latter day, a proposition of the minority declaring sitting Member entitled to the seat was disagreed to, yeas 40, nays 112.

The resolution declaring sitting Member not entitled to the seat was then agreed to, yeas 107, nays 39. And the resolution declaring contestant elected and entitled to the seat was then agreed to, yeas 113, nays 38.

Mr. Myers then appeared and took the oath.

875. The New York election case of Van Wyck v. Greene in the Fortyfirt Congress.

Form of resolution extending the time for taking testimony in an election case.

Votes cast by persons entitled to naturalization, but naturalized by illegal process, were rejected.

Contestant's notice not having specifically demanded the rejection of an entire precinct, the Committee on Elections corrected the poll, although rejection appeared justifiable.

At a poll where votes were cast by disqualified persons, the return was corrected on the testimony of persons who assumed to know how the disqualified persons voted.

The House declined to declare a seat vacant in a case wherein unsatisfactory proof of contestant's election was reenforced by bad conduct of election officers favorable to contestee.

The House being organized, but a quorum having failed, the Speaker declined to administer the oath to a contestant who had been declared elected.

On March 22, 1869,[2] Mr. John Cessna, of Pennsylvania, from the Committee on Elections, reported the following resolution, which was agreed to:

Resolved, That in the matter of the application for an extension of time to take testimony in the contested case of Van Wyck against Greene, twenty days be allowed to the sitting Member to take evidence, to be confined to evidence to rebut that taken by contestant, and that a like period of twenty days be allowed at the expiration of that period to the contestant if desired by them.

On February 3, 1870,[3] Mr. R. R. Butler, of Tennessee, submitted the report on the merits. It appeared that the returned majority of the sitting Member was 323. Fraud and irregularities were charged on both sides. The main points of the case are:

(1) Contestant alleged fraud and illegality in issuing naturalization papers. The report says at the outset:

The law was decided by the supreme court of the State of New York (see Barbour's Reports, vol. xviii, p. 444). In that case the court said the powers upon courts in admitting aliens to the rights of citizenship are judicial and not ministerial or clerical, and consequently can not be delegated to the clerks, and must be examined by the court itself. An examination must be made in each case suf-

[1] Globe, pp. 650, 683–693; Journal, pp. 178, 211–214.

[2] First session Forty-first Congress, Journal, p. 96; Globe, p. 202.

[3] Second session Forty-first Congress, House Report No. 22; 2 Bartlett, p. 631.

ficient to satisfy the court of the facts upon which the application is based, and upon which it must fail if not proven to the satisfaction of the court. The court, in the same case, adds: "The practice of clerks of courts in issuing certificates of citizenship, without any application being made to the court and on proof of residence only, is an abuse which needs be corrected."

After analyzing the testimony, the majority of the committee say:

The proof fully and satisfactorily establishes the fact that the clerks and deputies issued naturalization papers at various places other than in court. Louis Cuddeback swears that at one court he appointed four deputies to make out naturalization papers, and that they operated in a jury-room, and that he (Cuddeback) made it a rule to visit said jury-room and see how they were getting along and to see that they did it right. * * *

The testimony on the subject of naturalization is very full, and clearly establishes the fact that the law was totally disregarded and frauds perpetrated. The clerk and all his deputies, regular and special, were Democrats, and worked in the interest of their political friends. It further appears from the evidence that,'before the said election, public attention was directed to the frauds practiced in obtaining naturalization papers in said county of Orange, and that the district attorney made an effort to have the matter investigated by a grand jury of the county; and that after the subject had been before the grand jury several days the foreman notified the district attorney that he would not act on the cases, and had destroyed a part of the testimony taken before the jury, and would not surrender the same to the district attorney, as the law directs. And the facts and circumstances warrant the assertion that the Democratic judge winked at the same.

The minority[1] minimize the testimony tending to show irregularities in naturalization, and say:

But the fact stands out clear as testimony can make it, that the men so branded wholesale as wrongfully holding papers were, with very few exceptions, entitled to certificates of naturalization. A "conspiracy" to secure certificates for those legally entitled to them would be senseless and is not charged. On the contrary, the theory of the contestant is, that it was a conspiracy to procure certificates for parties not legally entitled; and to show that they were not entitled, contestant commenced the examination of these newly naturalized citizens (pp. 22–30), and after being questioned, 26 of them developed the fact that each one of them was legally entitled to papers. At this point he dismissed the remainder, some of whom were afterwards examined by contestee and all were shown to be legally entitled to naturalization papers.

In the debate it was retorted[2] that it was "not the right to naturalization, but naturalization itself, awarded by the proper judgment of a court of competent jurisdiction, and this alone" that gave citizenship.

(2) The attempt to trace to the ballot box the votes cast by those illegally naturalized and determine for whom they were cast led to sharp division of opinion.

(*a*) In the First Ward of Newburgh the majority of the committee find that 140 persons not entitled to vote cast their votes for sitting Member. The majority found that the inspectors of election refused to put an oath to persons challenged, although in so refusing they directly violated the statute. The majority of the election officers were of sitting Member's party. Sitting Member's majority was 131.

(*b*) The majority of the committee find that at Hamptonburg the inspectors of election acted "unlawfully and corruptly." They improperly registered alleged voters, and on election day they refused to put the oath to persons challenged. Sitting Member's majority was returned at 105. The majority of the committee deduct 28 from sitting Member.

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[1] Minority views were signed by Messrs. A. G. Burr, of Illinois, S. J. Randall, of Pennsylvania, and P. M. Dox, of Alabama.

[2] By Mr. Churchill, Globe, 1347.

(*c*) In Goshen also the election inspectors dispensed with the oath, and persons were allowed to vote on the irregular naturalization papers in spite of the efforts of the inspector belonging to contestant's party. Sitting Member's majority in the district was 129.

The majority conclude as to these precincts:

> The majority for contestee in the three last-mentioned districts, to wit, First Ward, Newburgh, town of Hamptonburg, and first district Goshen, was 365. The committee is of opinion that the irregularities and misconduct of the inspectors of the election at said districts were sufficient to throw out the entire vote of said districts, but does not recommend the same, as the contestant did not specifically demand the same in his notice to contestee. In all of said precincts actual fraudulent voting was proven; misconduct, illegality, and partiality of inspectors, all go to prove that the allegations of contestant were true that a conspiracy was formed to issue naturalization papers, and to prevent a judicial investigation of the frauds and to prevent an investigation of the many wrongs perpetrated by the friends of contestee.

It being decided not to throw out the entire polls of these places, the majority of the committee propose to purge the polls of these and other precincts by the testimony of people who assumed to know how electors voted.

As to the validity of this testimony the minority took issue, and especially in the debate on the floor. Passages from the testimony were quoted to show that no conclusive evidence was given to connect illegal voters with votes found in the box for sitting Member. Near the close of the debate one Member preferred to rest his vote on the propriety of throwing out entirely the vote of the three precincts, rather than on reliance on the process of purging.

The debate occurred on February 15 and 16,[1] and on the latter date a vote was taken on a proposition of the minority declaring sitting Member entitled to the seat, and it was disagreed to—yeas 56, nays 121.

A proposition offered by Mr. Samuel J. Randall, of Pennsylvania, declaring the seat vacant, was disagreed to without division, the yeas and nays being refused.

The resolution unseating sitting Member was then agreed to without division; and the second resolution of the committee, seating contestant, was agreed to—yeas 56, nays 121.

The usual motion to reconsider being made and laid on the table, a motion to adjourn was made. The vote being taken, the lack of a quorum was developed.

Thereupon, as a question of privilege, a demand was made that Mr. Van Wyck be sworn in.

The Speaker[2] demurred,[3] saying:

> The Chair is in serious doubt whether, in the absence of a quorum, a Member can be sworn in.

The House soon after adjourned without a quorum.

On the next day, February 17,[4] a quorum being present, Mr. Van Wyck appeared and was sworn in.

876. The Pennsylvania election case of Taylor v. Reading in the Forty-first Congress.

The Elections Committee declined to revise the returns on the strength of the tally lists, the election officers not being called or a recount of ballots made.

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[1] Globe, pp. 1305, 1339–1351; Journal, pp. 336–338.

[2] James G. Blaine, of Maine, Speaker.

[3] Globe, p. 1351.

[4] Journal, p. 340; Globe, p. 1373.

United States soldiers residing at the time of enlistment without the precinct and not having the intention of making a permanent residence therein were held not to be legal voters.

Votes of paupers were rejected, although the attorney-general of the State had given an opinion that they were legal voters therein.

On March 29, 1870,[1] Mr. John Cessna, of Pennsylvania, from the Committee on Elections, submitted the report of the majority[2] of the subcommittee in the case of Taylor *v.* Reading, of Pennsylvania. This case involved largely an exploration of questions of fact, but a few general principles were discussed:4

(1) A number of votes depended on whether reliance should be placed on the return from the precinct or on the tally lists, from which the returns were made up. The majority seemed inclined to disregard the tally lists. The sitting member having asked to be credited with certain votes shown by the tally list, which apparently was required to be preserved by the prothonotary, the majority say:

To allow this credit requires us to go behind the returns. The incumbent having asked this at our hands, should have called the officers of the election and shown the list of voters, or, at least, the aggregate thereof, or asked for a recount of the ballots. Nothing of this kind has been requested. On examining the tally list of the seventh division, Twenty-third Ward, we find an error of 6 against the contestant, or rather a difference of 6 between the tally list and the returns from this precinct. We have, therefore, concluded to stand by the returns in each case, especially as the correction of both would make no difference to either party.

The minority do not agree to this, but say:

As a general principle primary evidence is preferable to secondary evidence. The ballots are the primary or highest evidence of an election, and a Pennsylvania statute requires these ballots to be preserved for the purposes of contested elections.

The next best evidence are the tally lists. These are cotemporaneous records made at the very time of voting. The hourly report of the vote and the returns in the prothonotary's office are made up from the tally lists; are mere copies of those lists, and original documents are always better evidence than copies. The tally lists are preferable evidence to reports made from them.

The majority of the committee reject the allowance of these errors in the tally lists, on the ground that the ballot boxes were not examined or asked to be examined. They were not examined in the district where the testimony was taken, because the courts have decided that the Committee of Elections of Congress were the only competent authority to send for them and examine them, and that they were asked to be examined one of the committee making the majority report will cheerfully admit. The sitting Member rested his case, so far as the tally lists were concerned, on the examination of the ballot boxes and a recount of the ballots, but the majority of the committee saw fit to reject these gains without an examination, and the only one that could test their truth or falsity In the absence of the ballot boxes, or a refusal to recount the ballots, the committee must take the highest order of proof presented to them, which are the tally lists certified to them by the seal of the court having charge of them. They are conclusive, and especially so when the committee refuse to avail themselves of the primary evidence—the ballots.

(2) A question arose as to the votes of certain soldiers:

It is in proof that 20 soldiers of the United States Army, stationed at Frankford arsenal, voted for the incumbent in the eighth precinct of the Twenty-third Ward. Had these men a right to vote there? It is entirely immaterial to discuss the question as to whether they could have voted elsewhere or not. The only question before us is as to whether they were entitled to vote at that particular poll, where the

[1] Second session Forty-first Congress, House Report No. 50; 2 Bartlett, p. 661.

[2] Mr. Samuel J. Randall, of Pennsylvania, filed minority views. This case was submitted by a subcommittee of three. Mr. Eugene Hale, of Maine, concurred with Mr. Cessna.

vote was actually cast. To entitle a person to vote at any poll in Pennsylvania, under the laws of that State, he must have at the time of the election an actual residence in the precinct. Mere personal presence will not fulfill the requirements of the law. There must be a residence, and it has been well settled that residence is a question of intention. Had any of those men any intention to be at that particular place, or in that particular precinct, on that or any other day? From the necessity of the case they could not. They were in that precinct not by their own volition, but by command of their military superiors. An order issued to transfer them to Fort Lafayette on October 1 would have taken them far away from the precinct. In the case of Bowen *v.* Given it was expressly decided that an enlisted man did not gain a residence under similar circumstances. So, too, in the case of Howard *v.* Cooper, thirty-sixth Congress (Contested Election Cases, 1843 to 1865, p. 275), it was held under the law of Michigan that to be entitled to vote a man must have come into the State and township or ward with the intention of making it his permanent residence, and the law of Pennsylvania is quite as strict on this point as that of any other State, for if challenged at the poll the person offering the vote must also himself swear that his bona fide residence in pursuance of his lawful calling is within the district. (See Burden's Digest, Laws of Pennsylvania, edition of 1853, pp. 46 and 286.) How could a man so swear when he is there at the command of a power superior to his own will? As bearing particularly upon this point we add that in 1862 a contest arose in the State of Pennsylvania in regard to the right of soldiers to vote in camp or in quarters. In the trial of this case the constitution of Pennsylvania and the several statutes of the State regulating this subject or question were fully and elaborately considered. The case is entitled Chase *against* Miller, and reported in 5 Wright, pages 403 et al. The supreme court of the State held—

First. That residence, in the constitution, is the same as domicile—the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights.

Second. The right of a soldier to vote under the constitution is confined to the election district where he resided at the time of his entering the military service.

After quoting from the opinion the report proceeds to divide the soldiers into three classes:

The first class consists of persons who resided in this precinct at the time of their first enlistment, and consequently did not change residence. There are three of this class, to wit, James Cleary, Peter Hobin, and James Larkin, and their votes are allowed. The second class consists of those persons who had enlisted but once, who resided at the time of their enlistment outside of this precinct, and who had done nothing to indicate any determination on their part to change their residence, and who had made no election of this particular place as their place of residence since the time of their enlistment. On the contrary, two of this class testified that at the very time they voted their families resided elsewhere, and it is clearly proved that the entire class, seven in number, left the place soon after the election and have not returned. They were all single men except these two before referred to. Their names are Richard O'Leary, Owen Sheridan, Robert Armstrong, John Kennedy, John Laffey, Frederick Kopp, and Lewis Bingham. These 7 votes were rejected, being a part of the 51. The third class consists of those who did not reside in the district at the time of their enlistment, but remained for some years, in some cases reenlisting once, twice, and in one case three times. Most of these men have either purchased or rented property, had families in the district, and had given other evidences of an intention to elect this precinct as the place of their abode. These 10 votes are allowed.

The minority do not agree to the rejection of the 7 votes:

Since the action of the Senate of the United States on the 1st day of April, 1870, on the admission to a seat in the Senate of General Ames, who at the time of his election (in the language of the majority of the committee in this case as touching this soldier vote) was not in Mississippi "by his own volition, but by command of his military superiors," I am compelled, therefore, to say that I can not coincide with the majority of the committee in their rejection of 7 of the votes known as the soldier vote.

I can not agree that any of these votes should be rejected. In admitting any of the 20 votes thus attacked, you must admit all. You can not admit a part and reject a part. The integrity of these voters is nowhere impeached. It is no reason for disfranchisement that these men were soldiers and lived at a United States arsenal. They were what is known as the "permanent party" at a United

States station; they had been there for years, enlisting and reenlisting, marrying and raising families. Are such men to be disfranchised?

In Bowen *v.* Given, Justice Cartter, of the District of Columbia, held "that an officer or enlisted man neither gained nor lost a residence; his residence was where he enlisted." In view of this decision, I insist that when the term of enlistment expired, these soldiers, having the animus manendi, gained a residence eo instanti in this division, and it was their residence at the time of their reenlistment; and being so, they were not disqualified by reason of nonresidence.

(3) The majority rejected certain votes of paupers, regarding the right to do so too clear to demand explanation. The minority object to this, citing the opinion of Attorney-General Benj. H. Brewster, of Pennsylvania, who, in a contested election case in the senate of Pennsylvania, had given an opinion that a pauper who was in other respects qualified to vote could not be deprived of the suffrage:

Such a person is a qualified elector and can vote, and his vote cast is a lawful vote and as good as any man's vote, and it ought to be so. The Constitution establishes this, and it does not disqualify him because he is poor. That does not deprive him of his freedom or his citizenship.

They are amenable to the law, and being so, upon the very fundamental principles of our government have a right to be represented and to say who shall make the laws. It is not property or poverty that rules here. It is the man, responsible to God and responsible to the law. To say otherwise would make poverty worse than a crime. The pauper is bound by every law upon the statute book, and is protected by every provision of the Constitution, as much so as the wealthiest, wisest, or most successful man in the community. Sickness, the calamities and accidents of life, may reduce men to this sad condition. That is bad enough. The law never intended to add to his miseries by making him the only slave that remains in our Republic. All the duties of life bind him; he can make a contract, he can be obliged to testify, he can marry, he can sue and be sued, he is only restrained and bound by rules as every one is who lives in any institution. Persons in hospitals, asylums, factories, homes for disabled soldiers, public works, Government shops, and all kinds of public and eleemosynary institutions, as well as private establishments, are bound by fixed rules that are enacted for the preservation of good order, to maintain discipline, and carry out the purposes of the establishments. This is all that he is subjected to, and these rules and the restraints of the house he can relieve himself from at any moment by asking for his discharge. The poorhouse is his residence; it would be there that process of law, criminal or civil, would be served upon him; and it is from that residence he may vote, provided he has lived there ten days preceding the election and conformed to the requirements of the law. If to receive public support would be legal cause of disqualification, we must not forget that even now a large number of white and black citizens of the southern portion of this nation are still receiving and levying upon the supplied bounty of the Government. What would be their condition? For some of those who have received and still receive that bounty were once the wealthiest and best bred, and the most accomplished, and sometimes reputed the wisest people in this region. By the calamities of war they are reduced to want; but God forbid that they or any one should by any calamity be stripped of their right of manhood and brutalized down to that slavery from which we have been, by God's providence, all emancipated.

The minority also cited from the minority report in the case of Foster *v.* Covode.

On the face of the returns the sitting Member received 41 majority. After the settlement of questions of law and fact the majority found that in reality there should be a majority of 72 for the contestant. The minority, on the other hand, found that the sitting Member had a majority of 28 votes.

The report was debated in the House on April 13,[1] and on that day the resolution declaring Mr. Reading not entitled to the seat was agreed to, yeas 114, nays 45. Then the resolution declaring Mr. Taylor entitled to the seat was agreed to without division.

Mr. Taylor then appeared and took the oath.

[1] Journal, pp. 615–617; Globe, pp. 2650–2660.

877. The Senate election case of John P. Stockton, from New Jersey, in the Thirty-ninth Congress.

A committee report that in the absence of any law, State or national, a joint meeting of the two houses of a legislature may prescribe that a plurality vote shall elect a United States Senator was reversed by the Senate.

In 1865[1] the Senate considered the right of a legislative joint convention to adopt a plurality rule for the choice of a United States Senator. The case is thus stated in a report[2] of the Judiciary Committee, submitted by Mr. Lyman Trumbull, of Illinois:

The Committee on the Judiciary, to whom were referred the credentials of John P. Stockton, claiming to have been elected a Senator from the State of New Jersey for six years from the 4th day of March, 1865, together with the protest of certain members of the legislature of said State against the validity of his election, submit the following report:

The only question involved in the decision of Mr. Stockton's right to a seat is whether an election by a plurality of votes of the members of the legislature of New Jersey in joint meeting assembled, in pursuance of a rule adopted by the joint meeting itself, is valid. The protestants insist that it is not, and they deny Mr. Stockton's right to a seat, because, as they say, he was not appointed by a majority of the votes of the joint meeting of the legislature.

The legislative power of the State of New Jersey is vested by the State constitution in a senate and general assembly, which are required, for legislative purposes, to meet separately, but which, for the appointment of various officers, are required to assemble in joint meeting; and when so assembled are, by the constitution itself, styled the "legislature in joint meeting."

The constitution of New Jersey does not prescribe the manner of choosing United States Senators, as, indeed, it could not, the Constitution of the United States having vested that power, in the absence of any law of Congress, exclusively in the legislature; but it does constitute the two houses one body for the purpose of appointing certain State officers. The statute of New Jersey declares that "United States Senators, on the part of that State, shall be appointed by the senate and general assembly in joint meeting assembled;" but it does not prescribe any rules for the government of the joint meeting nor declare the manner of election.

The practice in New Jersey has been for the joint meeting to prescribe the rules for its own government.

In 1794 fifteen rules were adopted, the first two of which are as follows:

"1. That the election of State officers during the present session be viva voce, unless when otherwise ordered, and that all officers be put in nomination at least one day before their election.

"2. That the chairman shall not be entitled to vote except in case of a tie, and then to have a casting vote."

The other thirteen rules related chiefly to the method of conducting the proceedings. Each joint meeting which has since assembled has adopted its own rules, usually those of the preceding joint meeting, sometimes, however, with additions or exceptions.

In 1851 the following additional rule was adopted:

"Resolved, That no person shall be elected to any office, at any joint meeting during the present session, unless there be a majority of all the members elected personally present and agreeing thereto."

In 1855 the joint meeting, after adopting the fifteen rules of the preceding joint meeting, added the following:

"That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared duly elected."

The joint meeting of 1861 adopted the rules of the preceding joint meeting for its own government, among which were the following:

"1. That the election of State officers during the present session be viva voce, unless when other wise ordered.

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[1] Election cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 322.

[2] Report No. 4, First session Thirty-ninth Congress.

"15. That in all questions the chairman of the joint meeting be called upon to vote in his turn as one of the representatives in the senate or assembly, but that he have no casting vote as chairman.

"16. That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared to be duly elected."

The same rules were adopted by each joint meeting from 1861 to 1865.

The joint meeting which assembled February 15, 1865, and at an adjourned session of which Mr. Stockton was appointed Senator, adopted, at its first meeting, the rules of the preceding joint meeting, except the sixteenth rule, in lieu of which the following was adopted:

"Resolved, That no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both houses of the legislature."

After having appointed various officers under the rules which had been adopted at the assembling of the joint meeting, the following rule was adopted:

"Resolved, That the vote for county judges and commissioners of deeds be taken by acclamation, and that the counties in which vacancies exist be called in alphabetical order."

Acting under this rule, quite a number of officers were appointed by acclamation. Not completing its business the joint meeting adjourned from time to time till March 15, when the following rule was adopted:

"Resolved, That the resolution that no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both houses of the legislature be rescinded, and that any candidate receiving a plurality of votes of the members present shall be declared duly elected."

Every member of both houses, 81 in all, was present and voting when the above resolution was passed, and it was carried by a vote of 41 in the affirmative, of whom 11 were senators and 30 representatives, to 40 in the negative, of whom 10 were senators and 30 representatives. The joint meeting then proceeded to the election of a United States Senator, with the following result:

Hon. John P. Stockton, 40 votes; Hon. J. C. Ten Eyck, 37 votes; J. W. Wall, 1 vote; P. D. Vroom, 1 vote; F. T. Frelinghuysen, 1 vote; H. S. Little, 1 vote.

Whereupon John P. Stockton, having received a plurality of all the votes cast, was declared duly elected. The joint meeting then proceeded to the election of various other officers, having completed which, it rose.

The credentials of Mr. Stockton are under the great seal of State, signed by the governor and in due form. No objection appears to have been made at the time to the election. Its validity is now called in question by a protest dated March 20, 1865, and signed by 8 senators and 30 members of the general assembly. The Constitution of the United States declares that the Senate of the United States "shall be composed of two Senators from each State, chosen by the legislature thereof," and that "the times, places, and manner of holding election for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

The right to choose United States Senators in a joint meeting of the two houses which compose the legislature of a State has been too long and too frequently exercised to be now brought in question. This has been the manner of election in some States from the beginning, and is now the manner in most of them.

For the purpose of choosing United States Senators the joint meeting of the two houses is regarded as the legislature, and especially would this be so in New Jersey, where the joint meeting is by the constitution of the State denominated a legislature. It has uniformly been held that when the two branches of a legislature meet in joint convention to elect a United States Senator they are merged into one and act as one body, so that an election may be effected against the entire vote of the members of one house if the person voted for receive the requisite number of votes from members of the other. It being, then, settled that the two houses of a legislature in joint meeting assembled constitute the legislature, vested by the Constitution of the United States with authority, acting as one body, to elect a Senator, the question is: Did the joint meeting of the senate and general assembly of New Jersey, duly convened in pursuance of a resolution previously concurred in by each house separately, choose John P. Stockton United States Senator?

That it was competent for a plurality to elect, if a law to that effect had been prescribed by competent authority, will hardly be questioned. This is the rule very generally, if not universally, adopted in the election of members of the House of Representatives, who are "chosen every second year by the

people of the several States," and no one questions the validity of the election of a Representative by a plurality vote when the law authorizes a plurality to elect. It is, however, insisted, and truly, that no law of New Jersey authorizes a plurality to elect. The laws of New Jersey are silent on this subject, but they do authorize a joint meeting of the two houses of the legislature to appoint a Senator, and it has been the uniform practice of this joint meeting since the foundation of the Government to prescribe the rules for its own government. These rules as to the number of votes necessary to effect an election have varied at different times, sometimes requiring a majority of all the members elected to both houses of the legislature, sometimes a majority only of those present, and in the case under consideration only a Plurality

Suppose, under the rule fast stated, but 79 members had been present in the joint meeting, and 40 had voted for the same person, would he have been elected; and if not, why not? Seventy-nine out of 81 would have constituted a quorum, and 40 would have been a majority of those present. The only reason why such a vote would not have made an election would be the existence of the rule adopted by the joint meeting, declaring that "no candidate should be elected unless receiving a majority of the votes of all the members elected to both houses of the legislature." While that rule was in force no presiding officer would have thought of declaring a candidate elected, nor would any candidate have supposed himself elected because he received a majority of the votes cast, unless such majority was a majority of all the members elected to the legislature. Under the other rule, "that a person receiving a majority of the votes of those present should be declared elected," who would doubt the validity of an election by 31 out of 60 votes if only so many had been cast? If the joint meeting had the right to prescribe at one time that it should require a majority of all elected to the legislature to elect, at another time that a majority of those present might elect, and at still another time that elections might be had by acclamation, it had the right to prescribe that a plurality should elect; and when any candidate received a plurality he thereupon became elected, not simply by the will of those who voted for him, but by the will of the joint meeting, which had previously, by a majority vote, resolved that such plurality should elect.

It might be urged in this case, with much plausibility, that inasmuch as the constitution of New Jersey recognizes the two houses in joint meeting as a legislature, that such joint meeting was the very body on whom the Constitution of the United States had conferred the power to prescribe "the times, places, and manner of holding elections for Senators;" but your committee prefer placing the authority of the joint meeting to prescribe the plurality rule on the broader ground that in the Absence of any law, either of Congress or the State, on the subject, a joint meeting of the two houses of a legislature, duly assembled and vested with authority to elect a United States Senator, has a right to prescribe that a plurality may elect, on the principle that the adoption of such a rule by a majority vote in the fast instance makes the act, subsequently done in pursuance of such majority vote, its own.

The committee recommend for adoption the following resolution:

Resolved, That John P. Stockton was duly elected and is entitled to his seat as a Senator from the State of New Jersey for the term of six yews from the 4th day of March, 1865.

On March 23[1] this resolution was considered, and was agreed to by a vote of yeas 22, nays 21; but on March 26[2] objection was made that Mr. Stockton had been one of those voting in the affirmative, and that he should not have voted. So the vote was reconsidered. And on March 27 the resolution was amended so as to declare Mr. Stockton not entitled to the seat, and then was agreed to, yeas 23, nays 20.[3]

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[1] Globe, pp. 1589–1602.

[2] Globe, pp. 1635–1648.

[3] Globe, pp. 1666–1679.

Chapter XXIX.

GENERAL ELECTION CASES, 1870 TO 1875

878. The Ohio election case of Eggleston v. Strader, in the Forty-first Congress.

No fraud being shown, the House sustained the election returns, although a de facto election officer, of partisan bias and irregular conduct, officiated a portion of the time.

Distinction between election officers de jure and de facto and mere usurpers.

The Elections Committee examined a question raised in the notice of contest, although it had not been insisted on in the argument of contestant.

A small excess of votes in the box over names on the poll list does not justify rejection of a poll, no fraud being shown.

Rude conduct on the part of election officers does not necessarily constitute intimidation sufficient to vitiate the poll.

On May 23, 1870,[4] Mr. Eugene Hale, of Maine, from the Special Committee of Elections, submitted the report in the Ohio case of Eggleston *v.* Strader. The

[1] See also case of Joseph Segar, of Virginia. (Sec. 318.)

[2] Additional cases in the Forty-second Congress, classified in other chapters, are:
Bowen *v.* De Large, South Carolina. (Vol. I, sec. 505.)
McKissick, *v.* Wallace, South Carolina. (Vol. I, sec. 651.)
The Tennessee Members. (Vol. I, sec. 521.)
Whitmore *v.* Herndon, Texas. (Vol. I, sec. 600.)
Giddings *v.* Clark, Texas. (Vol. I, sec. 601.)
Boles *v.* Edwards, Arkansas. (Vol. I, sec. 605.)
McKenzie *v.* Braxton, Virginia. (Vol. I, sec. 639.)

[3] Additional cases in the Forty-third Congress:
Gunter *v.* Wilshire, Arkansas. (Vol. I, sec. 37.)
Shanks *v.* Neff, Louisiana. (Vol. I, sec. 609.)
Sheridan *v.* Pinchback, Louisiana. (Vol. I, sec. 623.)
Laurence *v.* Sypher, Louisiana. (Vol. I, sec. 623.)
The West Virginia Members. (Vol. I, sec. 522.)

[4] Second session Forty-first Congress, House Report No. 73; 2 Bartlett, p. 897.

sitting Member had been returned by a majority of 211 votes. The main issue in the contest was over the poll of the First Ward of Cincinnati, where sitting Member received a majority of 350 votes. If this poll should be rejected, as demanded by the contestant, the result would be changed.

There was no evidence that fraud was committed, but a person who presided as one of the judges was undoubtedly disqualified by reason of irregular election. The report says:

The polls were opened at about half past 6 o'clock a. m., James W. Fitzgerald, Republican, and James Malloy, Democrat, members of the city council, being present as judges of election ex officio. Mr. Fitzgerald took the lead in the proceedings, and, under his charge, Charles W. Rowland, Democrat, was chosen by the electors present, viva voce, to be the third judge of election. Three clerks were duly chosen, and the election proceeded.

The testimony shows that John C. Fiedelday, an active Democratic politician, was present at or about the polls from the time they were opened.

Between 10 and 11 o'clock Mr. Malloy left the polls because of duties elsewhere and requested that Fiedelday should act in his place. This was assented to, and he was sworn in. The substitution was confessedly irregular, there being no law authorizing such procedure. The report says:

Mr. Fitzgerald says that Fiedelday acted as judge in the absence of Malloy during the time when from five-eighths to three-fourths of the entire vote was polled, and that in disputed cases he, Fiedelday, united with Rowland, the other Democratic judge, in receiving Democratic votes to which he, Fitzgerald, believed there were valid objections; but he fixes the number of these at not over 25, to the best of his knowledge and belief, and he thinks that few or none of the proper Republican votes were rejected.

The conduct of Fiedelday during the day is shown to have been undignified, irregular, and unbecoming an officer taking any charge of an election. When he was not acting as a judge he mingled in a crowd and electioneered for Mr. Strader. He took a bet of $50 offered by one John Kissick, who rather rashly ventured his money on Mr. Eggleston. He left the polls and called back James Riley, who had once been rejected and whose right to vote was doubtful, and induced the other judges to receive the vote. He engaged in an altercation with Mr. Fitzgerald, the Republican judge, gave and took the lie, and showed a familiarity with profane language by no means commendable. He was evidently in no very judicial frame of mind.

But the committee find no proof nor even suspicion of fraud in his.conduct, nor, indeed, in the entire conduct of the poll. It was clearly conducted in a generally peaceable manner.

The contestant claimed that the whole day's proceedings were invalid, that there was no good or sufficient election board, that Fiedelday was no judge, and that his acts were the acts of an usurper.

The committee conclude:

That Fiedelday was not legally elected a judge of the election, and that he could not have held the place as against Malloy, who was an officer de jure, is clear.

But it is well settled in law that, so far as the public is concerned, the acts of one who claims to be a public officer, judicial or ministerial, under a show of title or color of right, will be sustained. Such a person is an officer in fact, if not in law, and innocent parties or the public will be protected in so considering and trusting him. This principle will not be questioned, it is believed. The highest authorities and courts have maintained it.

In case of public officers who are such de facto, acting under color of office by an election or appointment not strictly legal, or without having qualified themselves by the requisite tests, or by holding over after the period prescribed for a new appointment, as in case of sheriffs and constables, their acts are held valid as respects the rights of third persons who have an interest in them and as concerns the public to prevent a failure of justice. (2 Kent's Com., p. 295; Bouvier's Law Dictionary, de facto).

In Wilcox *v.* Smith (5 Wendall, p. 233) the court says: "The principle is well settled that the acts of an officer de facto are as valid and effectual when they concern the public or third persons as though they were officers de jure. The affairs of society could not be carried on on any other principle." To the same effect is the case of The People *v.* Cook (14 Barb. N. Y. Rep., 259). Numerous other citations from reports and elementary writers could be given if needed.

But the contestant claims that Fiedelday was not an officer or judge de facto, and his counsel has made an ingenious argument before the committee on the ground that Fiedelday was an intruder or usurper without color of right, basing his argument largely upon the view that there was no vacancy in the office of judge of elections and that there is no such officer known in Ohio as temporary judge. But he seems for the time to lose sight of the distinction between an officer de facto and an officer de jure, and some of the cases that he cites relate to the rights of claimants to offices as against other claimants which involve the question as to an officer de jure and not de facto. It takes but little to constitute an officer de facto as affects the right of the public. The exercise of apparent authority under color of right, thus inviting public trust and negativing the idea of usurpation, is sufficient.

There need have been no vacancy in the office claimed to be holden; indeed, no such office may have ever existed. The supreme court of Massachusetts decided, in Fowler *v.* Beebe (9 Mass. Rep., p. 231), that the appointment by the governor as sheriff of a county that does not exist is a colorable appointment, and makes the appointee an officer de facto, as to the public, and this though the appointment was absolutely void and not simply voidable.

It has been decided in Maine that the acts of a magistrate, under apparent right of office, will be sustained, although they were long after the commission of the magistrate had expired. (Brown *v.* Lunt, 34 Maine Rep., 423.) To constitute an individual an officer de facto he must not be a mere intruder, but must be in colore officii. There must be some color of an election or appointment, or such an exercise of the office, and an acquiescence on the part of the public, as would afford a reasonable presumption of at least a colorable election or appointment. In the case of the People *v.* Cook (14 Barbour, New York Rep., 289) the entire question as to what will constitute an officer de facto is discussed.

The report, after discussing the case in question, refers to certain Ohio cases, and then proceeds to refer to cases of the House itself. The committee admit that the House has sometimes apparently departed from the strict rule, but it is pointed out that in such cases the element of fraud was always present. The report concludes:

On these decisions, and seeking to give effect to the expressed voice of the people, as shown in the whole vote of the First Ohio district, the committee are dearly of the opinion that the poll in the First Ward in Cincinnati should not be thrown out. To disfranchise 1,700 voters, who cast their ballots in good faith at a peaceable election where no fraud is shown, upon irregularities in the constitution of the board of election, is what this committee is not prepared to recommend.

If the House of Representatives has ever, moved by partisan bias, established a precedent opposed to this conclusion, the committee have no hesitation in saying that it declines to be governed by any such precedent. It has been shown that if such precedent can be found it is also true that the contrary principle has been more than once recognized and acted upon. Even if this were not so, it is never too late to do justice. That requires that the poll in the First Ward shall be sustained notwithstanding the irregularities attending it.

A question of less importance was considered as to another ward:

The counsel for the contestant, in his oral argument before the committee, did not raise any question as to the Thirteenth Ward in Cincinnati; but as objection is taken to its poll in the contestant's. notice and in the printed brief of his counsel, the committee have fully considered the points there raised.

It is claimed that more votes were put into the ballot box than there were names on the poll book. The testimony shows that there was such an excess of 9 votes; but so far from suggesting any fraud, all, or nearly all, of the witnesses account for it by the great rush upon the polls in the morning, at noon, and at evening, causing a rapidity of voting so great that the clerks could not take down all the names. The witnesses for both contestant and sitting Member testify to this.

It is also set forth in contestant's notice that the judges of the election in this ward prevented persons from voting for contestant by rude and threatening language and conduct, driving legal voters away from the polls, and otherwise intimidating them. The committee have carefully read all the testimony bearing upon this charge, and fail to find any such violence or force as impairs the integrity of the poll. At times there was loud talk about the ballot box, and the crowd would become excited to some extent in its movements, calling for some effort on the part of the officers to keep the way to the polls clear. Several witnesses testify that they believe that voters were kept from voting by the course pursued by the judges of election, but the number stated is very small, varying from three to five or eight, while policemen present, and other well-known citizens, state that there was no such intimidation.

The committee, in accordance with their conclusions, reported resolutions declaring contestant not elected and confirming the title of sitting Member to the seat.

On December 21, 1870,[1] the resolutions were agreed to in the House without debate or division.

879. The Kentucky election case of Barnes v. Adams in the Forty-first Congress.

The House declined to find persons disqualified as voters because they had formerly borne arms against the Government.

The State law providing, with affixed penalty, that both political parties should be represented in boards of election officers, the House declined to reject the returns for noncompliance with this law.

The House held a duly appointed election judge to be an officer de facto, although not possessing a required qualification as to former loyalty.

In the absence of fraud the failure of an election officer to be sworn does not destroy the effect of his acts as an officer de facto.

On May 23, 1870,[2] Mr. George W. McGrary, of Iowa, from the special Committee of Elections, submitted a report in the case of Barnes *v.* Adams, of Kentucky. The sitting Member had been returned by a majority of 462 over the contestant.

The committee found the settlement of the contest to depend on several questions of law:

(1) As to the right of ex-Confederate soldiers to vote in Kentucky, the committee found:

There is no law of the United States or of the State of Kentucky disfranchising the persons who were common soldiers in the rebel army. It is well known that these persons are legal voters under the laws of most of the States of the Union. They are clearly entitled to vote under the constitution and laws of Kentucky for members "of the most numerous branch of the State legislature," and are, therefore, entitled to vote for Members of Congress under the provisions of section 2, article 1, of the Constitution of the United States, which declares:

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

In the case of McKee *v.* Young, in the last Congress, the House rejected the votes of certain rebel soldiers, but it was done upon the ground that at the time of the election at which they voted they were in actual organized, armed hostility to the United States. Although the rebel soldiers who voted were

[1] Third session Forty-first Congress, Journal, p. 97; Globe, p. 274.

[2] Second session Forty-first Congress, House Report No. 74; 2 Bartlett, p. 760.

at home on parole, they were held to be actually in the rebel army, and it was insisted that to allow them to vote would be equivalent to saying that an army, organized for and engaged in an effort to destroy the Government of the United States, might vote for Members of Congress. The case now before us is, however, very different. When this election took place, more than three years had elapsed since the close of the rebellion, and the armed hostility to the Government had long since ceased. With the policy of disfranchisement those who took arms against the Government the committee has nothing to do. It is simply a question of law, concerning which we can entertain no doubt.

(2) The law of Kentucky provided as follows in regard to the appointment of election officers:

Be it enacted by the general assembly of the Commonwealth of Kentucky, That hereafter, so long as there are two distinct political parties in this Commonwealth, the sheriff, judges, and clerk of election, in all cases of elections by the people under the Constitution and laws of the United States and under the constitution and laws of Kentucky, shall be so selected and appointed as that one of the judges at each place of voting shall be of one political party, and the other judge of the other or opposing political party; and that a difference shall exist at such place of voting between the sheriff and clerk of election: *Provided,* That there be a sufficient number of the members of each political party resident in the several precincts, as aforesaid, to fill said offices. And this requirement shall be observed by all officers of this Commonwealth who have the power to appoint any of the aforesaid officers of election, under the penalty of a fine of one hundred dollars for each omission, to be recovered by presentment of the grand jury.

The committee thus discuss a failure to conform to this law:

We inquire, in the next place, what was the effect of a failure to divide election officers equally between the two political parties. We are altogether unable, consistently with our views of the law, to hold that such failure of itself avoids the election. What we have said, and what we shall hereafter say, about the validity of the official acts of officers de facto applies here, for such officers are clearly of that class. Besides, the statute which we have quoted, requiring an equal division of election officers between the two political parties, itself provides the penalty which shall be incurred by the persons appointing these officers, if the statute is disregarded. It declares that the penalty shall be a fine of $100 for each offense of the kind. It does not declare that the election shall be set aside in such cases. It will be seen hereafter that this point is not material to the case of contestant, inasmuch as by throwing out all the polls where the election officers were not equally divided politically he would lose more than he would gain.

(3) An act of 1862 qualified the above act by providing that—

SEC. 1. That in construing the act approved February 11, 1858, to which this is an amendment, those who have engaged in the rebellion for the overthrow of the Government, or who have in any way aided, counseled, or advised the separation of Kentucky from the Federal Union by force of arms, or adhered to those engaged in the effort to separate her from the Federal Union by force of arms, shall not be deemed one of the political parties in this Commonwealth within the provisions of the act to which this is an amendment.

The committee conclude that the above provision was intended to prevent the recognition of the secession party of 1862 in Kentucky, and operated upon that party as a class and not upon individuals. The secession party had ceased to exist and therefore the provision was inapplicable. In the debate on the floor this construction of the law was disputed.

The committee observe, however, that if the statute should be construed as applying to individuals rather than to a party, and should be construed as forbidding the appointment of such persons, nevertheless if they were "de facto offi-

cers, acting under color of authority, and not mere usurpers, then their acts are not (in the absence of fraud) void as to third parties." The committee say:

These judges of election, under the law of Kentucky, are appointed by the county courts in the several counties. They are to consist of two justices of the peace, if so many there be, or of one justice of the peace and one other suitable person. In case of a disagreement between the judges, the sheriff acts as umpire. It seems clear to the committee that even if the acts above named were construed as claimed by contestant, it could only follow that the county courts in Kentucky had failed in some instances to do their duty in selecting election officers, and had thus subjected themselves to the penalty provided by those statutes, to wit, "a fine of $100 for each omission," and not that all votes cast at the elections held by such officers should be thrown away. An officer appointed by competent authority, having all the other qualifications requisite, save only that of loyalty during the rebellion (where that is required), would certainly be an officer de facto, clothed with color of authority, at least.

On a question arising from the charge that certain election officers were not sworn, the doctrine of de facto officers is considered further:

There is, however, a principle of law which your committee believe to be well settled by judicial decisions, and most salutary in its operations, which is conclusive of this point, as well as of several other points in this case. It is this: That in order to give validity to the official acts of an officer of election so far as they affect third parties or the public, and in the absence of fraud, it is only necessary that such officer shall have color of authority. It is sufficient if he be an officer de facto and not a mere usurper. This doctrine has been recognized and enforced by many of the highest courts of this country.

The report cites the cases of The People *v.* Cook (N. Y., 4 Selden, 67), Taylor *v.* Taylor et al. (10 Minnesota, 107), Baird *v.* Bank (Penn., 11 S. and R., 414), Pritchett *v.* The People (Ill., 1 Gilm., 529), The People *v.* Ammons (5 Gilm., 107), St. Louis County Court *v.* Sparks (10 Mo., 121), etc.

The report further reviews the Congressional cases of Jackson *v.* Wayne, McFarland *v.* Culpepper, Easton *v.* Scott, Draper *v.* Johnston, Howard *v.* Cooper, Delano *v.* Morgan, Milliken *v.* Fuller, Clark *v.* Hall, Flanders *v.* Hahn, and Blair *v.* Barrett, and concludes:

The question, therefore, regarded in the light of precedent or authority alone, would stand about as follows: The judicial decisions are all to the effect that the acts of officers de facto, so far as they affect third parties or the public in the absence of fraud, are as valid as those of an officer de jure. The decisions of this House are to some extent conflicting; the point has seldom been presented upon its own merits, separated from questions of fraud; and in the few cases where this seems to have been the case the rulings are not harmonious. In one of the most recent and important cases (Blair *v.* Barrett), in which there was an exceedingly able report, the doctrine of the courts, as above stated, is recognized and indorsed. The question is therefore a settled question in the courts of the country, and is, so far as this House is concerned, to say the least, an open one.

Your committee feels constrained to adhere to the law as it exists and is administered in all the courts of the country, not only because of the very great authority by which it is supported, but for the further reason, as stated in the outset, that we believe the rule to be most wise and salutary. The officers of election are chosen of necessity from among all classes of the people; they are numbered in every State by thousands; they are often men unaccustomed to the formalities of legal proceedings. Omissions and mistakes in the discharge of their ministerial duties are almost inevitable. If this House shall establish the doctrine that an election is void because an officer thereof is not in all respects duly qualified, or because the same is not conducted strictly according to law, notwithstanding it may have been a fair and free election, the result will be very many contests, and, what is worse, injustice will be done in many cases. It will enable those who are so disposed to seize upon mere technicalities in order to defeat the will of the majority.

In the debate this position was assailed.

880. The election case of Barnes v. Adams, continued.

Contestee having objected when certain evidence was taken that it was not covered by the notice, the Elections Committee sustained the objection.

The returns from an election precinct not being certified in any manner whatever, they were rejected by the House.

Persons working on a railroad and intending to leave on its completion were held not to have such residence as to make them voters.

Where elections were viva voce the Elections Committee required contestant to prove the want of residence of such persons as he claimed voted illegally.

An entire poll should not be rejected when it is possible to purge it of illegal votes.

Threatening notices posted before an election and not resulting in deterring voters from going to the polls do not justify rejection of the polls.

(4) A further point was thus considered:

The act of Congress regulating proceedings in cases of contested elections, and under which this proceeding was instituted, provides as follows:

"Whenever any person shall intend to contest the election of any Member of the House of Representatives of the United States, he shall, within thirty days after the result of said election shall have been determined by the officers or board of canvassers, give notice in writing, to the Member whose seat he designs to contest, of his intention to contest the same, and such notice shall specify particularly the grounds upon which he relies in the contest." (See Brightley's Digest, vol. 1, p. 254, sec. 14.)

As in this case there is nothing in the notice of contest in relation to the failure of election officers to take the oath prescribed by law, contestee objects to all the evidence upon that subject, and did so object, as the record shows, when the same was taken. The committee are of the opinion that the objection is well taken. The language of the statute is specific and admits of but one construction. The grounds of the contest which are to be insisted upon must be stated in the notice. This, of course, is to the end that the contestee may be fully advised of the nature of the case which he has to meet. The notice is the only pleading required of contestant; it is the foundation upon which the whole proceeding rests, and if the contestant could introduce one new cause of contest not mentioned therein he could introduce any number, and the contestee could never know in advance of the taking of the testimony what issues are to be tried. When we add to this the consideration that the time for taking testimony in these cases is, as compared with ordinary litigation of equal importance in the courts of the country, necessarily brief, and that if a contestant may go outside of his notice at all he may do so just before the time for taking testimony expires and thus cut off his adversary from the privilege of taking rebutting testimony, the great importance of adhering to the law will be apparent to all.

(5) Certain returns were thrown out because of the omission of necessary formalities:

We have already said that the Glades precinct, No. 11, in Pulaski County, must be rejected, because it is not certified to be correct by any officer. This objection is substantial and not technical. The paper purporting to be a poll book for this precinct proves nothing whatever. To admit such a, paper as evidence would be to set aside all rules and open wide the door for fraud.

In four other precincts the returns are rejected because "the poll books are not certified in any manner whatever."

(6) As to the qualifications of certain voters:

No person is a legal voter under the constitution of Kentucky unless he be a resident of the State, county, and voting precinct. A temporary sojourner is not a resident within the legal sense of that term. A person who goes to a place for a specified purpose, and with the intention of leaving it when that purpose is accomplished, does not gain a residence, however long he may remain. It follows that such persons as went into any of the precincts in question for the purpose of working on the railroad, and with the intention of leaving when the road should be completed, had no right to vote. The testimony is not as dear as it might be as to the number of votes which ought to be thrown out under this ruling. The committee are of the opinion that the following rule should govern in determining what votes to reject: Whenever it appears that a person came into the precinct for the purpose of working on the railroad, that he resided in a temporary habitation, and was generally regarded as a temporary inhabitant, and that he actually left very soon after the road was completed, and soon after the election, his vote should be rejected.

(7) It being charged generally that in a certain precinct certain disqualified railroad hands voted, the report says:

That there were illegal votes cast by some of these persons we think is beyond question, but the presumption is always in favor of the legality of a vote which has been admitted by the proper officers; and since all elections in Kentucky are viva voce, and since the record shows how each person votes, it would not, we think, be too much to require contestant to prove the want of residence of such persons as he claims illegally voted for contestee.

As to another precinct where a similar charge was made:

The vote at this precinct should undoubtedly be purged of a number of illegal votes, but the evidence is not sufficient to authorize the rejection of the entire poll, especially in view of the fact that it was within the power of contestant to show the facts in relation to each person who voted for contestee, and thus purge the poll of all illegal votes. The rule is well settled that the whole vote of a precinct should not be thrown out on account of illegal votes having been cast, if it be practicable to ascertain the number of illegal votes, and the person for whom cast, in order to reject them and leave the legal votes to be counted. Legal votes are not to be thrown out in order to get rid of illegal votes, unless necessity requires it as the only means of preventing the consummation of a fraud upon the ballot box.

(8) In one precinct intimidation was alleged. It was proven that preceding the election threatening notices promising that certain Republicans should be lynched had been posted, and several persons had been lynched and one or two murdered in the vicinity a short time previously. But the only result of this seemed to be that both parties appeared at the polls armed. There was no violence at the polls, and a full vote was given, no one being prevented from voting as he chose. The report says:

It is not to be doubted that an effort was made to intimidate the Republican voters at this precinct by posting up threatening notices and otherwise; but it is also clear that it was wholly unsuccessful. The Republicans went to the polls determined to maintain their rights, and they were not molested. The vote of this precinct can not be rejected.

In accordance with the principles set forth above the committee found the majority of sitting Member to be 332, and reported a resolution confirming his title to the seat.

On July 5 [1] the report was debated at length. A motion to recommit the report with instructions that the case be reexamined was disagreed to—yeas 21, nays 121.

The resolution of the committee was then agreed to without division.

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[1] Journal, pp. 1147, 1148; Globe, pp. 5179–5193.

881. The Indiana election case of Reid v. Julian in the Forty-first Congress.

Discussion of the reasons justifying the rejection of an entire poll.

Election officers not being residents of the precinct as required by law, the poll was rejected.

A person not possessing the qualifications required for an officer de jure may not be an officer de facto.

Discussion as to the principles on which a fraudulent return is rejected.

On July 6, 1870,[1] Mr. John Cessna, of Pennsylvania, from the special Committee on Elections, submitted the report in the Indiana case of Reid *v.* Julian. The minority views, presented by Mr. Samuel J. Randall, of Pennsylvania, gives the most succinct statement of the real issue in the case. The official ascertainment of the result in the district had given to Mr. Julian, the sitting Member, a majority of 116. The minority views thus explain:

> This result was reached, as the evidence shows and as is admitted by the contestee and contestant, in consequence of the clerk of Wayne County, in reporting the aggregate vote of that county, leaving out of his report the aggregate vote of the south precinct of Richmond City, a poll or precinct of Wayne County, at which Mr. Reid obtained 676 votes and Mr. Julian received 475 votes, as returned by the judges of election; thus giving Mr. Reid a majority of 201 votes over Mr. Julian at said poll or precinct; but which was rejected by the board of canvassers of Wayne County, Ind., and which was not counted by the county clerk in his return to the secretary of state, and consequently was not included by the latter in his aggregate of votes as certified to the governor. If this poll and vote had not been rejected by the board of canvassers of Wayne County, then Mr. Reid would have received a majority of 85 votes on the total vote over Mr. Julian and, as a matter of right, would have been entitled to the certificate of the governor.

This not being a prima facie case the committee did not review the action of the board of canvassers, but passed at once to consider the case on its merits and to consider the justice of sitting Member's claim that the entire poll in the precinct in question should be rejected.

The majority say:

> It has long been held by all the judicial tribunals of the country, as well as by the decisions of Congress and the legislatures of the several States, that an entire poll should always be rejected for any one of the three following reasons:
>
> 1. Want of authority in the election board.
> 2. Fraud in conducting the election.
> 3. Such irregularities or misconduct as render the result uncertain.
>
> We are clearly of opinion that the first and third reasons were sufficiently shown in this case.
>
> If the second reason has not been established against the officers conducting the election, it has been abundantly shown that these officers afforded the opportunity for someone else to commit the fraud, if they did not do so themselves.
>
> This House has, in very many cases, rejected the entire polls for the several reasons before stated or for either one of them. These decisions commenced many years ago, and have continued regularly until the present time. Jackson *v.* Wayne, 1792 (Contested Elections, vol. 1, p. 47); McFarland *v.* Purviance, 1804 (same vol., p. 131); Easton *v.* Scott, 1816 (same vol., p. 272); McFarland *v.* Culpepper, 1807; Draper *v.* Johnson, 1832 (same vol., p. 710); Howard *v.* Cooper (2 vol. Contested Elections);

[1] Second session Forty-first Congress, House Report No. 116; 2 Bartlett, p. 822; Rowell's Digest p. 253.

Blair *v.* Barrett (2 vol. Contested Elections, p. 308); Knox *v.* Blain (2 vol. Contested Elections, p. 521); and other cases therein cited.

Both volumes of contested election cases in Congress are full of such precedents. Delano *v.* Morgan, Myers *v.* Moffat, Covode *v.* Foster, and numerous other cases not yet reported, are to the same effect.

The majority also quote at length the decision of the court in the Pennsylvania contested elections of 1867. (1 Brewster, 171.)

As to the want of authority in the election board, the law is quoted with its requirement that the judges selected should be "two qualified voters of the precinct." Then as to the southern precinct of Richmond the majority say:

On the morning of the election in October, 1868, S. W. Lynde appeared at the poll of the southern precinct and claimed to act as inspector of elections. After some slight controversy, M. M. Lacey and John S. Lyle were declared elected as judges. Mr. Lynde claimed to act as inspector, because he was one of the board of registry for the township of Wayne. He acted as a sort of president of the meeting at the organization of the board, and put to vote the motions made. Mr. Lynde swears (pp. 8 and 9) that he was not a resident in, nor a citizen of, the southern precinct; that he was a citizen of the northern precinct, and that he did on that day vote at the poll in said northern precinct.

Mr. Lacey testifies to precisely the same thing in regard to himself (p. 14), and Mr. Lyle does the same (pp. 9, 10, and 11). Several other witnesses bear similar testimony in regard to the residence of these three officers of the election board of the southern precinct. It is not denied by anyone, nor in any place, that the three officers of this board were nonresidents in the precinct where they held the election, and all of them voted on that day at a different poll.

The majority continue:

Elections should not be set aside for want of mere form, for innocent or unintentional irregularities. On the other hand, all the mandatory provisions of the law must be observed, or the election can not and should not be sustained. These questions have often been considered by the courts of the country, by this House, and by the legislatures of the several States of the Union.

On behalf of the contestant, however, it is urged that these persons were officers de facto, although it is conceded that they were not officers de jure. A large number of authorities have been cited to this point. It is freely admitted that the distinction between officers de facto and de jure is not well defined. The decisions of the House, and even the decisions of courts, on this question are somewhat inconsistent and conflicting. While we admitted that party spirit and surrounding circumstances have produced such apparent inconsistency in the decisions of the House, yet we venture to assert that in no case has it ever been held that persons were officers de facto who did not possess the qualifications requisite for officers de jure.

In the case of Delano *v.* Morgan even the minority of the committee (Democratic) reported in favor of excluding the entire poll of Blue Rock Township, and gave as a reason for so doing that the polls had been closed by the officers for about one hour so as to enable them to take dinner. To sustain this decision they quote the opinion of Judge Brinkerhoff, of Ohio, and yet in that case there was no pretense that the ballot box was tampered with, but that the judges rather acted in ignorance of what their duties were. This case (Delano *v.* Morgan) is directly in point in regard to the distinction we have attempted to make as to officers de facto. One of the officers of the Pike Township election was disqualified; the poll was rejected. The debates on this case are full to the point, and the conclusion is full and complete in favor of the distinction we make. One may be an officer de facto who has been irregularly or improperly appointed or selected, and his acts may be binding on third persons; but in a case of personal disqualification of the officer for reasons which could not be cured by a change in the manner of his selection, the rule is universal that he can have no jurisdiction, and all his acts are void from the beginning for want of authority.

This view as to an ineligible person claiming to be an officer de facto was held of importance in the debate, and was indorsed by Mr. Luke P. Poland, of Vermont,[1] who had given much attention to election cases.

[1] Globe, p. 653.

The minority antagonized this theory:

The evidence shows that those officers acted with permission of all the voters present at the opening of the poll, had their sanction and approval as such, and, as far as is known or the testimony discloses, without a single objection during the day of the election from anyone. I hold, therefore, although they may not have been officers de jure, they were officers de facto, and as such their acts were valid so far as they concern the public and protect the rights of third persons, although they may have had no legal right to exercise the duties of such election officers, and should stand. They clearly should stand in the absence of fraud.

As to the second and third questions, that of frauds and irregularities, the majority report says:

We are aware of the fact that it is often argued in defense of irregularities, bad faith, and even fraud in conducting elections, that it is hard to disfranchise the honest voter by reason of the mistakes or misconduct of election officers. This view has been so completely answered by the judges, in the opinions already cited, that little more need be said on this point. It might be well, however, to add that no legal voter is disfranchised by throwing out a fraudulent poll. The only effect of such action by the proper tribunal is to destroy the prima facie character of the return, and to deny to the official acts of such officers the legal presumption of correctness usually accorded to the conduct of faithful agents

882. The case of Reid v. Julian, continued.

Votes proven aliunde by persons swearing that they were qualified, and that they voted for the contestee in the election in question.

Votes may be proven aliunde by evidence of third persons as to how the voters cast their ballots.

Where votes are proven aliunde, the voter, in swearing to his vote, need not identify the ballot.

When votes are proven aliunde by one party to a contest, the residue are not allowed to the other party.

As to the specific acts, the majority enumerate a series which are explained or disputed by the minority.

A question arose in regard to the proceedings of sitting Member to purge the poll by evidence aliunde. The South Richmond returns gave Mr. Julian 475 votes and Mr. Reid 676 votes. As to the evidence aliunde, the majority say:

We find that Mr. Julian has called 508 persons who swear that they were voters in that precinct; that they voted in October, 1868, at that poll, and that they voted for said Julian. In the judgment of the committee, the evidence of these witnesses is as full, complete, and reliable as it is possible for human testimony to be given. It would be received in any court of justice in the country, and held sufficient to establish any fact in a civil, or even criminal, case. These names are appended to this report and contained in statement marked "Paper A." In addition to these he has called 22 other persons who give similar testimony in regard to themselves, and corroborate these by calling 22 witnesses who gave them tickets and saw them vote. For this list see Paper B, hereto attached. He has also produced a list of other persons voting at said poll, being 21 in number, whom he also claims as having voted for him. Eight of these were examined personally and 13 witnesses examined as to the others. While the evidence in regard to this list is not so entirely conclusive and unanswerable as in regard to the other two lists, yet it is altogether satisfactory and sufficient to establish a fact before any legal tribunal. For this list see Paper C.

Mr. Julian claims to have proved that he is entitled to 29 other votes cast at this poll. See Paper D, hereto attached. The evidence in regard to these 29 persons is such as to render it highly probable that they did vote for Mr. Julian, yet, as we think, insufficient to establish the fact as a legal conclusion. The weight of evidence and probabilities, however, are so largely in favor of this theory as to add greatly to the uncertainty of the return of this poll.

In this precinct the returns gave to Mr. Julian 475 votes and to Mr. Reid 676. Had this vote been counted by the county board Mr. Reid would have had a majority of 85 votes in the district, making 90 with the credit of 5 votes hereinbefore allowed him.

Mr. Reid makes several objections to Mr. Julian's attempt to purge this poll. He says that in several cases of the 551 persons claimed by Mr. Julian it is not shown by the witnesses that such persons were legal voters. In point of fact this is true of some 30 or 40 names. In the judgment of the committee no such proof was necessary in this case. The poll is either valid or void as a return of election. If void no effort to purge it is necessary. If the officers who held this election had authority, and if they could conduct it, then every vote which went into the box is presumed to have been given by a person duly qualified. The legal presumption in favor of the right of the voter is all that can be required.

The minority say:

The contestee, not contending that any direct fraud has been proven by him against anyone, asserts that, as one of the badges of fraud, he has proven by the oral testimony of over 500 witnesses that this number of ballots were actually voted for him, and that by the evidence of some 40 more persons they either voted for him or intended to do so; and hence the ballots in the ballot box must have been changed by some other person or persons, as there were only 475 votes returned for him by the judges, instead of over 500 votes, as should have been; but against the oral testimony of these witnesses there is the evidence of the analyzation of the actual tickets voted, and a complete recount of their number, made in the presence of the contestee's counsel, sworn to by the inspector of the south Poll as being true, and the tickets voted and counted at the election; and this testimony is confirmed by the township trustee and others, who had charge of the tickets from the close of the election until they were counted by the contestant, which analyzation shows 670 votes for the contestant instead of 676, and 479 votes for the contestee instead of 475 votes, with 32 ballots scratched or which had no name on them, 31 of which appeared to be Republican tickets and 1 a Democratic, making in all 1,181 tickets instead of 1,183, the number returned by the judges, and also that which the poll book shows.

The contestant had objected to the evidence by which the votes were proven aliunde, citing the case of Wheat *v.* Ragsdale (27 Ind., 203) to show that the witness should first be asked if he could identify his ticket, and then a search should be made for it. The majority say:

It does not appear that the tickets were before the notary swearing the witnesses, or before the witnesses being sworn. We therefore agree with the court in saying that the question supposed to be indispensable would have been of little practical importance. There were 1,151 tickets in this box for Congress, and it would be almost absurd to suppose voters could identify their tickets from such a number after a lapse of several months.

It was claimed in the debate[1] that in the absence of positive fraud, which vitiated and corrupted the whole poll, the contestant should be credited with the residue of votes after the allowance to sitting Member for what he had proven. But the majority did not allow this contention.

The majority of the committee found as a result of minor corrections and the purging of the South Richmond poll a majority of 602 for Mr. Julian, and reported resolutions declaring contestant not elected and that sitting Member was entitled to the seat.

On July 15[2] the report was debated in the House, and on that day a substitute of the minority declaring contestant elected was decided in the negative without division. Then the resolution declaring sitting Member entitled to the seat was agreed to, yeas 127, nays 50.

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[1] By Mr. Michael C. Kerr, of Indiana, Globe, p. 5651.

[2] Journal, pp. 1283–1285; Globe, pp. 5645–5653.

883. The Missouri election case of Shields v. Van Horn, in the Forty-first Congress.

Where a canvassing officer had without doubt wrongfully rejected a decisive return, it was held that the burden of proof should be on the wrongfully returned member.

Where the registration on which the vote depended was fraudulent, the House rejected the entire return.

On July 15,1870,[1] John C. Churchill, of New York, from the Committee on Elections, submitted the report of the majority in the case of Shields *v.* Van Horn, of Missouri. The report, after stating the vote of the district, says:

That this is a correct statement of the vote cast at that election is not questioned by either party, and it shows a majority for the contestant over the sitting Member of 983 votes. The secretary of state, to whom, by the law of Missouri, the returns of votes cast for the several candidates for Representative in Congress in each county are made by the clerk of the county court in each county, rejected the returns from the counties of Platte and Jackson, whereby a majority of 867 votes in the eight remaining counties was shown in favor of Robert T. Van Horn, to whom he give a certificate of election in due form, upon which he was admitted to the seat. The supreme court of Missouri, in two cases arising in different parts of the State at this election of 1868, have decided, in accordance with the general current of authority in this country, both legislative and judicial, that the action of the secretary of state was not authorized by law; that his sole duty was to add together the votes returned to him as cast for each candidate in the several counties, and to give the certificate to the person to whom, upon such addition, it appeared that a majority of votes had been given. (The People *v.* Rodman, 43 Mo., 256; The People *v.* Steers, 44 Mo., 224,228.)

The action of the secretary of state, therefore, does not aid us in deciding this contest upon the merits of the case, and is only referred to to explain the attitude of the different parties to this contest.

The minority[2] of the committee contend:

It being in proof, and in point of fact not denied by the contestee, that Shields received a majority of votes cast at the election and duly certified to the secretary of state, the commission, of right and in law, belongs to him. In contemplation of law and by virtue of the vote cast Shields is in Congress and Van Horn out, thus reversing the legal status of the parties to this contest, and changing the burden of proof from the contestant Shields to the contestee Van Horn. The consequences of this position of parties are important and bear on the whole question of testimony, its application to and value in the case. The contestee says, "Congress possesses original and exclusive jurisdiction in extending the right of parties to seats in Congress." Without questioning this rule, it maybe remarked that it is in entire harmony with the foregoing suggestions as to the status of the parties; and that it is plainly at war with the usurpations of the secretary of state as a canvassing officer, in assuming a jurisdiction belonging "exclusively" to Congress. With just as much support in law might the secretary assume all the powers of Congress, and pass upon the qualifications of Members, as to assume to judge of their election and returns.

The legal consequence therefore is that in order rightfully to hold the seat he now occupies in the House by usurpation of the secretary of state, and which seat prima facie belongs to the contestant, the burden of proof is upon the sitting Member to show that a majority of the qualified votes cast at the election in the whole district, Platte and Jackson included, were cast for him, and not, as returned by the several clerks, for Shields, the contestant.

The committee found that the returned vote of Platte County should stand, since the sitting Member, although he had attacked it in his answer to the notice of contest, had presented no e-evidence to sustain the allegations of his answer.

[1] Second session Forty-first Congress, House Report No. 122; 2 Bartlett, p. 922.

[2] Views presented by Mr. Albert G. Burr, of Illinois.

Therefore the only question left was as to the vote of Jackson County. This vote the sitting Member had attacked, and taken evidence to sustain the attack.

The basic facts in this case were substantially the same as in the case of Switzler *v.* Dyer, already decided at this session,[1] the oath of loyalty being required before registration, and it being charged that this requirement had been rendered inoperative by the corrupt acts of a superintendent of registration named Phelan, in the county of Jackson. The majority regarded this charge as proven, and say:

> The officers of election also have no discretion in the receiving or rejecting of votes. They are governed by the registration, and it is made a penal offense for them to receive the vote of any person not registered or to reject the vote of any person registered. It is of the first consequence, therefore, that the registration be honest and pure, for without that the purity of the election can not be maintained. and if the registration be rejected the whole election falls. We think that the evidence in this case establishes: That the removal of the first board appointed by Phelan, and the appointment of their successors, who made the registration, was the result of a corrupt agreement to that effect, made by Phelan with Charles Dougherty and others, and was made in the interest of one of the political parties in the county of Jackson (pp. 20, 21); also that the registrars appointed were parties to that corrupt agreement, or cognizant of it; and, further, that the registration was conducted contrary to law and with the purpose of carrying that corrupt agreement into effect.
>
> In the case of Switzler *v.* Dyer, decided by this Congress, the majority of the committee did not believe the fraudulent agreement in that case charged to have been established by the evidence, made, and therefore reported in favor of the contestant. The House, however, reversed the finding of the committee in this report; rejected the vote of Monroe County, which was in question, and gave the seat to the contestee. In this case the majority of the committee find the corrupt agreement established by the evidence, and upon the authority of the case just quoted, as of many other cases, reject the registration of Jackson County as fradulent, and with it reject the vote of that county, which was the result of that fradulent registration.
>
> This conclusion makes it unnecessary for the committee to consider the irregularities shown to have occurred at the election, where persons not on the list of registered voters were allowed to vote upon the certificate of a single member of the board of registration (pp. 35, 36, 42), nor the defects in the poll books returned by the judges of election to the clerk of the county court (pp. 42, 43, 53). The rejection of the vote of Jackson County makes the vote of Robert T. Van Horn 5,964 and of James Shields 5,352 and elects the former by a majority of 612. The committee therefore recommend the adoption of the following resolutions:
>
> *"Resolved,* That James Shields is not entitled to a seat in the House of Representatives in the Forty-first Congress from the Sixth Congressional district of Missouri.
>
> *"Resolved,* That Robert T. Van Horn is entitled to a seat in the House of Representatives in the Forty-first Congress from the Sixth Congressional district of Missouri."

The resolutions were considered in the House on February 21, 1871,[2] and were agreed to without debate or division.

884. The Tennessee election case of Sheafe v. Tillman, in the Forty-first Congress.

A decision as to what constitutes the determination of result within thirty days of which the notice of contest is to issue.

The action of a State executive in throwing out votes was disregarded by the House.

The governor of a State, as canvassing officer, is not justified in rejecting votes duly cast and returned.

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[1] See section 873 of this volume.

[2] Third Session, Forty-first Congress, Journal, p. 388; Globe, p. 1474.

An election officer appointed without authority of law was held not to be an officer de facto.

There being evidence of both fraud and intimidation, the failure of election officers to be sworn vitiated the returns.

On January 10, 1871,[1] Mr. G. M. Brooks, of Massachusetts, from the Committee of Elections, presented the report of the majority in the Tennessee case of Sheafe *v.* Tillman. At the outset a preliminary question was settled, the minority concurring in the view set forth by the majority:

Before proceeding to a consideration of the merits of this case, a question, preliminary in its nature, first should be disposed of. The contestee in his answer claims that contestant did not serve notice of his intention to contest his seat within the time required by statute, and his specification is as follows:

"First. Because contestant did not file his notice or deliver a copy of the same in time. Respondent's certificate is dated and was issued on the 31st of December, 1868; and contestant's notice, or a copy of it, was not served on or delivered to respondent until the 19th of February, 1869, more than thirty days after the date and issuance of the certificate to respondent."

The United States statute of February 19, 1851, provides that—

"Whenever any person shall intend to contest an election he shall, within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice in writing to the member whose seat he designs to contest, etc." (9 Stat. L., 568.)

To decide the question raised, it becomes necessary to ascertain at what time the result of the election in the Fourth Congressional district was determined by the officers "authorized by law to determine the same."

Section 880 of the Code of Tennessee, page 232, provides that—

"The governor and secretary of state shall, as soon as the returns are received, in the presence of such electors as choose to attend, compare the vote in these several cases (among others for Members of Congress) and declare the person receiving the highest number of votes duly elected."

From this provision it would seem that it was the intention of the law that the governor and the secretary of state should personally meet and, in the presence of such electors as choose to attend, make a comparison of the votes. From the evidence introduced, it does not appear that this requirement of the statute was ever complied with by a comparison of the votes by the governor and the secretary of state being personally present together and performing this duty. The secretary of state in October, 1869, testified that he had not seen the governor for nearly two years; that this provision of the code had been treated as only directory by the State officers, and was understood only to require a comparison of the duplicates which ought to be in each office, and that even this had never been done by the governor and secretary of state together to his knowledge. Without deciding the question whether the above officers should personally compare the returns, unquestionably the governor and the secretary of state, by the Code of Tennessee, constitute the officers referred to in the United States statute of February 19, 1851, above cited, and until they have made a comparison of the votes, and definitely and finally acted upon the matter, the result of the election can not be determined in such manner as to bring a contestant within the provisions of the United States statute last above cited.

The committee found that the governor by proclamation of February 11, 1869, had stated that he awarded the certificate to Mr. Tillman, The report says:

The committee are of the opinion that if the provisions of section 880 of the Code ever had been complied with, according to the construction given to the section by the secretary of state, yet there had been no such determination of result of the election as required by the United States statute of February 19, 1851, until after the issuance of the commission to the contestee after February 11, 1869, and therefore the notice, being given on February 15, 1869, was within the time required by statute.

On the count of votes returned the contestant, Mr. Sheafe, had a majority of 1,156 votes; but the governor had assumed to reject the returns of one entire

[1] Third Session, Forty-first Congress, House Report No. 3; 2 Bartlett, p. 907.

county and parts of another county, thereby causing a plurality of 432 votes to result for Mr. Tillman. The committee was unanimous as to the following conclusion:

There is no law of the State of Tennessee that gives authority to the governor to reject the vote of any county or part of a county; his duty is only to compare the returns received by him with those returned to the office of the secretary of state, and, upon such comparison being made, to "deliver to the candidate receiving the highest number of votes in his district the certificate of his election as Representative to Congress." (Code of Tennessee, sec. 935, p. 239.) If illegal votes have been cast, if irregularities have existed in the elections in any of the counties or precincts, if intimidation or violence has been used to deter legal or peaceable citizens from exercising their rights as voters, to this House must the party deeming himself aggrieved look for redress. This great power of determining the question of the right of a person to a seat in Congress is not vested in the executive of any State, but belongs solely to the House of Representatives. (Constitution United States, Art. I, sec. 5.)

The action of the governor, so far as he has thrown out the votes of counties or parts of counties, is to be disregarded, and the matters in dispute are to be settled upon the actual returns and the evidence introduced, independent of the doings of the executive.

In determining the actual result of the election the committee consider, first, the county of Lincoln, which returned for Tillman 5 votes, and for Sheafe 554. The statutes of the State provided that the governor should appoint a commissioner of registration for each county of the State, and also that—

he is hereby fully empowered to set aside the registration of any county in this State, or any part thereof of said registration, when it shall be made to appear to the satisfaction of the governor that frauds and irregularities have intervened in the registration of voters in such county. The governor shall make known such fact, and set aside said part or whole of said registration, when frauds are shown to have been committed, by proclamation.

Some time prior to the November election in 1868 the governor by proclamation did "set aside and declare null and void all that part of the registration of our county of Lincoln made by A. H. Russell, late registration commissioner."

The governor not making any other appointment, it was generally assumed in the county that no legal election could be held, since the statute provided that the commissioner of registration should appoint "the judges and clerks of all elections," and "hold all elections." But on the day preceding the election the county court of Lincoln County appointed one C. S. Wilson to open and hold the election in the county, and the said Wilson did in fact hold elections in seven of the twenty-five districts in the county, and made returns thereof, signed by himself as coroner. The report concludes as to this act of Wilson:

It is not necessary to discuss the question of the constitutional powers of the governor to set aside a registration, for if this act of his was unconstitutional, and he had no power to set aside a registration and remove a commissioner, then there was no vacancy; the commissioner had not been deprived of his office, and he was the only person by law authorized to hold the election. But if this act of the governor did have the effect of removing the commissioner, the county court had no right under the statute to appoint an election officer; the act of February 26, 1867, chapter 26, section 2, above referred to, vested the appointing power of these officers wholly in the executive, and repealed all laws in conflict therewith. Wilson, therefore, held his office under no color of legal authority; was not even an officer de facto, but was a mere usurper, and all acts done by him as such officer were illegal and void; and when it appears that Wilson was appointed by the court only the day prior to the election, so that it would have been impossible that due notice of his appointment or of the election could have been given; that elections were held in only seven of the twenty-five districts of the county; that it was generally understood that there was no officer legally appointed to hold the elections, and that voters did not attend the polls on that account; and when it further found that there existed in the county organizations of men

mounted, armed, and disguised, and known by the name of the Ku-Klux Klan, banded together for political purposes, who, by their threats and violence, intimidated and deterred voters from attending the polls, there could not have been and was not such a full and free expression of the will of the voters as is deemed necessary to constitute a fair election. The committee, therefore, is of the opinion that this election had no semblance of legality, and that the entire vote of Lincoln County should be rejected.

The minority [1] claimed that the action of the governor was void as to the registration, and that the coroner was the proper officer to hold the election under the old law, the repeal of which was not admitted. The intimidation alleged by the majority was also denied.

The majority of the committee further find that in Marshall County previous to the election there was intimidation by the Ku-Klux so that there was not a free expression of public sentiment at the polls. For this reason, and for the reasons set forth below, they recommended the rejection of the poll. The report says:

The commissioner of registration of this county in his return states that in the districts numbered 1, 4, 7, 13, and 15, which gave Tillman 9 and Sheafe 559 votes, "no oath accompanied the poll box, but all certified to be held according to law." And the evidence introduced does not disclose that the oath required by statute was taken and subscribed in the above districts in conformity to law.

The committee adheres to the principle enunciated in the contested election cases of Barnes *v.* Adams, second session of this Congress, viz, that it is not essential to the validity of an election that the officers should be sworn, or should in all things be held to the strict requirements of the law, so far as their qualifications for the office which they hold are concerned. If it appears that there was no fraud in the election, that it had been fairly conducted, and that there was an opportunity for a full expression of the will of the voters at the ballot box, the mere fact of the omission of an officer to take the oath prescribed by law will not vitiate an election. But if, on the other hand, the election was not fairly conducted, if there was fraud in the ballot, if it should appear that there was an organized attempt of a class of persons in the county to prevent citizens of one particular political belief from depositing their votes freely and peaceably, if intimidation was used to control the voters, and by these means there was not a full, fair, and free expression of the will of the voters at the ballot box, then, in such voting precincts where the requirements of law were not complied with, the vote should be rejected.

The report also approves the rejection of the returns of the first district of Franklin because of intimidation exercised before the election, and also because neither judges nor clerks were sworn according to law. The report says:

In the first district, in which Tillman received 3 and Sheafe 293 votes, the poll book was among the papers in evidence; no oath accompanied the same, and no statement or certificate appeared that any of the officers were sworn; testimony was introduced showing that all the officers were sworn except the one who held the election. It also appeared in evidence that some persons voted without proper certificates, and that the frauds perpetrated at the election were so flagrant that the crowd about the ballot box regarded it as a huge joke and seemed to enjoy it as such. It also appeared that the Ku-Klux visited this district at times during the spring and summer of 1868, in various numbers.

The majority of the committee recommended resolutions declaring contestant not elected, and sitting Member entitled to the seat.

On February 14, 1871,[2] the resolutions were taken up in the House and were at once agreed to without debate or division. But it appeared that there was some understanding, and on a motion to reconsider, the report was debated at length. Then, on a motion to lay on the table the motion to reconsider, there was a division, the motion being tabled—yeas 123, nays 60. So the report of the majority of the committee was sustained.

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[1] Views filed by Mr. P. M. Dox, of Alabama.

[2] Journal, p. 338; Globe, pp. 1219–1229.

885. The Pennsylvania election case of Cessna v. Meyers, in the Forty-second Congress.

When a voter's qualifications are objected to the burden of proof is on the objecting party to show that the person voted for the competitor and was disqualified.

Evidence of hearsay declarations of the voter is receivable only when the fact that he voted is shown by evidence aliunde.

Declarations of the voter as to his vote must be clear and satisfactory and clearly proven.

Discussion of the value as evidence of a party's declaration as to his vote, whether a part of the res gestae or not.

Discussion of the English and American rules of evidence as applied to the declarations of the voter.

Discussion of the status of the voter as a party to the proceedings in a contested election case.

As to the application of technical rules of evidence in an election case, which is a public inquiry.

On February 7, 1872,[1] Mr. George F. Hoar, of Massachusetts, from the Committee on Elections submitted the report in the Pennsylvania case of Cessna *v.* Meyers. The sitting Member was returned by an official majority of 15 votes. Contestant charged that a large number of illegal votes were cast and counted for sitting Member, and sitting Member also charged that illegal votes were similarly cast and counted for contestant.

The committee passed upon two questions as to evidence:

(*a*) The State constitution prescribed the qualifications of voters, and as to evidence the report says:

> Under these constitutional provisions, the burden of proof, when either party insists that a vote should be deducted from those cast and returned for his competitor, is upon that party to show that the person whose vote is in question voted; that the vote was for the competitor; that the voter lacked some one of the following qualifications.

(*b*) As to the effect and sufficiency of certain testimony of voters, the report says:

> Another question of importance which has arisen in the discussion of the cause is the question whether evidence of the declarations of alleged voters, made not under oath, in the country, should be received to show the fact that they voted, or for whom, or that they were not legally entitled to vote.
>
> Some of the committee think that such evidence ought in no case to be admitted, except, of course, so far as declarations made at the time of the party's intent or understanding as to his then present residence, or his purpose in a removal, is admissible as part of the res gestae. All of the committee are of opinion that such evidence is to be received with the greatest caution, to be resorted to only when no better is to be had, and only acted on when the declarations are clearly proved, and are themselves clear and satisfactory. As this question has been quite fully considered, it may be proper briefly to discuss it here.
>
> While the practice of the English House of Commons is not uniform, the general current of the precedents is in favor of admitting the declaration of voters as evidence.
>
> The opinions of several American courts and of some text writers of approved authority are the same way. The correctness of this practice has been earnestly questioned in this House, and there is one deci-

[1] Second session Forty-second Congress, House Report No. 11; Smith's, p. 60; Rowell's Digest, p. 266.

sion against it; but, on the whole, the practice here seems to be in favor of its admission. In England, where the vote for members of Parliament is viva voce, the fact that the alleged voter voted, and for whom, is susceptible commonly of easy proof by the record. In one case, however, where the poll list had been lost, the parol declaration of a voter how he voted seems to have been received without question. In State *v.* Olin (23 Wis., 319) it is stated that the declaration of a voter is admissible to prove that he voted, and for whom, as well as to prove his disqualification. The general doctrine is usually put upon the ground that the voter is a party to the proceeding, and his declarations against the validity of his vote are to be admitted against him as such. If this were true, it would be quite clear that his declarations ought not to be received until he is first shown, aliunde, not only to have voted, but to have voted for the party against whom he is called. Otherwise it would be in the power of an illegal voter to neutralize wrongfully 2 of the votes cast for a political opponent—first, by voting for his own candidate; second, by asserting to some witness afterwards that he voted the other way, and so having his vote deducted from the party against whom it was cast.

But it is not true that a voter is a party in any such sense as that his declarations are admissible on that ground. He is not a party to the record. His interest is not legal or personal. It is frequently of the slightest possible nature. If he were a party, then his admissions should be competent as to the whole case—as to the votes of others, the conduct of the election officers, etc., which it is well settled they are not. Another reason given is that the inquiry is of a public nature and that it should not be limited to the technical rules of evidence established for private causes. This is doubtless true. It is an inquiry of a public nature and an inquiry of the highest interest and consequence to the public. Some rules of evidence applicable to such an inquiry must be established. It is nowhere, so far as we know, claimed that in any other particular the ordinary rules of evidence should be relaxed in the determination of election cases. The sitting Member is a party deeply interested in the establishment of his right to an honorable office. The people of the district, especially, and the people of the whole country are interested in the question who shall have a voice in framing the laws. The votes are received by election officers, who see the voter in person, who acts publicly in the presence of the people, who may administer an oath to the person offering to vote, and who are themselves sworn to the performance of their duties. The judgment of these officers ought not to be reversed and the grave interests of the people imperiled by the admissions of persons not under oath and admitting their own misconduct.

The practice of admitting this kind of evidence originated in England. So far as it has been adopted in this country it has been without much discussion of the reasons on which it was founded. In England, as has been said, the vote was viva voce. The fact that the party voted, and for whom, was susceptible of easy and undisputable proof by the record. The privilege of voting for members of Parliament was a franchise of considerable dignity, enjoyed by few. It commonly depended on the ownership of a freehold, the title to which did not, as with us, appear on public registries, but would be seriously endangered by admissions of the freeholder which disparaged it. An admission by the voter of his own want of qualification was therefore ordinarily an admission against his right to a special and rare franchise, and an admission which seriously impaired his title to his real estate, an admission so strongly against the interest of the party making it would seldom be made unless it was true. It furnishes no analogy for a people who regard voting not as a privilege of the few, but as the right of all; where the vote, instead being viva voce, is studiously protected from publicity, and where such admissions, instead of having every probability in favor of their truth, may so easily be made the means of accomplishing great injustice and fraud, without fear either of detection or punishment.

It may be said that the principle of the secret ballot protects the voter from disclosing how he voted, and, in the absence of power to compel him to testify and furnish the best evidence, renders the resort to other evidence necessary. The committee are not prepared to admit that the policy which shields the vote of the citizen from being made known without his consent is of more importance than an inquiry into the purity and result of the election itself. If it is, it can not protect the illegal voter from disclosing how he voted. If it is, it would be quite doubtful whether the same policy should not prevent the use of the machinery of the law to discover and make public the fact in whatever way it may be proved. It is the publicity of the vote, not the interrogation of the voter in regard to it, that the secret ballot is designed to prevent. There would seem to be no need to resort to hearsay evidence on this ground, unless the voter has first been called, and, being interrogated, asserts his privilege and refuses to answer. Even in that case, a still more conclusive objection to hearsay testimony of this character is this: It is not at all likely to be either true or trustworthy.

The rule that admits secondary evidence when the best can not be had only admits evidence which can be relied on to prove the fact, as sworn copies when an original is lost, or the testimony of a witness to the contents of a lost instrument. Hearsay evidence is not admitted in such cases, and is only admitted in cases where hearsay evidence is, in the ordinary experience of mankind, found to be generally correct, as in matters of pedigree and the like. But a man who is so anxious to conceal how he voted as to refuse to disclose it on oath, even when the disclosure is demanded in the interest of public justice, and who is presumed to have voted fraudulently—for otherwise, in most cases, the inquiry is of no consequence—would be quite as likely to have made false statements on the subject, if he had made any. To permit such statements to be received, to overcome the judgment of the election officers, who admit the vote publicly, in the face of a challenge, and with the right to scrutinize the voter, would seem to be exceedingly dangerous.

The action of the House heretofore does not seem to have been so decided or uniform as to preclude it from now acting upon what may seem to it the reasonable rule, even if it should think it best to reject this claw of evidence wholly. But as both parties have taken their evidence, apparently with the expectation that this class of evidence would be received, and as, in view of the numerous and respectable authorities, it is not unlikely the House may follow the English rule, we have applied that to the evidence, with the limitation, of the reasonableness of which it would seem there can be no question, that evidence of hearsay declarations of the voter can only be acted upon when the fact that he voted has been shown by evidence aliunde, and when the declarations have been clearly proved, and are themselves clear and satisfactory.

886. The case of Cessna v. Meyers, continued.

Discussion of the meaning of the words "residence" and "domicile" as related to the qualifications of a voter.

Persons working on a railroad and expecting to go thence on the completion of the work may nevertheless be considered as having a voting residence.

Sojourners in a place for the sole purpose of study at a college may or may not have a legal residence therein.

Discussion of the law of residence as applied to paupers.

On the merits of the case the committee settled certain legal principles, as determining the result. The constitution of Pennsylvania provided as follows:

Article III, section 1. In elections by the citizens every (white) freeman of the age of twenty-one years, having resided in this State one year, and in the election district where he offers to vote ten days immediately preceding such election, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. But a citizen of the United States who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district and paid taxes as aforesaid, shall be entitled to vote after residing in the State six months: *Provided*, That (white) freemen citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year and in the election district ten days as aforesaid, shall be entitled to vote although they shall not have paid taxes.

Interpreting this constitution the committee took the following grounds as to the law of domicile:

It is claimed by the contestant that a considerable number of those who voted for his competitor lacked the qualification of residence in the election district. The largest number to whom this objection applies came into the election district for the purpose of working upon a railroad in process of construction therein, were employed in building said railroad, and were not proved to have formed any intention to reside in the district after its completion. The length of time which the completion of the road would be likely to occupy was not distinctly proved, but it was shown that persons who were in fact at work upon it continued in the district for a longer period than eighteen months. The committee have carefully considered the legal question which is thus raised.

The word "residence" used in the constitution of Pennsylvania in describing the qualification of voters is equivalent to "domicile," not in the sense in which a man may have a commercial domicile or residence in one country while his domicile of origin and of allegiance is in another, but in the broadest sense of the term. As it is upon the meaning of this word that the case chiefly turns, it will be well to consider it a little more fully.

The word "domicile," or "residence," as used in law, is incapable of exact definition. Inquiries into it are very apt to be confused by taking the tests which have been found satisfactory in some cases and attempting to apply them as inflexible rules in all. Probably the definition which is most expressive to the American mind is that a man's domicile is "where he has his home." Two or three rules, however, are well established. A man must have a domicile somewhere; a domicile once gained remains until a new one is acquired; no man can have two domiciles at the same time. With these exceptions, it will, we believe, be found that nearly every rule laid down on the subject in the books, even if generally useful, fails to be of universal application, and would be opposed to the common sense of mankind if extended to some states of fact that may arise. For instance, Vattel defines domicile to be a fixed residence in any place with an intention of always staying there. On this Judge Story (Conflict of Laws, sec. 43) well remarks:

"This is not an accurate statement. It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom."

But certainly Judge Story's definition is not much better. A man's domicile remains after he forms the intention of removing therefrom, and sometimes even after he removes, until he gets another. A man may acquire a domicile, if he be personally present in a place and elect that as his home, even if he never design to remain there always, but design at the end of some short time to remove and acquire another. A clergyman of the Methodist Church, who is settled for two years, may surely make his home for two yews with his flock, although he meant, at the end of that period, to remove and gain another. So of the principle upon which the contestant most relies in the present case.

He claims—and many expressions can be found used by commentators and in judicial decisions which seem to support the claim—that personal presence in a place with intent to remain there only for a limited time and for the accomplishment of a temporary purpose, and to depart when that purpose is accomplished, will not constitute a residence. This is true as a general rule. It is true of those persons, probably the greater number, who, while so present and engaged in business, have some other principal seat of their interests and affections elsewhere. Most men have some permanent home, the claim of which outweigh those of a place of temporary sojourn. The place where a man's property is, where his family is, the place to which he goes back from time to time whenever no temporary occasion calls him elsewhere, the domicile of his origin, where the permanent and ordinary business of his life is conducted—that is to the ordinary man the place of his home. But we are now dealing with a claw of persons who have no property, who have no family, or whose family moves with them from place to place, who have no place to return to from temporary absences, the domicile of whose origin is in another country, and has been in the most solemn manner renounced, and the ordinary business of whose life consists in successive temporary employments in different places.

Suppose a man, single, with no property, to come from Ireland and be employed all his life on railroads or other like works in different places in succession. If he does not acquire a residence he can never become a citizen, because he never would reside in this country at all. It seems to us that to such persons the general rule above stated does not apply. But where a man who has no interests or relations in life which afford a presumption that his home is elsewhere, comes into an election district for the purpose of working on a railroad for a definite or an indefinite period, being without family or having his family with him, expecting that the question whether he shall remain or go elsewhere is to depend upon the chances of his obtaining work, having abandoned, both in fact and in intention, all former residences, and intends to make that his home while his work lasts—that will constitute his residence, both for the purpose of such jurisdiction over him as residence confers and for the purpose of exercising his privileges as a citizen. Of course the intent above supposed must be in good faith and an intent to make such district the home for all purposes. The party's intent to vote in the district where he is, he knowing all the time that his home is elsewhere, will not answer the law.

The rule is stated by Chief Justice Shaw, in Lyman *v.* Fiske (5 Peck, 234) as follows: "It is difficult

to give an exact definition of habitancy. In general terms, one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place with the intent to regard it his home. The act and the intent must concur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt that a slight circumstance may turn the balance. In such a case the mere declaration of the party, made in good faith, of his election to make the one place rather than the other his home, would be sufficient to turn the scale."

The article in the appendix to volume 4 of Doctor Lieber's Encyclopedia Americana, title Domicile written by Judge Story, is, perhaps, the best treatise on this subject to be found. He says: "In a strict and legal sense, that is properly the domicile of a person where he has fixed his true, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." It is often mere question of intention. If a person has actually removed to another place, with an intention of remaining there for an indefinite time and as a place of present domicile, it becomes his place of domicile, notwithstanding he may have a floating intention to go back at some future period. A fortiori would this be true if his "floating intention" were to go elsewhere in future and not to go back, as in such case the abandonment of his former home would be complete.

In the Allentown election case (Brightly's Lead. Cases on Elections, 475) it is said: "Unmarried men, who have fully severed the parental relation, and who have entered the world to labor for themselves, usually acquire a residence in the district where they are employed, if the election officers be satisfied they are honestly there pursuing their employment, with no fixed residence elsewhere, and that they have not come into the district as 'colonizers,' that is, for the mere purpose of voting, and going elsewhere as soon as the election is held." "The unmarried man who seeks employment from point to point, as opportunity offers, and who has severed the parental relation, becomes a laborer, producing for himself, and thus adds to the productive wealth of the community in which he resides, being willing not only to enjoy political privileges, but also to assume and discharge political and civil duties." A fortiori would this reasoning apply to the married laborer who takes his family with him.

The habits of our people, compared with many other nations, are migratory. To persons, especially young men, in many most useful occupations the choice of a residence is often experimental and temporary. The home is chosen with intent to retain it until the opportunity shall offer of a better. But if it be chosen as a home, and not as a mere place of temporary sojourn, to which some other place, which is more truly the principal seat of the affections or interests, has superior claim, we see not why the policy of the law should not attach to it all the privileges which belong to residence, as it is quite clear that it is the residence in the common and popular acceptation of the term.

The case of Barnes *v.* Adams (3 Con. El. Cas., 771) does not, when carefully examined, conflict with these rules. The passage cited from that case is not a statement of the grounds on which the House or even the committee determined the case, but a concession to the party against whom it was decided. It therefore, if it bore the meaning contended for, would not be authority in future cases. But the language taken together, it seem to us, means only that going into an election precinct for a temporary purpose, with the intent to leave it when that purpose is accomplished, no other intent and no other fact appearing, is not enough to gain a residence. In this view, it is not in conflict with the opinion here expressed.

It is true that, as was remarked in the outset, a former residence continues until a new one is gained. But in determining the question whether a new one has been gained, the fact that everything which constituted the old one—dwelling house, personal presence, business relations, intent to remain—has been abandoned is a most significant fact.

The above principles are then applied.

(a) To a class of railroad laborers and contractors—

The cases of the railroad laborers and contractors should be disposed of by the following rules:

1. Where no other fact appears than that a person, otherwise qualified, came into the election district for the purpose of working on the railroad for an indefinite period, or until it should be completed, and voted at the election, it may or may not be true that his residence was in the district. His vote

having been accepted by the election officers, and the burden being on the other side to show that they erred, we are not warranted in deducting the vote.

2. Where, in addition, it appears that such voter had no dwelling house elsewhere, had his family with him, and himself considered the voting place as his home until his work on the railroad should be over, we consider his residence in the district affirmatively established.

3. On the other hand, where it appears that he elected to retain a home, or left a family or a dwelling place elsewhere, or any other like circumstances appear, negativing a residence in the voting precinct, the vote should be deducted from the candidate for whom it is proved to have been cast.

(b) As to certain students—

The principles applicable to the students are not dissimilar. The law, as it applies to this class of persons, is fully and admirably stated by the supreme court of Massachusetts, in an opinion given to the legislature, and reported in Fifth Metcalf, and which is cited with approbation in nearly all the subsequent discussions of the subject. Under the rule there laid down, the fact that the citizen came into the place where he claims a residence for the sole purpose of pursuing his studies at a school or college there situate, and has no design of remaining there after his studies terminate, is not necessarily inconsistent with a legal residence, or want of legal residence, in such place. This is to be determined by all the circumstances of each case. Among such circumstances the intent of the party, the existence or absence of other ties or interests elsewhere, the dwelling place of the parents, or, in the case of an orphan just of age, of such near friends as he had been accustomed to make his home with in his minority, would of course be of the highest importance. (See Putnam *v.* Johnson, 10 Mass., 488.)

(c) As to paupers—

The case of the paupers presents greater difficulty. Under the laws of Pennsylvania it is conceded they may be entitled to vote. In several contested election cases cited by the contestant it is stated by the committee that, in the absence of statute regulations on the subject, a pauper abiding in a public almshouse, locally situated in a different district from that where he dwells when he becomes a pauper, and by which he is supported, away from his original home, does not thereby change his residence, but is held constructively to remain at his old home. (Monroe *v.* Jackson, 2 Elect. Cas., 98; Covode *v.* Foster, Forty-first Congress; Taylor *v.* Reading, Forty-first Congress.)

And there are some strong reasons for this opinion. The pauper is under a species of confinement. He must submit to regulations imposed by others, and the place of his abode may be changed without his consent. Having few of the other elements which ordinarily make up a domicile, the element of choice also in his case almost wholly disappears. There are also serious reasons of expediency against permitting a class of persons who are necessarily so dependent upon the will of one public officer to vote in a town or district in whose concerns they have no interest. On the other hand, the pauper's right to vote is recognized by law. It can practically very seldom be exercised except in the near neighborhood of the almshouse. In the case of a person so poor and helpless as to expect to be a lifelong inmate of the poorhouse it is, in every sense in which the word can be used, really and truly his residence—his home. And it is important that these constitutional provisions as to suffrage should be carried out in their simplest and most natural sense, without the introduction of artificial or technical construction. It will, however, be unnecessary to determine this question, as will hereinafter appear.

In accordance with these conclusions the committee reported that the sitting Member, Mr. Meyers, was entitled to hold his seat, and a resolution to that effect was presented.

On March 12 [1] the report was debated and the resolution of the committee was agreed to without division.

887. The Alabama election case of Norris v. Handley in the Forty-second Congress.

The House can not be precluded from going behind the returns by the fact that a State law gives canvassers the right to reject votes for fraud or illegality.

[1] Journal, p. 495; Globe, p. 1610.

The decision of a board of canvassers as to the legality of votes, made in pursuance of State law, is regarded as prima facie correct.

It is an extraordinary and dangerous policy for a State law to lodge in canvassing officers the power to reject votes.

General testimony that voters were deceived by false tickets, etc., does not, in the absence of specific proof, justify the rejection of a poll.

General intimidation may not be proven solely by hearsay and general reputation without specific testimony of the voters.

A comparison of the votes cast with the population may be admitted as bearing on the question of intimidation.

On March 14, 1872[1] Mr. George W. McCrary, of Iowa, from the Committee of Elections, presented the report of the committee in the contested case of Norris *v.* Handley, of Alabama. The sitting Member had been returned by a certified majority of 3,142. The contestant alleged that this majority had been procured by fraud, violence, and intimidation.

At the outset the committee discuss a question as to the power of canvassing officers:

> The statute of Alabama, defining the powers and duties of the board of county canvassers or supervisors of elections, provides as follows:
>
> "That it shall be the duty of the board of supervisors of elections, upon good and sufficient evidence that fraud has been perpetrated or unlawful or wrongful means resorted to to prevent electors from freely and fearlessly casting their ballots, to reject such illegal or fraudulent votes cast at any such polling place, which rejection so made as aforesaid shall be final unless appeal is taken within ten days to the probate court." (Acts of 1868, p. 277, sec. 37.)
>
> Another section provides that this "board of supervisors of elections "shall be composed of the judge of probate, sheriff, and clerk of the circuit court in each county.
>
> In the opinion of the committee it is not competent for the legislature of a State to declare what shall or shall not be considered by the House of Representatives as evidence to show the actual votes cast in any district for a Member of Congress, much less to declare that the decision of a board of county canvassers, rejecting a given vote, shall stop the House from further inquiry. The fact, therefore, that no appeal was taken from the decision of the board of canvassers, rejecting the vote of Girard precinct, can not preclude the House from going behind the returns and considering the effect of the evidence presented.

The committee in another place comment again on this power lodged with the board of canvassers:

> Although this is an extraordinary, not to say a dangerous, power when placed in the hands of a board of this character, with such inadequate facilities for obtaining legal evidence and deciding upon questions of fraud, yet it is believed by the committee that the action of such a board, under the statute in question and in pursuance of the power conferred thereby, is to be regarded as prima facie Correct, and to be allowed to stand as valid until shown by evidence to be illegal or unjust.

Having thus discussed the powers of the canvassing officers under the law, the committee considers their action in rejecting certain returns from Macon County.

> The testimony of but one witness has been taken in relation to the rejection of these votes in Macon County, and that is the testimony of J. T. Menafee, judge of probate, and ex officio one of the board of canvassers. He testifies that the board spent several days in the work of revising the vote of the county.
>
> They had no evidence before them, however, except the registration list and the poll list. The former is shown to have been exceedingly imperfect and unreliable and can not be considered such

[1] Second session Forty-second Congress, House Report No. 33; Smith, p. 68.

"good and sufficient evidence" as the statute requires to justify the board in rejecting the votes in question.

The presumption is strongly in favor of the legality of a vote which has been received by the officers provided by law for that purpose; and the question is whether this presumption can be overcome by evidence so unsatisfactory as that upon which the board acted. The board were empowered by the statute we have quoted to obtain evidence of the alleged illegality and fraud practiced at the precincts named, and they were not limited to an examination of the registration list and the poll list. Since no evidence was taken it is our opinion that the decision of the officers of election at the various precincts, admitting the votes in question, is entitled to greater weight than the action of the board of canvassers in throwing them out. The former had the voters before them and the power to examine them as to their qualifications, while the latter, in our judgment, had no reliable evidence before them upon which to act.

The contestant had asked that 325 votes be stricken from sitting Member's return for Silver Run, Russell County, on the ground that 325 voters who would have voted for contestant were deceived into voting for sitting Member. In support of this several witnesses testified what they had heard or read in the newspapers; others gave their opinions as to the proportion of black and white people who voted. One witness swore that he saw tickets of sitting Member's party headed with the name of contestant's party and believed that the freedmen were deceived thereby. As to this the committee say:

When, however, an attempt is made to say, from the evidence before us, with anything like accuracy, how many voters, if any, were in this manner deceived, it will be found impossible. If the facts be as contestant claim, it was within his power to prove them by evidence, at least, reasonably satisfactory. He should have proven the number of votes cast, and for whom cast, by the returns, or a certified copy thereof. He should have shown the names of the persons who voted by the poll list, and he should have called the voters themselves, or some of them, to prove how many and who intended to vote for him and were defrauded by being furnished a ticket resembling the Republican ticket, but containing the name of the sitting Member as a candidate for Congress. As the evidence is presented to us, it would not justify any action unless it might possibly be the rejection of the vote of the precinct, which would vary the general result by only 140 votes. If there was a fraud perpetrated, and we are inclined to the opinion, from the scanty evidence before us, that there was, it is utterly impossible to determine how many votes contestant lost and his competitor gained thereby.

In accordance with the principles set forth as above, the committee purged the returns, but found that there still remained a majority of nearly 2,000 votes for sitting Member.

There remained, then, a question as to violence and intimidation, alleged by contestant, which became the material question of the case. The committee say at the outset:

Upon this subject it is to be observed, in the first place, that the evidence is exceedingly vague and unsatisfactory. It would seem that if over two thousand electors were deterred from voting by violence, threats, or intimidation, some of these electors could be found to come forward and swear to the fact. Your committee think that it would establish a most dangerous precedent to allow a fact of this character, so easily established by the direct and positive testimony of so many witnesses, to be proven solely by hearsay and general reputation. We have not forgotten nor overlooked the fact that the same state of things which would make men afraid to vote for a particular party might also make it difficult to secure testimony in behalf of that party. But in many parts of the district where testimony, was taken there is no pretense that witnesses were intimidated; and, besides, if the contestant had shown to the satisfaction of the House that witnesses needed the protection of the Federal Government in order to be safe in testifying fully and freely, that protection would have been afforded at any cost. In the volume of testimony taken to prove the fact of general and wide-spread intimidation, not one

witness is found who testifies that he himself was prevented from voting by reason of intimidation. They all testify to what they have heard others say, to the common rumor, and general reputation. There can be no doubt that testimony of this character ought to be held insufficient of itself to establish the fact of intimidation. It ought at least to be corroborated by other facts, such as the unexplained failure of large numbers of those alleged to have been intimidated, to vote, before the House could safely act upon it.

Nevertheless the committee considered the evidence, and determined that it fell short of sustaining the contestant's allegations. It appeared that there was no phenomenal suppression of the vote in the district, since a comparison of the vote with the population, tested in the light of the usual ratio of voters to population, showed that the total vote fell short of what might have been expected by only 581 persons. This effectually disproved, taken with the weakness of the direct testimony, the contention that 2,000 or more voters were deterred from voting. In conclusion the committee say:

It must not be supposed that the committee have overlooked or failed to consider the fact that gross wrongs and outrages are shown by the evidence to have been inflicted upon some of the freedmen in the district in question. Threats were undoubtedly made against this class of voters of personal injury or dismissal from employment in case they voted the Republican ticket, and these threats were carried out after the election, in several instances at least, in the brutal whipping of a number of freedmen in the night time by disguised men, and by the dismissal of others from employment. Several churches, occupied by freedmen for worship, were prior to the election burned down. Several cases of apparently unprovoked murder are in proof, and several cases of shooting and wounding. A white woman, who had been a teacher among the freedmen, was compelled to flee in the night time from her home, and a freedman who was a preacher among his people was at the same time brutally murdered. Other cases similar in character are in proof, and it does not appear that the perpetrators of a single one of these outrages have ever been tried or punished, or that any vigorous or determined effort has been made to apprehend or punish any of the criminals. These crimes were well calculated to alarm and intimidate the colored people, and it must be said to their great credit that, in spite of all the dangers and difficulties, the great body of them did in fact exercise their right to vote, many of them traveling 10, 15, and even 20 miles from their homes for that purpose. These outrages, therefore, do not invalidate the election, because they did not intimidate the freedmen. We call attention to them now, to denounce them as most infamous, and to show that they have not escaped our attention.

The committee therefore, in view of the conclusions reached by them, recommended a resolution declaring:

Resolved, That W. A. Handley is entitled to retain his seat in this House as Representative from the Third district of Alabama.

On April 4 [1] this resolution, after an explanatory speech by Mr. McCrary, was agreed to without division.

888. The Indiana election case of Gooding v. Wilson, in the Forty-second Congress.

Official and formal counts should be set aside on subsequent, informal, and unofficial counts only when the ballots are inviolably kept and the subsequent count is safeguarded.

A vote being admitted should not be rejected on evidence that merely throws a doubt on it.

Should the fact that judges of election are not freeholders as required by law impair their acts as de facto officers?

[1] Journal, p. 631; Globe, p. 2172.

Does the absence from the returns of certificates prescribed by law vitiate an election of which the result may be known from other legal returns?

As to the sufficiency of ballots bearing only the last name of the candidate.

On April 9, 1872,[1] Mr. Aaron F. Perry, of Ohio, from the Committee on Elections, presented the report of the majority of the committee in the Indiana contested case of Gooding *v.* Wilson. The sitting Member had been returned by an official majority of 4 votes. Contestant assailed this result on two grounds: The correctness of the count and the legality of certain votes.

(1) As to the correctness of the count, the majority report says:

> The proof of these mistakes, all except one, consists in evidence of subsequent informal and unofficial counts, made at a considerable time after the election; and as to the one exception, the proof, if such it can be called, is even less satisfactory.
>
> On examination of precedents, it does not appear that this House favors the setting aside of official and formal counts, made with all the safeguards required by law, on evidence only of subsequent informal and unofficial counts, without such safeguards. No instance was cited at the hearing where the person entitled by the official count was deprived of his seat by a subsequent unofficial count. On principle it would seem that if such a thing were, in the absence of fraud in the official count, in any case admissible, it should be permitted only when the ballot boxes had been so kept as to be conclusive of the identity of the ballots, and when the subsequent count was made with safeguards equivalent to those provided by law. In the absence of either of these conditions, the proof, as mere matter of fact and without reference to statutory rules, would be less reliable and therefore insufficient.
>
> In the present case both of these conditions are wanting. The ballot boxes were not kept in a way to be conclusive of the identity of the ballots, nor were the subsequent counts conducted in a way to entitle them to credit as against the official count.
>
> The statute of Indiana requires at each poll, in addition to other officers, an officer called an inspector, who is required to preserve the ballots, one poll book, and a tally paper six months after the election, except when such election is contested; then they shall be preserved, subject to the order of any court trying such contest, until the same is determined. The official count appears to have been a careful one. The three unofficial counts differed each from the other, and all differed from the official one. Neither of the unofficial counts was made under circumstances to command confidence as against the official count.

In the debate[2] Mr. George W. McCrary, of Iowa, elaborated this more fully:

> I do say that there is great danger in setting aside the official count and substituting for it an unofficial count in any case. * * * In the first place, if the law provides an officer whose duty it is to hold possession of the ballot boxes and the ballots themselves after the polls have been closed, I think that no recount should ever be allowed unless it appear that the ballot boxes and ballots had remained in the custody of that officer during the interval between the election and the recount. That ought always to be one of the prerequisites, and without it there can be neither certainty nor safety. * * * It must appear that the ballots have been securely kept, that they have not been exposed, and that there has been no opportunity to tamper with them. This ought to appear affirmatively. * * * If the law provides the mode of preserving the ballots, and of having them recounted, that mode should in every case be strictly followed. * * * Now, in the State of Indiana there is such a law. * * * Now, Mr. Speaker, this law was violated in the case of every one of these recounts. They should have subpoenaed before the court trying the contest in this case the inspector of the election, who was the legal custodian of the ballot box, and should have shown by his testimony that the ballot box had remained in his possession, and had been so securely and carefully kept that it could not have been

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[1] Second session Forty-second Congress, House Report No. 41; Smith, p. 79.[2] Globe, p. 2655.

tampered with. The identity of the ballots must always be shown by the legal custodian of them. * * * The House can not depend upon a recount made by any outsider who goes surreptitiously or otherwise and gets possession of the ballot box. It must be done in the presence of the court or of an officer. * * * In this case neither of the things has been done.

The minority views, presented by Mr.,W. E. Arthur, of Kentucky, did not argue this point at length, but in the debate,[1] Mr. Arthur went into the precedents of the House at length to justify the recounts. In reply it was asserted that while committee reports had sometimes justified an unofficial count, the House had never acted upon the result of such recount.[2]

There was also a difference, of opinion as to the sufficiency of the testimony on the custody of the ballots and the carefulness of the unofficial recount.

A second question related to legality of certain votes cast for sitting Member. The majority of the committee thus dispose of this point:

Most of the questions were questions of residence or nonresidence. Evidence which might have been sufficient to put the voter to his explanation, if challenged at the polls, is not deemed sufficient to prove a vote illegal after it has been admitted. Nor has the mere statement by a witness that a voter was or was not a resident, without giving facts to justify his opinion, been considered sufficient to throw out such a vote. The testimony shows a number of instances where a witness would state positively the residence or nonresidence of a voter on some theory of his own, or some mistake of fact, when other testimony would show with entire clearness that the vote was legal. The adoption of laxer rules of evidence would affect both sides, and change the result very little, if at all. After a vote has been admitted, something more is required to prove it illegal than to throw doubt upon it. There ought to be proof which, weighed by the ordinary rules of evidence, satisfies and convinces the mind that a mistake has been made, and which the House can rest upon as a safe precedent for like cases. In regard to most of the alleged illegal votes on both sides, the proof, however plausible, falls short of the requirement.

In accordance with the principles set forth in its report, the majority of the committee find for sitting Member a clear majority of 8 votes.

This did not render it necessary for the majority of the committee to investigate certain objections made by the sitting Member to returns and votes affecting the poll of the contestant.

The minority, as part of their argument—

(1) The minority views say:

Contestee has alleged and proved that some one or more of the acting judges of election at the following-named precincts were not at the time freeholders; that they were therefore ineligible; and that the entire vote and return of such precincts must be rejected, to wit: [Here follows an enumeration of 20 precincts.]

And contestee has insisted that the question of ineligibility involved in these specifications is decisive of the case in his favor. By excluding the entire vote of the legal voters of those 20 precincts he claims his majority will then be more than 300 over contestant, even if "other matters attempted to be proven for contestant be taken in his favor."

The officers all acted under appointment; all acted in good faith; were all sworn; no objection at the time was raised; no other person claimed the position, and the entire people acquiesced in their official acts.

The law of Indiana required that every judge of election should be a freeholder.

Under the circumstances above recited, if a person acted as a judge of election who at the time was ineligible to that position, for want of the qualification required by the statute, must the election of that precinct for that cause be held void, and the votes and returns be set aside and rejected?

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[1] Globe, pp. 2657, 2658.

[2] Speech of Mr. George F. Hoar, of Massachusetts, Globe, p. 2667.

Contestee says yes, and appeals to the law and the precedents. We say no; and we go further, and say that the great preponderance of both law and precedent is on the side of the negative of that question. The result of a very patient investigation of the election cases of this House is the conclusion on our part that the rule is substantially that—

Ineligibility or want of statutory qualification on the part of an officer of election, otherwise capable, and acting in good faith, and with the acquiescence of the voting public, will not, of itself, vitiate or impair the poll or return. (Barnes *v.* Adams, Dig. El. C., 760; Eggleston *v.* Strader, ibid., 897.)

(3) As to the certificate of a certain precinct:

1. Contestee alleged and proved that the law of the State of Indiana required the board of judges of the election to make out an attested certificate in written words of the number of votes each person received, etc., and return the same, together with the list of voters, and one of the tally papers, to the county board; and that the board of judges of West precinct, township of Hendricks, county of Shelby, failed to return such certificate. The proof shows that this failure was an innocent inadvertence. The poll lists, tally papers, and ballots were all properly returned, and are unimpeached.

Contestee insists that the omission of that certificate vitiates that poll, and that the returns and votes of that precinct should be rejected from the count. And he insists upon it with great confidence, and cites authorities in support of the position, all of which we have carefully examined.

We respectfully submit that his authorities do not sustain his position in this case. And these, when carefully considered, along with those numerous other authorities directly in point, to which he has not referred, have brought us to a conclusion directly the opposite of that insisted on by contestee.

Is such a certificate indispensable? We say it is not, and so say the authorities. The rule as established by the courts and by the precedents of the House is substantially as follows:

In the absence of the certificate prescribed by law, recourse will be had to the poll lists, the ballots, or other returns; and if from these, or any of them, the result can be ascertained, and there is no taint of fraud, effect will be given to the result precisely as though the certificate was present. (Chrisman *v.* Anderson, 2 El. C., 331–334; Blair *v.* Barrett, 2 El. C., 315.)

(4) As to the sufficiency of a ballot:

At the precinct in the township of Brandywine, county of Shelby, two ballots were counted for contestee which had on them for Congress merely the letters "Wilson." On their face the ballots were ambiguous and unintelligible. The defect was curable by extrinsic evidence to explain and apply them; it has not been offered, and the defect is fatal to both ballots, and they are deducted from contestee's vote in this count.

The minority, in accordance with their conclusion, found for contestant a majority of 17 votes, and accordingly recommended the following as a substitute for the resolution of the majority:

Resolved, That Jeremiah M. Wilson was not duly elected and is not entitled to the seat in the Forty-second Congress from the Fourth district of the State of Indiana.

Resolved, That David S. Gooding was duly elected and is entitled to the seat in the Forty-second Congress from the Fourth district of the State of Indiana, and should be admitted to his seat.

On April 22[1] the report was debated at length, and the proposition of the minority was negatived, yeas 64, nays 105. Then the majority resolution was agreed to without division, and sitting Member retained the seat.

889. The election case of Burleigh and Spink v. Armstrong, from Dakota Territory, in the Forty-second Congress.

The House rejected votes cast at a precinct on an Indian reservation which was by law excluded from the domain of a Territory.

The House counted votes cast at a precinct within a military reservation

[1] Journal, pp. 723, 724; Globe, pp. 2654–2670.

tion of which the title and jurisdiction were temporarily with the United States by Executive order.

On April 12, 1872,[1] Mr. M. M. Merrick, of Maryland, from the Committee on Elections, submitted the report of the committee in the case of Burleigh and Spink *v.* Armstrong, of Dakota Territory. The official returns gave Spink 1,023 votes, Burleigh 1,102, and Armstrong 1,198. Accordingly the certificate was issued to Mr. Armstrong, and he was sworn in.

The first question which arose was as to the legality of certain votes cast upon United States military reservations:

> By the law organizing the Territory of Dakota (12 Stat. L., p. 239) it is provided that the Territory of Dakota shall not include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Dakota until said tribe shall signify their assent to the President of the United States to be included in said Territory, or to affect the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent for the Government to make if the act had been passed. It is quite apparent from the terms of this organic act that it was not competent for the authorities of the Territory to hold an election or exercise any other jurisdictional act within any part of the Indian reservations embraced within the exterior bounds of the Territory, and the proof establishing the fact that the Buffalo, or Fort Thompson, precinct was established, and the election there held within an existing Indian reservation, the committee have excluded all the votes cast there from their computation. But with regard to the election held within the military reservations of Fort Sully and Fort Randall (or the Ellis precinct), the committee have reached the conclusion that there is nothing in the terms of the organic act nor in the general policy of the law forbidding an election to be held at such places. The contestants have insisted that the rule which disqualifies persons from voting within any State, who reside within forts or other territory to which the title and jurisdiction has been ceded by the State to the Federal Government, applies to the military reservations which have been designated by the Executive within the Territories belonging to the United States. But forasmuch as there is no conflict of sovereignty between the Government and the Territory, and the latter holds all its jurisdiction in subordination to the controlling power of Congress, and the military reservations are not permanently severed from the body of the public lands, but are simply set apart and withheld from private ownership by an Executive order to the Commissioner of the Land Office, and may be and often are restored to the common stock of the public domain, when the occasion for their temporary occupancy has ceased, at the pleasure of Congress, and which requires no concurrent act of any State authority to give it efficacy, the residents upon such reservations, although abiding thereon by the mere sufferance of the United States authorities, do not in any just sense cease to be inhabitants or residents of the Territory within which such military reserve may be situated. Such residents seem to the committee to have that same general interest in the welfare of the community in which they live and the same right to vote there as any of the workmen at the arsenal or navy-yard in Washington City, who may be allowed to sojourn within their limits, have to vote at elections within the District of Columbia for officers of its Territorial government, or for a Delegate in Congress from that District.

As to charges of illegal voting by Indians and nonresidents, the committee found evidence of great irregularities, but the testimony failed to show that one candidate had profited more than another by them.

Therefore the committee reported a resolution confirming the title of sitting Delegate to the seat.

On January 22, 1873,[2] the resolution reported by the committee was agreed to without division.

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[1] Second session Forty-second Congress, House Report No. 43; Smith, p. 89.

[2] Third session Forty-second Congress, Journal, p. 230; Globe, p. 794.

890. The Florida election case of Niblack v. Walls in the Forty-second Congress.

Instance wherein the time of taking testimony in an election case was twice extended.

A return impeached by the evidence of an election officer is rejected as worthless and is not received for any purpose.

Returns impeached on their face and forwarded irregularly were not, counted by the House until explained by evidence.

The law requiring a return to be signed by three officers, at least two must sign to make the certificate evidence.

On January 21, 1873,[1] Mr. George W. McCrary, of Iowa, from the Committee of Elections, submitted the report in the Florida case of Niblack *v.* Walls. The State canvassers had so certified the result as to show a majority of 629 for the sitting Member, but had reached this result by rejecting the returns from 8 counties, where the returns had given contestant a majority of 821 votes. By admissions and waivers the returns from 5 of these counties were admitted before the committee, so there were left in issue the counties of Lafayette, Manatee, and Brevard, where the returns gave contestant 335 votes and sitting Member 3 votes.

The time for taking testimony was twice extended—once on February 9, 1872,[2] so as "to take testimony within the period of sixty days after the passage of this act," and again on May 29, 1872,[3] in accordance with the resolution recited later.

(1) The first question which the committee considered arose from the returns of Lafayette County, which gave 152 votes for contestant and none for sitting Member. The county canvassers had rejected three of the precincts of the county and counted but two. Of the returns from this county the report says:

> This return is rendered worthless by the testimony of William D. Sears, sheriff of LaFayette County, and a member of the board of county canvassers.
>
> This witness swears that at New Troy precinct, which is one of the two precincts counted, there were at least 42 votes cast and counted out for the sitting Member; a fact he knows from having been present at the counting of the vote, and yet by the return every vote is given to contestant.
>
> The same facts, in substance, are shown by the evidence of Redden B. Hill, another member of the board of canvassers. (See pp. 11 to 14, inclusive, of evidence.)
>
> Other objections are raised to this return, but they need not be considered, for this testimony successfully impeaches it, and shows that it is tainted with fraud, and must therefore be rejected.
>
> We are left, then, to the inquiry, What votes have been proven by evidence outside of this return?
>
> Upon looking into the evidence upon this point, we find that there is no proof whatever as to the actual state of the vote at the precincts of New Troy and Summerville, which are the two which purport to have been included in said return, except the proof, already mentioned, that the sitting Member received at New Troy at least 42 votes. The vote of these two precincts, in which contestant claims 152 votes, must therefore be rejected, because the return is shown to be void for fraud, and no secondary evidence is offered to take its place.
>
> It is suggested by counsel that we might allow the 152 votes which, according to this return, were cast for contestant, and also allow the sitting Member the 42 votes which are shown to have been cast for him and not returned. But the committee hold that, it having been shown that the return is fraudulent and false in a matter so material as the suppression altogether of the whole of the sitting Member's vote, it can not be received for any purpose.

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[1] Third session Forty-second Congress, House Report No. 41; Smith, P. 101.

[2] Second session Forty-second Congress . Journal, p. 312; Globe, p. 929.

[3] Journal, p. 1008; Globe, p. 3984.

(2) As to Manatee County:

The returns from this county were thrown out for the following reasons:

First. Because the returns made by the county board, which by the statute are required to be duplicates, are not such. One return states that the board met and canvassed the votes "on the 29th day of November, 1870," while the other states that the board met and canvassed the vote "on the 1st day of December, 1870," and the former is dated November 29 and the latter December 1.

Second. Because the vote of said county was not canvassed and the returns made out and forwarded to the State officers authorized to receive them within twenty days from the day of election, as required by statute.

Third. Because said returns were not forwarded by mail, addressed to the secretary of state and governor, as expressly required by statute, but were in fact sent in an envelope addressed to contestant, by a private messenger, and delivered to, and opened by, one W. H. Pearce, of Polk County, who afterwards placed it in the hands of the board.

These objections were considered by your committee at the last session of Congress, and it was considered by the committee very desirable to obtain more reliable evidence as to the actual vote cast in this county.

It was thought that it would be unsafe to establish a precedent of accepting as evidence a return which, instead of being transmitted from the county to the State board by mail, as the law requires, was sent by the hand of a private individual, and by him delivered to one of the candidates, to be by him delivered to the State board.

Accordingly, your committee recommended and the House, on the 29th of May last, adopted the following resolution:

"*Resolved,* That the contested-election case of Niblack *v.* Walls be continued until the next session of this Congress, and that in the meantime the parties have leave to take further evidence as to what was the true vote cast in the counties of Brevard and Manatee, and Yellow Bluff precinct, in Duval County, and also as to whether the election in said counties and in said precinct was conducted fairly and according to law."

Under this resolution the sitting Member has taken no evidence, but the contestant has called and examined E. E. Mizell, county judge, and John F. Bartholf, clerk of Manatee County, and who were two of the three canvassing officers for that county.

These witnesses each identify a paper shown them as a true copy of the return as made out by them as canvassing officers.

The copy is identical with the return which was rejected by the State board, the difference of one day between the dates of the two papers filed as duplicates being considered immaterial.

This evidence seems to be sufficient to show that the returns from this county were not tampered with, and that, notwithstanding the irregular and illegal mode adopted for their transmission from the county to the State board, they are, in fact, correct and reliable.

This return is also certified (as well as sworn to) by the clerk of the county, who, by the statute of that State, is the legal custodian of the original record of the canvass.

(3) As to the signing of the returns of Brevard County:

The statute of Florida requires that the returns shall be signed by the judge of the county court, the clerk of the circuit court, and one justice of the peace.

The return from this county relied upon as proof of the vote of the county is signed by but one of these three officers, the county judge.

The committee are of opinion that where the law requires the certificate to be made by three officers, a majority at least must sign to make the certificate evidence.

This is not a merely technical rule; it is substantial, because the refusal or failure of a majority of the board to sign the return raises a presumption that it is not correct.

It is fair to infer that if it had been free from objection a majority of the board at least would have signed it.

It is enough, however, to say that the law requires the certificate of the three officers, and all the authorities agree that at least two must certify or the certificate is inadmissible.

Therefore, as contestant did not prove the vote, the committee declined to, count the votes alleged to have been cast.

891. The case of Niblack v. Walls, continued.

The rejection of an entire poll for intimidation on behalf of contestant may add to the injury if the return gave contestee a majority.

Evidence showing that a voter's due effort to vote was thwarted by intimidation on the vote should be counted as if cast.

Evidence tending to show intimidation may be disproved by the ratio of votes cast to population.

To justify the rejection of a poll for intimidation, the evidence should be specific, not general.

Disturbance at the polls does not in the absence of specific evidence as to the effect of intimidation justify rejection of the poll.

Instance of the seating of a contestant belonging to the party in minority in the House.

(4) A question as to intimidation arose as to several precincts. The evidence convinced the committee that there was an organized effort of contestant's friends at Quincy precinct, and that it was partially successful, to intimidate voters who proposed to vote for sitting Member. This intimidation was exercised at the polls on the day of election. The contestant insisted that the only remedy was the rejection of the poll. The report says, however:

> This remedy in the present case would only add to the injury, inasmuch as the sitting Member received a majority, and this shows the necessity of some other remedy.
>
> This is to be found in the rule, which is well settled, that where a legal voter offers to vote for a particular candidate, and uses due diligence in endeavoring to do so, and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote should be counted. The principle is that the offer to vote is equivalent to voting.

In two other precincts there was some evidence tending to show intimidation, but as from the ratio of votes cast to population, no unusual decrease of vote appeared, the allegations were disproved. At Lake City there was some shooting the night before election, but no actual violence at the polls. The committee say:

> It is thought by some of the witnesses that a number of voters, principally colored men, were afraid to go to the polls on election day because of these disturbances of the previous night; but as to the number of persons thus deterred, and as to what, if any, efforts they made to exercise their right, the evidence is wholly unsatisfactory. One witness puts the number at "several," while another estimates it at 40. The number who were intimidated (with or without sufficient reason) was evidently not so great as to justify the rejection of the entire poll. By the use of proper diligence the sitting Member could have called the voters themselves, or some of them, and could have thus shown their number and the facts as to their intimidation and offer and efforts to vote.

In Marianna there were disturbances, but the committee conclude:

> There were disturbances at the polls in Marianna, where three polls were opened, and where the whole county voted. One or two personal collisions occurred, some harsh language was used, and some persons were doubtless frightened away; but as to the number who left, and as to whether they left without voting, and as to the candidate for whom those who left without voting intended to vote, the evidence is wholly unsatisfactory. Several witnesses are called on the part of the sitting Member, who testify that, in their opinion, from 100 to 200 colored persons were deterred from voting; but this is a mere conjecture, and the census, already referred to, shows that it is wholly incorrect. By the census report of 1870, it appears that at the time the census was taken (which was but a short time prior to the election) there were in the county of Jackson 1,879 male citizens over the age of 21 years, and the returns before us show that 1,752 votes were actually cast, leaving only 127 voters who failed, from all causes,

to exercise their right. This is an exceedingly small percentage, being less than 10 per cent, and shows conclusively that the allegation that some 400 voters were intimidated, and thereby deprived of the privilege of voting, is not true. On the contrary, we must conclude, in view of the unusually large vote polled, that nothing can be deducted from the vote returned for the contestant on the ground of intimidation in this county.

In conclusion, in accordance with the principles set forth, the committee found a majority of 137 for Mr. Niblack, the contestant, and recommended the usual resolutions declaring sitting Member not elected, and seating contestant.

The report was considered in the House on January 29, 1873,[1] and the resolutions of the committee were agreed to without division.

Mr. Niblack then appeared and took the oath.[2]

892. The Arkansas election case of Gause v. Hodges, in the Forty-third Congress.

A return shown by testimony of the returning officer to have been made up on data rendered insufficient by theft was rejected.

The fact that a return has been accepted and acted on by State authorities does not cure its inherent defects.

Fraud will not be presumed simply from an unusual ratio between votes and population.

At the organization of the House on December 1, 1873, the Clerk did not enroll any Representative from the First district of Arkansas.[3] On February 4, 1874,[4] the House, without division, seated Mr. Asa Hodges as having the prima facie title, leaving open the right to contest.

On February 24, 1875,[5] Mr. Austin F. Pike, of New Hampshire, submitted the report of the majority of the committee on the merits of the contest of Gause v. Hodges. Mr. Edward Crossland, of Kentucky, submitted minority views. The majority and minority considered, besides questions of fact, certain questions of law.

(1) The majority reject the returns of Poinsett County, saying:

The clerk who made the certificate rebuts by his testimony (Record, pp. 342, 343) any presumption of the validity of the vote which his certificate might raise. The returns, poll books, tally sheets, and votes were all stolen from his office. He never made an abstract of the votes as required by the law of the State (acts of Arkansas, 1868, sec. 39, p. 322), and of course never made a copy of it and sent the same to the secretary of state, as required. (Ibid., p. 323, sec. 42.) He only sent a certificate founded on the affidavits of the judges of part of the voting precincts in the county. This away of making a return is substantially defective, and such a certificate can furnish no evidence of the correctness of its contents. No precinct returns and no other evidence was before the committee.

The minority say:

There are five townships in this county. The election was fairly held in all of them. The returns were made to the clerk and were stolen from his office on the Friday night after the election. The judges made certificates under oath in each precinct. These were presented to the clerk, and he made the following abstract and certificate.

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[1] Journal, p. 269; Globe, pp. 949–952.

[2] It should be noticed that contestant belonged to the party in the minority in the House and the contestee to the majority party.

[3] See case of Gunter v. Wilshire. (Section 37 of Volume I.)

[4] First session Forty-third Congress, Journal, p. 1192; Record, p. 375.

[5] Second session Forty-third Congress, House Report No. 264; Smith, p. 291; Rowell's Digest, p. 299.

Having quoted the abstract and certificate, the minority continue:

This was forwarded to the secretary of state, and he accepted it, acted on it, and counted the votes for Mr. Gause. The committee changed their opinion of the conclusive effect of a certificate that has been accepted and acted on by the State authorities" and refuse to count the vote of this county. The testimony on which the certificate was based was the best attainable after the returns were stolen from the clerk's office, was legally secondary evidence, and the committee ought to have followed the "State authorities" and given Mr. Gause the vote of this county.

(2) As to Crittenden County the following ruling is made in the majority report:

It is urged that the percentage of the voting population in this county is too large as compared with other counties, and therefore ask that fraud may be presumed. This can not furnish any reliable test, as it is well known that the proportion of the voting population in different counties and localities, as well as in States, is widely different.

The minority say:

In conclusion, we invite attention to the evidence in regard to the election in the county of Crittenden. By the census of 1870 the population of this county was 3,831 souls; in 1872 there were given 2,183 votes, of which Mr. Hodges claimed to have received 1,889. This is certainly a very uncommon ratio of voters to the population, strongly indicating fraud.

893. The case of Gause v. Hodges, continued.

Objection to the legality of the constitution of an election district not raised in the notice of contest was not considered.

An election district being established illegally, but all parties participating in the election in good faith, is considered as having a de facto existence.

The right to vote not depending on registration, and returns showing prima facie that an election, was duly held without registration, the Elections Committee counted the votes.

(3) Contestant objected that the court which, under the law, divided the county of Lincoln into election districts had no authority to act, as a quorum was not present. There seems to be no doubt that less than the legal quorum acted; but the report shows that contestant did not raise the objection in his notice of contest, and so the right to object was not open. Furthermore, the majority say:

Even if it were, it ought not to prevail. This order of the court establishing these precincts seems to have been acted on, on all hands, as a valid order. The clerk of the court acted on it and made the abstract required by law. The precincts were duly registered, officers of the election duly appointed, and an election duly held, and the returns thereof duly made. All the votes polled in these precincts for State, county, district, and municipal officers have been counted. We thin the vote for Congressmen ought not to be an exception, especially when upon the pleadings no such issue was raised. These precincts must be regarded as established under color of law and as having a de facto existence.

(4) In Monroe County a question arose as to counting votes from precincts where registration had not been completed under an order of the governor setting aside one registration and ordering a new one. The report says:

The vote of only three precincts—Troy, Pecan, and Monroe—is regarded as valid by the secretary of state. A registration was commenced; it was set aside on the ground of the alleged disturbed and violent condition of the people, and a new one ordered. Only the three precincts above named were registered under this new order. The vote of these is the only one counted by General Hadley.

The clerk of this county (p. 286 of the Record) makes an abstract of returns from the townships of Scott, Chickasaba, and Canadian, giving Gause 239 and Hodges 2.

The question presented by the pleadings and evidence is whether only these precincts are entitled to have their votes counted.

By the registration law of Arkansas (Laws of 1868, see. 23, p. 59) it is provided that—

"In any county of this State where, for any reason, a proper registration has not been made previous to any general election, the governor, when notified of the fact, shall cause a new registration to be made."

And by section 39 of chapter 73, page 222, Laws of 1868, it is provided that—

"On the fifth day after the election, * * * or sooner if all the returns have been received, the clerk of the county court shall proceed to open and compare the several election returns which have been made to his office, shall make abstracts of the votes given for the several candidates for each office on separate sheets of paper. Such abstracts, being signed by the clerk, shall be deposited in the office of the clerk, there to remain."

By section 41 of the same act the clerk is made guilty of a misdemeanor if he refuse to count the vote on any poll book returned to him.

Poll books and returns were returned for the rejected townships as well as for those counted. (See pp. 279 and 286 of Record.) It appears that there was not time to complete the new registration in all the county.

The authority of the election officers appointed by the first board of registration is not set aside by the mere order for a new registration, and their power ought to continue at least until successors are appointed by the new board. The right of a man to vote does not depend upon his registration. It does not follow, then, that there might not have been a legal election in the precincts not registered anew. The clerk's certificate is prima facie evidence that there were such elections, and the committee decide to count all the votes of this county.

894. The case of Gause v. Hodges, continued.

The return of a canvassing officer is given prima facie effect although he may have omitted from it the votes of certain precincts.

Returns made by volunteer officers at "outside polls" of votes cast by persons of unknown qualifications were rejected.

(5) As to the vote of Van Buren County, the minority views present the following statement of fact:

The device by which Gause was deprived of the vote of this county is novel and interesting. There are 19 precincts in this county. The actual vote cast, returned, and counted by the clerk was as follows: Hodges, 208; Gause, 527; whole vote, 735; majority for Gause, 319. The returns from all the precincts, except Mountain, which contained only 3 votes, were duly returned to the clerk, counted by him, and abstract made as required by law; but before he mailed it to the secretary of state he suppressed it and made another, in "obedience to instructions received from the attorney-general." Under these instructions he suppressed the vote of 11 precincts, counted only 7, giving Mr. Hodges 131 and Mr. Gause 141, making in the whole county 272 votes.

The "instructions" purported to give a rule as to votes admissible under the law. The minority say:

Admit that the instructions contained a correct interpretation of the law, the clerk does not swear that he made the alteration because he discovered irregularities in the manner the election was conducted, but made it solely because he was instructed to do it. By what data, under what evidence, he assumed that the voters of certain precincts ought to be disfranchised he does not tell us. But we insist that the clerk had no power to adjudicate upon the subject of irregularities in the precincts. All that he was authorized to do was to receive and count the votes as they were returned from the precincts and make the "abstract;" his powers began and ended with the performance of these duties. He had no authority to examine, hear, or act on any other evidence than that contained in the returns from the precincts. The majority of the committee carefully abstain from any expression of approbation in regard to what this clerk did, and insist only that he having made this second abstract and forwarded it to the governor, and the "governor and secretary of state having acted on it," it becomes the only legal evidence of the vote of the county.

The majority of the committee contended that the paper actually transmitted by the clerk, and not the other paper relied on by the contestant, was the prima facie evidence of the vote of the county. The majority say:

The committee think that the only official proof furnished by this clerk is the paper acted on by the secretary of state and the governor.

It was upon the contestant to show what the vote was in the other precinct in this county, he claiming the benefit of it. The paper he relies on does not show it for the reasons above stated.

Here, then, are certain precincts which were not returned, and which might be set up by competent proof if they were legal polls. Neither copies of the election returns or the depositions of the election officers are produced. Whatever papers were sent the clerk were rejected by him as returns, and there is no evidence what they were.

A similar question arose as to Conway County, the minority making violent objection to the decision of the majority.

(6) In Independence, Jefferson, and Woodruff counties the question of "outside polls 2" arose. The majority say:

In each of these counties, at one or more voting places, persons considering that they had a right to vote, which right had been denied them at the regular polls, and perhaps others who simply desired to vote, organized what has been called "outside polls." The persons assuming to act as officers at these outside polls made returns to the clerk of the county, and the contestant claims that the votes thus returned shall be counted.

The committee is unable to find any authority for such a proceeding in either State or national law.

The national law provides a way in the election of Congressmen and Presidential electors by which persons having the right to vote can make that right available to them when it is denied them at the regular poll. These persons did not think proper to pursue this course. They resorted to this new scheme outside the law, subversive of the purity of elections and revolutionary in the extreme.

It can not be urged that the persons making these returns are election officers. Their certificate, then, can have no legal force and can furnish no evidence that what they certify to is correct.

There is no evidence that a single one of these participants at the outside voting had any legal right to vote, and the whole claim for the allowing of the vote rests simply upon the certificate of these self-constituted and illegal officials.

The minority questioned the facts assumed by the majority, and contended that the outside polls were the legal polls.

(7) In Greene County the majority held to the following decision:

The registration was set aside in this county and no new one made. There were elections held in many or all of the precincts of the county under the registration rejected by the governor and by the officers appointed by that board of registration. The clerk of the county refused to receive the returns brought to him, and he never made any official abstract of them. He says they were "stolen."

The governor has authority to set aside a registration, but the committee does not think that a fair construction of this law can give the governor the authority to disfranchise a county by setting aside the registration.

By section 23 the governor was authorized to cause a new registration to be made only in the same manner in which the old registration was made. He was not authorized to set aside the old registration, except by making a new one. And the new one must be "governed in all respects as other regular registrations under this act" (sec. 23)—that is to say, the new precinct registration must be made between the 60th and 10th days preceding the election, and the new review must be made between the 16th and 10th days preceding the election.

In conclusion, the majority found a majority of 1,143 votes for Mr. Hodges, the sitting Member, and presented resolutions confirming his title to the seat.

The minority found a majority of 799 for Mr. Gause.

In the few remaining days of the session the report was not acted on.

895. The Georgia election case of Sloan v. Rawls, in the Forty-third Congress.

A doubt as to whether or not an election precinct existed or had been abolished did not vitiate a vote duly cast and returned.

An election being properly conducted, the House counted a return made by a portion of the election officers, the others having declined to act.

On February 27, 1874,[1] Mr. Ira B. Hyde, of Missouri, submitted the report of the majority of the committee in the Georgia case of Sloan v. Rawls. The officially tabulated vote of the district had given Mr. Sloan 6,979 votes and Mr. Rawls 8,319. But an abstract of votes actually cast, as made up by the secretary of state, showed a total of 8,350 votes for Mr. Sloan and 8,338 votes for Mr. Rawls.

The majority of the committee, besides correcting some errors and deciding certain questions of fact, joins issue on certain questions of law.

(1) The law of Georgia provided—

SECTION 1312. Such election shall be held at the court-houses of the respective counties, and if no court-house, at some place within the limits of the county site, and at the several election precincts thereof, if any, established or to be established. Said precincts must not exceed one in each militia district. Such precincts are established, changed, or abolished by the justices of the inferior court, descriptions of which must be entered on their minutes at the time.

At three precincts in Chatham County, where Sloan received 1,239 votes and Rawls 2, the returns were rejected. The majority of the committee say that these precincts should be counted.

There is no evidence tending to show that the election at these precincts was not fairly and legally conducted and the returns made and forwarded to the county managers within the time and in the manner required by the laws of Georgia; but, on the contrary, the testimony of King S. Thomas (p. 55), Avery Smith (p. 57), and James Porter (p. 58), together with the exhibits of the names of the voters referred to in their testimony, and which are printed on pages 148 to 174, inclusive, established the fact, in the opinion of the committee, that the election at these precincts was fairly and legally conducted; but it is claimed by the sitting Member that these voting precincts had no legal existence, and he gives that in his brief as the reason for the rejection of the returns from them. He says:

"The consolidators of the Chatham election refused to receive and count these votes, because they considered that there were no such precincts existing by law in Chatham County, etc."

The question of law at issue in regard to the legality of these voting precincts is simple, and may be briefly stated.

It is admitted on both sides that the ordinary of the county was authorized by the laws of Georgia to establish or abolish voting precincts by an order entered of record in his court.

And it is also admitted that these precincts were established on the 22d day of October, 1868, by the ordinary of Chatham County sitting as a court of ordinary by an order duly entered of record.

A certified copy of said order is printed on pages 174 and 175 Mis. Doc. No. 20.

Said order is as follows:

Court of ordinary, Chatham County, sitting for county purposes:

"OCTOBER 22, 1868.

"It being necessary that election precincts should be established in the county in order to facilitate the election to be held on the 3d day of November next, it is therefore ordered that election precincts be, and they are hereby, established at Cherokee Hill, in the eighth militia district, embracing the whole

[1] First session Forty-third Congress, House Report No. 216; Smith, p. 144.

of said district, at Chapman's house, in the seventh militia district, embracing the whole of said district, and on the Isle of Hope, embracing the whole of the fifth and sixth militia districts.

"HENRY S. WETMORE,
"Ordinary C. C."

In the judgment of the committee, no order abolishing these precincts had been made until about a month after the election in November, 1872.

But it is claimed by the sitting Member that the order of October 22, 1868, by which these precincts were established, applied only to the election for the year 1868, and that it does, by its terms, limit their establishment to that election.

And that appears to be the reason for the rejection of the returns from these precincts by the managers who consolidated the returns of Chatham County.

The committee is clearly of the opinion that such was not the effect of said order; that the words "it being necessary that election precincts should be established in the county in order to facilitate the election to be held on the 3d day of November next," only expressed a reason for action at that time, but did not in any manner limit the terms of the order, and much less did they have the effect of abolishing those precincts on the 4th day of November following.

It is proper to state in this connection that the sitting Member produces the testimony of the ordinary (see p. 284, Mis. Doe. No. 20), in which he states:

"It was my intention when I established these precincts to have them in force only for the election referred to."

But certainly such evidence can not be admitted to contradict or change the records of courts.

Judgments and orders of courts of record would be of little value as evidence, or for any purpose, if they could be contradicted, changed, and set aside by the testimony of the judge taken five years after the record was made.

The action of this same ordinary in abolishing these precincts in December, 1872, about a month after the election, shows how little confidence he has in his own opinion thus solemnly expressed.

It also appears by the evidence that United States supervisors of the election at all of these three precincts were appointed on November 1, 1872, by the judge of the district court of the United States for the southern district of Georgia. (See p. 179, Mis. Doc. No. 20.)

And that all of said supervisors acted, except the Democratic supervisor appointed for the Isle of Hope precinct

The argument of the minority that an act of the. legislature of Georgia had abolished these precincts is answered by the statement that this law was applicable only to one election, and did not affect the election in question.

The minority views, submitted by Mr. R. Milton Speer, of Pennsylvania, argued that the precincts had been established only for the election of 1868, and asserted that at subsequent elections these precincts had not been used.

(2) At Lawtonville the managers were all of sitting Member's party, and refused to make out and forward the return of the precinct, or even to conclude the count. But one of the managers and the clerk afterwards made out the vote and forwarded it. Testimony indicated that the election was properly conducted, and that the returned result was true. The majority held that this return, which had not been credited in the county tabulation and which showed a majority to contestant, should be counted.

The minority contended that the vote, which had not been formally returned or canvassed, should not be counted, and contended that the testimony relied on by the majority was not worthy of confidence.

896. The case of Sloan v. Rawls, continued.

There being a discrepancy between the return and the vote proven to have been cast, the House corrected the return.

Kind of proof accepted to prove votes additional to those returned for contestant at a precinct where his supporters were unable to read or write.

There being no evidence of fraud and some evidence of the correctness of the vote, the House counted a return whereon the election officers did not subscribe to the oath.

A defective precinct return, irregularly transmitted, was counted, there being no evidence of fraud and some evidence of its correctness.

(3) Contestant alleged fraud in the return from Liberty Hill, as there was a discrepancy between the vote returned for him and the vote proven to have been cast. The majority report says:

> The committee is of the opinion that this does not constitute such proof of fraud as to require them to reject the return, but that they might properly add to it such votes as the contestant proves were cast for him above the number returned.
>
> In the case of Washburn *v.* Voorhees, reported February 19, 1866, this identical question arose in relation to Jefferson Township, and the report in that case, which was adopted by the House, did not reject, but corrected, the return by giving the contestant the benefit of the votes proved in excess of those counted in the return.
>
> The evidence relied upon to prove the number of votes actually cast for Mr. Sloan at this precinct is as follows:
>
> First. A list of Republican who voted at this precinct on the day in question. This list contains 67 names, and is printed on page 129.
>
> Second. The deposition of Edmund Harper (p. 100), who was questioned, and answered as follows:
>
> "Question. Have you any knowledge of the number of Republican votes actually put in the box that day?—Answer. I saw and counted 74 that were given out to men who took them and went to the box to deposit them-"
>
> Third. The depositions of 60 Republican voters, who swear that they voted at this precinct at the election in question, receiving most, if not all, of the ballots from the vice-president or secretary of the Grant and Wilson Club, and that they all voted the Republican ticket, and all but 5 swear that they intended to vote or did vote for Mr. Sloan.
>
> As these voters were unable to read or write, the evidence is as conclusive as could be obtained under the circumstances, and the committee are of the opinion that at least a part of these votes should, if it were necessary to decide the contest, be counted for Mr. Sloan. But, in view of the length of the testimony, the few votes in issue in this precinct, and the further fact that in the judgment of the committee they could in no view of the case change the result, the committee have thought it unnecessary to make a count of them

The minority contend that the testimony relied on by contestant to prove the vote cast was unreliable because of the ignorance of the witnesses.

(4) The canvassers rejected the returns of precinct 259 of Scriven County because the managers did not subscribe to the oath. It appears that the copy of the precinct return was defective and was transmitted to the secretary of state in an irregular way. While admitting that the strict rules of law would require its rejection, the committee say that as there was no evidence of fraud and some evidence of the correctness of the vote, they would count it. This precinct gave 31 for Rawls, the sitting Member, and 4 for contestant.

(5) The majority and minority disagreed as to the vote of Jefferson precinct, the minority holding that the precinct had been abolished, and the majority contending that under proper construction of the law it could not be held to have been abolished. Considering it a legal polling place, the majority counted the vote.

897. The case of Sloan v. Rawls, continued.

Precinct returns being impeached only by the fact of suspicious custody, they were counted in spite of gross irregularities in the consolidated returns therefrom

The use of several ballot boxes, with alleged object of defeating the purpose of the Federal inspection law, did not cause rejection of the returns.

(6) The majority decided to accept the result of the precinct returns of Bullock County although the officials who consolidated the return at the county seat acted irregularly. The majority report says:

In the case of Howard *v.* Cooper (Bartlett, 275) the committee laid down the following rule in relation to cases of fraud:

"When the result in any precinct has been shown to be so tainted with fraud that the truth can not be deducible therefrom, then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction, but call for the rejection of the entire poll, when stamped with the characteristics here shown."

This same doctrine has been repeatedly laid down by committees, and has received the sanction of the House. (See Washburn *v.* Voorhees, Contested-Election Cases, 1865 to 1871, and cases there cited.)

The laws of Georgia, heretofore cited, require that—

"The superintendents, to consolidate the vote of the county, must consist of all those who officiated at the county seat, or a majority of them, and at least one from each precinct."

The consolidated return for Bullock County (see p. 257) has the names of six managers signed to the return and certificate, which states that—

"We do certify that we have this day met and consolidated the returns of the other voting places with the court-house, and that the following is the result, etc."

But the testimony of these men, whose names are signed to the consolidated return (see pp. 72–79), discloses the fact that not one of them ever signed or ever saw the consolidated return, or had anything whatever to do with the consolidation of the returns from that county.

Not one of them is able to tell anything about the making up of the consolidated returns; and two of them, De Loach and Proctor, decline to answer questions on the ground that the answers might tend to criminate them. This consolidated return was made up by one C. A. Sorrier (Mis. Doe. 20, pt. 2, p. 2), who was not a manager, and had no legal connection whatever with the election, and had no right to handle any of the papers.

Yet, strange as it may seem, all of the precinct returns were handed over to him as soon as they reached the court-house, and continued in his exclusive possession for many days.

He swears that he made up the consolidated return without the assistance or supervision of anybody, and signed the names of the managers to it. That consolidated return is dated on the 5th day of November, and yet it was not mailed to the executive department until the 19th of November, as appears by the testimony of the secretary of state, who examined the postmark (p. 139).

And instead of being sent by mail from Bullock County, it was, on the 11th or 12th of November (see p. 51), in the hands of one Sims, who delivered it to some party in Savannah.

It appears to have been held back until the returns from all the other counties had been received.

Another most significant fact in this connection is the failure to turn over the ballots, returns, tally sheets, and lists of voters to the clerk of the superior court, as required by the laws of Georgia before referred to.

In spite of the unlawful making up of the consolidated returns and the suspicious custody of the precinct returns, the majority concluded to count them. They gave Rawls 493 votes and Sloan 0.

The minority say on this point:

The contestant denied the irregularity of the county canvass or consolidation for Bullock County; but inasmuch as the sitting Member does not rely upon this county canvass or consolidation, but upon the precinct returns themselves, and these precinct returns, establishing the vote of the county beyond question, are presented on pages 32 to 39 of the small pamphlet, duly authenticated by the secretary of state, and wholly unimpeached, the undersigned do not see that it is material to inquire into the regularity of the canvass or consolidation. At the same time they find no such irregularity as would, under the statutes of Georgia, invalidate this canvass, even if it were the only evidence of the vote before the House. There is no testimony tending to show that the precinct officers did not sign the precinct returns. No attempt was made to show this, although an attempt was made to show that they did not make a consolidation at the county site. The contestant complained that the ordinary, Mr. Sorrier, after considerable delay, sent these returns to the secretary of state by way of Savannah. But however this may be, it would not affect the case; for his testimony, on pages 2, 3, 4, and 5 of the small pamphlet, shows how the delay occurred and why the consolidation was sent by way of Savannah; so that even if there was proof that the precinct returns accompanied the consolidation to the office of the secretary of state that would not impeach them under the evidence here.

(7) The law of Georgia, as already quoted, provided that there should not be exceeding one voting precinct in each militia district. The majority say in relation to the city of Savannah:

And it is claimed by the contestant that, in violation of this provision, four voting places were established in different parts of the court-house in Savannah.

The evidence is positive upon this point and is undisputed; four ballot boxes, at four different voting places in the court-house, were used, and were presided over by four distinct sets of managers and clerks. They were so disconnected that no man could superintend the voting at more than one box at the same time. Two of these voting places were from the streets on opposite sides of the court-house, and two were from the main passageway through its center. (See plan, p. 279.)

The act of Congress approved February 28, 1871, provides for the appointment in certain cases of two United States supervisors for each election precinct, to superintend the election.

Under that act and the act amendatory thereto, two supervisors were appointed to superintend the election at the court-house precinct in the city of Savannah.

Section 5 of that act requires the supervisors to "attend at all times and places for holding elections" and "for counting the votes," to challenge any vote offered by any person whose legal qualifications the supervisors, or either of them, shall doubt; to be and remain where the ballot boxes are kept at all times after the polls are open until each and every vote cast at said time and place shall be counted," etc.

Section 6 of the same act requires the supervisors to—

"take and occupy and remain in such position or positions from time to time, whether before or behind the ballot boxes, as will in their judgment best enable them or him to see each person offering himself for registration, or offering to vote, and as will best conduce to their or his scrutinizing the manner in which the registration or voting is being conducted; and at the closing of the polls for the reception of votes, they are, and each of them is, hereby required to place themselves or himself in such position in relation to the ballot boxes for the purpose of engaging in the work of canvassing the ballots in said boxes contained as will enable them or him fully to perform the duties," etc.

It is therefore evident that if four ballot boxes, separated as these were, can be used at one precinct, it will be impossible for the United States supervisors to perform the duties required of them by the act of Congress above referred to, and that the act can anywhere, by the managers of elections, be annulled and disregarded.

If four ballot boxes in four separate places can be legally used in one voting precinct, so can 40 or 100 in as many different places in the precinct, and any attempt at supervision would be impossible.

And it is also evident that the use of four ballot boxes, in four separate places, and with four complete sets of election officers, in what could legally be only one voting precinct, was in violation of the spirit and intention, as well as the letter, of the law of Georgia.

The committee can not refrain from noticing the attempt which was made by the authorities of Chatham County to set aside all the other voting precincts, and thereby compel the voters of the entire county either to come to the court-house or to lose the opportunity of voting.

Such a law practically disfranchises large numbers of voters, and ought to be the subject of additional legislation, so far as the election of Members of Congress is concerned.

As the rejection of the vote of the city of Savannah would not change the result in this case, the committee have not deemed it necessary to pass upon its legality, and they therefore count it as it was officially returned.

The minority say that the number of ballot boxes to be used was not prescribed by law, and that four ballot boxes had been used at this precinct for many years. The minority continue:

The use of four ballot boxes was an absolute necessity, for the statute of Georgia provides only one voting place in the entire city of Savannah; nor had any additional voting place been established by the ordinary of the county; and unless several boxes had been used at that place between 5,000 and 6,000 ballots must have been deposited by voters of the city in one box before 3 o'clock p.m., which, of course, would have been an impossibility. The contestant's proposition, therefore, disfranchises a large proportion of the voters of his district, whichever horn of the dilemma they may see fit to take. If they do not all vote in one box, they are to be disfranchised, but if they attempt to vote in one box, large numbers of them are virtually disfranchised, because they can not all vote in a single ballot box. There is an additional reason why the voters of Savannah should not be disfranchised on account of these ballot boxes. It is found in section 1362 of the Code of Georgia.

"1362. Election not void by reason of formal defects. No election shall be defeated for noncompliance with the requirements of the law if held at the proper time and place by persons qualified to hold them, if it is not shown that by that noncompliance the result is different from what it would have been had there been a proper compliance."

No attempt has been made to show anything of this kind in the case of the Savannah vote.

Moreover, the law of Georgia did not limit the number of managers. The minority further say:

Obviously there was the same imperative necessity for additional managers as for additional boxes. All the electors of Savannah were obliged to vote at the court-house, and unless more than one ballot box had been used, the election could not have been held at all. These boxes could not have been properly superintended by three managers. The boxes were arranged in a straight line in one hall and at intervals of from 10 to 16 feet, with no partition or wall or screen between them. It seems to have been the best and fairest possible arrangement to enable the citizens to vote and the managers and supervisors to perform the duties prescribed by law.

It was suggested that the use of additional ballot boxes and the employment of additional superintendents seemed to be a device to evade the acts of Congress known as the "enforcement acts," but the proof shows that this practice obtained in Savannah many years before the passage of the enforcement acts; and, besides, it is manifestly no part of the object or effect of those acts to prescribe the number of precinct officers or ballot boxes.

The report was debated in the House on March 20 and 24.[1] On the latter day the proposition of the minority that Mr. Rawls, the sitting Member, was elected and entitled to his seat was defeated, yeas 77, nays 131.

The question recurring on the resolutions of the majority, seating contestant, there appeared, yeas 135, nays 74.

Thereupon Mr. Sloan appeared and took the oath.

[1] Journal, pp. 626, 653–656; Record, pp. 2316, 2399–2412.

898. The Virginia election case of Thomas v. Davis, in the Forty-third Congress.

Instance of refusal of sitting Member's request for further time to take testimony.

On March 5, 1874,[1] the House agreed to a report from the Committee on Elections, submitting resolutions unseating Alexander M. Davis, of Virginia, and seating Christopher Y. Thomas .

The minority views, signed by Mr. L. Q. C. Lamar, of Mississippi, did not dissent from the conclusion, but held that—

as the testimony of the contestant was taken after the time allowed by law, and for this reason the contestee did not take the testimony which he alleges he otherwise would have taken, we are of the opinion that his request for further time should have been granted.

The resolutions were agreed to without division, and Mr. Thomas appeared and took the oath.

899. The Kentucky election case of Burns v. Young, in the Forty-third Congress.

Proof of mere irregularities in the administration of the election law does not justify the rejection of the votes.

The prefix "Hon." with a candidate's name is not such distinguishing mark as will justify rejection of the votes.

Where canvassing officers acted arbitrarily, although not fraudulently, the House corrected their result by the precinct returns.

On April 6, 1874,[2] Mr. Edward Crossland, of Kentucky, from the Committee on Elections, submitted the report of the committee in the case of Burns v. Young, of Kentucky. The sitting Member had been returned by an official majority of 188 votes. Contestant alleged irregularities and fraud. The committee concluded as follows:

This was the first election held under the statute of Kentucky requiring elections for Representatives in Congress to be by ballot, as directed by the act of Congress approved February 28, 1871.

The directing provisions of the act of the Kentucky legislature are very elaborate, and were not in every instance strictly complied with by officers who conducted the election. Many irregularities occurred in precincts in which contestee received majorities, and exactly similar irregularities occurred in precincts which gave majorities for contestant. And if proof of mere irregularities is sufficient to vitiate the vote in these precincts and these only counted where there was strict conformity to the Kentucky statute, the majority of the contestee would be increased. In some instances the county boards, in compliance with a provision of the statute which directs that the ballots shall have on them the name of the person voted for and no other distinguishing mark, threw out ballots cast for contestant because the word "Hon." was prefixed to his name on them. The committee are of opinion that the ballots thrown out for this reason ought to have been counted for contestant. In the county of Bracken there were thrown out because of the prefix "Hon." 36 ballots for contestant. In the county of Mason, according to the certificates of the precinct officers, Young received 1,663, Burns 1,347. The county board certify for Burns 1,338 votes, or 9 votes less than the precinct certificates aggregate. These 9 votes the committee believe ought to be counted for Burns, for the reason that the county board refused to allow any person except the members of the board to be present when the ballots were counted. Witness

[1] First session Forty-third Congress, Journal, p. 565; Record, p. 1996.

[2] First session Forty-third Congress, House Report No. 385; Smith, p. 179; Rowell's Digest, p. 290.

Hutchens swears that he asked that permission to remain in the room while the board were counting the votes and was refused by a member of the board.

The said witness Hutchens testifies that the members of said board are men of integrity and veracity; nevertheless the committee consider the practice reprehensible and dangerous and believe that contestant Burns ought to have corrected for him all the votes certified by the precinct officers, viz, 1,367.

In conclusion the committee say:

In conclusion, the committee are of opinion that, concerning the precincts wherein the irregularities were of so grave and important a nature as to affect the validity of the returns, the secondary proof of the actual votes cast shows a result not differing from that shown by the returns. In other precincts the irregularities complained of on both sides, though to be reprehended, are not of a nature to necessarily affect the validity of the returns.

The committee recommend the adoption of the following resolution:

Resolved, That John D. Young, the sitting Member, was duly elected a Representative in the Forty-third Congress from the Tenth Congressional district of Kentucky and is entitled to his seat.

On April 11[1] the resolution was agreed to by the House without debate or division.

900. The Arkansas election case of Bell v. Snyder, in the Forty-third Congress.

An affidavit of a voter as to how he intended to vote, made at the time the vote was rejected, was accepted as a valid declaration and part of the res gestae.

Oral testimony as to the making of affidavits by rejected voters was accepted as evidence of the fact and not as hearsay.

Testimony taken after the expiration of the legal time, and objected to at the time, was not admitted.

On December 23, 1874,[2] Mr. Horace H. Harrison, of Tennessee, from the Committee on Elections, submitted the report of the committee in the case of Bell *v.* Snyder, from Arkansas. The official returns had shown a majority of 104 votes for sitting Member. Various irregularities were alleged, and the committee came to conclusions as to several questions relating to facts rather than principles. Only a single important question of law was discussed and actually passed on.

The statutes of Arkansas provided for a registration to be made in each county by a board. After quoting these statutes, the report says:

It will be perceived that by virtue of these provisions every person who holds a certificate is entitled to vote until his name is stricken from the original list and his certificate revoked.

The board, when in session as a court of review, ascertain and determine who is entitled to vote, subject to appeal to the supreme court, and when they close the registration and adjourn on the sixth day they are to make fair copies of the list for the clerk of the county and for the judges of election. The original list never goes to the judges of election. The board of review exercises an arbitrary power to strike names from the list on their own knowledge of disqualifying acts and to revoke certificates already issued, but every name which is on the list when they close the registration, so as to be ready to make copies is, under the statute, a legal voter, and no power on earth can deprive him of the legal right to vote. After that no action of the board as a whole, or of any member of the board, or of any other authorities or persons can invalidate that right.

Section 30 of the election law of July 23, 1868, is in these words:

"All persons who present certificates of registration, and whose names appear on the registration

[1] Journal, p. 761; Record, p. 3009.

[2] Second session Forty-third Congress, House Report No. 11; Smith, p. 247.

books, shall be entitled to vote at any and all elections authorized by the laws and constitution of this State, and no challenge shall debar such person from voting at any election."

The proof showed that certain voters duly registered and having certificates of registration, whose names were on the original registration lists and were not stricken therefrom by any competent authority, but whose names did not appear on the precinct lists, were refused the right to vote. The committee say:

Under the law every person holding a certificate was entitled to vote until his name was stricken from the original list and his certificate revoked. The position contended for by contestant, sustained by the authorities, cited that where names appear on original registration books, but do not appear on copies furnished precinct judges, it is an error to reject the votes of such electors and that their votes are to be counted (Hogan *v.* Pile, 2 Bartlett, 285); and that votes of qualified electors should be counted (Delano *v.* Morgan, 2 Bartlett, 170; Vallandigham *v.* Campbell, 1 Bartlett, 231; Niblack *v.* Walls, Forty-second Congress) is undoubtedly correct, but in this case we are to consider the conclusiveness or sufficiency of the proof as to which of the candidates the electors who are shown to have been registered and to have held certificates would have voted for and what constitutes competent proof thereof.

The committee found it proven that certain men were duly registered and had certificates, and offered and attempted to vote for contestant, and that they made affidavit and again tendered their ballots and were refused. The affidavits made by the excluded voters were in form as follows:

STATE OF ARKANSAS, *County of Ashley:*

I, Jason C. Wilson, of the county and State aforesaid, do solemnly swear that I am a male person over 21 years of age, and have been a resident of the State of Arkansas more than six months previous to this date, and an actual resident of Ashley County, in the State of Arkansas, and am not disqualified from registering and voting by any of the subdivisions 1, 2, 3, 4, 5, and 6 of section 3 of article 8 of the constitution of the State of Arkansas; and that, on the 10th day of October, 1872, I presented myself for registration as a voter to C. W. Gibbs, president of the board of registrars for Ashley County, in said State, duly appointed by the governor of said State, and acting, and at Hamburgh, the place designated by the advertisements of the said president of said board for the registration of the voters of Carter Township, in said county, and on the day and between the hours designated in said advertisement, and did take the oath prescribed by section 5 of article 8 of the constitution of the State of Arkansas, and that I was registered by said board of registrars as a legal voter for said township, in said county, and that my name has been improperly stricken from the registration books.

JASON C. WILSON.

Sworn to and subscribed before me, an acting and duly commissioned justice of the peace for Ashley County, in the State of Arkansas, this 5th day of November, 1872.

THOS. J. WELLS, *Justice of the Peace.*

STATE OF ARKANSAS, *County of Ashley:*

I, Jason C. Wilson, of the county and State aforesaid, do solemnly swear that, upon the 5th day of November, A. D. 1872, at the general election for Representatives in Congress and Presidential electors, held at said time, I did present before the judges of election for the precinct of Carter, county of Ashley and State of Arkansas, the affidavit hereunto annexed, and upon said affidavit I did offer to vote the ticket thereunto attached; and that said judges of election in the precinct aforesaid did reject and refuse to receive the same, and to record my said vote thereunder.

JASON C. WILSON.

Sworn to and subscribed before me, an acting and duly commissioned justice of the peace for Ashley County, in the State of Arkansas, this 5th day of November, 1872.

THOS. J. WELLS, *J. P.*

A copy of the ticket was presented therewith.

The committee say that the case of Vallandigham, *v.* Campbell shows that the declaration of a voter as to how he voted or intended to vote. made at the time, is competent testimony on the point.

The statement contained in the affidavits amounted to a declaration of the voter which brought it within the rule of the case above cited. The committee continue:

> These declarations are valid as a part of the res gestse; and these declarations are supported by the testimony of the supervisor, who states the fact that nearly all of these 19 voters made these affidavits when they presented their certificates, and with their ballots attached, and that they deposited them with him, as supervisor, on the day of election.
>
> The objection that this is hearsay evidence, and that the deposition of each particular voter is the only competent evidence of the fact sought to be proven, is not well taken. The witness Butler does not prove what these 19 voters said to him, but what they did. There is a marked distinction between proof of what a party said and proof of acts of the party or facts connected with what he did. In the one case it may be hearsay testimony; in the other it is testimony as to facts which the witness observed, which is just as competent as the testimony of the voter as to facts in which he was an actor.

So the committee count for contestant the votes not received by the election officers.

In Hempstead County a person claiming to be county clerk sent in a return, which was carried into the abstract of the secretary of state. Another return from this county by a person shown by the testimony to be the legal clerk and in possession of the office, was made and showed a different result from the first return. Furthermore the evidence showed that the second return was based on a canvass of the precinct returns, while the person making the first return did not make such a canvass, and never had possession or control of the precinct returns. But the committee do not disturb the first returns for the reason—

> And the committee, if there was not an insuperable objection to the admissibility of the testimony showing what has hereinbefore been stated as to this vote in Hempstead County, and in the absence of any rebutting testimony, would be inclined to put the vote of this county down as showing a majority of 315 votes for Mr. Snyder, instead of 696, as it is in the abstract certified by the secretary of state; but the testimony, showing the grounds for reducing Snyder's vote 381 votes, was taken by Mr. Bell, the contestant, after the expiration of the forty days allowed him by law for taking proof, and Snyder entered and filed his formal written protest at the time; and the committee can not sanction a practice in violation of the law, especially when exception was taken at the time to the taking of the testimony. It will be seen hereinafter that even if this proof, as to the vote in Hempstead County, was admitted (which the committee do not feel justified in sanctioning), Snyder's majority would simply be reduced.

In Drew County there were various irregularities in the precinct returns, such as failure to sign or swear to the poll books, delivery of ballots unsealed, etc. But the committee do not find it necessary to pass on the question involved, as it would not change the result.

They find as a result of their examination a majority of 462 votes for sitting Member. Therefore they recommend resolutions confirming the title of sitting Member and declaring contestant not elected.

On December 23,[1] the report was considered in the House, and the resolutions were agreed to without debate or division.

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[1] Journal, p. 107; Record, p. 228.

901. The Arkansas election case of Bradley v. Hynes, in the Forty-third Congress.

The notice of contest being served after expiration of the legal time and the testimony taken without regard to the statute, the committee did not examine the case.

Payment of the expenses of a contestant by sitting Member, on condition of latter's withdrawal, was not held as a corrupt obtaining of the seat.

On June 16, 1874,[1] Mr. Austin F. Pike, of New Hampshire, from the Committee on Elections, submitted a report in the Arkansas case of Bradley *v.* Hynes. Contestant had charged that sitting Member had corruptly caused the returns to be so falsified as to reverse the true result of the election, and had further paid him (the contestant) a sum of money to abandon the contest.

Mr. Hynes denied this in a statement made under oath before the committee; but admitted that he had reimbursed contestant for his expenses when the latter proposed to withdraw.

The committee report that there was no evidence to show that contestant had been elected, but, on the contrary, there was evidence that sitting Member was entitled to a larger majority than the returns gave him. The report continues:

> His certificate of election was given him December 14, 1872, and the notice of contest was not made until the 28th of January after, and many days out of time.
>
> So, too, the depositions which Bradley had taken were commenced several days after his time had expired and with a total disregard of the statute in nearly every other particular. All of which would seem to indicate that he had something in view other than a serious contest for a seat in Congress.

As to the payment of money by sitting Member, the report says:

> While the committee regard this agreement as an act on the part of Mr. Hynes which they can not approve, they do not find that it was made for the purpose of securing his seat in Congress corruptly, nor that he had any cause to fear the result of the contest.
>
> The committee can not but regard the conduct of the memorialist as dishonorable and mercenary. If he believed he had any merit in his case, he betrayed the rights of those who gave him their suffrages. If he did not believe his contest was meritorious, his demand for money was most dishonorable.
>
> The committee have instructed me to report the accompanying resolution:
>
> *Resolved,* That the Committee on Elections be discharged from further consideration of the case of John M. Bradley against William.T. Hynes, a Member of this House from the State of Arkansas.

This report was agreed to by the House on June 16,[2] without debate or division.

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[1] First session Forty-third Congress, House Report No. 646; Smith, p. 240.

[2] Journal, p. 1193; Record, p. 5046.

Chapter XXX.

GENERAL ELECTION CASES, 1758 To 1880.

902. The Florida election case of Finley v. Walls, in the Forty-fourth Congress.

Election officers fraudulently chosen and acting illegally were held to be intruders and not de facto officers.

Fraud having been commited by election officers, no reliance was placed on their returns, and they were rejected.

Where returns are rejected, the vote may not be proven aliunde by the opinion of a person who kept a tally sheet.

On March 23, 1876,[2] Mr. Charles P. Thompson, of Massachusetts, from the Committee on Elections, submitted the report of the majority of the committee in the case of Finley *v.* Walls, of Florida. As returned by the State canvassers, the sitting member had a majority of 371 votes, which the contestant sought to overcome by proving frauds and irregularities. While a large number of allegations were made, the decision was universally conceded in the debate to depend on the disposition of the returns from the Colored Academy precinct, where sitting member received 588 votes and contestant 11. This disparity was not of itself a suspicious circumstance, since under the laws of Florida the voter might cast his vote at any precinct in the county, and the white and colored people quite generally sought different polls.

The law of Florida provided:

> The polls of the election shall be opened at 8 o'clock a.m. on the day of the election.

And also—

> The county commissioners shall * * * appoint a board of three discreet electors to be inspectors of the election for each place designated for voting within the county.

And—

> In case of the death, absence, or refusal to act of any or all of the inspectors appointed by the county commissioners, the electors present at the time appointed for opening the election may choose,

[1] Also Lee *v.* Rainey, South Carolina (Vol. I, sec. 641).

[2] First session Forty-Fourth Congress, House Report No. 295; Smith, p. 367; Rowell's Digest, p. 305.

viva voce, from the qualified electors, such a number as, together with the inspector or inspectors present, if any, will constitute a board of three, and the persons so chosen shall be authorized to act as inspectors of that election. The inspectors shall, before opening the election, choose a clerk, who shall be a qualified elector, and said inspectors and clerk, previous to receiving any votes, shall each take and subscribe an oath or affirmation in writing that they will perform the duties of clerk or inspectors of election according to law, and will endeavor to prevent all fraud, deceit, or abuse in conducting the same. Such oath may be taken before any officer authorized to administer oaths or before either of the persons chosen as inspectors, and shall be returned with the poll list and the returns of the election to the clerk of the circuit court. One of the inspectors shall be chosen as chairman of the board.

The majority of the committee say in regard to the Colored Academy precinct:

At this precinct your committee find that there was a conspiracy to commit a fraud upon the election. That the conspirators were Dr. E. G. Johnson, who was a candidate for State senator in Columbia County and was voted for at this precinct, together with Charles R. King and John W. Tompkins, who acted as inspectors, Charles A. Carroll, who acted as clerk, and one Duval Selph, a supporter of Doctor Johnson. Carroll and Selph were at Doctor Johnson's during the night previous to the election, and King took breakfast with him in the morning. They all, except Selph, left the house of Doctor Johnson in the morning, a little after daylight, and proceeded to the place where the election was to be held, and, in pursuance of the object of the conspiracy, opened the polls at about 7 o'clock in the morning, an hour before the time at which the meeting was notified and an hour before the duly appointed inspectors were called upon to be present and an hour before the election could be held according to law. No one of the duly appointed inspectors, unless it was Aleck, Hamilton, was present or acted at this precinct. Tompkins and King had been requested to be present by Doctor Johnson and act as inspectors, and Charles A. Carroll had been requested by him to act as clerk, and these several persons were either nominated by, or acted at the request of, Doctor Johnson. They were not legally elected, as there was no regular meeting of the electors having power to choose inspectors before Tompkins and King undertook to act as such, and without legally appointed or chosen inspectors no legal clerk could be chosen or appointed, so that the election at this precinct was conducted by persons not legally authorized, with the exception of Hamilton, and by persons who were ready and willing to violate the election laws of the State, and who did violate them.

The committee then go on to quote testimony that there was fraud at the precinct, persons voting who had voted at other precincts and others voting who had not conformed to the legal requirements. And the committee insisted that there was fraudulent collusion on the part of the election officers. They say:

Your committee are satisfied that the irregularities at this precinct were not the result of ignorance, inadvertence, or carelessness, but were the result of fraud, and that there were no legally appointed inspectors nor a legally appointed clerk at this precinct; that Johnson took the entire charge of the polls through persons who, by his procurement, acted as inspectors and clerk. They can not stand better than mere intruders, having no official character; intruders not for the purpose of aiding in conducting an election fairly, but for the purpose of carrying into execution a previously arranged fraud upon the ballot box. It is clear that the pretended clerk, Charles A. Carroll, arranged with Doctor Johnson to commit a gross fraud at this election, and although he did not do the particular acts it was arranged he should do, still the evidence is clear that Doctor Johnson himself carried out the fraud planned with the clerk, of putting illegal votes into the ballot box with the knowledge of the clerk.

In conclusion the majority say:

The law is, that where fraud is proved to have been committed by the officers of an election in conducting the election, no reliance can be placed upon any of their acts and their return must be rejected as wholly unreliable. The party claiming under the election must prove the actual vote in some other way. The only evidence as to what the vote was is from John V. Brown (p. 79), one of the challengers, a Conservative, who says: "Finley got 11 and Walls 588, 1 think. I derived my information from being present and keeping a tally sheet." This certainly can not establish the vote, as his testimony at most can only be evidence of the actual number of votes cast, but one of the principal objections

is that illegal votes were cast, and this, too, with the guilty knowledge of the officers of the election. There being proof that such illegal votes were cast and the real number of legal votes not being proved, there is nothing upon which the true vote can be ascertained, and, therefore, the entire poll must be rejected; and your committee so find and determine.

The minority dissent from the majority's views as to the facts, deny that fraud is proven, and hold:

As these men acted as inspectors and clerk, and as no proof is given to show that they were not, in fact, appointed, and as it is now claimed that their return went into the Columbia County return, counted by the State board, and found at page 23, and as it is now sought to deduct this vote from the State count, these inspectors and clerk must be taken to be officers de facto, and full faith, prima facie, is due to their acts.

The committee considered at length other objections of the contestant, and came to conclusions thereon:

903. The case of Finley v. Walls, continued.

Persons actually registered but omitted from the copy of the list in use at the polls were held to have cast valid votes, although a required oath was not administered when they voted.

Where the nature of illegal votes had not been determined the Committee on Elections deducted a proportionate number from the poll of each candidate.

(1) At the Gainesville precinct about 60 persons voted whose names were not on the certified copy of the registration list. The majority say:

It is clear by the election laws of Florida that a person, in order to be entitled to vote at any election, must, six days prior thereto, be duly registered as a voter in the clerk's office of the circuit court in the county. If, on offering to vote, his name is not on the certified copy of the registry list at the voting precinct, he may then, if he takes the oath prescribed in section 16 and the additional oath required by section 9, which is "that his name has been improperly struck off from the list of registered voters," be entitled to vote. And the taking of the oath in section 9 is indispensable to the right of the person to vote whose name is not upon the registration list. The officers presiding at the election have no right to receive his vote without this oath. But it also appears by the evidence that, although the names of these 60 voters were not on the certified copy of the registration list furnished for this poll, still a large number of the names were actually on the registration list in the clerk's office of the circuit court. Your committee, in view of this fact, although the inspectors were in fault in allowing the persons to vote whose names were not on the list furnished them by the clerk of the circuit court, still, as their names should have appeared on such list, and they were deprived of the legal right to vote without taking the oath in section 9, by the neglect of the clerk of said court in not providing a correct list of the voters of said precinct, have arrived at the conclusion that, they having voted, their votes should be counted when their names are found to have been on such registry list at the clerk's office. This leaves the poll to be purged of 12 votes. "In purging the polls of illegal votes, the general rule is that, unless it is shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidates having the highest number." "Of course, in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each." (Am. Law of Elec., sec. 298.) Although this is the rule to be applied where it can not be ascertained for whom the illegal votes were cast, and in this case there is nothing to show that it might not have been ascertained for whom the illegal votes were cast, as the names of the unregistered voters could have been ascertained by comparing the poll list and the registry list, and the evidence of the illegal votes taken as to whom they voted for, and the poll purged in this the more regular mode; still, as this has not been done, your committee, unwilling to reject the entire poll, there being not evidence sufficient to prove actual fraud on the part of those having charge of the election, have determined to purge the poll of the 12 illegal votes by subtracting from each of the candidates a proportionate number of the illegal votes, according to the entire vote returned for each.

904. The case of Finley v. Walls, continued.

An entire poll is not to be rejected except after the fullest attempt to purge it of illegal votes.

Where election officers did not follow State law and draw out an excess of ballots, the Elections Committee deducted proportionately.

Failure to swear the election officers, combined with other irregularities, was, by a divided committee, held not to require rejection of the poll, actual fraud not being shown.

Failure to return the poll book to the county officer, as the law required, was not held in the absence of proof of fraud to vitiate the election.

(2) As to sheriff's office precinct the report says:

> There was at this precinct a grave omission on the part of the officers of election in their failure to purge the poll, as directed by the law of Florida. It appears from the testimony of Albert A. Ellenwood, one of the inspectors (pp. 96, 97), that there were only 298 names on the poll list while there were 309 votes cast and counted.
>
> There appearing to be 11 more votes than names on the poll list, it was the duty of the inspectors to replace the ballots in the box and have one of their number publicly draw out and destroy, unopened, so many of such ballots as were equal to such excess. (Sec. 22, above.)
>
> This not having been done, it becomes a difficult problem to determine what shall be done with the poll. The statute having prescribed the method of and the person by whom the poll should have been purged, can it be purged in any other manner? Your committee, upon a careful consideration of the question, regarding it as settled that an entire poll is not to be rejected except after the fullest attempt to purge the poll of illegal votes, and, to ascertain the real vote by all reasonable means, have decided to regard this statute of Florida as providing a principle upon which, as well as a mode by which, the poll in such a case should be purged; and, as the method was omitted without fraud, have not regarded its omission an act of such a character as to compel the rejecting of the entire poll, but have decided to apply the principle established by the law, viz: that the excess of votes shall be regarded as thrown proportionately for both candidates, according to the entire vote for each, and that the drawing out in the manner provided by law would draw a proportionate number for each candidate. Your committee have taken from each candidate a proportionate part of said 11 votes.

Certain members of the committee who concurred in the majority report generally advocated more severe treatment of this poll, Mr. J. S. C. Blackburn, of Kentucky, insisting that it should be thrown out altogether.

(3) At Archer precinct, besides the voting of certain persons whose names were not on the lists and the presence of a few more ballots in the box than there were names on the poll list, the committee found other irregularities:

> At this poll other and serious informalities are found to exist, such as a failure to swear the inspectors, the concealment of the ballot box from public view during the adjournment for dinner, being about a half hour (Geiger, p. 56), not opening of the poll until about half past 9 o'clock, and the keeping it open after sunset. There was also an improper interference with the election by W. U. Saunders, United States marshal, both in meddling with the ballots and controlling the order of voting, so that several conservatives could not vote at all. These irregularities are grave ones and might, with much reason, be adjudged sufficient to vitiate the poll; still, your committee are unwilling to reject an entire vote where there is not proof of actual fraud and the poll may probably be purged of its illegal votes. They have, therefore, allowed the returns to stand as certified by the inspectors, deducting only the 35 illegal votes proportionately from each candidate, which will leave the vote 260 for Walls and 23 for Finley, instead of 293 for Walls and 25 for Finley.

Mr. Blackburn and three other members of the majority of the committee considered the decision too lenient.

(4) As to irregularities in Alachua County, the report says:

That said election at precinct No. 3, at Gainesville, within the county of Alachua, and within said Second Congressional district of Florida, was irregularly and illegally conducted, and was null and void, and I hereby notify you that I will ask that all the votes cast at said precinct be rejected on the following grounds, viz: First. Because no poll book or list of the names of the electors voting at said precinct was returned to the judge of the county court or to the clerk of said county, with the certificates of the election at said poll, as the law requires, but a paper list of names was found eight days after said election, unsigned by any of the officers of the election at said precinct; second, because a large number of illegal votes at said election were received and counted at said poll, viz, about 58 votes not registered, and 5 not checked, as the law requires, were received at said poll, and changed the result of the election at said poll, and only 3 appeared to be sworn, and because the oath administered to the unregistered voters who voted at said poll was not such as the law prescribes.

To which the contestee answers in substance that it is untrue that said election was irregularly and illegally conducted, or was null and void. He admits that the poll book was not returned to the judge of the county court nor to the clerk of the county with the certificate of the election at said precinct, but alleges that the same was found eight days after said election, and that this irregularity is not such as will affect the rights of the contestee. He also objects to proof of any illegal votes, as it does not appear from the contestant's said specifications for whom said illegal votes were cast. A poll may be purged of illegal votes without it being proved for whom they were cast. (Am. Law of Elec., sec. 298.)

The not returning of the poll list, although an irregularity which might, connected with other irregularities, be entitled to very considerable weight, still, in this case, it being shown that the poll list used at this precinct was found and used by the county canvassers in canvassing this precinct, and there being no evidence that it had been tampered with, or was by reason of fraud not returned in the ballot box, the committee have not regarded it as a sufficient reason for rejecting said poll.

The majority of the committee concluded, from an application of the principles set forth, that the true result showed a majority of 343 votes for Mr. Finley, the contestant, and reported resolution giving the seat to him.

The report was debated at length on April 18 and 19,[1] the debate being confined almost exclusively to the Colored Academy precinct. On the latter day the resolutions of the minority, confirming the title of sitting Member to the seat, were offered as a substitute, and were disagreed to, yeas 84, nays 135.

Then the resolutions of the majority were agreed to without division.

The contestant, Mr. Finley, then appeared and took the oath.

905. The Alabama election case of Bromberg v. Haralson, in the Forty-fourth Congress.

Illustration of a specification in a notice of contest condemned as too general.

Testimony taken after the time allowed by law was rejected.

Original testimony, taken on notices stating that witnesses were to be examined in rebuttal, was rejected.

On March 23, 1876,[2] Mr. John T. Harris, of Virginia, from the Committee on Elections, submitted the report of the committee in the case of Bromberg *v.* Haralson, of Alabama. The contestant alleged fraud and intimidation sufficient to overcome the majority of nearly 2,700, by which sitting Member had been returned.

Two preliminary questions were discussed and passed on in relation to the vote of the district, especially of Wilcox County.

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[1] Journal, pp. 817, 825, 826; Record, pp. 2553, 2593–2603.

[2] First session Forty-fourth Congress, House Report No. 294; Smith, p. 364; Rowell's Digest, p. 303.

(*a*) The report quotes one of the specifications:

Twelfth. That illegal and undue influences were employed by United States and State officials, or by persons representing themselves to be such, adherents of the Republican party, to prevent voters in this district from voting for me (the contestant), or inducing or intimidating voters into voting for you (the contestee), by threats of prosecution and otherwise, by the presence of detachments of United States troops at or near the polls, and by the illegal distribution of provisions donated by act of Congress to sufferers by the overflow of the Tombigbee and Alabama rivers in 1874.

And says:

The twelfth specification is too vague and uncertain to be good. The statute requires that the contestant, in his notice, "shall specify particularly the grounds upon which he relies in his contest." (Rev. Stat., pp. 17, 18, sec. 105; McCrary, sec. 343; Wright *v.* Fuller, 1 Bartlett, 152.)

It is impossible to conceive of a specification of the grounds of contest broader or more general in its terms. It fixes no place where any act complained of occurred. It embraces the whole district in one sweeping charge. This specification embraces three general grounds of complaint, not one of which possesses that particularity essential to good pleading; but it can subserve no valuable purpose to pursue the question of legal sufficiency of this specification further, because there is another ground upon which the whole evidence of the contestant, relating to the election in this county, must be rejected.

(*b*) As to the notice of contest and validity of certain testimony, the committee say:

The sitting Member served his answer to the notice of contest on the contestant on the 23d of December, 1874. The statute gives ninety days next after the service of the answer in which to take the testimony. (See act of February, 1875.) This period is to be divided as follows: The contestant shall take testimony during the first forty days, the returned Member during the succeeding forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period. (Rev. Stat., p. 18, sec. 107.) During the first forty days the contestant took no testimony in Wilcox County or elsewhere to sustain any specification in his notice of contest affecting the election in said Wilcox County. His entire evidence was confined to the election held in other counties. During the succeeding forty days the returned Member did not take any testimony in Wilcox County or elsewhere relating to the election held in said county of Wilcox; and yet, on the 15th and 16th days of March, 1875, the contestant caused notices to be served on the attorney of the returned Member that on the 22d of March, 1875, he would take testimony in said county of Wilcox. Both notices specify that the witnesses therein named "will be examined in rebuttal of the testimony taken" by the returned Member. Knowing that he had taken no testimony in relation to the election in Wilcox County at all, and hence that there was nothing to rebut, the returned Member did not attend the taking of the testimony of contestant in said county. In violation of the statute, and contrary to the terms of the notices served upon the attorney of the sitting Member, the contestant took a large number of ex parte depositions or affidavits for the purpose of proving the truth of the general charges embraced in the twelfth specification above quoted. The whole of the testimony taken in Wilcox County is directed exclusively to the proof of the contestant's original case, and no portion of it is directed to the rebuttal of the proofs adduced by the returned Member. The rules of law and the principles of common fairness alike require that the whole of contestant's testimony relating to the election in Wilcox County should be entirely rejected, first, because the time within which the contestant could lawfully take testimony to prove his original case had long previously expired; and, second, because the notices explicitly state that the witnesses were to be examined in rebuttal, and under such notices, in the absence of the returned Member, it would be to give sanction to a surprise to allow any other than rebutting testimony to stand. And, in addition thereto, the contestee would have no right or opportunity to introduce evidence in answer to the original evidence thus taken during the ten days prescribed by law for taking of rebutting testimony.

906. The case of Bromberg v. Haralson, continued.

Clear and satisfactory proof of fraud or mistake is required to remove the legal presumption in favor of the correctness of the acts of sworn election officers.

Isolated cases of violence or intimidation do not justify a rejection of the poll.

The mere presence of United States soldiers in the neighborhood of the polls, unaccompanied by disorderly or threatening conduct, does not vitiate the poll.

As to the merits of the contest, several considerations were involved:

(1) Extensive frauds were alleged in the city of Mobile through the agency of a club organized for the purpose of encouraging fraudulent voting.

The committee discuss at length the quality of the evidence required for proof of such a charge:

> The burden of proof is always upon the contestant or the party attacking the official returns. The presumption is that the officers charged by law with the duty of ascertaining and declaring the result have discharged that duty faithfully. (Am. El. L., secs. 306, 394, subdiv. 10.)
>
> The action of a board of supervisors of election, when in due form, is prima facie correct, and it must stand until it is shown by extrinsic evidence to be illegal and unjust. The presumption is always the commission of a fraudulent or illegal act, and in favor of the honesty and correctness of the official acts of a sworn officer. The rule on this subject is thus stated in the New Jersey cases, 1 Bartlett, 25:
>
> "It is not sufficient that there should exist a doubt as to whether the vote is lawful or not; but conviction of its illegality should be reached to the exclusion of all reasonable doubt before the committee are authorized to deduct it from the party for whom it was received at the polls."
>
> The true rule is believed to be one which, while it may not require the exclusion of all reasonable doubt, does require clear and satisfactory proof of fraud or mistake before the legal presumption in favor of the correctness of the acts of sworn officers shall be nullified. The testimony of a conspirator swearing to his own infamy and implicating others in the same crime is always jealously scrutinized, and unless corroborated in material points by evidence coming from uncontaminated sources, can not generally be received as sufficient to establish a litigated fact. And if in addition to this, such conspirator declines to submit to a full, thorough, and searching cross-examination upon the whole subject-matter testified to by him in his examination in chief, this circumstance casts additional suspicion upon his testimony. And if to this be also added the fact that such conspirator is at the time he so testifies the paid agent of the party producing him in ascertaining and arranging the evidence for his employer, this circumstance is one calculated to cast additional doubt and suspicion upon his testimony. There was a period in the history of both English and American jurisprudence when the paid attorney or counsel of a litigant party would not be heard to testify in behalf of his client.
>
> Bearing in mind these salutary rules, there can be found no reliable evidence to sustain the charges of fraud and overcome the legal presumption in favor of the returns. It would seem upon its bare statement incredible that, in the city of Mobile, at an election where the contestant polled 6,497 votes, mostly cast by the intelligent and lately master race, a number nearly 2,000 in excess of the entire vote polled for the sitting Member, such a conspiracy to repeat, if it existed, could have been consummated. It demands large credulity to believe that in the presence of 6,500 white voters, intelligent, alert, jealously watching their rights, 250 colored men, with the aid of a few white leaders, could have polled about 2,000 votes, or in the neighborhood of 1,700 fraudulent votes. There are nine witnesses who were examined to prove that such a fraud was consummated.

The witnesses, however, did not testify to any specific acts of illegal voting, and the report concludes:

> This evidence given by these conspirators is so vague, indefinite, and contradictory that if it came from purer and less suspicious sources it would furnish no safe or reliable basis upon which to act.

To undertake to purge the poll upon such evidence would be impossible. No man can safely say how many illegal votes, if any, were cast. There is no basis furnished by the evidence from which it can be determined whether there was 1 or 1,000 illegal votes cast. Admitting that there is evidence that there were some illegal votes cast, still, no reliable data are furnished to show how many there were. The result in such case would be that the whole poll would have to be thrown out. The rule is thus stated in Howard *v.* Cooper, 1 Bartlett, 275: "When the result in any precinct has been shown to be so tainted with fraud that the truth can not be deducible therefrom, then it should never be permitted to form a part of the canvass. The precedents as well as the evident requirements of truth not only sanction but call for the rejection of the entire poll when stamped with the characteristics here shown." The application of this rule would end the contestant's case if every other charge of fraud were admitted, and it is therefore safe to say that he will concede that the proper rule is not to reject this poll.

(2) As to intimidation:

The report says:

As to the violence, intimidation, and deception alleged to have been practiced by the Republican voters in Mobile County, the evidence is so meager and unsatisfactory that it can serve no useful purpose to enter into an analysis of it. While there doubtless were isolated cases of violence and intimidation, the election seems in the main to have been orderly, full, and fair. All the witnesses, with perhaps one single exception, testify that they were amply protected in voting as they pleased. This evidence presents a case which the precedents concur in showing can not affect the poll. (McCrary, secs. 416, 424, 586; Harrison *v.* Davis, 1 Bartlett, 341; Brown *v.* Loan, ib., 482.) Nor is there anything in the argument that the colored vote polled was so large as to suggest the existence of illegal voting. The census of 1870 shows the population of Mobile County to have been 49,311, divided by races as follows: Whites, 28,195; colored, 21,107. The evidence tends to show that there has been little increase in the population since that time, and that the races maintain about the same relative proportions. The contestant, in 1874, received 6,497 votes, and the sitting Member 4,753. It may be safely inferred that each race voted about equally solid for the candidate of its own color and blood. On this basis the contestant received 1 vote for every 4.34 inhabitants, while the sitting Member received only 1 vote for every 4.44 inhabitants, thus showing a larger vote polled in proportion to the population by the white than by the colored people. Hence it seems clear that the poll of Mobile County ought not to be disturbed.

(3) In Monroeville, in Monroe County, both bribery and intimidation by soldiers were alleged. Of the latter charge the report says:

There was a small squad of United States soldiers stationed at Monroeville, and on the day of the election they were in the neighborhood of the polls. But the evidence fails to show any disorderly or threatening conduct on their part, and it is apparent that no man of ordinary firmness was or could have been thereby intimidated from voting. The allegation that the presence of this small squad of soldiers intimidated a large number of Democratic voters and kept them from voting the Democratic ticket is not sustained. Indeed, in the year 1872 the contestant received, at the Monroeville precinct, 214 Democratic votes only, while in 1874, at the same precinct, he received 218 votes.

907. The case of Bromberg v. Haralson, continued.

The Elections Committee leaned to the view that a promise of general distribution of food to voters was a corrupting influence justifying purging of the poll.

Discussion as to validity of English rule that to justify rejection of votes bribery must be practiced by the candidate or agent.

It is not safe to assume voting by nonresidents on mere testimony as to migrations of large numbers of persons.

(4) The above precinct of Monroeville was attacked on other grounds, however. The report says:

It is established by the evidence before the committee that a report was industriously circulated among the colored voters that in order for them to obtain bacon they would have to vote the straight

Republican ticket; that if they received bacon, and afterwards neglected or refused to vote the Republican ticket, they would forfeit their legal rights; that they should come to Monroeville on election day, and that Perrin would give them a big barbecue and meat enough to last them a year. It seems that no effort was made by the Republican leaders to correct these reports and disabuse the minds of the colored voters of their truth. It is testified by Perrin and many others that, in their opinion, the belief in the truth of these reports induced the colored voters to cast for the sitting Member at least 800 votes more than he would otherwise have received. The evidence fails to connect the sitting Member with these reprehensible practices. But it is apparent that these corrupt practices did have an influence to swell the vote of the sitting Member at this precinct. There are but a few voters who are shown to have been directly influenced to vote otherwise than they would have done by these means. It is apparent that more were corrupted than can be distinctly proved to have been influenced. It is probable that the truth has between the extremes. On the one hand it is claimed that at least 800 votes were obtained for the sitting Member by corruption and bribery; on the other hand it is claimed that this estimate is proved by the mere opinions of witnesses, and that the evidence does not point distinctly to more than 10 or 12 voters who are shown to have been thus corrupted. It perhaps would be fair to assume that the whole vote cast at this precinct in excess of the vote of two years before, when no such influence existed, was cast by voters who came there under the influence of the corrupt practices and promises disclosed in the evidence. At the Congressional election held in that precinct in 1872, the total vote polled was 516, and at the Congressional election in 1874 the total vote polled was 848. The excess in 1874 over the vote of 1872 is thus shown to be 332. The practice indulged in by Perrin and others to corrupt the colored voters in this county is of a most shameless and reprehensible character. It strikes at the foundations of republican government, and poisons the very sources whence all legitimate authority flows. No system of government can long endure where public opinion tolerates such conduct. Its general prevalence must lead to anarchy and bloodshed, and loosen the very ligaments binding society together. It strikes a fatal blow at the social compact. It overturns all just distinctions between honesty and corruption in the delegation of authority to the representatives of the people. No language can too strongly express our disapproval of the practices indulged in to corrupt the purity of the ballot box, at Monroeville, in particular. Votes thus obtained, even if cast by legal voters, it would seem ought to be rejected as illegal and void, even though it is not shown that the candidate who received them knew or consented to the corrupt practices whereby they were obtained. Such is the rule of law laid down in the unanimous judgment of a highly respectable court of last resort in one of the States of the Union. In that cue it is said:

"In our form of government, where the administration of public affairs is regulated by the will of the people, or a majority of them, expressed through the ballot box, the free exercise of the elective franchise by the qualified voters is a matter of the highest importance. The safety and perpetuity of our institutions depend upon this. It is therefore particularly important that every voter should be free from any pecuniary influence. For this reason the attempt by bribery to influence an elector in giving his vote or ballot is made an indictable offense. * * * Can a vote thus obtained, in direct violation of the statute, be considered a valid or legal vote? If it can, then the very object of the statute, which is that it should not be so obtained, is defeated. We are of opinion that such votes are illegal, and that the judge was right in directing the jury to disregard them. This conclusion is sustained by the authorities, so far as we have been able to find any." (State ex rel. Hopkins *v.* Olin, 23 Wis., 326.)

The Lex Parliamentaria of England seems to require that the bribery which will justify the rejection of a vote shall be practiced by the candidate to be affected, or by his agent. It is not necessary to the decision of this case to determine which rule should be applied in election cases depending before this House, and hence the committee express no judgment upon it. If it should be held that 332 votes cast at this precinct should be thrown out, or that every vote cast for the sitting Member should be rejected, it would not affect the result at which the committee have arrived.

Further on the report says:

No sufficient evidence has been produced to warrant the rejection of any votes cast in Monroe County except at the Monroeville precinct.

(5) Changes were made that in Dallas County 1,000 votes were cast by persons not residents of the county. The report says:

There was a large body of testimony produced before the committee which tended in some degree to raise an inference that a large number of votes had been cast by nonresidents of the county. This testimony is susceptible of being grouped into two general classes:

1. The testimony of a large number of witnesses showing quite a large emigration of colored people from this county since the year 1869.

In the opinion of the witnesses the number was from 2,000 to 3,000, of whom it is estimated that from one-half to three-fourths were colored voters.

2. The second class of testimony is that of railroad officers, steamboat men, and other persons engaged directly or indirectly in procuring and sending away colored laborers into Western States, particularly Mississippi and Louisiana.

It is quite apparent that it would be unsafe to hold that illegal votes had been cast on deductions drawn from testimony so infirm. The number of persons removing into the county would have to be ascertained; also how many of those who went abroad to seek labor went away temporarily and afterwards returned would have to be determined; and, in addition to this, it would be necessary to determine how many who were minors in 1869 had attained their majority in 1874. With so many elements of uncertainty the committee do not realize the force which the contestant attached to this class of proofs.

Therefore the committee held that the charge was not made out.

In conclusion the-committee found:

In conclusion, and without entering into any recapitulation of the votes rejected by the committee in the several precincts in this district, the committee content themselves with the statement that when all such illegal votes have been rejected, it still lacks much of overcoming the majority of nearly 2,700, which the sitting Member received; and it is believed no beneficial purpose would be subserved by any more minute analysis of the votes which we agree should be rejected.

And your committee have unanimously agreed to report to the House the following resolutions:

Resolved, That Frederick G. Bromberg was not elected a Member of the Forty-fourth Congress of the United States and is not entitled to a seat in this House.

Resolved, That Jere Haralson was elected a Member of the Forty-fourth Congress of the United States and is entitled to a seat in this House.

On April 18[1] the House agreed to the resolutions without debate or division.

908. The Illinois election case of Le Moyne v. Farwell, in the Forty-fourth Congress.

Where rejection of the poll (although undoubtedly merited) would accrue to advantage of the offending party, the House purged by deducting the illegal votes from the latter's poll.

On April 10, 1876,[2] John T. Harris, of Virginia, from the Committee on Elections, submitted the report of the majority of the committee in the Illinois case of Le Moyne *v.* Farwell. The official returns gave sitting Member a majority of 186. The contestant alleged fraud and irregularities. Three questions arose, the first two being of essential importance.

(1) In the first precinct of the Twentieth Ward of Chicago the returns gave sitting Member a majority of 171 votes. It was admitted by the whole committee that these returns were entirely unreliable. The minority say:

In reference to this precinct the committee are all agreed that the election was thoroughly corrupt; that an organized effort was made to commit fraud, commencing with a false registration list and ending in the polling of hundreds of illegal votes. Unless these votes can be eliminated and the poll purged,

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[1] Journal, p. 817; Record, p. 2552.

[2] First session Forty-fourth Congress, House Report No. 385; Smith, p. 406; Rowell's Digest, p. 308.

we must reject the entire returns, as the number of fraudulent votes cast was clearly sufficient to change the majority. We clearly recognize the duty to follow the rule, that the exclusion of an entire poll is the very last resort, and that it must never be done where there is any rational means by, which the illegal votes can be eliminated and we be enabled to arrive at the truth. In this case no such means exists. The evidence clearly shows not only fraud, but that the judges of the election were parties to it, that they were corrupt and dishonest, and so conducted the election that frauds might be and were committed. They would not respect challenges nor allow challengers in the room; they numbered the ballots so that no one can tell who cast them, although under the Illinois law it was their duty to place on the ballot cast by each voter a number corresponding to that opposite his name on the poll list; and when the ballots were produced from the clerk's office, it was found not only that the ballots were not so numbered, but that on a count there was a discrepancy of 48 against Farwell between the returns of the officers and a count of the ballots. These facts destroy the prima facie character of the returns, the judges are impeached, and their returns become as blank paper.

The only question which arose, then, was as to the disposition of the poll, whether it should be wholly rejected or purged. While the majority of the committee—seven in all-sustained the whole report, which recommended purging, yet two of this seven indorsed their dissent and favored the entire rejection of the vote. The four minority members also favored the rejection of the vote, so on this branch of the case the report submitted by the majority of the committee actually represented the opinion of a minority.

The report makes this argument:

Presumption is raised against contestee from the fact of his receiving a large majority in the precinct. It is also proven that one person who was furnishing names to illegal voters was providing them with tickets bearing contestee's name, and that the four men who made out the fraudulent registry, who, with one addition, constituted the judges and clerks of election, all voted for contestee. All the testimony proving illegal voting in this precinct is adduced by contestant. The contestee has called no witness nor made any attempt to show an illegal vote in the precinct, nor does he claim that there was any fraud practiced therein by contestant, but in his answer says that there was no illegal votes given for him in said precinct, and only asks to have the whole vote of the precinct thrown out, after the number of illegal votes proven by contestant to have been given to contestee exceeds his (contestee's) majority in the precinct. Contestee's majority in the precinct is 171. The number of illegal votes proven to have been given him in the precinct is 252, so that a rejection of the whole poll would give to contestee the advantage of the difference between these numbers, or 81 votes. "No man shall be allowed to take advantage of his own wrong," is one of the plainest and best settled of legal principles. The law says, "A wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it." The old rule is, "At law fraud destroys rights. If I mix my corn with another's, he takes all." If contestee can have the whole vote of this precinct rejected because of the fraud perpetrated by his own supporters and in his own interest, as proven in the record and not denied, then he is rewarded to the extent of 81 votes for the perpetration of said frauds. The proposition appears to be inequitable and illegal, bordering too closely upon absurdity to admit of argument.

By the law of elections it is held (American Law of Elections, sec. 304):

"Nothing short of the impossibility of ascertaining for whom the majority of the votes were given ought to vacate an election."

Again, section 305, page 231:

"It is the first duty of the tribunal trying the contest to purge the poll of the illegal votes, if this can be done."

This rule is particularly applicable in a case where it is proven that illegal votes were received and counted, rather than in cases where from the proof of irregularities upon the part of the judges it was to be presumed that the count and returns were illegal. The method used in this election was such that had fairness and honesty been observed, the poll of this precinct could have been purged with certainty and without difficulty. Every voter's name was entered upon the poll book as he voted. Opposite his name was written the street and number of his residence, as given by himself; also a poll-book number, and the testimony of the judges shows that the same number as that opposite his name on the

poll book was written on the ballot of every voter before it was put into the box, so that when proof is made that any name on the poll book is fictitious, or not the name of a legal voter, it is only necessary to select the ballot bearing the corresponding number, and thus identify the candidate from whose vote the deduction should be made. In this case the proof shows that after the election was closed, the ballot box was taken off by one of the judges to the house of a candidate on the same ticket with the contestee, and there left for two days before the official returns were made, and that the friends of contestee having charge thereof withheld their returns until the other precincts were heard from; that when said official returns were made the ballots were sealed and returned to the county clerk, and were not again opened until in taking the testimony in this case they were produced and opened in the presence of the parties to this contest or their attorneys and the officers taking the testimony. Then great irregularity appeared in the numbering of the ballots. There were found 183 names on the poll book for which no ballots were found, 198 ballots of duplicate and triplicate numbers. There were only 673 names on the poll book, but there are ballots numbered 674, 675, 675, 676, and 677. It is clear that the ballot box had been tampered with, but it must be remembered that the box was in the custody of the friends and supporters of contestee, which raises the presumption that whatever alterations or changes were made were in his interest and to his advantage. It must be to the disadvantage of contestant to be forced to purge this poll of fraudulent or illegal votes, after the ballots had been thus manipulated by the friends and in the interest of contestee. In such a condition of things, would it be inequitable or unfair to hold that whenever an illegal vote was proven it should be charged to contestee, whether a ballot bearing a corresponding number was found for him or not? In the case of Duffey (4th Brewster, p. 531), the court held, "Upon notice, etc., that fraudulent votes had been received, the burden of proof falls upon the candidate advantaged by the count, to show that the person so voting was a legal voter or voted for his opponent; otherwise it will be presumed that they were polled and counted for him, and the poll will be purged by striking the whole number of such votes from his count." This ruling was no doubt based upon the presumption that the party receiving the majority is responsible for the fraud, and upon which presumption the court felt warranted in throwing the burden of proof on him, and thus purging the poll. But the application of this rule, which might be claimed to be stringent, is not asked or contended for in this case. Here it is only proposed to deduct from the returned vote of the contestee the number of illegal votes, with ballots bearing numbers corresponding to the names of the illegal voters proven to have been received by him in this precinct (there are 84 names in addition to these proven to be of illegal voters, for which there are no ballots, and we disregard them), and it is held that the adoption of this method for the purging of said poll will necessitate the deduction of 252 votes from the returned votes of contestee.

The minority views,[1] after quoting section 442 of McCrary's American Law of Elections, say:

> Returns which are impeached are good for no purpose whatever; they prove nothing; and to us the result seems inevitable that if it is admitted, as it is by every member of the committee, that the judges of the election were corrupt and the election fraudulent, that then the whole of the return becomes valueless, does not import verity, and can be used for no purpose whatsoever. The rule of the law, falsus in uno, falsus in omnibus, applies and we have no middle course except to admit all or reject all; and we shall not attempt to argue the absurdity of taking ballots from the same source, numbered by the same hands, and which are proved to be numbered wrongfully, and from these numbers and ballots determine who the illegal voters cast their ballots for. The rule is a safe one; no one is injured by it; it deprives no one of a single legal vote; for when returns are excluded, it is always in the power of the candidate who believes he has a majority of the legal votes to call the voters and prove whom they cast their ballots for.

In the debate it was urged[2] that the officers of the election were not the agents of either party, but were officers of the law, and there was no presumption one way or the other on account of their acts. Legal authorities on this point were adduced.

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[1] By Mr. Thompson, of Massachusetts, Record, p. 2843.

[2] Submitted by Mr. William R. Brown, of Kansas.

909. The case of Le Moyne v. Farwell, continued.

Illustration of a vague and uncertain specification in a notice of contest, which was nevertheless considered.

Discussion by a divided committee as to the status of paupers at a poorhouse with reference to question of residence.

Discussion as to the evidence required to reject votes of alleged paupers received and counted by the election officers.

The House declined to be bound by a decision of a State court on an analogous question, but not the identical question of qualification of voters.

(2) The majority report thus sets forth a question as to the residence of certain alleged paupers:

> Norwood Park: At this precinct the contestee received 51 and contestant 94 votes.
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> The contestee, in his answer, charges:
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> "Third. That a large number of illegal voters, to wit, over one hundred, who temporarily were inmates of the poorhouse in the town of Norwood Park, and who were not legal voters of said town, were allowed to cast their votes for you, which were counted and returned for you."
>
> This charge is very vague and uncertain, and leaves the reader in ignorance of any other objection to these voters than the simple fact that they are paupers. But as the law of Illinois allows paupers to vote, it is evident that the objection, as disclosed by the testimony and the brief of the contestee, is to the residence of these supposed paupers.

The report criticises the evidence presented to prove that these were paupers as negative and not the best evidence when the law of Illinois required a list of persons admitted to the poorhouse to be kept as a public document.

The votes of the alleged paupers were received in accordance with all the precautions of the law as to challenges. Therefore the majority report argues:

> No fraud being proved, or attempted to be proved, in the officers who received the votes, the question recurs, what degree of proof, as to the illegality of these voters, ought to obtain to justify this committee in excluding votes thus received, counted, and duly certified?
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> In the celebrated New Jersey cases (1 Bart., p. 25) the committee say:
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> "It is not sufficient that there should exist a doubt as to whether the vote is lawful or not, but conviction of its illegality should be reached to the exclusion of all reasonable doubt before the committee are authorized to deduct it from the party for whom it was received at the polls."
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> In Rogers's Law and Practice of Election Committees, page 116, it is said:
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> "So in petitions against candidates on the ground of want of sufficient qualification, although a negative is to be proved, it is the usage of Parliament that the party attacking the qualification is bound to disprove it."
>
> So run all the authorities, that a vote once legally cast can not be set aside except upon proof so strong as to produce the certain moral conviction that the said vote was illegal. The burden of proof is on the party assailing the vote. See Cessna *v.* Myers (McCrary, p. 426), wherein Judge Hoar, in behalf of the committee, says, "The burden of proof, when either party insists that a vote should be deducted from those cast and returned for his competitor, is upon that party to show the person whose vote is in question voted, and that he voted for his competitor, and that he lacked some one of the qualifications to constitute him a voter."
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> Admit, for the argument, that the law of Illinois disqualifies paupers from voting in that State, is the testimony in this case sufficient to satisfy the judgment that those "employees," as they were called, were paupers? We think not, though, secondarily, the weight of evidence is that they were a class employed by the superintendent of the poorhouse by order of the board to do work upon the county farm an about the premises, and to receive their clothing and food as a compensation. We know the human heart revolts at being called a pauper, and that there are many, many poor persons in

every county who would gladly work the remainder of their days for their food and clothing rather than be called paupers. To this class, it seems to your committee, these voters belong. Therefore, in the light of the authorities and the evidence, your committee could not strike off these votes, even if the law prohibited paupers from voting. But the law of Illinois does allow paupers to vote, and the contestee attacks, in his evidence and the brief of his very learned and able counsel, the residence of these parties. This brings us to consider the law of residence within the meaning of the constitution of Illinois so as to allow the exercise of the election franchise.

No question has been more discussed and to less purpose than the definitions of "residence" and "domicile." No two authors precisely agree in their attempt to define them. But all agree upon the universal principle that every man must have a domicile. We can well understand why a strict rule should apply in the definitions of these terms, as has ever been and will be, in regard to domicile where the rights of property, the law of descent and distribution, the law of the duty of the citizen or the subject to his government, are involved. We can as readily see, in regard to suffrage, why the strictness of the rule should not apply in our Government. While the extent to which suffrage may be carried is under the control of the law power of the several States, conferred by their constitutions, yet suffrage in some form is inherent in our Government and forms its very basis. Without the free and legitimate exercise of this right, we can have no republican government; and all laws passed by the States requiring its exercise in particular localities and requiring a residence are not to abridge the sacred right, but to guard and protect it from abuse and violation.

The report then goes on to quote Vattel, Story, the American Cyclopedia, Bouvier, and the House cases of Monroe *v.* Jackson, Covode *v.* Foster, Taylor *v.* Reading, and Cessna *v.* Myers, and concludes:

Upon this brief summary of these cases, it is evident that the weight of authority is to the point that paupers at a poorhouse do acquire there a residence within the meaning of the election laws prescribing a residence as a requisite to suffrage.

There had been in Illinois decisions of the court (Paine *v.* The Town of Durham, 29 Ill., 125; Freeport *v.* Supervisors, 41 Ill., 41) that paupers did not lose their residence in the towns from which they went, nor did they acquire a residence at the poorhouse. The report calls attention to the fact that the law of Illinois allowed the towns to take care of their own poor or to have them cared for at a county poorhouse. It was therefore evident that had the court authorized the contrary doctrine, the town where the county poorhouse was located would become responsible for all the county paupers. The report points out that these decisions have reference to a police matter merely and have "no reference or bearing upon the constitutional provision in regard to suffrage." Therefore the majority of the committee decline to be bound by the decisions of the court.

The report quotes the constitution of Illinois:

Every person having resided in this State one year, in the county ninety days, and the election district thirty days shall be entitled to vote.

A law passed by the legislature also provided as quoted and commented on in the report:

"A permanent abode is necessary to constitute a residence within the meaning of the preceding section."

Certainly it will not be contended that the legislature had a right to change the constitution, or so to construe it as to enlarge or restrict the right of voting. It can do neither, and their act on the subject of residence is null and void; and we must decide this question as if it had never passed, and look alone to the constitution for our guide. By that constitution we find "every person having resided," etc. This is certainly putting the question of residence in its mildest form, and rebuts the presumption that the constitution means that a man, before he can vote in Illinois, must have a domicile in the sense of the old

and strict construction of that word when applied to contracts, distribution, etc. In the opinion of your committee, "having resided" simply means that a man shall, in good faith, have lived in Illinois for twelve months, not as a mere itinerant or visitor, but that he shall have been substantially engaged in business there during that time. Given the construction contended for by contestee, then there is a very large class in that State who do not dwell in poorhouses who would be disfranchised. The law of Illinois is rather singular in this. It requires the relatives of a poor person, if they are able, first to support them, in the following order: First, children shall support their parents; next, parents support their children; next, brothers and sisters; next, grandchildren; next, grandparents. And it is made the duty of the State's attorney for the county to apply to the court for judgment and award of execution such relative for the support of his pauper kinsman; for the statute recognizes all persons as paupers who are not able to support themselves. Will it be contended that these poor persons, living in the family of their relatives, do not acquire a home, a residence there, because they are placed there in obedience to the law? Surely not. If so, we would witness the painful spectacle of disabled soldiers and some of the most intelligent citizens disfranchised because of poverty and because they live in the family of their relatives, away from the town in which they had previously lived.

This is as much their poorhouse under the law as the county building is the poorhouse of those who have no relatives within the degree able to support them. If the home of the family in which he lives is not his, then he has none—no home on earth. So with the pauper at the poorhouse. It is his home, his residence; he has none other. It is idle to say his residence is a restrained one. It is not. He can leave when he pleases. He is there for no offense; paying the penalty of no violated law. His only crime is poverty, and he is there to receive the bounty of his county or his town, as the most convenient place. It is a necessity that compels him to go there, but it is not the necessity of duress which deprives him of his volition and his intent. Unlike the lunatic, the infant, and feme covert, he is a free agent, to think and act for himself, except so far as he is restrained by poverty. The humblest citizen in his little hut, living perhaps on one meal a day, is restrained by poverty, yet he is a freeman and a voter. That necessity which compelled them to go to the poorhouse will compel them to remain; and if there be one class above another whose homes, whose residences, are fixed, it is this class of persons. We presume but few go animo revertendi, but they go with the expectation of spending the remainder of their days there. Then admitting these persons to be paupers, which we do not, in the opinion of this committee, their home, their residence, their permanent abiding place is at the poorhouse, and they have a right to vote in the Norwood Park precinct, in which the poorhouse is.

The minority views combat the above argument:

Norwood Park is a small country precinct, casting outside the poor farm only eighty-four votes. In such a precinct every man knows and is acquainted with his neighbor, and especially is this true of the officers and business men in such a place; and when these come up and testify that they do not know these men, and have never known them there, the evidence seems to us very conclusive. In speaking of this class of testimony Mr. McCray says (American Law of Elections, sec. 356):

"This kind of evidence is admissible for what it is worth, but it is manifest its value must depend upon circumstances. If the district or territory within which the voter resides is large or very populous, and the witness has not an intimate and extensive acquaintance with the inhabitants, the evidence will be of little value, and, standing alone, will avail nothing. But on the other hand, if such district or territory be not large or populous, and if the witness shows his acquaintance with the inhabitants is such that he could scarcely fail to know any person who may have resided therein long enough to become a voter, his evidence may be quite satisfactory, especially if it further appears that soon after the election the alleged nonresident voter could not be found in the district within the limits of which all voters must reside. Proof of this character must at least be regarded sufficient to shift the burden upon the party claiming that the vote of such alleged nonresident be counted and require him to show affirmatively that he is a bona fide resident."

The evidence in this case of Winship, justice of the peace; Corse, town clerk; Pennoyer, an old resident of ten years; Ball, who had lived in the town since it was organized and had been through it three times within two years in assessing and collecting taxes, and of Stockwell, certainly is sufficient to change the burden of proof and throw upon Mr. Le Moyne the duty of showing such prior residence. But instead of attempting this, Mr. Kimberly, the warden of the poor farm, and Mr. Le Moyne's only witness, directly testifies that he does not know that these men had been residents of Norwood Park, and if cor-

roborative evidence was necessary that they had no residence in the town except at the poor farm, it is found in the fact that John Walsh, deputy warden of the poor farm, signs all the affidavits as witness, showing in itself that the men were not acquainted in the town. Now, if these men had no prior residence at Norwood Park could they have obtained one by being inmates of the poorhouse? To us the answer is plain—that as employees they could; as paupers they could not

The minority then examines the authorities, after which they consider the status of the alleged paupers, coming to the following conclusions:

We believe every rule of evidence would require us to come to the conclusion that the seventeen men whom Mr. Kimberly will not attempt to prove to be employees were paupers; for certainly their place of residence, their appearance, the manner in which they were brought to the polls, and the manner in which they were voted would raise that presumption, and, in the language of Mr. McCrary, at least shift the burden of proof upon the contestant.

Were the others not also paupers? Mr. Kimberly, the warden of the poor farm, testifies that they belonged to a class of employees "to whom, in lieu of money, I allow payment in the way of extra clothing, board, and accommodation and liberties"—persons who were not on the pay rolls, but employed as "assistants in the bakery, cooks in the kitchen, men in the washhouse and soup house, men in care of the wards of the almshouse, nurses, teamsters, men in care of the stock, and men on the farm—gardeners." They are paid in "extra board, accommodations, clothing, and are allowed small perquisites, liberty." The same witness stated that he could not state where the men came from, but presumes "most of them were convalescent patients from the hospital, and that they came on physicians' certificates in the city, and that, as a general thing, they came to the institution as paupers;" that, "generally, this extra employment was given to the inmates of the institution." He also states the regular corps of employees consisted of twenty-one men and twenty-three women. We submit that this evidence of Mr. Kimberly is conclusive that these men were paupers, and came there mostly from the city. The manner in which such institutions are usually conducted is, to have a regular force of persons hired and paid to take charge, and that the assistants are always paupers; that the very object of having such an institution on a farm is to furnish such employment as the inmates may be capable of performing, so that they may, in part, make the institution self-supporting; and we do not understand that the mere fact that paupers labor, that a system of rewards is established to encourage them to labor, that thereby their status is changed. The very evidence of Kimberly calling their pay "extras" shows that without this employment they would receive ordinary fare. Notice his language: "Extra board," "extra clothing," "privileges at first table," "extra diet,' "in the winter time an extra meal," "extra allowance of clothing," "privilege of selecting their own ward," "small perquisites." The evidence is so convincing that we hardly feel that we need go beyond Kimberly's testimony to show that these employees were paupers from the city; but we have, besides, conclusive evidence as to their status. Comparing the lists we have made of persons who called themselves paupers and those whom Kimberly calls employees, we find that the names of Thomas Sage, Hugh Gallagher, Daniel McFarland, I. A. Hipwell, John Campbell, Daniel Boyle, and M. A. Kinsella appear on both lists, showing that these men did not conceive these extras changed their status, and that they were not paupers, supported by the county, as they stated they were. If ever a witness was contradicted, Mr. Kimberly is, by the very facts he testifies to, and by the statements of the very men whom he claims as his employees. The conclusion, to our mind, is irresistible, that these persons were never residents of Norwood Park, and were paupers; and we reject the votes of each and all of the forty-seven voters named on our two lists.

910. The case of Le Moyne v. Farwell, continued.

A return made up "irregu1arly from ballots that had not been properly kept" was rejected.

Affidavits given by nonregistered voters need not be signed; but the jurat must appear or the votes are rejected.

(3) The report rejects the returns from the third precinct of the Eighteenth Ward of Chicago "as wanting in regularity and certainty." After the election

had closed the ballot box, ballots, and all papers pertaining to the election were taken to a saloon and left over-night in inadequate custody of one who was not an officer of election or authorized to have care of the ballot box under the law. On the day after the election some of the election officers with others unauthorized took charge of the box and papers, made a count, and drew up a return, which was claimed to be an official return.

(4) The report further says as to another precinct:

> Contestee objects to a number of affidavits furnished by nonregistered voters, because of their not being signed by the affiants, though properly certified to by the officer taking the same. We hold that said affidavits are clearly sufficient. In this precinct contestant objects to seven affidavits furnished by voters for contestee, upon the ground that they do not appear to have been sworn to before any officer. There is no jurat thereto; it is agreed that the same are fatally defective, and 6 votes therefore should be deducted from contestee.

As a result of their reasonings the majority report finds contestant elected by a majority of 106 votes, and presents resolutions unseating sitting Member and seating contestant.

The report was fully debated in the House for three days, and on May 3 [1] resolutions declaring sitting Member entitled to the seat offered by the minority as a substitute, were disagreed to, yeas 89, nays 129. Then the resolutions of the majority, seating contestant, were agreed to without division.

911. The Minnesota election case of Cox v. Strait, in the Forty-fourth Congress.

The State legislature having included a county within a Congressional district, the House did not examine whether or not it was technically entitled to be so included.

County commissioners having established election districts at a special meeting when the law specified a stated meeting, the action was void.

The election district having been illegally constituted, the votes cast therein were rejected.

On April 12, 1876, [2] Mr. John Harris, of Virginia, from the Committee on Elections, submitted a report in the case of Cox *v.* Strait, from the Second district of Minnesota. The election in question was held on November 3, 1874, and the official canvass showed a majority of 221 votes for sitting Member. The contestant sought to prove sufficient fraud and irregularities to overturn this result. The questions examined were:

(1) In the vote of the Second district was included that of Kandiyohe County, to which the legislature had in 1870 added what had formerly been Monongalia County. And as the districting act had left to the Third district all counties not specifically enumerated as in the First or Second district, and as Monongalia County was not especially mentioned as in the First or Second district, it was urged by contestant that contestee was not entitled to the majority of 188 votes returned for him from the territory of Monongalia County. The ground of the contestant for

[1] Journal, pp. 910–912; Record, pp. 2834, 2885, 2918–2922.

[2] First session Forty-fourth Congress, House Report No. 391; Smith, p. 428; Rowell's Digest, p. 309.

making this claim was that the consolidation of the two counties was unconstitutional and void. The report says:

Section 1, article 11, constitution of Minnesota, is as follows:

"The legislature may from time to time establish and organize new counties, but no new county shall contain less than four hundred [square] miles; nor shall any county be reduced below that amount; and all laws changing county lines in counties already organized, or for removing county seats, shall, before taking effect, be submitted to the electors of the county or counties to be affected thereby, at the next general election after the passage thereof, and be adopted by a majority of such electors. Counties now established may be enlarged, but not reduced below four hundred square miles."

The contestant claims that the clause which prohibits the reducing of the counties then existing below 400 square miles, and the provision that counties then existing may be enlarged, but not reduced below 400 square miles, prohibit the extinguishing of the county of Monongalia by consolidating it with the county of Kandiyohi, and that the act of the legislature of Minnesota consolidating those counties is unconstitutional and void, and that Monongalia is now in fact a county, and not being included by name in either the First or Second district, belongs to the Third district instead of the Second. It appears that the object sought to be accomplished by that section of the constitution is to prevent the reducing of the original counties below 400 square miles, and the formation of new counties with a less amount of territory than 400 square miles, and to prevent the changing of county lines in counties then organized without the consent of the electors of the counties to be affected thereby. The legislature certainly has the right to consolidate counties formed subsequent to the adoption of the constitution. There is no direct prohibition to the consolidating of original counties, and thereby forming a new county. The only direct prohibition is that the county so formed shall not contain less than 400 square miles. The power to form new counties without specifying the territory out of which they may be formed certainly gives the right to form a new county by consolidating counties, whether original or otherwise, unless the prohibition relative to reducing the original counties below 400 square miles shall be held to forbid the extinguishment of a county by consolidating it with another county. This does not seem to be the mischief designed to be remedied. In fact, the consolidating of counties might be a remedy for the evil and in manifest futherance of the object of this constitutional provision, viz, to avoid the existence of small counties. Constitutional restriction upon legislation must be plain and certain. A State legislature has supreme power of legislating except where it is restricted by the constitution, and everything will be presumed in favor of the power of the legislature. The courts will not declare an act unconstitutional unless it is clearly made so by an express provision of the constitution. Your committee are strongly of the opinion that the act consolidating those counties is constitutional, but have not deemed it necessary to decide that question in this case. The real question is, What territory was included in the Second district? The representative districts are formed of contiguous territory. In 1872 the legislature of Minnesota set off a certain amount of territory as the First district, a certain amount of territory for the Second district, and then enacted that all the territory of the State not included within the First and Second districts should compose the Third district. The legislature designated the territory to be comprised in the Second district by in naming the counties to be included in it, and it must be assumed that it included the territory which the legislature itself had determined belonged to said counties. The legislature passed the act of 1870 consolidating Monongalia and Kandiyohi counties, and the same was made effectual by the methods provided in the act. The consolidation of the counties was recognized in the division of the State into senatorial and representative districts in 1871 (chap. 20), and it is plain that the legislature when it designated the county of Kandiyohi as a part of the Second district designated it as it was formed by itself and did include in it the territory which formerly composed the county of Monongalia. Your committee, therefore, find that the majority of 188 votes canvassed for the sitting Member was rightly canvassed, and ought not to be deducted from his majority of 221.

(2) As to the illegality of certain voting precincts, the report says:

Second. It is provided (p. 220, Stat. L., see. 19) that the board of commissioners shall meet at the county seat of their respective counties, for the purpose of transacting such business as may devolve upon or be brought before them, on the first Tuesday of January and September in each year, and may

hold such extra sessions as they deem necessary for the interest of the county; such extra sessions shall be called by a majority of the board, and the clerk shall give at least ten days' notice thereof to the commissioners, but no regular session shall continue longer than six days, and no extra session longer than three days.

Page 233, section 31: The commissioners of such county (any county not divided into towns) shall, at their stated meetings in January and September, upon the petition of not less than 10 legal voters not residing within 10 miles of any established election district, create and establish within said county an election district at such point as will be most convenient for the persons so petitioning; but no place of holding elections shall be located in said election districts within 10 miles of any other place of holding elections previously established, nor shall the commissioners create any election district except at the time of their stated meetings, and then only in compliance with the request of 10 or more legal voters residing not less than 10 miles from any established election district. The election districts of Southeast, Blaen Avon, Michigan, South, Ceresco, East, and Northeast were not established at a stated meeting of the county commissioners, but at a special meeting holden October 5, 1874 (pp. 50, 51, record), and were therefore not legally established. The action of the county commissioners was without authority of law, and null and void, and no legal election could be held at either of said districts; therefore 111 votes must be deducted from the majority reported for the contestee—that being the majority he received in said districts which was wrongfully canvassed for him.

912. The case of Cox v. Strait, continued.

Although election officers left the ballot box unguarded while adjourned for dinner, the returns were not rejected in the absence of evidence of fraud.

Although de facto officers presided and returns were transmitted unsealed by an unauthorized person, the House did not reject the return.

As to the evidence required to establish a charge of bribery.

Irregularities unaccompanied by fraud do not vitiate the return.

(3) In the town of West Newton the election judges closed the polls for about an hour while they took dinner, the ballot box being left in the election room, which adjoined that in which the dinner was taken. After quoting the evidence, the report holds:

Your committee regard the conduct of the judges of election at this place in leaving the ballot box for the space of an hour unsealed and unguarded as highly reprehensible. It is of the highest importance that the ballot box should be guarded and protected in the most careful manner; that all the provisions of law made for the security of the ballot should be strictly obeyed. There should not be the least opportunity for tampering with the ballots. It is certainly a serious question whether such an irregularity as this ought not to vitiate the election; but your committee under all the circumstances have not felt compelled to reject this entire poll, there being no evidence that the ballot box was actually tampered with, but, on the contrary, there is some negative testimony showing that it was not tampered with. Your committee would, were there any facts tending to show that the ballot box had been tampered with, have decided to reject the returns from this poll. The adjournment for dinner has frequently been decided not to be sufficient to vitiate an election. The law of the State of Minnesota provides that no election returns shall be refused where there has been a substantial compliance with the law.

Section 40, election law of Minnesota:

"Sec. 40. No election returns shall be refused by any auditor for the reason that the same are returned or delivered to him in any other than the manner directed herein; nor shall the canvassing board of the county refuse to include any returns in their estimate of votes for any informality in holding any election or making returns thereof, but all returns shall be received and the votes canvassed by such canvassing board and included in the abstracts, provided there is a substantial compliance with the provisions of this chapter."

The fact ought also to be considered, in determining what should be done with the votes at this

place, that the contestant did not in his notice of contest claim that the ballot box was tampered with, or even left unguarded, but rested his claim to have the vote excluded upon the sole and untenable ground of the adjournment of the judges of election for an hour at noon.

(4) As to West Newton precinct certain questions were settled thus:

It does not appear from the evidence that the ballot box was not all of the time in sight of some one of the election officers during the adjournment for dinner, and we apply the same rule here as in the case of the town of West Newton. It does not appear that any unnaturalized person voted, and the officers who presided at the election were de facto officers, and there is nothing shown which so impeaches their action as to vitiate the poll on that account. The returns should have been conveyed to the county auditor by one of the judges of the election sealed, but were conveyed by the witness, an unauthorized person, and were unsealed. This is a grave irregularity, but the evidence is that he delivered the returns to the county auditor just as he received them from the town canvassers, and this testimony is not impeached. The committee do not, therefore, reject the returns from this town.

(5) As to a charge of bribery:

Sixth. The contestant claims that 200 votes given for the contestee should be deducted for bribery. The evidence shows that Ph. Stelzer received a check for $25 in a letter which purported to be from the contestee, and requesting Stelzer to use his influence in the election for the contestee (pp. 38, 39). Also Julius Christianson received $2 from one J. B. Sackett the day before election, and was promised $2 on election day, "to peddle Republican tickets with H. B. Strait's name on." The $2 promised was paid the day after election. A. J. Lamberton testified that "common report was that J. B. Sackett and William Beckel were distributing a great deal of money for the purpose of buying and influencing votes for H. B. Strait for Member of Congress." But he had no personal knowledge of a dollar having been spent for that purpose. Your committee find the evidence wholly insufficient to establish the charge of bribery.

(6) As to irregularities not accompanied by charges of fraud:

The contestee makes counter charges, alleging irregularities in a large number of voting precincts which gave a majority for the contestant. These voting precincts are in the counties of Carver, Le Sueur, Sibley, and Dakota, but the irregularities, where any are shown to exist, relate to the manner of returning the votes, the swearing of the election officers, and adjournment for dinner, and are not of that nature and character and extent which, unaccompanied with fraud, will vitiate the returns.

In conclusion the committee found:

The committee do not make any deductions from the votes of the contestant, and only deduct from the contestee the majority of 111 votes which were canvassed for him in those precincts in Lyon County which were not legal voting precincts. The returns as corrected give Horace B. Strait 110 majority, instead of 221. Your committee find that he was elected by that majority, and recommend the passage of the following resolution:

Resolved, That Horace B. Strait was duly elected, and is entitled to retain the seat which he now holds from the Second Congressional district of Minnesota.

On June 23 [1] the resolution of the committee was agreed to in the House without debate or division.

913. The Louisiana election case of Spencer v. Morey.

The making of essential tally-lists by unsworn volunteers, combined with other irregularities, caused the rejection of return, although no fraud was shown.

The record of a trial in a State court as to a title to a State office is not competent evidence in an election case, although relating to the election in question.

[1] Journal, p. 1143; Record, p. 4076.

On April 27, 1876,[1] Mr. John F. House, of Tennessee, from the Committee on Elections, submitted the report of the majority of the committee in the Louisiana case of Spencer *v.* Morey. It was admitted that the result was not impeached in any parts of the district except in the precincts of Carroll Parish and in the Fifth precinct of Concordia Parish. Outside of this contested territory Mr. Spencer, the contestant, received a majority of 1,396 votes. Therefore the sitting Member's majority depended on the disposition of the questions relating to the disputed territory. The examination of the case is naturally divided into two main branches:

(1) As to the fifth precinct of Concordia Parish.

The law of the State provided:

That immediately upon the close of the polls on the day of election, the commissioners of the election at each poll or voting place shall proceed to count the votes. * * * The votes shall be counted by the commissioners at each voting place immediately after closing the election and without moving the boxes from the place where the votes were received, and the counting must be done in the presence of any bystander or citizen who may be present. Tally lists shall be kept of the count, etc.

SEC. 45. *Be it further enacted, &c.,* That any civil officer or other person who shall assume or pretend to act in any capacity as a commissioner or other officer of election to receive or count votes, to receive returns or ballot boxes, or to do any other act toward the holding or conducting of elections, or the making returns thereof, in violation of or contrary to the provisions of this act, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary for a term not to exceed three years nor less than one year, and by a fine not exceeding three hundred dollars nor less than one hundred dollars.

Of the conduct of the commissioners of the parish the majority report says:

In view of the specific requirements of the law upon the subject, it must be admitted that the conduct of the commissioners in totally disregarding its plain provisions is somewhat extraordinary. The law required them not to remove the ballot box from the place where the election was held until they had counted every vote in it in, the presence of such of the voters as saw fit to be present and witness the counting. This counting they were required to commence immediately on the close of the polls, and their returns were to be made out and delivered to the supervisor of registration within twenty-four hours after the voting ceased.

Instead of doing this, after the close of the election, between 6 and 7 o'clock in the evening, they took the ballot box and started with it to Vidalia, the parish site, a distance of some 16 miles from the voting place. Dameron, one of the commissioners, who is sworn by both parties, in his testimony says when the polls were closed the box was locked, and he took the key and gave the box to Robert H. Columbus, another commissioner. They started to Vidalia on horseback, and when they arrived at the store of one Witherspoon, the suggestion was made that Dameron should get into a buggy with one Irvine and take the ballot box in the buggy with him. They then proceeded to Vidalia, one of the commissioners riding in front and the other in rear of the buggy, on horseback. They reached Vidalia between 11 and 12 o'clock that night, and finding the court-house occupied by the officers of election at Vidalia, they went upstairs into the room of the tax collector, opened the box, and commenced counting the votes. They counted until half past 2 o'clock that night, when, being fatigued, they adjourned for the night. When the box was closed, Dameron says he locked it and gave the key to Columbus, and took the box himself with him to the hotel, where he and William C. Yorger, United States supervisor, occupied the same room for the balance of the night. The box was placed under the bed during the night. The next morning, Dameron says, he took the box with him to the table when he went to breakfast. After breakfast they again met in the upstairs room of the court-house, opened the box, and commenced counting, and after counting there a while went down into the court room. They completed their returns on Wednesday night, November 3, between 10 and 11 o'clock, and made their returns to the supervisor of the parish on the next day, 4th November, between 12 m. and 1 o'clock p.m. Dameron further says

[1] First session Forty-fourth Congress, House Report No. 442; Smith, p. 437; Rowell's Digest, p. 311.

that during the time they were counting the votes in the tax collector's office there were several spectators present; the tax collector's office was considered a public office; says when he went to his meals, during the counting, he left the box in the court room in charge of his co-commissioner Columbus, and took the key himself, and when Columbus went to his meals he took the key, leaving the box in Dameron's custody. Columbus and Jefferson, the other two commissioners, being colored men, did not take their meals at the same place Dameron did.

The minority views call attention to the fact that Dameron, who was most prominent in the action, represented the political party friendly to contestant. The former law had required the election commissioners to go to Vidalia to count the vote, and they appeared to consider the requirement still in force. The minority views continue:

No other presumption can arise out of this evidence than that they supposed and believed the law required them to go to Vidalia, the parish seat, and there count the votes, and that this was done by them in order to conform with the law, as they supposed it to be, and not with the intent to commit fraud in connection with the election; especially when we understand that the election laws of Louisiana, in force at the last election prior to this one, and for some time prior thereto, provided that "at the conclusion of the election, at each poll, the boxes containing the ballots shall be securely locked and sealed, and taken immediately by the commissioners of election to the parish seat, where they shall be counted out by the said commissioners, in the presence of the supervisors of registration and election of the parish." It certainly would be a violent presumption to presume anything else than this from the evidence before us. There is not a scintilla of evidence proving fraud of any kind, nor is any attempt made to prove fraud by contestant, nor was it urged in argument that any fraud was committed; but it was urged that the mere fact of removing the box gave an opportunity for fraud.

The evidence shows that the box was never out of the hands of the lawful custodians until the votes were counted and the returns made. Until the contestant proves some act showing fraud on the part of the commissioners, or some one of them, or some act from which fraud will, be presumed, the law is that their acts must be taken as having been honestly performed. The legal presumption is against fraud on the part of the officers of election, and that nothing but the most unequivocal proof can destroy the credit of official returns. (See Goggin *v.* Gilmore, 1 Bart., 70; Little *v.* Robbins, same; p. 130.) The burden of proof is upon contestant to prove the fraud. We do not deem it necessary to cite authorities to establish this legal proposition. We conclude therefore that, as there is no evidence proving fraud, or any evidence from which fraud can be presumed in connection with this box, the committee will not, in the absence of such proof, conclude that because there was an opportunity for fraud that therefore fraud was committed. Certainly this would be a monstrous violation of the legal presumption in regard to legal acts, viz, that all persons are presumed innocent until proven guilty, that officers are presumed to have performed their duties, and to have performed them honestly, and that the mere opportunity to commit a crime, in the absence of other evidence, will. not be taken as a presumption to establish the fact that a person committed the crime. The evidence regarding this box, taken all together, does not even raise the presumption of fraud.

The majority of the committee say on this point, and on a second question raised as to these returns:

Whatever may be thought as to whether those portions of the law are mandatory or directory which require the votes to be counted at the place where they axe polled, without removing the ballot box, in the presence of such voters as may see fit to witness the count, and the commissioners to make their return to the supervisor of the parish in twenty-four hours after the close of the polls—all of which provisions were intentionally violated or ignorantly disregarded by the commissioners—we assume that there can be no two opinions on the proposition that that part of the law which requires the commissioners to make a correct count of the votes cast is certainly imperative. Before entering upon their duties, as we have seen, they are required to swear that they will "carefully and honestly canvass" the votes. How were the votes at this box counted? How did these commissioners discharge their duty in this respect?

The keeper of the tally list, to all intents and purposes, makes the only record from which the votes can be counted. If his list is correct, the number of votes cast can be correctly ascertained; if his list is erroneous, the returns based on it are necessarily incorrect. The tally keeper is, then, the party who counts the votes. The marks he makes on the paper determine how many votes each candidate has received. It is not pretended, and indeed can not be, that these commissioners had any other mode or means of determining the result of the election than from the tally sheets kept by parties "picked up"—to use Dameron's expression—at random in the court-house to tally the vote. Can sworn commissioners, whom the law places around the ballot box as guardians of its purity, and charges with the duty of "carefully and honestly" canvassing the votes at an election, delegate to unsworn and irresponsible parties the delicate task which the law imposes upon them alone? The law of Louisiana expressly requires tally sheets to be kept; and when properly kept they are authority upon the state of the vote. Says McCrary, in his Law of Elections, section 291:

"In the case last named it was held that the tally sheet kept by the officers of the election is competent evidence, in an election contest, to show the true state of the vote. It is good until impeached, and affords prima facie evidence of the votes cast for such candidate." This gives to the tally sheet kept by officers of the election the same dignity and authority as the returns themselves, and properly so; for the returns are based on the tally sheets, and unless the latter are correct the former can not possibly be so, or import verity. Who were Connell, Joyce, and Nutt, the three parties picked up in the court-house to work upon these tally sheets? All we know of them is their names. They were not officers of the election, and were not sworn to discharge their duties faithfully. By the law of Louisiana it is made a felony for any person not an officer of election to assume to act as such in receiving or counting votes, or doing any other act toward the holding or conducting elections, or making returns thereof; clearly prohibiting all unofficial hands from touching anything connected with holding elections or counting the votes. No legal presumption of correctness attaches to their acts. If the tally sheets kept by them can stand at all, they must stand on extrinsic evidence of their truth, as they can lean on no legal presumption for support. It is no extenuation of such a proceeding as this for witnesses to swear, as Dameron does, that the election was all fair. Of what avail is a fair election with a dishonest or uncertain count of the votes?

But, in addition to the absence of any legal presumption to support such a count, Dameron says, in positive disparagement of the manner in which the tally sheets were kept, "I don't think the tally lists were very regularly kept, as we had no regular tally keepers, and had to pick them up as we could get them. I believe the tally lists were kept as correctly as they could have been kept under the circumstances." Not "very regularly kept," but "I believe" they were "as correctly kept as they could have been kept under the circumstances!" The law required him and his cocommissioners to keep them regularly. They had been sworn to do so, and they were required to know of their own personal knowledge that they were correctly kept, and yet this sworn officer admits they were not very regularly kept, but excuses the irregular manner in which they were kept by saying the commissioners had to pick up such persons as they could get to keep them. Why did they have to pick up anybody to discharge a duty which the law imposed on them and them alone?

The minority [1] thus answer the above argument:

It is further urged by contestant, however, that the fact that the tally keepers were not sworn officers throws suspicion upon the count. All the evidence on this subject is as follows: Dameron says: "I do not think the tally lists were very regularly kept, as we had no regular tally keepers, and had to take them about as we could get them. I believe the tally lists were kept as correctly as they could have been kept under the circumstances." It can not be urged that this statement would throw suspicion upon or impeach the returns, for Dameron swears that they proceeded to make out the returns, and tally lists in accordance with law. The law of Louisiana requires that the election returns shall be sworn to by the commissioners, and Dameron and the other commissioners took and subscribed to the following oath: "Personally appeared before me, the undersigned authority, duly appointed and qualified, commissioners of election of poll No.—, election precinct of the parish of—, for the general election held November 2, 1874, who, being duly sworn, depose and say that they received the ballots cast at the said poll of the said precinct, and that the above is a true return of the vote cast at the said poll on the said day.

[1] Minority views were submitted by Mr. G. Wiley Wells, of Mississippi.

It is not presumed that Mr. Dameron would be willing to swear and subscribe to that which was untrue. And it is a conclusive legal presumption that he was satisfied at the time when the return was made that it contained a correct statement, as he swore. Nor does Mr. Dameron swear that the return is not correct, nor is there any evidence tending to disprove the return. The return, therefore, stands, taking all the evidence in regard to it, as unimpeached. The law is well established, and this House has repeatedly held that the introduction of persons who were not sworn to assist in holding the election will not of itself vitiate the return of the officers, without evidence of fraud. (Eggleston *v.* Strader, 2 Bart., 897.) The evidence in this case proves that all the officers were regularly appointed and sworn, but that the commissioners requested some bystanders to assist in keeping tally lists while counting the vote. It can not be maintained for one moment that, in the absence of any proof of fraud or irregularities, the legal returns should be rejected for this reason. There remains but one other ground that can be urged against the receiving and counting of these returns from this box, viz, the removing of the box from the poll before the vote was counted. Taking the evidence altogether, we are of the opinion that it established only an irregularity, and the only question to be determined in regard to this poll is whether the ballots cast at this poll shall be thrown out on account of the votes not having been counted at the poll before it was removed.

The minority further call attention to the fact that the supreme court of Louisiana (case of Burton et al. v. Hicks et al.) had declared the Louisiana law providing the regulations as to the manner of conducting and holding an election as directory merely. The minority say also:

Even without the opinion of the supreme court, we are satisfied that the law in contested elections sustains us in asserting that these clauses are directory and not mandatory, and must be interpreted, in view of the evidence, as directory in this particular case, for the reason that the evidence does not tend to show that the actual merits of the election were affected by a noncompliance with their provisions.

But the majority of the committee say:

The commissioners disregarded an imperative provision of the law without the observance of which there can be no safety or certainty in elections.

The integrity of their returns and their prima facie character are therefore destroyed. There being no proof outside of the returns of the vote of this ward or poll, it must be excluded from the count.

(2) The second branch of the case referred to the election in various precincts of Carroll parish. The law of Louisiana provided that at each polling place after the close of the polls the commissioners should count the votes—

and after they shall have so counted the votes and made a list of the names of all the persons voted for, and the offices for which they were voted for, and the number of votes received by each, the number of ballots contained in the box, and the number rejected, and the reasons therefor, duplicates of such lists shall be made out, signed, and sworn, to by the commissioners of election of each poll, and such duplicate lists shall be delivered, one to the supervisor of registration of the parish, and one to the clerk of the district court of the parish, and in the parish of Orleans to the secretary of state, by one or all such commissioners in person, within twenty-four hours after the closing of the polls. It shall be the duty of the supervisors of registration, within twenty-four hours after the receipt of all the returns for the different polling places, to consolidate such returns to be certified as correct by the clerk of the district court, and forward the consolidated returns with the originals received by him to the returning officers provided for in section two of this act, the said report and returns to be inclosed in an envelope of strong paper or cloth, securely sealed, and forwarded by mail. He shall forward a copy of any statement as to violence or disturbance, bribery or corruption, or other offenses specified in section twenty-six of this act, if any there be, together with all memoranda and tally lists used in making the count and statement of the vote.

If the returns, poll lists, etc., were deposited with the parish clerk as required they nevertheless were not found there, and had disappeared in some way. The testimony was conflicting as to whether they were ever brought there.

A question of evidence is thus discussed by the majority:

Contestant offers in evidence in this cause a record in the cause of Burton et al. *v.* Hick et al., a proceeding instituted by certain parties who were voted for, the State or county officers, at the election in Carroll Parish on November 2, 1874, to test the validity of said election. To this suit neither contestant nor contestee is a party. Contestee objects to the introduction of said record in this cause because it is res inter alios acta. It is true the validity of the same election at which contestant and contestee were voted for is involved in the cause, yet neither of them being parties to the same can be bound thereby. We therefore sustain the objection to the introduction of the record, and exclude it as evidence in this case.

The minority views say on this point:

We think it will need no argument to satisfy the committee that this evidence should be excluded. We are of the opinion that it should be excluded on the grounds assigned by contestee, that it is "res inter alios acta" (p. 331, record).

914. The case of Spencer v. Morey, continued.

An election officer being detected in fraudulent acts, a return in due form signed by him and two unimpeached associates was not accepted as evidence of the vote cast.

Returns having been lost or destroyed, testimony of election officers being conflicting, and the voters not having been called, the vote was not counted.

The election (distinguished from the return) was set aside when the best obtainable evidence showed the vote only approximately.

The returns of a decisive portion of the district having been lost and the vote not being proven aliunde, the House declined to declare the seat vacant or examine further before seating contestant.

The legal returns of the parish not being available, questions arose as to the votes of several precincts:

(*a*) From the precinct of the First Ward the returns were missing with all the others from the clerk's office. The majority report says:

The only returns produced of the election at this poll is a paper purporting to be signed and sworn to by the three commissioners, David Jackson, T. B. Rhodes, and E. M. Spann. This paper is produced by the witness, R. K. Anderson, on his examination, who seems to have been a commissioner of election at Ward 3, in Carroll Parish, and to have had no connection whatever with Ward No. 1. Says he received it from the clerk of the court. How the clerk came to give it to him, how long he had it in his custody, are questions on which Mr. Anderson furnishes no information, and on which, strange to say, neither the contestant nor contestee asks him to furnish any.

After discussing the testimony, the majority report continues:

The paper produced by Anderson seems on its face to be in due and proper form as a return. The names of the persons voted for, the number of votes received by each, the position for which each was supported, the whole number of votes cast, the number rejected, and the reasons given therefore, are all stated, and, as before shown, the paper duly signed and sworn to by the three commissioners. The depositions of Spann, Rhodes, and Jackson, the commissioners, are taken, the paper produced by Anderson exhibited to them, and they all swear positively that the paper shown them is the original of one of the duplicate returns made out and sworn to by them after the election, and that it contains a true statement of the result of that election.

The question arises, Can this paper be received and treated as a legal return of the election held at this ward on the facts disclosed in the record, some of which have been already adverted to, and some of which will be noticed hereafter?

If we assume, according to the statement of Spann, that the ballot box and election papers were properly deposited in the office of the clerk, it would seem a hardship to make the candidates for office suffer the consequences of a loss by fraud, in which they had no agency, and for which they are not, therefore, responsible. On the other hand, it might appear dangerous to allow a paper to stand as a valid return which comes from the pocket of a party not entitled to its custody, his possession of it unexplained, and the paper unaccompanied by its legal companions, the ballots, tally sheets, etc., and no account given of their whereabouts, or how they happened to disappear entirely, while the returns are permitted to see the light when an election contest comes up. The law, as before shown, requires that after the ballots are counted they shall be replaced in the box, and the returns and the ballot box shall be deposited in the clerk's office. By the ballots the truth of the returns can be tested and their correctness verified. A paper purporting to be the returns comes to light unexpectedly from a depository unauthorized by law, but the written evidence provided by law to test its accuracy, in case of a dispute or a contest, is missing. But there are other infirmative considerations which enter into the question as to whether this paper shall be received and treated as a legal return.

Burton, the ex-sheriff of Carroll Parish, swears that he detected David Jackson, the commissioner who received the ballots from the voters on the day of election, changing the votes handed him by the electors for others which he put into the box instead of the ballots of the voters. He says he charged him with it and complained to him of its unfairness. "He (Jackson) tried to bluff me out of it, but I showed him the tickets he had dropped lying on the floor." On cross-examination, Burton says he could not swear to more than one ticket, which he saw Jackson change, but there was another on the floor in the same position, but he does not know that this one was changed. Jackson is not recalled, nor did contestee offer to recall him to deny this statement.

Caesar Jones and Noah Lane both swear that they saw Jackson hand greenbacks out at the window to voters. Lane says he saw him do it several times. Jones says he saw him pass money out to voters several times with their registration tickets as they were returned. Jackson denies having handed out any money to voters, and swears he would not believe Caesar Jones on oath.

David Jackson, the commissioner of election in the First Ward precinct, was also the clerk of the parish, one Galbraith being his deputy in charge of the office. The majority conclude that Jackson's honesty is impeached by the testimony and by the disappearance of the returns from his office, to the extent that no confidence can be placed in the returns which had been in his custody. The majority further say:

It may be said that the names of the other two commissioners being to the return makes it sufficient and valid as a return. It is true, as a general rule, when the law requires a certificate to be made by a board of officers composed of three or more persons, it is sufficient if a majority of such board join in the certificate; but this rule was never intended to be applied, nor could it be properly applied, to a case where one of them had been guilty of fraudulent acts. Who can tell how far the fraudulent acts of Jackson entered into that election? It is impossible to tell; just as impossible as it would be, if poison were dropped into a basin of water, to select the drops infected from those that remained pure. The good faith of the other two commissioners can not purge the ballot box of Jackson's fraud. It is for this reason that the law holds, and wisely and justly holds, that fraud vitiates everything into which it enters. It is for this reason that McCrary says that no confidence can be placed in the contents of a ballot box which has been in the custody of an officer detected in the perpetration of a deliberate fraud. This position is strengthened in this case from the fact that the ballot box, for a great portion of the day, was placed in a room through the window of which the votes were received. This window was 6 feet from the ground. The weight of proof shows that the voter could not see what became of his ballot when he reached it up to the window to the commissioner with his hand or on the end of a stick, nor could the commissioners see the voter. The law required that the commissioner should put the ballot in the box in plain view of the voter. The object of this provision was to prevent just such fraud as Jackson was detected in perpetrating. The law further gives the voter the right to deposit his ballot in the box with his own hand. This box was placed beyond his reach, and he was practically denied thereby this right.

And finally the majority conclude:

Upon the whole, we conclude that the paper produced by Anderson can not be received as a valid return, and therefore reject it as such. There being no proof aliunde of the vote at this poll, it must be excluded.

The minority consider the evidence conclusive that the ballots were properly deposited in the clerk's office, and explain their disappearance by the fact that no law required their preservation beyond the term of the district court and by the further fact that the grand jury actually did investigate the election in Carroll Parish and found nothing to require their action.

The minority put full confidence in the return, and say:

We therefore have the actual return made, which is the best evidence of the vote cast at this poll. But the return is supported by three witnesses. Contestant has wholly failed to show any legal reason why this return should be rejected.

It may be argued that because the return was found in the possession of an unauthorized person therefore it should be rejected. This certainly can not be urged or supported upon any legal principle governing contested elections. The officers discharged their duties, made their returns, and deposited them in compliance with law. It certainly would not be contended, if a thief had invaded the office of the clerk and abstracted the returns, and they were found afterwards in the possession of some person unauthorized, that it would be as much a return as before it was stolen, provided the officers who made the return should swear to its identity. But, further, on pages 111 and 112 of record, E. M. Spann, the Democratic commissioner, on November 23, 1874, makes an affidavit in which he gives the actual vote cast, and in that affidavit he states that Morey received 569 and Spencer 33 votes, corroborating in every particular the return, as well as the parol evidence of Jackson and Rhodes. But the evidence before us does not leave us in any doubt as to where this return came from. R.K. Anderson (p. 49, record) swears that he received this return from the clerk of the court, and Galbraith, as before stated, certifies to that fact. The return, the moment that it is fully identified as one of the originals made by the board, becomes the highest evidence that can be adduced as to the result, and must be received as such until impeached by evidence. We therefore accept the return as giving the correct result at poll No. 1, Carroll Parish, of the votes cast for Members of Congress.

The minority contend that the evidence fails to show that the election was not lawful, or that there were any irregularities in pursuance of an intention to defraud in the conduct of the voting, and find that the returns should be accepted as true.

(*b*) As to the second precinct of Carroll Parish, the minority views present a statement of the case and the contention of sitting Member:

It is admitted by both parties—contestant and contestee—that as to this ward there are no official returns, ballots, or ballot box to be found, except a poll list. They have been either abstracted or destroyed.

The first question to be determined is, What evidence is necessary to establish the vote cast at this poll? We are of the opinion that the best evidence to establish the actual vote cast at this poll is the evidence of the commissioners of election, and if it can not be established by them, then by such other evidence as can be procured, and we are clearly of the opinion that the commissioners' evidence as to the vote cast at this poll is competent. We are sustained in this opinion by the action of this House in the case of Adams *v.* Wilson, Clark and Hall, 375, decided December 8, 1823, wherein the committee and the House held "that the testimony of the board of inspectors is competent and ought to be received to correct any mistakes that may have occurred in returning the votes given at said election." If the commissioners' evidence is competent to alter or change the returns certainly their evidence is competent to establish what the returns were at the poll. The best evidence, viz, the returns, having been lost or destroyed, secondary evidence is then admissible to establish what were the contents of the written instrument, viz, the returns. We understand the rule governing the admissibility of secondary evidence with respect to documents to be that proof of their contents may be

established by secondary evidence, fast, when the original writing is lost or destroyed; secondly, when its production is a physical impossibility, or at least highly inconvenient. Before, however, secondary evidence can be introduced there must be evidence showing that the documents once existed and are lost or destroyed. In this case the proof establishes the fact that a search for the returns has been made where, by law, they ought to have been found and that the search has been unsuccessfully made. This evidence was introduced by contestant, and the testimony of Galbraith, deputy clerk, shows that the returns from Carroll Parish, poll 2, are not on file in the clerk's office, the legal depository of them. Taylor, in his excellent work on evidence, says (sec. 401): "If the instrument ought to have been deposited in a public office or other particular place it will generally be deemed sufficient to have searched that place, without calling the party whose duty it was to have put it there, or any other person who may have access to it." Again (sec. 405): "The law does not require that the search should have been recent or made for the purposes of the cause and therefore where a search was made among the proper papers three years before the trial this was held sufficient." But in this case Galbraith's testimony (p. 28, record) is as follows:

"Q. Have you not been the principal deputy clerk of the court, and as such having the entire control of the said office during your occupancy?—A. I have, since July 26, 1873."

This election was held November 2, 1874. This evidence was given April 27, 1875. In answer, whether any of the tally sheets, returns, ballot boxes, or other legal documents relating to the election had been on file or were on deposit at that time in the clerk's office, he says:

"There have been none, except the tally sheet handed me by the commissioner for the other ward, which tally sheet was afterwards taken out of my office and carried away."

The next interrogatory propounded to the witness is to this effect:

"Q. Has diligent search been made for these ballot boxes by yourself and others?—A. There has been.

"Q. Do you know where these ballot boxes and papers are?—A. I do not."

The minority regard it proven that proper search was made for the returns, and that not being found it was proper to proceed to secondary evidence. The minority produce the poll lists of the commissioners as evidence of the act of voting, and this is primary evidence as to who voted, the commissioners having duly certified the list. The minority views continue:

There is no evidence contradicting this poll list, but it stands as admitted evidence of the number of votes cast at this poll, which was 713. It is not contended by contestant that a single man upon this list who voted was not a legally qualified elector, nor has any testimony been adduced tending to prove that these 713 persons did not vote on November 2, 1874, at poll No. 2, in Carroll Parish. We understand that the elections are simply the method whereby the citizens of the country may manifest their choice or preferences, and when they have proceeded in accordance with law, and manifested through legal forms their choice or preference by the ballot box, their right and privilege so to do will not be taken away from them as long as their preference or choice can be ascertained. Did these 713 electors, at poll 2, Carroll Parish, November 2, 1874, in accordance with law, express their choice or preference? Secondly, can that choice or preference be ascertained by the evidence before us? The law governing this subject, as laid down by all writers, is "that to set aside the returns of an election is one thing; to set aside the election itself is another and a very different thing. The returns from a given precinct being set aside, the duty still remains to let the election stand. The return is only to be set aside, as we have seen, when it is so tainted with fraud or with the misconduct of the election officers that the truth can not be adduced from it. The election is only to be set aside when it is impossible, from any evidence within reach, to ascertain the true result; when neither from the returns nor from other proof, nor from all together, can the truth be determined. It is important to keep this distinction in mind."

In support of this view the minority cite, from Brightley the cases of Chadwick *v.* Meldin, and State *v.* Steers; from Brewster's reports the case of Weaver *v.* Given; and of House cases Flanders *v.* Hahn, McHenry *v.* Yeaman, Covode *v.* Foster, Blair *v.* Barrett, Barnes *v.* Adams.

The minority then say:

As to the first proposition, viz: "Did these 713 electors of Carroll Parish, on November 2, 1874, express their choice or preference for Member of Congress?" the evidence of both contestant and contestee proves that they did. There can be no dispute on this point. It remains, then, to answer the second proposition, viz: "Can that choice or preference be ascertained from the evidence before us?" And, thirdly, was the election free and fair? Assuming that the evidence of the commissioners and those employed in holding and conducting the election is competent, we now proceed to present all the evidence, both of contestant and contestee, as to the number of votes polled.

After citing testimony to show how the vote was divided, the minority views continue:

By an examination of all the testimony introduced it will be observed that all the evidence as to the actual vote cast at this poll, with the exception of that of one witness, was introduced by contestee. Montgomery, contestant's witness, swears that he signed all the papers that he believed were necessary according to law. He swears positively that he signed the poll list, heretofore commented upon, and nowhere is this poll list contradicted. We, therefore, have the evidence uncontradicted that 713 persons did vote at this poll. The highest number of votes which contestant can possibly claim by the evidence is 65, which is sworn to by W. A. Blount, the United States supervisor at that poll, who says that he took a memorandum of the vote for Spencer at that poll, and that the vote was 65. This witness is contradicted by three other witnesses, to wit, Benham, one of the commissioners, who swears that he counted all the votes, says that Spencer's vote was 49 or 50; and is corroborated by W. B. Dickey, appointed by the commissioners to keep the tallies (as Montgomery testifies), Dickey swearing positively that Spencer received 49 votes at this poll; and B. H. Lanier swears that Spencer's vote was 49 or 50. It certainly cannot be claimed by contestant that he is entitled to any more votes than the highest number that he has proven. Notwithstanding this witness, who testifies that Spencer received 65 votes, is contradicted by three other witnesses, we concede contestant 65 votes. Benham swears that there were 4 blank votes cast. Adding the 4 blank votes to the 65 votes conceded to Spencer, we have 69 votes to be deducted from 713, which leaves the number sworn to and admitted by contestant's evidence, viz, 644, the lowest number which can possibly, from the evidence, be counted for Morey. Contestant does not attempt to disprove that these votes, 644, were cast for Morey.

The minority then examine the evidence as to the fairness of the election of this ward, and find in favor of its fairness on the question of fact.

The majority of the committee decline to count the vote of the precinct, for the reason that "there are no reliable data from which the result can be ascertained." The majority regard the evidence as showing that the commissioners at this poll failed to sign any returns at all, a certain return presented before the board of State canvassers being a forgery. The authenticity and regularity of the poll list is admitted; and the majority say that the voters should be called to show how they voted. As to the evidence relied on by the minority, the majority say:

Although not differing very widely in their figures, no two of the witnesses agree as to the number of votes cast or the number received by each candidate. The uncertain memory of two or three witnesses as to the result of an election six months after it took place cannot be permitted to take the place of the testimony of the voters themselves, and in this case, to the frailty of memory are added the uncertainty and unreliability of the source from which the facts to be remembered were derived. Montgomery says W. B. Dickey, M. A. Sweet, J. D. Therrell, and S. T. Austin kept the tally list, by consent and request of the commissioners, alternately, while keeping the lists to relieve each other. The habit of officers of election in calling in unsworn bystanders to keep tally lists, and thus virtually to count the vote has been already alluded to and animadverted upon in considering the vote at poll 5, Concordia Parish, and need not be here repeated. Benham, who is contradicted in several essential particulars in the testimony given in this cause, and who is shown to be the author of the forged returns that were delivered to the State board, occupied the important position of calling out the votes from the tickets to

unsworn tally keepers, and it is from this source that Dickey and other witnesses who speak of the result of the election get their information. There are other objections made to the vote at this poll, but as enough has already been stated to show that there are no reliable data from which the result can be ascertained, it is deemed unnecessary to further prolong the examination. The vote can not therefore be counted.

(*c*) As to the third precinct the minority find no frauds or irregularities, and the same general conditions as in preceding precincts. The minority views say:

As to the vote cast, one of the commissioners, R. K. Anderson, testifies that there were 550 votes cast in all. There were 7 votes cast for Spencer for Member of Congress, and 2 blanks, the balance for Morey. This evidence stands unimpeached. Spencer can not claim that he received more than 7 votes. He nowhere attempts to contradict the evidence of Anderson.

The majority decline to accept such testimony as conclusive, and hold that the vote cannot be counted.

(*d*) The majority find the votes of the Fourth and Fifth wards satisfactorily shown and count them.

In conclusion the majority find:

We have already seen that, excluding the contested territory, Spencer had, by agreement of the parties, a majority of 1,396. The Fifth Ward of Concordia Parish, and the First, Second, and Third wards of Carroll Parish, being excluded by this report, that majority still stands, to be affected only by the vote at the Fourth and Fifth wards of Carroll Parish. Adding to the majority (1,396) with which Spencer entered the contested territory, the majority of 12, which he received at the Fifth Ward, would make his majority 1,408, from which is to be deducted 93 votes, the majority received by Morey at the Fourth Ward, thus electing Spencer by a majority of 1,315 votes.

The committee therefore recommend the adoption of the following resolutions:

Resolved, That Frank Morey was not elected and is not entitled to a seat in the House of Representatives of the Forty-fourth Congress from the Fifth district of Louisiana.

Resolved, That William B. Spencer was elected and is entitled to a seat in the House of Representatives of the Forty-fourth Congress from the Fifth district of Louisiana.

Four of the minority favored resolutions confirming the title of sitting Member, but Mr. John H. Baker, of Indiana, preferred that the seat should be declared vacant. The minority views also contend for declaring the seat vacant if it should be found that sitting Member was not elected:

If the House, after having considered all the evidence in this case, are willing to adopt the rule that a minority candidate can by some frivolous pretext obtain a seat to which he is not entitled or elected by rejecting the suffrages of electors after the election had been fairly held, the votes counted, and the returns made, because these votes and returns have been abstracted, they will place it in the power of all malicious and evil-disposed persons to destroy the evidences of an election, and by that means defeat the will of the majority. Nowhere has Mr. Spencer introduced an iota of evidence tending to establish the fact that on account of the irregularities mentioned in the evidence was he deprived of a single vote, nor does he in his notice contend that on account of these irregularities mentioned in his notice he would have received a greater vote in the fifth precinct of Concordia Parish or in Carroll Parish; but the entire evidence establishes the fact that of the actual votes cast (and it is admitted by contestant) Morey received a majority. It is further conceded by contestant that, if the actual vote polled in the fifth precinct of Concordia Parish and in Carroll Parish is counted, Morey unquestionably is elected. Therefore, admitting that he (Spencer) is the minority candidate, we contend that if the committee should arrive at the conclusion that the fifth precinct of Concordia Parish and the whole of Carroll Parish are to be rejected under the rule governing contested elections, established by this House, the seat cannot be awarded to Mr. Spencer, but the election will have to be remanded again to the people, and both Morey's and Spencer's claims are to be rejected.

The report was debated at length on May 24 and 31, 1876.[1] On the latter date Mr. George W. McCrary, of Iowa, proposed a resolution to recommit the report with instructions that the poll of Concordia Parish be counted, that the time for taking testimony be extended sixty days, within which time testimony should be taken as to the election in the first, second, and third precincts of Carroll Parish. This resolution was disagreed to, yeas 76, nays 101.

The first resolution of the minority, declaring Mr. Spencer, the contestant, not elected, was disagreed to, yeas 74, nays 99. The second resolution of the minority, declaring sitting Member entitled to his seat, was disagreed to without division.

Then the resolutions of the majority were agreed to without division, and so the contestant was seated.

915. The election case of Fenn v. Bennett, from the Territory of Idaho, in the Forty-fourth Congress.

The use of the prefix "Hon." with the name of a candidate does not justify rejection of the ballot.

The canvassing of votes by an illegal board, while important to returning officers, does not prevent the House ascertaining the result from precinct returns.

The vote is not vitiated by failure to observe a directory law as to method of tabulation of returns.

On June 5, 1876,[2] Mr. John F. House, of Tennessee, from the Committee on Elections, submitted the report of the committee in the case of Fenn *v.* Bennett, from the Territory of Idaho. Three questions were involved in this report:

(1) The report says:

> The reason alleged by the Territorial board of canvassers for rejecting 246 votes for S. S. Fenn in the county of Oneida is that there was the prefix "Hon." to said votes. The sitting Member, at the hearing, waived the objection to the counting of those votes from Oneida County, and they are accordingly counted for the claimant.

(2) The report further says:

> The returns from the county of Nez Perces were rejected by the Territorial canvassers for the reason that the votes of the county were canvassed under the law of 1864, which gave the canvassing of the votes to the clerk of the county commissioners, and two county officers to be selected by the clerk, and not under the act of 1869, which gives the county commissioners jurisdiction to canvass the votes of the several precincts of the county. Although the question as to the proper board to canvass the precinct returns is a very important one for the Territorial canvassers to consider, your committee do not regard it of much importance in coming to a decision in this case, as the question for the House to consider is, who, in fact, received the highest number of votes, and the precinct returns are proved, which very clearly show that the actual vote cast in this county was 423 for S. S. Fenn and 37 for T. W. Bennett; and although the Territorial canvassers acted rightfully in rejecting the returns from this county, as they were not canvassed by the county commissioners, your committee, from the precinct returns, find that 423 were, in fact, given for S. S. Fenn, and should now be counted for him, and 87 votes were, in fact, given for T. W. Bennett, and should be counted for him.

(3) The report also says:

> The vote of Idaho County was rejected on the ground that the returns for the Delegate to Congress were not on a separate sheet of paper. The law of the Territory * * * provides that the clerk of

[1] Journal, pp. 1034–1037; Record, pp. 3294, 3423–3442.

[2] First session Forty-fourth Congress, House Report No. 624; Smith, p. 592; Rowell's Digest, p. 314.

the county commissioners shall make an abstract of the votes for Delegate to Congress on one sheet, the abstract of votes for members of the legislative assembly on one sheet, and the abstract of votes for district officers on one sheet, and the abstract of votes for county and precinct officers on another sheet. The returns from this county had all of the votes for the several officers voted for on the same sheet; but your committee regard the law in this matter as merely directory, and do not find that the vote is thereby vitiated, but count the votes from this county for the parties for whom they were cast.

On June 23 [1] the House, without debate or division, agreed to the report, which seated the contestant on the finding that he had a plurality of 105 votes.

916. The Massachusetts election case of Abbott v. Frost, in the Forty-fourth Congress.

There being evidence raising a suspicion of fraud the House rejected a return made in disregard of the requirements of law and by the hands of unauthorized persons.

Discussion as to whether or not a law was directory or mandatory.

On June 10, 1876,[2] Mr. Early F. Poppleton, of Ohio, from the Committee on Elections, submitted the report of the majority of the committee in the Massachusetts case of Abbott *v.* Frost. The sitting Member was returned by an official majority of 210 votes.

In the debate Mr. Poppleton insisted mainly on one point in the case, the rejection of the returns of the Fourth Ward of Chelsea. As sitting Member received in that ward a majority of 470 votes it is evident that this decision was decisive of the case.

The sixth specification of contestant's notice was:

Sixth. That the votes and check list, and the result of the counting of the votes in Ward 4, in said city of Chelsea, at said election, were not returned forthwith by the warden of said ward to the clerk of said city of Chelsea by any constable in attendance at said election, or by any ward officer, as required by law, and, in fact, were not returned to said city clerk until the morning following the election.

The majority report thus states the requirements of the Massachusetts law:

All the laws of the State of Massachusetts on this subject are embraced in sections 40 to 43 of chapter 376 of acts of 1874, viz:

"SEC. 40. In all elections in cities, whether the same be for United States, State, county, city, or ward officer, it shall be the duty of the warden, or other presiding officers, to cause all ballots which shall have been given in by the qualified voters of the ward in which such election has been held, and after the same shall have been sorted, counted, declared, and recorded, to be secured in an envelope, in open ward meeting, and sealed with a seal provided for the purpose; and the warden, clerk, and a majority of the inspectors of the ward shall indorse upon the envelopes for what officer, and in what ward the ballots have been received, the date of the election, and their certificate that all the ballots given in by the voters of the ward, and none other, are contained in said envelope.

"SEC. 41. The warden, or other presiding officer, shall forthwith transmit the ballots, sealed as aforesaid, to the city clerk, by the constable in attendance at said election, or by one of the ward officers other than the clerk; and the clerk shall retain the custody of the seal, and deliver the same, together with the records of the ward and other documents, to his successor in office."

Section 42 provides for the preservation of the ballots for a specified time, and authorizes a recount of them by the board of aldermen.

Section 43 provides for the preservation of the check lists.

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[1] Journal, p. 1142; Record, p. 4076.

[2] First session Forty-fourth Congress, House Report No. 653; Smith, p. 594; Rowell's Digest, p. 314.

This statute seems to have been enacted the same year the election took place, and, as is to be presumed, the object was to render more certain and reliable the returns of the officers of elections generally in the cities of the State, and no one can doubt for a single moment that a strict observance of all of its provisions and directions would render frauds, by tampering with the check lists and ballots after the closing of the polls (a most convenient mode, and often resorted to for the perpetration of the greatest frauds) almost impossible.

After quoting testimony the report summarizes thus:

This testimony, we think, clearly shows that very many of the plainest and most important provisions of the law were recklessly disregarded if not purposely disobeyed by the officers having in charge said election. The votes of Ward 4 were not returned to the city clerk forthwith, as was required by the law, but were, upon being sealed and indorsed by the officials, placed in the hands of a police officer, an official unknown to the election statute, and by him taken and placed in the hands of a night watchman, away from the polling place, and at an entirely different locality from the city clerk's office, he being a person in no way authorized by the law to hold or have the custody of the votes for a single moment, in whose possession they remained until about 7 o'clock the next morning—a period of some seven hours—when the votes again passed into the possession of the policeman, who, accompanied by the clerk of the ward, which is strictly forbidden by the statute, arrived at the office of the city clerk and deposited with him the envelopes containing the votes, which were afterwards counted by the board of aldermen, and by them certified as the vote of the Fourth Ward, Chelsea, upon which the governor and council of the State acted officially. We are clearly of the opinion that the provisions of the statute, which have been so totally and unblushingly disregarded in this case, are not merely formal and directory, but vital and essential, in order to render the election fair and free from fraud, or the suspicion of fraud; for we hold it to be the duty of election officers to so conduct the election, and everything thereunto appertaining, as to as carefully guard against suspicion of or opportunity for fraud as fraud itself. Nothing short of this will satisfy either the spirit or letter of a statute made and enacted to protect and maintain the purity of elections, as was the unquestioned purpose of the law under consideration.

This principle is most fully recognized in the case of Chaves *v.* Clever (2 Bartlett, 467), and in the case of Gooding *v.* Wilson, decided in the Forty-second Congress, it is held that no recount of votes should be allowed unless the forms of the law for the preservation of the ballots, etc., have been strictly followed. In this case, in order to retain the vote of the Fourth Ward of Chelsea, it is necessary to approve of a recount made by the board of aldermen some four days after the day of election, and that, too, when there is no pretense that the provisions of the law have been followed as to the management of the votes, their legal custody, etc., during the night succeeding the election.

Your committee are fully of the opinion that this ought not to be done, and that we would be establishing a dangerous precedent, opening the door wide to the perpetration of fraud, were we to give our approval to a recount of votes under such circumstances. In this opinion we are strongly supported by the authorities.

The majority report also finds that the evidence gives "serious reasons for suspecting that actual fraud was committed in favor of the returned Member in this ward." After quoting testimony tending to show that suspicion might be raised by the delay of the returns, the report says:

When the votes and returns are out of the legal and proper custody, it must be proven that while illegally held they were not tampered with. Notwithstanding this well-recognized rule of law, Daniels, the night watchman in whose custody the votes and check lists were during the night after the election, is not called, and no reason is assigned for the omission to call him. He, of all other persons, best knew whether the clerk or any other person or persons meddled with the votes, or opened the bundle, or had anything to do with them during his illegal custody. Neither was the warden, whose duty it was to seal up the ballots, called, nor either of the three inspectors; and we are therefore left to guess as to the extent of their information and knowledge of the subject under examination. There being no proof aliunde of the vote at Ward 4, Chelsea, your committee is of opinion that the entire vote must be excluded from the count.

The minority views, presented by Mr. John H. Baker, of Indiana, after examining the testimony, say:

The most that can be claimed for this testimony is that it tends to prove that the ballots and check list were not returned so promptly as they might have been, and that they were brought by a police officer to the office of the city clerk, instead of by a constable. The provisions of the statute above quoted must be construed as directory under the precedents of this House and the decisions of the courts. A slight delay in the return of the ballots and check list, or their being carried by a police officer instead of a constable, would not of itself vitiate the poll. The returns of the election appear to have been constantly in the custody of the clerk of the election, their rightful custodian, from the time they were made out until they were delivered to the city clerk. No suspicion is cast upon the returns, and we have them before us. They corroborate the testimony of the witness, Bassett, in proving that the packages containing the ballots and check list had not been tampered with. On a recount they agreed with the returns.

The testimony of the witnesses examined by the contestee, James A. Dinning and Jeremiah Norris, fully establish the fact that the ballots, check list, and returns were not tampered with, and that they were delivered to the city clerk in the identical condition in which they left the hands of the officers who held the election, and without unnecessary delay.

In the debate Mr. Baker urged that the returns were in the custody of an officer "invested with the power and authority" of a constable, but gave no authority in support thereof.

917. The case of Abbott v. Frost, continued.

Unnecessary employment of men in a navy-yard preceding election, some on recommendation of a candidate, was held a condition on which to predicate a rejection of votes for bribery.

Employment for the purpose of controlling a vote, such object being known and acquiesced in by the voter, throws on the party naturally profiting the onus of proving that the vote was not influenced.

If an elector enters into an express or implied agreement as to his vote, the presumption is created that he votes in accordance with the agreement.

Discussion of the evidence required to prove charges of bribery.

A specification in notice of contest defective in specifying the number of illegal votes and where they were cast was, nevertheless, regarded.

Certain other questions were discussed and determined, although apparently not vital if the rejection of the Chelsea vote should be sustained.

(1) As to alleged bribery the report of the majority says:

The third specification charges "That many votes were cast and counted at said election for you in said Fourth Congressional district by persons who were induced to cast said votes by paying, giving, and bestowing upon such voters gifts and rewards, and by promising to pay, give, and bestow to and upon such voters gifts and rewards." All of which is denied by the contestee. The statutes relating to the offense charged in this specification are as follows:

"Whoever, by bribery, or threatening to discharge from his employment, or to reduce the wages of, or by a promise to give employment or higher wages to a person, attempts to influence a qualified voter to give or withhold his vote in an election, shall be punished by a fine not exceeding three hundred dollars, or by imprisonment in the county jail or house of correction for a term not exceeding one year, or both, at the discretion of the court." (Mass. Gen. St., ch. 7, see. 31.)

"If any person shall pay, give, or bestow, or directly or indirectly promise, any gift or reward to secure the vote or ballot of any person for any officer to be voted for at any national, State, or municipal election, the person so offending, upon conviction before the court having jurisdiction of such offense, shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the

house of correction not less than sixty days nor more than six months, or by both, at the discretion of the court." (Mass. Acts, 1874, ch. 356, sec. 2.)

The charges in this specification relate to the giving of employment to a large number of voters in the United States navy-yard at Boston, formerly Charlestown, for the purpose of inducing them to vote for the sitting Member. The question is new and very important in its character; it touches the very foundation stone of representative government; of the free and uncontrolled exercise of the elective franchise and the counting of votes influenced. by a consideration. The rules of law which we think should govern in the consideration of this case are embodied in the following declarations:

1. If the giving of employment to the voters immediately prior to the election was for the purpose of inducing them to vote for the contestee, and such object was in any manner made known to the voter, and he accepted or continued in such employment after obtaining such information, he thereby became a party to the transaction, accepted its terms, and the onus of showing that he did not carry it out in good faith is on the contestee.

If it be shown that an elector enters into an agreement or understanding, direct or indirect, for a consideration to vote a specified party ticket or for a particular candidate, it is fair to presume that he casts his ballot in accordance with such agreement or understanding, and unless the contrary be made to appear such presumption becomes conclusive.

Ballots thus obtained we hold to be illegal and ought to be disregarded. To count them in the general canvass is to place them on the same footing with the votes cast by the honest, free, and independent voter. To seat a Member upon majorities obtained through such influences is to defeat the very object for which the statute was created.

The punishment of the briber and the bribed avails nothing toward purifying the ballot box; the vote is there all the same, whether punishment be inflicted or not, and if counted, the fraudulent and corrupt purpose for which it was cast is obtained, and the candidate thus securing success is foisted upon the country contrary to the wishes of the legal electors of the district.

The only remedy against such illegal votes is to throw them out and disregard them in the general count or canvass. The establishment of any other rule would render it useless to contest the seat of a sitting Member, even in the most flagrant cases of bribery.

The report cites in support of this view the following cases: Malcolm *v.* Parry (Law Reports, 9 C. P., 610), King *v.* Isherwood (2 Kenyon, 202), Felton *v.* Easthorpe (Rogers' Law and Practice of Elections 221), and continues:

The doctrine that the bribing of voters by the agent or those managing or controlling the election in the interest of a candidate will render his election void is clearly recognized in 3d Douglass, Election Cases, page 157.

Admitting the foregoing propositions of law to be correct, the only remaining question is, to determine whether the evidence is sufficient to lead the mind to the conclusion that these electors, or any number of them, were given employment for the purpose of influencing their votes.

In a great majority of cases it is impossible to prove a charge of bribery by direct and positive testimony.

From the very nature of the case the only sources from which such testimony can come is from the briber and the bribed, both of whom are criminals. Although in this case we must depend to some extent upon circumstantial evidence, yet it is so strong in itself, so strengthened and corroborated by declarations of confederates in the fraud, as to exclude all other reasonable theories than that of guilt.

It is established by the evidence that immediately prior to the election in 1874 an increase of more than 300 voters from the Fourth Congressional district in Massachusetts was added to the force employed in the navy-yard at Boston.

It is clearly shown, by the correspondence here inserted, that the object of the Navy Department at Washington, and Hanscom, Chief of Bureau of Construction, was to secure a sufficient number of votes to insure the election of the sitting Member.

After quoting the letters, the report goes on:

It is evident from this extraordinary correspondence that the Department at Washington knew of no proper or legitimate reason for the increase, otherwise the inquiry of Hanscom, of date December 2, 1874, as to the cause of the increase, would have been unnecessary. There can be no doubt that the

political influence of those high in authority was brought to bear to cause the additional employment of men, and that the avowed purpose was thereby to secure the election of the contestee.

It was made against the protest of the commandant at the navy-yard, and every effort on his part to prevent this corrupt increase "was frustrated by some outside influence more powerful than his own." It must be observed that the source from which this influence emanated was the honorable Secretary of the Navy and the Chief of the Bureau of Construction.

Again, it appears that the committeemen and managers of the election in Boston entered heartily into the conspiracy, and exerted all their influence in soliciting and recommending men for employment in the navy-yard, the sitting Member himself recommending a large proportion.

In fact, with one or two exceptions, all the persons recommending men for employment were active politicians, who, during the campaign, worked earnestly for the election of the contestee.

The report then quotes correspondence and evidence to show that political managers of sitting Member's party were active in recommending men for employment; that the increase of force began immediately prior to the election; that more men were employed than there was work for; that a reduction began the day after election; that an enlisted man of the navy was active in distributing tickets to employees at the polls; that the check lists showed that the employees voted; and concludes that 300 votes should be deducted from sitting Member's poll, saying:

From all the testimony in this case, the committee are forced irresistibly to the conclusion that employment was given to those men as part consideration and that they entered into and accepted such employment with the full understanding that they were to vote for the contestee, and, by the application of the rules of law heretofore laid down, the votes of all such must be disregarded.

It is a species of bribery. If tolerated and encouraged, strikes at the foundation of republican government and poisons the very sources from whence all legitimate authority flows. No system of government can long endure where public opinion tolerates such conduct. Its general prevalence must lead to anarchy and bloodshed and loosen the very ligaments binding society together. It strikes a fatal blow at the social compact. It overturns all just distinctions between honesty and corruption in the delegation of authority to the representatives of the people.

The minority assail the majority's conclusions in two ways:

(*a*) On the pleadings:

The only portion of the notice of contest under which any question can arise as to the vote of the employees in the navy-yard is the third specification. It is in these words:

"Third. That many votes were cast and counted at said election for you (the returned Member) in said Fourth Congressional district by persons who were induced to cast said votes by paying, giving, and bestowing upon such voters gifts and rewards, and by promising to pay, give, and bestow to and upon such voters gifts and rewards."

The act of Congress to prescribe the mode of obtaining evidence in cases of contested elections provides, among other things, that the contestant shall, "within thirty days after said election, give notice in writing to the Member whose seat he intends to contest, and in such notice shall specify particularly the grounds on which he relies in such contest." Much discussion has arisen as to what is to be understood by the words, "shall specify particularly the grounds of contest on which he relies." It may be doubted whether any definition can be formulated which will accurately fix the limits of these words so as to determine by such definition whether the ground of contest is in substantial conformity to the statute or not. It is evident that it was the purpose of the framers of the law to require the averments in the notice of contest to be as certain and definite as the facts of the case would permit. The notice ought to be sufficiently specific as to the time, place, and nature of the charge, to put the returned Member on notice and enable him to prepare his defense and thus prevent any surprise.

In Amer. Law of Elec., section 344, it is said:

"It seems settled by the decisions of the House of Representatives that a notice is good under the law if it specify the number of illegal votes polled, for whom polled, when and where polled, without

specifying the names of the illegal voters. (Wright *v.* Fuller, I Bartlett, 152; Vallandigham *v.* Campbell, 1 Bartlett, 223; Ottero *v.* Gallegos, 1 Bartlett, 177.)"

This author declares that it is settled as the law of this House that such notice must at least specify the following facts to be good:

1. The number of illegal votes polled.
2. For whom they were polled.
3. When and where they were polled.

(*a*) The notice in this case does not specify the number of votes which were procured by paying, giving, and bestowing gifts and rewards upon such voters. It simply alleges that "many votes were cast and counted" which were thus procured. "Such an allegation may mean 5 or 10, or 20, or 500; it is uncertain and not particular. This point was expressly ruled in the case of Lelar, sheriff of Philadelphia, in 1846. The courts say they will require of the party complaining of illegal votes to state the number, for instance, thus: 20 voted under age; 15 voted who were unnaturalized foreigners; 10 who were nonresidents, etc. This particularity the courts of Pennsylvania say they will require, because otherwise they would be converted into a mere election board for the purpose of counting disputed ballots. They do not require the names of the illegal voters to be given." (See Wright *v.* Fuller, supra, p. 161.) We think no reputable lawyer will be found who will contend that the averment "that many votes were cast" is sufficient to raise any issue. The authorities, it is believed, are all one way. As well contend that a declaration by A alleging that B owed him "many dollars" would be good. Such averments are always treated as nugatory. In this case we can treat it as a "sufficiently particular statement" only by overruling the statute and running against the current of all the authorities.

As to the second point, the allegation as to "whom they were polled" is admitted to be sufficient; but as to "when and where they were polled" the notice was criticised as defective as to the place, since not one of the 13 voting precincts of the district was specified particularly as the place.

The insufficiency of the notice is dwelt on at length. The sitting Member could not obtain from it the information needed for his defense. The parties might not waive objection to this defect, since the returned Member could not waive the rights the people have in the contest; nor could the House, with due regard to the public interests, permit a contestant to disregard utterly a plain requirement of law so necessary to a proper trial.

The majority of the committee, while not specifically, meeting this question, disregarded it by sustaining the objections of the contestant.

(*b*) As to the question of bribery, the minority say:

The statute of this Commonwealth touching bribery is as follows:

"If any person shall pay, give, or bestow, or directly or indirectly promise, any gift or reward to secure the vote or ballot of any person for any officer to be voted for at any national, State, or municipal election, the person so offending, upon conviction before the court having jurisdiction of such offense, shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the house of correction not less than sixty days nor more than six months, or by both, at the discretion of the court." (Mass. Acts, 1874, chap. 356, sec. 2.)

The rule is well settled that penal statutes are to be strictly construed. This statute neither disqualifies the voter to vote nor the person voted for to hold the office, even if convicted of bribery in a judicial tribunal. The supreme court of Pennsylvania, in Commonwealth *v.* Shaver (3 Watts. & Serg., 338), thoroughly examined the question of bribery by a candidate as affecting his qualification to hold office. Their unanimous judgment was: "That the trial and conviction of a sheriff of the offense of bribing a voter, previously to his election to the office, does not constitutionally disqualify him from exercising the duties thereof."

We believe the true rule is this: Where a voter is shown to have been bribed by a candidate, or by a duly authorized agent, to vote for him, and he has so voted, that such vote ought to be struck from the ballots cast for such candidate.

The minority then quote at length the English case "In re Boston Election Petition, Malcolm *v.* Parry Law Reports, 9 C., p. 610), and concludes:

The only ground upon which the charge of bribery rests is that Mr. Frost and his political friends gave recommendations to a number of voters, asking the proper officers in the navy-yard to give such persons labor. It appears that persons who were not voters were employed. No questions were asked and no conditions imposed on the persons who entered the service. It is abundantly proven that no influence, no inducement, no suggestion, even, was held out by Mr. Frost or any other person to affect or influence any elector in giving his vote. If any elector had been influenced, coerced, or even a suggestion had been made to him as to his vote, the contestant could have shown it. The law required him to prove it. The fact that he did not venture to enter upon this line of proof clearly shows that he knew it would prove unavailing, because his charge was untrue. He fails to show that one solitary elector from the force employed in the navy-yard was improperly or illegally induced or influenced to vote for Mr. Frost. He fails to show that a single person from that force cast an illegal ballot for the returned Member. No man's opinion or vote is shown to have been changed or influenced by the circumstance of his employment in that yard. There is not one word of evidence in the record to show that of that increased force a single man actually voted for Mr. Frost. The probabilities are that the most of the applicants for labor belonged to the party who had the labor in its gift. This presumption runs into every department of the Government. The contestant is the last man to object to the application of that standard canon of the Democratic confession of faith: "To the victors belong the spoils." We admit that the maxim is odious in principle and demoralizing in practice. But who ever before seriously contended that a voter who asked the influence of a Member or candidate for Congress to aid him in obtaining Government employment was thereby disqualified to vote? Who ever before claimed that it came within the prohibition of the statute of bribery? The fair presumption is that the employees of the navy-yard were Republicans—were employed because they were Republicans, and that they voted uninfluenced, according to their convictions. We believe the law is undoubted that the contestant is bound to show that in consequence of this increased force he lost votes which he otherwise would have received, or that Mr. Frost received votes which he otherwise would not have received. This he has not done nor even attempted to do. A certain number of men, legal residents of the Fourth Congressional district, were employed in the navy-yard between the 1st of September and the day of the election. It is not shown how these men voted. Nay, it is not shown that they voted at all. It is shown that they were legal voters, and that no influence, inducement, or dictation was used upon any voter; and it is not shown that a single one of them voted contrary to his free and uninfluenced convictions. The contestant does not prove that a single one of this increased force in the navy-yard was bribed by Mr. Frost or anyone acting on his behalf to vote for him. He does not prove that anyone of this increased force in the navy-yard actually voted at all at that election. He does not attempt to show how anyone of this increased force in said navy-yard voted. He asks the House to infer that every man of this increased force was bribed, because they were recommended and employed by Republicans; that they voted, and that their votes were cast for the returned Member. No rule of law can be found which will justify the indulgence of such presumptions to disfranchise electors otherwise duly qualified.

918. The case of Abbott v. Frost, continued.

In determining qualifications of voters the House follows the strict letter of the law, and not local usage in disregard of law.

There being no doubt for whom votes were intended, the House did not reject ballots bearing very imperfect names.

(2) The committee unanimously agreed that two votes cast for the sitting Member in the town of Winthrop should be deducted as illegal. The minority set forth their views at length on this point:

The contestant contests the legality of the votes cast by Charles A. Stevens and Frank Tuckerman at the election in the town of Winthrop. The law of Massachusetts (Stat. 1874, chap. 376, sec. 6) permits a person who is not assessed on the 1st day of May of any year to be assessed upon presenting to the

assessors, on or before the 15th day of September, a written application, containing a true statement of his taxables, and satisfying them that he was on the 1st of May liable to be assessed in the town in which he makes the application. The list of persons thus assessed must, by the same statute, be deposited with the city or town clerk on or before the 1st day of October. In order to be a legal voter at any election, a person must, in addition to possessing the other legal qualifications of an elector, have paid a poll tax, legally assessed upon him, in the State within two years previous to the election at which he claims to vote.

The right of these two men to vote was challenged on the grounds (1) that they were not residents of the State and town where they offered to vote, as required by law; (2) that they had not paid any poll tax legally assessed upon them in the time and manner provided by law within the two years next preceding the election at which they offered to vote. They took the required oath and each was permitted to and did vote for the returned Member. In our judgment there is no sufficient evidence to overcome their declarations on oath, when challenged, that they were residents of the town of Winthrop, so as to be eligible to vote if otherwise qualified. They were young unmarried men. Their residence was largely a matter of intention. It seems to us that there is no evidence which rebuts their sworn declarations on the question of residence.

The other question is one which involves no inquiry into intention. Their application for assessment was made upon the 2d of November, 1874, and they were both assessed upon that day and not before. Their names were put upon the list of voters when they presented themselves to vote. To hold that such assessment and payment of poll tax were a substantial compliance with the statute, would operate to defeat its obvious purpose. It is suggested that these votes ought not to be struck off, because they were allowed to vote in accordance with the universal usage in that town, permitting persons to be assessed, pay the tax, and vote, as these two men did. The sufficient answer is that it is our duty to ascertain and apply the law as we find it. If the usage exists and its wisdom commends it to the legislature of that Commonwealth, it will doubtless be enacted into law. Then only can it be successfully invoked as a rule for our decision. For this reason we agree with the majority in striking off the votes of these two men.

(3) The full name and residence of sitting Member was "Rufus S. Frost, of Chelsea." Certain votes were offered bearing the names: "Benjamin Frost, of Chelsea," "Rufus S. Frost," "Frost, of Chelsea," "Rufus S. Frost, of Boston," and "R. S. Frost, of Chelsea." The full name and residence of contestant was "Josiah G. Abbott, of Boston," and certain votes were cast for "Judge Abbott," "Josiah G. Abbott," "Josiah G. Abbott, of Chelsea," "Abbott, of Chelsea," "P. G. Abbott," "J. G. Abbott," "Abbott," "J. G. Abbott, of Chelsea." The committee unanimously agreed that these votes, which were relatively few and of no effect on the result, should be counted for sitting Member and contestant, respectively.

The minority say:

It is admitted that Josiah G. Abbott, of Boston, and Rufus S. Frost, of Chelsea, were the only persons who were candidates for election to Congress in this district at the election held in November, 1874. There can be no serious doubt that the votes above referred to were intended to be cast for them. It was not claimed by either party on the argument that those votes should be excluded from the count in settling the contest in this case. We therefore agree with the majority of the committee that the 23 votes above mentioned should be counted for Josiah G. Abbott, of Boston, and the 8 votes above mentioned should be counted for Rufus S. Frost, of Chelsea.

(4) The committee unanimously cast out fraudulent and illegal votes cast for sitting Member in Ward 5, of Boston.

The majority of the committee found, as the results of the application of the law which they contended for, that contestant had a majority of 712 and presented resolutions giving to him the seat.

On July 14 [1] the report was debated in the House, and on that day a substitute proposed by the minority confirming the title of sitting Member to the seat was disagreed to, yeas 79, nays 102.

The resolutions of the majority, seating contestant, were then agreed to without division.

919. The Louisiana election case of Breaux v. Darrall in the Forty-fourth Congress.—On July 12, 1876,[2] Mr. John T. Harris, of Virginia, from the Committee on Elections, to whom was referred the contested-election case of Breaux *v.* Darrall, of Louisiana, reported a resolution declaring Mr. Darrall entitled to the seat. This was agreed to without debate or division.

920. The South Carolina election case of Buttz v. Mackey in the Forty-fourth Congress.

Gross frauds perpetrated in such a way as to show connivance of election officers caused rejection of the returns of all the precincts of a city.

One-third of the votes of a district being rejected, the House did not seat contestant, but declared the seat vacant.

Both parties having proceeded under misapprehension of the law, the evidence was admitted.

On July 13,1876,[3] Mr. Charles P. Thompson, of Massachusetts, from the Committee on Elections, submitted the report in the South Carolina case of Buttz *v.* Mackey. The official returns gave sitting Member a majority of 2,537. The report thus states the case:

> The city of Charleston gave 10,404 votes, 7,976 of which were for the contestee and 2,428 for the contestant, making a majority for the contestee of 5,548. The contestant alleges in his notice of contest that frauds were committed in most of the voting precincts of the city of Charleston, and at the hearing before the committee he, without objection, introduced evidence that frauds were committed in all of the voting precincts of that city by the partisans of the contestee through an organized system of repeating, and that persons entitled to vote and desiring to vote for the contestant were prevented from voting for him by violence and threats and induced to vote for the contestee; also that a large number of persons, through bribery, were induced to vote for the contestee, and that this was done with the approval of the managers of the election. The contestee denies all the material allegations of the contestant, and alleges that many of the allegations are irrelevant and immaterial. Although there are allegations of irregularities at other precincts than those in the city of Charleston, your committee have not thought it necessary to consider them, as the decision they have arrived at with reference to the vote of the city of Charleston is conclusive of this case.
>
> The evidence clearly shows that most gross frauds were perpetrated at the voting precincts in the city of Charleston through repeating, bribery, intimidation, and violence, and that the same were carried on under such circumstances as to satisfy the committee that they must have been done with the knowledge and assent of the officers of the election.

This evidence showed that repeaters were taken from poll to poll and voted in large numbers. After quoting from the testimony the report says:

> The whole evidence, of which the above is a fair specimen, clearly shows the character of the election in the city of Charleston, and must, we think, satisfy the House that such an election ought not to be sanctioned or tolerated. To allow the returns from such voting precincts to be canvassed is to encourage fraud and corruption, and your committee have unanimously come to the conclusion that the whole vote

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[1] Journal, pp. 1267–1270; Record, pp. 4589–4598.

[2] First session Forty-fourth Congress, Journal, p. 1252; Record, p. 4516.

[3] First session Forty-fourth Congress, House Report No. 758; Smith, p. 683; Rowell's Digest, p. 320.

of the city of Charleston must be rejected, as fraud was committed by, or assented to by, the managers of the election as well as by other parties, and it is impossible to ascertain how many legal votes were cast. Your committee have had not a little difficulty in determining what ought to be done under the circumstances of the case. The district outside of the city of Charleston gives a large majority for the contestant. Still we are of opinion that he ought not to be declared elected, as it is impossible to determine who received a majority of the legal votes of the district. And the votes of so large a proportion of the district have been rejected and the people thereby disfranchised that justice to the district requires that a new election shall be had and an opportunity given the legal voters to hold an election to determine who shall represent the district.

The total vote of the district was 30,965, and the vote of the city of Charleston was 10,404.

A preliminary question as to evidence was thus determined:

The contestee claims that all the evidence taken by the contestant after the 18th of February, 1875, should be stricken out, as the forty days from the time of the serving of the answer of the contestee expired on that day. It appears that both parties proceeded in ignorance of the act of 1873 concerning contested elections, and the contestant gave notice and took evidence under the law as it existed prior to that date. And your committee are of opinion, as both parties proceeded under a mutual misapprehension of the law, that neither ought to take any advantage of the other on that account, but that the evidence must be regarded as having been taken by mutual consent, waiving the provisions of law, and that this rule will apply until one party or the other declined to proceed under this arrangement. It appears that no objection was made to this mode of proceeding until March 1, 1875, during the taking of the evidence of one Henry P. Dart, who appears to have been the first witness examined on that day. Your committee have, therefore, not considered any of the evidence taken subsequent to that of Dart's (p. 47). The contestee, although having full opportunity to take evidence, declined to take any evidence, and your committee are compelled to pass upon this case upon the evidence of the contestant alone.

The committee recommended this resolution:

Resolved, That neither C. W. Buttz nor E. W. M. Mackey was lawfully elected to the Forty-fourth Congress from the Second Congressional district of South Carolina, nor is either of them entitled to a seat in said Congress.

On July 19,[1] after short debate, the House agreed to the resolution without division.

921. The Virginia election case of Platt v. Goode, in the Forty-fourth Congress.

Overruling its committee, the House declined to deduct proportionately from the two candidates unidentified votes cast by disqualified persons.

Contestant having neglected to show for whom votes impeached by him were cast, they were deducted from his poll.

While State canvassers are justified in requiring returns to be technically perfect, the House in judging final right looks rather to the substance.

On July 17, 1876,[2] Mr. William R. Brown, of Kansas, from the Committee on Elections, submitted the report of a bare majority of the committee in the Virginia case of Platt *v.* Goode. The official returns had given the sitting Member a majority of 131 votes over contestant.

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[1] Journal, p. 1293; Record, pp. 4734–4742.

[2] First session Forty-fourth Congress, House Report No. 762; Smith, p. 650; Rowell's Digest, p. 318.

A number of questions arose in the determination of this case:

(1) The returns from Prince George County were rejected by the State board of canvassers because they lacked the attestation of the county clerk. That is, the words "Attest, Robert Gilliam, clerk," were omitted.[1] The majority report state the case, with copies of the full returns, as follows:

The returns before the State board were as follows:

"Abstract of votes of the election held in the county of Prince George, on the third day of November, one thousand eight hundred and seventy-four, for a Representative from the Second Congressional district of Virginia, in the Forty-fourth Congress of the United States of America.

"James H. Platt, jr., received nine hundred and eighty-seven (987) votes.

"John Goode, jr., received five hundred and sixty-two (562) votes.

"Given under our hands this fifth day of November, one thousand eight hundred and seventy-four.

"B. J. PEEBLES,
"T. A. LEATH,
"WM. D. TEMPLE,
"CHARLES T. ROBERTSON,
"Commissioners.

"STATE OF VIRGINIA,

"County of Prince George, to wit:

"I, Robert Gilliam, sr., clerk of the county court of Prince George, in the State of Virginia, do certify the foregoing to be a true copy of the return of the election for a Representative from the Second Congressional district of Virginia to the Forty-fourth Congress of the United States.

"In testimony whereof I have hereto set my hand and affixed the seal of the said court this 5th day of November, A. D. 1874, and in the ninety-ninth year of the Independence of the United States.

"[SEAL.]

RO. GILLIAM, SR., *Clk."*

The statute of Virginia, after providing for a board of commissioners to act as county canvassers, provides: "The said commissioners shall determine the persons who have received the greatest number of votes in the county or corporation for the several offices voted for at such election. Such determination shall be reduced to writing and signed by said commissioners, and attested by the clerk, and shall be annexed to the abstract of votes given to such officers, respectively. As soon as the commissioners aforesaid shall have determined the persons who have received the highest number of votes for any office, the clerk shall make out abstracts of the votes in the following manner: * * * which abstracts, being certified and signed by such commissioners and attested by the clerk, shall be deposited in the office of the latter, and certified copies of abstracts, * * * under the official seal of said clerk, shall be placed in separate envelopes * * * and forwarded to the seat of government by mail."

The abstract is a substantial compliance with the requirements of the statute, and, except in lacking the formal attestation of the clerk, is sufficient. And showing as it does that it was the act of the commissioners, by the certificate of the clerk duly attached, it seems to us an arbitrary and unjustifiable course for the State board of canvassers to have rejected it merely because the same officer who had certified to its correctness had failed to make assurance doubly sure by attesting it.

The statute further provides: "If from any county, city, or town no such abstract of votes shall have been received within twelve days next after any election by the secretary of the commonwealth, he shall dispatch a special messenger to obtain a copy of the same from the proper clerk." This he failed to do; and in spite of the fact that the county seat of Prince George County is within three hours' ride of Richmond, and in spite of the fact that Mr. Platt at the time presented a duly attested abstract to them, the State board did not have a messenger sent, and adjourn over till his return, but rejected the abstract and gave Mr. Goode his certificate.

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[1] Record, p. 4872.

The minority views, presented by Mr. J. S. C. Blackburn, of Kentucky, uphold the action of the State canvassers, but do not insist that the House should be bound by the results of the act:

The returns from the county of Prince George were fatally defective. The law required that the returns should be certified by the board of county commissioners and attested by the clerk under his official seal. Neither of these requirements was complied with. We are of opinion that the board of State canvassers acted properly in refusing to take notice of what purported to be the returns from said county of Prince George, as the law only required them, in fact only authorized them, to canvass such returns as might be found in the office of the secretary of the commonwealth, properly certified by the board of county commissioners, their determination reduced to writing, and attested by the clerks of the several counties with their official seal. It will not be necessary to determine whether said board of State canvassers erred in refusing to receive and canvass the amended returns from Prince George County. We, in the exercise of the power belonging to the House of going behind the action of all boards, State or county, and even behind the returns of the election officers, are convinced that the returns from the precincts of Bland and Rives, in the county of Prince George, should be rejected.

The minority, whose views prevailed, counted all of this county except the Bland and Rives precincts.

922. The case of Platt v. Goode, continued.

As to whether the House should count ballots illegally but not fraudulently cast and properly rejected by the election officers.

As to whether an unnaturalized foreigner may be a de facto election officer.

Question as to whether or not a law requiring returns to be transmitted sealed should be considered mandatory or directory.

It is presumed that elections officers who are partisan of the objecting party have not intentionally erred against his interest.

(2) In Nansemond County certain returns were rejected, as described in the minority views:

As to the 206 votes cast for contestant in Nansemond County, and rejected by board of county commissioners, 193 of them had printed upon them the name of contestant and the words "Against constitutional amendments;" 13 of said ballots had each a second ballot folded within them, upon which were printed the words "Against constitutional amendments." Under the general election law of Virginia and the act of assembly providing for the taking of the sense of the people upon the constitutional amendments submitted for their ratification, it is clear that such ballots were not cast as required by law. The county commissioners for Nansemond County, in our judgment, did not err in rejecting and refusing to count said ballots, which, under the law, they were not permitted to receive; but we do not feel that this committee or the House should be restricted to such a rigid observance of the technical requirements of the statute as will do violence to the equities involved. We therefore feel disposed to go behind the action of the board of county commissioners of Nansemond County and allow to contestant the 206 votes deducted from his count.

The majority report that the statutes of Virginia with regard to casting of ballots were directory, and that the words "deposit a ticket or ballot" as applied to the constitutional amendment did not necessarily mean that the ballot must be separated from the general ticket. The fact that 13 detached tickets on the constitutional amendment were folded into tickets for Mr. Platt and voted in the same box showed an evident mistake. The law did not require separate ballot boxes and no claim was made that illegal votes were cast.

(3) The majority report discusses Bland and Rives townships:

These two townships, in Prince George County, gave Mr. Platt 408 majority. The allegation of Mr. Goode in reference to them is as follows:

"Seventh. I shall maintain and insist that the entire vote cast at the precincts or voting places in Rives and Bland townships, in the county of Prince George, should be rejected as illegal and void, because the poll books and ballots at said precincts were not sealed and were not returned to the clerk's office, as the law directs; because, at the precinct in Bland Township, one John Palmer acted as clerk of election, he being at the time a subject of Great Britain, and not a naturalized citizen of the United States, and because a large number of colored persons, at least one hundred, whose names are unknown to me, were imported into the said townships in the said county of Prince George from Petersburgh and other places in the adjoining district, and allowed to deposit their ballots for you at the said election, thus placing upon the polls at the said precincts such a taint of illegality and fraud that the result can not be clearly ascertained."

In reference to the charges, except upon the point the poll books and ballots were not sealed, the evidence is totally insufficient. Even if it were true that John Palmer was a foreigner and unnaturalized, it could make no difference, as we have always decided. If not de jure he was a de facto officer, and his acts valid. C. T. Robinson, a judge of election in Rives Township, a Conservative, testifies that the election was fairly, faithfully, and honestly conducted, and that to his knowledge no man was allowed to vote who was not entitled to. Robert B. Batte, one of the Conservative judges in Bland Township, says that the judges of election did their duty as far as they could. Robert E. Bland, who was at Bland Township, swears that he does not think the election was conducted as the law directs, but saw nothing that looked like corruption, criminality, and bad intent. One man voted illegally in Bland Township and one in Rives, and this is the whole testimony. The poll books and ballots were returned unsealed, and this is the only irregularity we need to consider.

The report further says:

The evidence shows that five out of the six judges of election in these two precincts were Democrats. Both judges who carried in the returns were Democrats, and the county clerk to whom they were delivered was a Democrat; and it will be noticed that in his brief the sitting Member claims no irregularity, except that "several colored persons" illegally voted, and this leaves but the one question, Was the failure to seal the poll book and ballots fatal? Mr. Goode correctly quotes the law in his brief above quoted, and it will be noticed that no negative words are used making the election invalid unless the judges sealed the returns.

The report quotes McCrary's Law of Elections at length in support of this view, and declares that there is neither proof nor suspicion of fraud. The election officers were partisans of Mr. Goode, and the report says:

In the case of Farwell *v.* Le Moyne the majority of the committee went to the length of deciding that where fraud is proved it must be presumed as having been committed in favor of the party controlling the polls. We still hold to the doctrine to the length that the presumption is that Democrats will not intentionally commit frauds to help Republican , nor vice versa.

The minority views take issue as to the poll of these precincts:

The statute of Virginia requires that one of the poll books of election shall be put under cover and seal and sent to the county or corporation court clerk, together with the ballots, inclosed and sealed. There can be no question as to the mandatory character of this statute. Its object is to prevent fraud in tampering with the ballots or alteration of returns. In these two precincts the law in this regard was wholly ignored and violated. The rule laid down and supported by a number of adjudicated cases and applied in several instances by this House does not require that positive proof shall be adduced showing that the ballots have been tampered with. It is sufficient to show that opportunity for such tampering has been afforded. The burden of proving that this has not been done devolves upon the party insisting upon the count. We can not but conclude, in the light of the testimony, under the application of the law, as stated, that the vote of Bland and Rives townships, in the county of Prince George, should be rejected.

In the debate, however, Mr. J. Randolph Tucker, of Virginia, speaking in favor of sitting Member, Mr. Goode, said as to these two precincts, "We yield all claim to them, and based his argument on other features of the case." [1]

923. the case of Platt v. Goode, continued.

Bribed votes being given, but their separation being impossible, the whole poll was rejected.

Employment for the purpose of controlling a vote, such object being knowingly acquiesced in by the voter, throws on the party naturally profiting the onus of proving that the vote was not influenced.

If an elector enters into an express or implied agreement as to his vote, the presumption is created that he votes in accordance with the agreement.

(4) A question as to votes cast by persons alleged to have been illegally registered, and the method of purging the poll of such votes, were discussed by the majority, and the rule set out in the case of Finley *v.* Walls, that in the absence of fraud the illegal votes were to be divided proportionately between the candidates in accordance with the vote received by each, was approved:

The statute of Virginia provides for registration of voters as follows: "Ten days previous to the November election the registrar shall sit one day for the purpose of amending and correcting the lists." And this is the last time provided by statute for registering prior to an election, and registration is prerequisite to having a right to vote. The evidence shows illegal registration and voting in several precincts, as follows: At Sussex Court-House Township, in Sussex County, 13. Here the vote stood, Platt 293, Goode 83, which, dividing proportionately, makes the vote stand Goode 3, Platt 10. At Stony Creek precinct 26 persons registered and voted for the first time on the day of the election. The statute provides—

"Whenever a voter changes his place of residence from one voting precinct to another, it shall be lawful for him to apply for in person or in writing, and it shall be the duty of the registrar of his former voting district at any time, whether it be in a township, ward, or voting place, to furnish a certificate that he was duly registered, and that his name has since his removal been erased from the registration books of said voting district, which shall be sufficient evidence to entitle him to register; and the name of every such person shall be entered upon the registration book of the township, ward, or voting precinct to which he has removed, by the registrar at any time, or by one of the judges on the day of election: *Provided,* That in cities or towns containing over 2,000 inhabitants the name of such person shall only be entered by the registrar on the days provided in the ninth section of this chapter."

The evidence shows that 25 of these 26 voters were registered on the day of election on transfers, as provided in this section, and that the judges were satisfied that they had resided in the election district three months. We find, therefore, that but one of these votes was illegal, which we subtract from Mr. Platt.

In Jamestown Township, James City County, 16 illegal votes were cast. The vote stood, Platt 136, Goode 78; dividing in the same proportion gives Platt 10, Goode 6. In Bruton Township 3 illegal votes are proved. The vote stood, Platt 203, Goode 88; and dividing in the same proportion gives Platt 2, Goode 1. In Guilford Township the evidence shows that about 20 persons illegally registered the Saturday before election. Eight only are identified by the witness, and these 8 voted and were illegal voters. Because a man illegally registers on the Saturday before an election is no evidence that he voted on the Tuesday following; hence, we can only consider 8 as illegal. The vote stood, Platt 265, Goode 189; and divided in same proportion gives Platt 5, Goode 3. In Nelson Township, York County, 15 illegal votes were cast. The vote stood, Goode 49, Platt 160, Norton 189; dividing in same proportion the illegal votes would stand, Platt 2, Goode 6, Norton 7. Six illegal votes are also proved in different

[1] Record, p. 4900.

townships, one or two in a place; being unable to divide, as in most if not all of the precincts Mr. Platt got more votes than Mr. Goode, we subtract all from Mr. Platt, which would make the illegal vote stand, Platt 40, Goode 15.

This conclusion of the majority is combatted by the minority:

Under the law of Virginia no man is a legal voter who has not been duly registered, and such registration must be had ten days before the election. The testimony shows that at all the precincts named persons were registered on the day of election, or within the ten days next preceding the election. There can be no doubt of the validity of a statute requiring the registration of voters. McCrary says (American Law of Elections, p. 12):

"It being conceded that the power to enact a registry law is within the power to regulate the exercise of the elective franchise and preserve the purity of the ballot, it follows that an election held in disregard of the provisions of a registry law must be held void."

This rule has been repeatedly applied by this House. (See Howard *v.* Cooper, Contested Election Cases, p. 275; also, Reed *v.* Julian, p. 822; Myers *v.* Moffitt, p. 564, and many others.) It is not to be objected that the honest voter should not be disfranchised by reason of the mistakes or misconduct of election officers. Every candidate has the right to bring forward and prove the legality of every vote cast at a precinct which has been appealed.

At Sussex Court-House Township precinct there were 13 illegal votes cast—8 white and 5 colored. At Stony Creek Township there were 18 illegal votes cast—2 white and 16 colored. At Jamestown Township, in James City County, there were 16 illegal votes cast—1 white and 15 colored. At Guilford Township precinct, in Surry County, there were about 20 illegal votes cast, principally colored. At Nelson Township precinct, in York County, there were 15 illegal votes cast—2 white and 13 colored. At Bruton Township precinct, in York County, there were 2 illegal votes cast. At Rives Township, in Prince George County, there was 1 illegal vote cast—colored. At Bland Township, in Prince George County, there was 1 illegal vote cast—colored—exclusive of those voting at Bland and Rives precincts brought from other precincts and other counties, of which several are proven in the record. At Blackwater Township, in Prince George County, there was 1 illegal vote cast—colored. At Sherman's Cross-Roads precinct, in Prince George County, there was 1 illegal vote cast—colored. At Brandon Township precinct, in Prince George County, there was 1 illegal vote cast—colored. At Suffolk precinct, in Nansemond County, there were 2 illegal votes cast—both colored-making an aggregate, at all the precincts named, of 90 illegal votes. What is to be done with these illegal and fraudulent votes?

The rule in certain cases is to divide the fraudulent or illegal votes between the candidates in proportion to the whole vote received by each; but on page 225, American Law of Elections, it is held:

"Let it be understood that we are here referring to a case where it is found to be impossible, by the use of due diligence, to show for whom the illegal votes were cast. If in any given case it be shown that the proof was within the reach of the party whose duty it was to produce it, and that he neglected to produce it, then he may well be held answerable for his neglect, and because it was his duty to show for whom the illegal votes were cast, and because he might, by the use of reasonable diligence, have made this showing, it may very properly be said that he should himself suffer the loss occasioned by deducting them from his own vote."

We see no reason why this fair and well-established rule should not be applied in this case. Contestant had the opportunity to make this proof and failed to do so or to attempt it. The eighty days allowed both contestant and contestee for taking testimony in chief had expired before these illegal and fraudulent votes were discovered to be upon the several polls; but, after such discovery, contestant then had by law ten days in which to take testimony in rebuttal. These polls and the legality of the votes cast thereat having been put in issue by the answer of contestee, such testimony might have been competent; at any rate, the contestant might have relieved himself of the burden of proof imposed by the law by an effort in these remaining ten days of his time to show for whom these illegal votes were given.

It clearly appears from the record that, should this rule be not applied, but these illegal votes deducted from both candidates in proportion to the whole number of votes received by each at the several polls, the majority of contestee would be still further increased beyond the final summary hereafter given; but as such action would not change or affect the final result of the contest, we do not deem it necessary to state the exact number to be taken from each.

In debate [1] Mr. Tucker argued against the rule proposed by the majority of the committee, saying:

> The question is how those illegal votes which are found in the ballot box, without its being known for which candidate they were cast, are to be disposed of. And I would say that at these several precincts the evidence shows, in the aggregate, that Mr. Platt gets a majority of some 400 to 600.

After quoting the passage of McCrary cited by the minority, he contended that the onus was on contestant to show that the 92 illegal votes did not go to constitute his majority of 500, and as he had not proven this they should be stricken from his majority. To use the proportionate rule was merely guessing at the result. The rule was arbitrary and not founded on reason. It appeared further on that Mr. Tucker was influenced by the fact that the proportionate rule would require the assumption that a certain number of colored voters had cast their ballots for Mr. Goode, an assumption which in this case he seemed to consider against reason. Mr. Tucker held that the disposition of the 92 illegal votes in the way advocated by him showed the election of Mr. Goode, and was really decisive.

(5) Certain charges of corruption were made as to the use of navy-yard influence at Norfolk in behalf of contestant. The majority report of the committee did not consider that the exclusion of three affected precincts, where contestant's majority was 441, could overcome the majority which they found him entitled to in the district, and so did not enter fully into the discussion. The majority report says:

> The evidence is vague and indefinite. No effort was made by the sitting Member to particularize. He acted in reference to this matter as in reference to others, that where illegal votes are proved, be they few or many, the effect was to vitiate the whole election, and he endeavors, both in his proof and argument, to make us determine that some illegal votes were cast, so that we may exclude the returns of entire precincts. We believe that bribery can be committed in the employment of voters in a navy-yard, but the mere fact of employment alone does not prove bribery. If employment is given to make men vote contrary to what they would do, it would be bribery, but there must be proof, first, that men were employed in order to cause them to change their politics, and, second, that they voted and voted in favor of the party giving the employment. The presumption is in public service that Republicans employ Republicans, that Democrats employ Democrats. The presumption is almost conclusive that men obtaining employment in places controlled by Democrats are Democrats and in places controlled by Republicans are Republicans, and the employment does not change their politics. If any presumption arises when a man obtains employment in a navy-yard it is that he is a Republican, and if that be so, the employment does not affect either his vote or the result. Here the employment is the whole evidence of bribery, and is extremely weak—only a link in the chain to prove the charge. Our duty is to act on evidence, not on surmises; to seek fixed data, not make wild guesses, and hence we decline to throw out any portion of the navy-yard vote.

Two members of the committee, who sustained generally the majority report, Messrs. Charles P. Thompson and John F. House, dissented from the conclusion as to the navy-yard precincts and believed they should be rejected. Thus an actual majority of the committee were against the report in this particular.

The minority views found that large numbers of men had been employed in the yard for partisan purposes, on condition that they should vote the ticket of contestant's party, and that espionage was resorted to to make sure that the employees voted in accordance with the arrangement. The minority views contend that the presumption was that the voter complied with his obligation and executed his contract by giving his vote as promised. The onus of proving the contrary

[1] Record, p. 4900.

rested on the contestant in this case, as it was in his interest that the acts were done. Therefore the minority views (and evidently a majority of the committee actually sustained them) hold:

> These bribed votes should not be counted. The record furnishes no method for their elimination. Their acceptance can only be avoided by applying the rule of law, so well known and of such general adoption that it need scarcely be repeated here, that when illegal or fraudulent votes have been proven, and the poll can not be purged with reasonable certainty, the whole vote must be rejected. Such, we think, is the case in these three precincts, viz, Third and Fourth wards of Portsmouth, and Hall's Corner precinct, in Norfolk County.

The majority report counted the Prince George vote, added 200 Nansemond votes and 12 Norfolk votes for Platt, and deducted from him 40 illegal votes and 15 illegal votes from Goode. This left a majority of 487 for Platt in the district.

Therefore the majority reported resolutions giving the seat to contestant.

The two dissenters from the majority report subtracted the navy-yard precincts and also 64 illegal votes from Platt and 29 from Norton, leaving Platt a plurality of 24 in the district.

The minority views added the Prince George and Nansemond votes, but excluded Rives and Bland precincts, and rejected the navy-yard precincts. This gave sitting Member 349 majority. This summary "waived the question of illegal voting by reason of fraudulent or unlawful registration," on which Mr. Tucker had laid so much stress, and rejected the Bland and Rives precincts, which he had waived. The minority views conclude that Mr. Goode is entitled to his seat.

The case was debated at length on July 25, 26, and 28,[1] and on the last day the minority resolution was substituted for the majority proposition by a vote of yeas 105, nays 98. The majority resolutions as amended were then agreed to, yeas 107, nays 95. So the majority of the committee were overruled and the sitting Member retained the seat.

924. The Louisiana election case of Acklen v. Darrall in the Forty-fifth Congress.

The House, respecting a written agreement of the parties, counted a return which State canvassers had rejected as forged.

Form of agreement between parties in an election case as to counting certain votes.

A poll unauthorized by law, taken at a place different from the legally appointed place under control of partisan officers, was rejected.

A recount honestly made of ballots preserved inviolate is valid, although circumstances rendered impossible a technical compliance with law.

Instance wherein the House in an election case accepted its own historic knowledge in lieu of evidence.

An honest recount of ballots kept inviolate was sustained, although the authority which ordered it was questioned.

At the organization of the House on October 15, 1877,[2] the name of Mr. C. B. Darrall, of Louisiana, was on the roll of Members-elect presented by the Clerk.

[1] Journal, pp. 1343–1345; Record, pp. 4871, 4879, 4887, 4900, 4931–4938.

[2] First session Forty-fifth Congress, Journal, p. 20.

When Mr. Darrall was about to take the oath, he was challenged; but in October 16 the House voted that he be sworn in and that the credentials and papers of J. H. Acklen, a contestant, be referred to the Committee on Elections.

On February 8, 1878,[1] Mr. John T. Harris, of Virginia, from the committee, presented the report in the case of Acklen *v.* Darrall.

The preliminary facts as to this election are thus set forth in minority views submitted by Mr. Hiram Price, of Iowa:

On the 7th day of November, 1876, an election was held in this Congressional district for a Member of the Forty-fifth Congress, and after the election, and after the votes at the polls at all the parishes had been counted by the legally authorized officers, and the returns made as required by law, the following certificate of election was issued:

"STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,

"Third District of Louisiana, New Orleans, December 28, 1876.

"Be it known that at an election begun and held on the 7th day of November, A. D. 1876, for Members of Congress, Chester B. Darrall received 15,626 votes, and Joseph H. Acklen received 13,533 votes.

"Now, therefore, I, William Pitt Kellogg, governor of the State of Louisiana, do hereby certify that Chester B. Darrall received a majority of the votes cast at said election, and is duly and lawfully elected to represent the Third Congressional district of the State of Louisiana in the Forty-fifth Congress of the United States.

"Given under my hand and the seal of the State this 28th day of December, A. D. 1876, and of the Independence of the United States the one hundred and first.

"WM. P. KELLOGG.

"By the governor:

"[SEAL.] P. G. DESLONDE,

"*Secretary of State.*"

From which it appears that Chester P. Darrall was legally elected as a Representative to the Forty-fifth Congress from the said Third district of Louisiana.

Subsequent to this, and after the inauguration of the Nicholls government, a law was passed creating a new returning board, and this new board, created under a new law, proceeded to a recanvass of the same returns for the same office for the same district, and after a full canvass, Governor Nicholls issued the following certificate of election:

"UNITED STATES OR AMERICA,

"EXECUTIVE DEPARTMENT, STATE OF LOUISIANA.

"This is to certify that at general election begun and held in the State of Louisiana, and in the Third Congressional district of said State, on the 7th day of November, 1876, it being the first Tuesday after the first Monday in said month, and the day prescribed by the laws of the United States and the said State of Louisiana for the election of Representatives in Congress from the said State, C. B. Darrall and Joseph H. Acklen appear from the returns of said election, filed in the office of the secretary of state, within and for said State, to have been the only persons voted for in the Third Congressional district of said State for Representative in the Forty-fifth Congress of the United States from said State; and that it further appears from said returns on file and of record in said office that C. B. Darrall received 15,786 votes and Joseph H. Acklen received 14,692 votes for Representative as aforesaid in said district; and that C. B. Darrall having received a majority of the votes cast for Representative from the Third district in said State of Louisiana, in the Forty-fifth Congress of the United States of America at said election, has been duly, lawfully, and regularly elected to represent said Third district of said State in the aforesaid Congress of the United States, in accordance with the laws of the United States and of the State of Louisiana.

FRANCIS T. NICHOLLS,

"Governor of the State of Louisiana.

[1] Second session Forty-fifth Congress, House Report No. 147; 1st Ellsworth, p. 124.

"We, Francis T. Nicholls, governor of the State of Louisiana, and Oscar Arroys, assistant secretary of state of said State, do hereby certify that the above and foregoing declaration of the result of the election begun and held in the Third Congressional district of the State of Louisiana on the 7th day of November, 1876, is a true copy of the original certificate, as recorded in the office of the secretary of state of the State of Louisiana, by the secretary of state, and signed by the governor.

"Witness our hands and the seal of the State of Louisiana, at the city of New Orleans, this 27th day of February, 1877.

"FRANCIS T. NICHOLLS,
"Governor of the State of Louisiana.

"OSCAR ARROYS,
"Assistant Secretary of State."

From which it appears that Chester B. Darrall, the same man for the same office, was elected.

By the Kellogg returning board Darrall's majority is 2,093, and by the Nicholls returning board it is 1,094.

The majority of the committee disregarded the return of the Kellogg board, and the minority practically did the same, the consideration of the case being based on the computation of the Nicholls board. Speaking of the latter board, the majority report says:

They adopt the count of the votes as declared by the present legal board of canvassers in all the parishes except those of St. Martin, Lafourche, and Iberville. That board counted the vote actually cast, and returned it without the exercise of judicial powers and without disfranchising any portion of the people. It is composed of men of high character, Republicans and Democrats, and there is every reason to give full faith and credit to its official acts.

The Nicholls board omitted from the count the vote of St. Martin's Parish, holding the returns to have been forged. The committee found no proof of that fact, and counted that return in accordance with the following agreement:

Great Seal In testimony whereof I have hereunto set my hand, and caused to be affixed—E

JOSEPH H. ACKLEN

v. Before the Committee on Elections, House of Representatives.

CHESTER B. DARRALL.

It is hereby stipulated and agreed by and between the parties contestant and contestee that, in the consideration and determination of the above-entitled case, the committee shall allow to the contestant 1,027 votes as having been lawfully cast, counted, and returned for him in the parish of St. Martin, in the State of Louisiana, and to the contestee 1,095 votes as having been lawfully cast, counted, and returned for him in said parish, and that said parties respectively lawfully received, and are entitled to the benefit of, the number of votes aforesaid on account of said parish.

J. H. ACKLEN.
C. B. DARRALL.

In Lafourche Parish the whole committee united in rejecting the poll of precinct No. 17, where sitting Member had 86 votes and contestant none, the majority report thus setting forth the reasons:

The evidence, however, goes to show that the vote of poll 17, where 86 Republican votes were cast and not one Democratic vote, which was held at a place unauthorized by law, and about 1 mile from the place legally appointed, with no Democratic commissioners present, and appears to have been so held for the express purpose of preventing any Democrats from voting there, should be rejected and not counted.

The report quotes the decision of the supreme court of Louisiana on this poll:

We have been unable to find, and have been referred to no case, where votes cast under similar circumstances have been counted to determine an election.

These questions disposed of, only the parish of Iberville is left. Without Iberville the result was very close. Contestant had a majority of 63 votes in all the other parishes. The returns of Iberville Parish, both in the Kellogg and the Nicholls canvass, gave Darrall, the sitting Member, a majority of 992. So it is plain that Iberville Parish is decisive.

The returns of 5 of the 11 precincts in Iberville are not impeached. These 5 gave Darrall 677 votes, and Acklen 430 votes, or a majority of 247 for Darrall. This overcame Acklen's majority of 63 in the remainder of the parishes, and gave Darrall a net majority of 184 in the entire district except the 6 impeached precincts of Iberville.

The Nicholls canvass gave in the 6 impeached precincts a majority of 745 votes for Darrall.

But a recount was made at the instance of contestant, and the result of this was to destroy the 745 majority for Darrall and substitute a majority of 292 for contestant. This result would overcome sitting Member's majority of 184 in the rest of the district, and leave a final majority of 108 for contestant in the entire district.

It is evident, then, that the recount is decisive.

The law of Louisiana provided as to custody of ballots:

> The votes shall be counted by the commissioners at each voting place immediately after closing the election and without moving the boxes from the place where the votes were received, and the counting must be done in the presence of any bystander or citizen who may be present. Tally lists shall be kept of the count, and after the count the ballots counted shall be put back into the box and preserved until after the next term of the criminal or district court, as the case may be; and in the parishes, except Orleans, the commissioners of election, or any one of them selected for that purpose, shall carry the box and deliver it to the clerk of the district court, who shall preserve the same as above required; and in the parish of Orleans the box shall be delivered to the clerk of the first district court for the parish of Orleans, and be kept by him as above directed. (Act 98, 1872, p. 174.)

The following certificate was given to show when the next term of court met:

> STATE OF LOUISIANA, *Parish of Iberville.*
>
> CLERK'S OFFICE, FIFTH JUDICIAL DISTRICT COURT.
>
> I, Charles H. Gordon, clerk of the fifth judicial district court of Louisiana, in and for the parish of lberville, do hereby certify that the first term of said district court for the present year was held in Iberville Parish on Tuesday, the 2d day of January, A. D. 1877, as the first Monday was the 1st and a dies non, his honor James L. Cole presiding.
>
> Witness my hand officially and the impress of the seal of said court at the parish of Iberville this 8th day of May, A. D. 1877.
>
> [SEAL.]
>
> C. H. GORDON, *Clerk.*

The recount was made March 6, 1877, after the date of the session of the court, as given by the clerk's certificate.

Several questions arose as to this recount:

(*a*) As to the legal preservation of the boxes.

The majority report says:

> Another objection to the consideration of the recount urged by contestee is that the time between the election and the recount was some four months, and that the time for the preservation of the boxes by the clerk, under the laws of Louisiana, had expired. Section 13 provided in substance that the clerk of the court should safely keep the ballot boxes, after delivery to him by the officers of election, until after the next regular term of the district or criminal court for said parish. Contestee urges that the next regular term of the district or criminal court for the parish of Iberville was in January, 1877,

two months after the election, and that after the lapse of said term, the law no longer obligating the clerk to safely keep the ballot boxes, a recount of such boxes or their contents was illegal. The facts are that the time for holding the term of the regular district court was in January, but no court was held. There were two claimants to the office of district judge. One of these claimants (and the one, too, who was afterwards declared not to be the judge) went through the form of holding court; but no business whatever was transacted, and no regular term of court was held until the month of April. But, granting the fact that the term of court had elapsed between the time of the election and the recount, would that fact abridge the power of Congress in determining the rights of claimants to seats in its body to take the ballot boxes, no matter what might be the lapse of time; and if satisfied that the boxes had not been tampered with, and that the ballots contained in them were the identical ballots cast at the election, to open the boxes, count the ballots, and decide in accordance with the result of said recount? But the committee find, after thorough examination, that contestant could not have obtained the recount at a date earlier than it was effected. The election took place November 7, but the Wells-Anderson returning board did not declare any result until nearly two months afterwards. After that declaration the contestant gave notice of contest, which was given within the time required by law. During this time, and until the Nicholls government was established in Louisiana, the state of affairs was such that few or no courts transacted business, and it was not until the month of February that the board of canvassers under the Nicholls government declared any results. And thus awaiting final action of these two boards of canvassers were any proceedings by contestant delayed; and, further, the answer of the contestee to notice of contest bears date "Washington, D. C., January 20, 1877," and appears to have been served some time thereafter. Thus the recount, which took place early within the first forty days, granted the contestant by law was effected at as early a date as the case permitted.

In the course of the debate it was admitted that the fact as to Judge Cole being an usurper, and in fact holding no real court, was known rather "from the general knowledge of the condition of affairs in Louisiana" than from any evidence in the record of the case.[1]

The minority views, presented by Mr. J. N. Thornburgh, of Tennessee, said:

The annexed certificate from the clerk of the district court shows that the first term of court was held January 1, and the said recount was not had till March. After that the clerk is not responsible for safe-keeping of either boxes or ballots, and no law requires that the ballots shall be longer preserved, and it is no offense to tamper with or change the ballots after that time.

In the debate[2] this question was discussed at considerable length, it being urged on behalf of the majority that the object of the law was not to keep the ballots until a certain date; but until they could be examined if need be at a session of court. The minority insisted that it must be concluded that after the date set the clerk would not feel himself responsible for the safe-keeping of the ballots.

(*b*) As to the authority by which the recount was ordered.

The minority views say:

This recount was ordered to be made by James Crowell, parish judge of Iberville, on an application made to him by contestant in an oral argument, as contestant says in his brief. It was had against the protest of the contestee's representative, and the judge gave his authority for so ordering the recount, section 123, Revised Statutes of the United States. Neither that section or any other law of the United States or of the State of Louisiana authorizes this recount.

This point was further discussed in the debate[3] the authority of the judge to order the recount being denied by the minority. The majority contented them-

[1] Speech of Mr. Clarkson N. Potter, of New York, Record, p. 1226.

[2] Record, p. 1219.

[3] Record, pp. 1218, 1219.

selves with holding that the conduct of the recount was unquestioned, whatever might be the authority to order it.

(*c*) As to the custody of the ballots preceding the recount.

The majority report, after discussing the evidence, concludes:

> The rules of law governing recounts of ballots are plain and positive. Before courts or legislative bodies will give weight to results of recounts of ballots it must be shown absolutely that the ballot boxes containing such ballots had been safely kept; that the ballots were undoubtedly the identical ballots cast at the election; and when these facts are established beyond all reasonable doubt, then full force and effect are given to the developments of the recount. After full examination of the evidence your committee found no difficulty whatever in arriving at the conclusion that in this case the ballot boxes had been preserved; that they had never been tampered with, and that the ballots found in them were the identical ballots cast at the November election.
>
> Suffice it to say that the evidence is conclusive that the ballot boxes had been safely kept, and had not been tampered with between the time of the election and that of the recount.
>
> Such being the case, the presumption follows that the ballots found in the boxes when the recount was made were the identical ballots cast at the election.

The minority deny that the evidence shows conclusively that the boxes were properly kept.

(*d*) While both parties were represented on the election boards in the various precincts, it would seem impossible that the official count could be so far wrong as the recount showed. This was explained by the fact that a member of sitting Member's party who controlled the distribution of many tickets put forth a deceptive ballot containing either contestant's name or a blank, and that many of these tickets were counted as straight tickets.

As a result of their conclusions, the majority of the committee reported resolutions seating contestant. The minority held that sitting Member should retain the seat.

The report was debated at length on February 19 and 20, 1878[1] and on the latter day a motion to substitute the proposition of the minority was disagreed to, yeas 115, nays 139. Then the resolutions of the majority were agreed to without division. Mr. Acklen, the contestant, thereupon took the oath.

925. The South Carolina election case of Richardson v. Rainey in the Forty-fifth Congress.

Irregularities found to be infractions of directory provisions of law do not justify rejection of the poll.

Discussion as to whether the distribution of United States soldiers in the neighborhood of the polls justified rejections of returns for intimidation.

Discussion as to whether or not undue influence must be shown to have affected the result materially to justify rejection of the returns.

Discussion of social, business, and religious influences as forms of intimidation in elections.

Over half the vote being rejected because of undue influence, the committee, in an inconclusive case, favored declaring the seat vacant.

On October 15, 1877,[2] at the organization of the House, objection was made to

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[1] Record, pp. 1173, 1211–1229; Journal, pp. 475–477.

[2] First session Forty-fifth Congress, Journal, pp. 12, 13, 15.

the administration of the oath of office to Mr. Joseph H. Rainey, of South Carolina; but on October 16 the House voted that Mr. Rainey be sworn in, and he accordingly took the oath.

On May 18, 1878,[1] Mr. E. John Ellis, of Louisiana, from the Committee on Elections, submitted the report of the majority of the committee in the case of Richardson *v.* Rainey.

Sitting Member had been returned by an official majority of 1,528 votes. Contestant made various allegations, from which the following questions arose for the consideration of the committee:

(1) Numerous objections to the counting of various polls. The majority report thus enumerates and discusses them:

> A failure of one or more precinct officers to take the oath of office prescribed by law; a failure of one or more of the precinct officers to file the official oath in the office of the secretary of state; a failure to appoint a clerk of election according to law; a failure of the precinct officers to organize as a board; a failure to keep a poll list according to law; a failure to open the polls at the hour fixed by law; a failure of the clerk to take the oath of office prescribed by law; the fact that a ballot box contained more than one opening; the circumstance that but one United States supervisor attended the election; an adjournment of the polls during the day; a failure to keep a tally list; a failure to count the ballots immediately after the close of the poll; a failure to administer the oath prescribed by law to the electors; the fact that the poll list, ballot boxes, and statements of results were not delivered to the county canvassers by the chairmen of the precinct boards; the refusal of the county canvassers to entertain and decide upon protests presented by electors; the fact that the election was conducted by two instead of three precinct officers, and the fact that the county canvassers opened the ballot boxes when they canvassed the votes.
>
> These objections are most elaborately set forth and discussed by the contestant and the counsel for contestee. It will be observed that most of the objections relate to violations of the election law that are purely directory in their character. Their violation, if no fraud be shown to have resulted therefrom, can not vitiate an election. It is wholly different when mandatory provisions of an election law are violated. In the latter case the election is void.
>
> But the voter is not to be deprived of his right, and the citizens are not to lose the result of an election fairly held because of some unimportant omission of form, or of the neglect, carelessness, or ignorance of some election officer, or the failure to carry out some unimportant direction of the law. (Vide McCrary's Law of Elections; Cooley, Const. Limitations; Botts *v.* Jones, 1 Bartlett, 73; People *v.* Cook, 4 Selden, 67; Taylor *v.* Taylor, 10 Minn., 107; People *v.* Cook, 14 Barbour, 259; Barnes *v.* Adams, 2 Bartlett, 764; Blair *v.* Barrett, 1 Bartlett, 313; Cox *v.* Strait, decided in Forty-fourth Congress, and other authorities.)
>
> Your committee find that the irregularities complained of, even if true in every particular, are infractions of directory provisions of the law and are unaccompanied by proof of fraud, and ought not, therefore, to vitiate the election of themselves.

(2) It was objected that the presence of United States soldiers at the polls had prevented a free, fair, and peaceable election.

The governor of South Carolina had, on October 7, 1876, preceding the election which was held on November 7, 1876, issued a proclamation declaring certain irregular military organizations unlawful and commanding them to "abstain from all unlawful interference with the rights of citizens and from all violations of the public peace," and commanding them to disband. On October 17, 1876, the President of the United States issued a proclamation reciting that whereas it had been shown that "insurrection and domestic violence exist in several counties;" and

[1] Second session Forty-fifth Congress, House Report No. 806; 1 Ellsworth, p. 224.

whereas the executive of the State had made application for Federal aid, and that, therefore, he commanded all persons engaged in such unlawful and insurrectionary proceedings to disperse. Later the following order was issued:

WAR DEPARTMENT,
Washington City, October 17, 1876.

GEN. W. T. SHERMAN,

Commanding United States Army.

SIR: In view of the existing condition of affairs in South Carolina, there is a possibility that the proclamation of the President of this date may be disregarded. To provide against such a contingency, you will immediately order all the available force in the Military Division of the Atlantic to report to General Ruger, commanding at Columbia, S.C., and instruct that officer to station his troops in such localities that they may be most speedily and effectually used in case of any resistance to the authority of the United States. It is hoped that a collision may thus be avoided, but you will instruct General Ruger to let it be known that it is the fixed purpose of the Government to carry out the spirit of the proclamation, and to sustain it by the military force of the General Government, supplemented, if necessary, by the militia of the various States.

Very respectfully, your obedient servant,

J. D. CAMERON,
Secretary of War.

The majority of the committee cite much evidence to show that the presence of these soldiers, distributed at various points through the district, had the effect of preventing many colored voters from supporting contestant. The majority say:

There can not remain a doubt in the impartial mind that the sending of the troops of the United States into South Carolina and the uses made of their presence did produce a marked and controlling effect upon the result of the election, amply sufficient of itself to justify your committee in declaring the election null and void.

But even had no effect been proven, we are not prepared to say but that their very presence at the polling places, the mere fact of their being sent, without proof of effect, would of itself be sufficient to set aside and annul the election. Our English ancestors, from whom our laws and ideas of constitutional freedom are derived, have been wisely jealous of the slightest tampering or interference with an election by the Government, and especially through its armed forces.

The report then quotes the English statute, 100 years old, requiring troops to be moved out of any place where an election was to be held, cites Blackstone's Commentaries also to the same effect, and refers to a precedent of Parliament:

At an election held for member of Parliament for Westminster, over one hundred and thirty years ago, by order of three magistrates a body of English troops were marched up and halted in the churchyard of St. Paul, Covent Garden, very near the polls, where the balloting was proceeding. Upon being informed of this fact by the Speaker, the House of Commons passed unanimously the following resolution:

"That the presence of a regular body of armed soldiers at an election of members to serve in Parliament is a high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this Kingdom."

And by the order of the House the three offending magistrates were arrested and brought to its bar and compelled to kneel, in which position they were reprimanded by the Speaker for the breach of English liberty in daring to procure the presence of troops at an election for member of Parliament.

The majority further say in their report:

But we are asked by contestee's counsel to go into a critical examination of the testimony and to endeavor to ascertain the exact results of the intimidating influences. He contends that undue influence in an election must be shown to have affected the result materially. In this he is in the main correct. In the entire district over 34,000 votes were polled. Only about 500 witnesses were examined, and many of these in regard to facts other than the subject of intimidation. It is impossible to tell the exact change produced by the intimidating influences, nor is it essential. It is sufficient that 300 witnesses,

white and colored, Democratic and Republican, and some of them men of the highest character, swear positively to the general widespread and powerful influence and change produced by the intimidating influences. McCrary's Law of Elections lays down the rule, page 326, which we regard as correct: "If the violence and intimidation have been so extensive and general as to render it certain that there has been no free and fair expression by the great body of electors, then the election must be set aside, notwithstanding the fact that in some of the precincts or counties there was a peaceable election." And in the Canada case, already quoted from, Justice Ritchie said, in delivering his opinion: "And though I have no means of computing or ascertaining the exact extent of the terror or undue influences, it was still, in my opinion, such and so great an interference with the freedom of the elections as demands that the election should be annulled." That these undue influences were general and powerful and caused the greatest change is admitted by the counsel for contestee, himself a Carolinian and a gentleman of great attainments.

The minority [1] deny that the Federal troops were a source of intimidation.

It is not claimed that the troops coerced, intimidated, or persuaded; that an officer or soldier did or said aught indicating a personal preference for one side or the other.

They were stationed usually, so far as the evidence discloses, out of sight, and in no case immediately at the polls; 250 or 400 yards are given as their nearest approach to the polls.

An officer and 29 men were divided between Sumter Court-House and Lynchburg, places 10 miles apart, in Sumter County.

As we have already stated, it is not alleged the soldiers did anything to influence the election; that is, committed any overt act. Located as aforesaid, it appears they were silent and passive spectators of the scenes, without expressing preference in the result of the election. And it is claimed these men coerced the colored voters to a support of the Republican ticket.

We grant their presence emboldened the theretofore despairing black man to dare to exercise a freedman's right and vote his choice.

The majority report advises us there was no violence before the troops came. We grant there was none, because terrorism had stamped out resistance, threatened starvation had crushed the souls of these men, and when the Federal soldiers appeared upon the scene, and it was understood the rifle clubs and saber clubs, while they would valiantly frighten negroes, did not want a conflict with Federal authorities, we assert, these freedmen to a great extent took courage to enjoy their highest privilege and right.

The proposition of the majority is, a police force detailed by the Federal authorities, that simply enables the citizen to enjoy his rights, is illegal, and renders that enjoyment illegal and void.

The proposition of the majority is, that a community terrorized into a course of involuntary action, or subjugated to the extent of being unable, through fear of violence, to take their lawful part in an election, if from the presence of troops they are relieved of their apprehension, and exercise their rights as electors, such exercise is illegal and void.

The minority also cite the law and the Constitution to show that the troops were properly sent to the State.

(3) It was objected by contestant that the colored militia of the State and the religious and social organizations of the colored people were also agencies of intimidation. The majority report charges that the process of intimidation—

by Republican organizations against colored Democrats was to be effected, first, by threatening, intimidating, and maltreating them, and terrorizing them by means of armed colored organizations, and, secondly, by bringing to bear upon them the fear of social and religious ostracism.

After condemning such modes of electioneering as against the principles of free institutions, and after citations from McCreary and Cooley, the majority continue:

The laws of the States and of the United States, the spirit of popular government, the laws and precedents of England and English courts all tend to the principle that the elector shall vote and vote

[1] The minority views were presented by Mr. Frank Hiscock, of New York.

according to the dictates of his judgment, untrammeled and uninfluenced by any improper influences. Not only has intimidation by violence and threats, or the presence of armed troops at or near the polls, or of armed men other than troops, and bribery, the promise of advancement, the treating of electors to influence their votes been held as causes that interfered with the freedom and purity of elections, but most of the States have laws which forbid courts to be held, or process served on election day, or militia musters to take place, accounting that these might be used as means of intimidation or of improper influence. A great English lawyer, who is standard authority upon the common law, has written that "it is essential to the very existence of Parliament that elections should be free; wherefore all undue influences on electors are illegal." (1 Blackstone, p. 177.) And in a recent case which arose in Canada Mr. Justice Ritchie said:

"The rights of individual electors are the rights of the public. The public policy of all free constitutional governments in which the electoral principle is a leading element (at any rate in the British constitution) is to secure freedom of election. * * * A violation of this principle is equally at variance with good government and subversive of popular rights and liberties." (Brassard et al *v.* Langevin, Supreme Court, Canada. Decided January, 1877.)

This case was one of controverted election. It arose from the county of Charlevoix, in which an election for member of the Canadian Parliament was held in January, 1876. The respondent was declared elected. His election was contested upon the ground that "undue" spiritual or religious influence had been exercised by the priests of certain parishes in the county, under the ninety-fifth section of the election act of 1874. The section is as follows:

"SEC. 95. Every person who, directly or indirectly, by himself or by any other person on his behalf, makes use of, or threatens to make use of, any force, violence, or restraint, or inflicts or threatens the infliction, by himself or by or through any other person, of any injury, damage, harm, or loss, or in any manner practices intimidation upon or against any person, in order to induce or compel such person to vote or to refrain from voting, or on account of such person having voted or refrained from voting, at any election, or who by abduction, duress, or any fraudulent devise or contrivance impedes, prevents, or otherwise interferes with the free exercise of the franchise of any voter, or thereby compels, induces, or prevails upon any voter to give or refrain from giving his vote at any election, shall be deemed to have committed the offense of undue influence."

The proof was that the respondent was supported by all the priests of the Roman Catholic Church, and that from their pulpits one priest had declared that to vote against respondent and for his opponent "was a grave sin, a matter of conscience." Another priest characterized such a vote as a "mortal sin." Another said that with "that party (the party opposed to respondent) in power, we would wade in the blood of priests; that the horrors of the French revolution would be reenacted; that, to prevent these misfortunes, liberalism must be crushed by the people and the clergy." Another declared to his flock "that it was a sin to vote for the liberal party, and that at the hour of death those who voted for that party would regret it." Another said, "Whoever votes for Mr. Tremblay (the opponent of respondent) would be guilty of a grave sin, and if he died after so voting he would not be entitled to the services of a priest." There was no proof that respondent had incited these sermons. But the court had no difficulty in determining the question of agency, and said:

"Decisions in England, the election law of which is identical with ours, and those rendered in Ontario and Quebec, lay down the principle that every person who, in good faith, takes part in an election for a candidate with his consent, becomes ipso facto an agent of the candidate. Upon that point there can be no doubt; and the election of a prominent member of Parliament was annulled in consequence of the excessive zeal of his agents.

"All these sermons [said the court], accompanied by threats and declarations of cases of conscience, were of a nature to produce in the mind of a large number of electors of the county, compelled to hear these things during several consecutive Sundays, a serious dread of committing a grievous sin and that of being deprived of the sacraments. There is here an exerting of undue influence of the worst kind, inasmuch as these threats and declarations fell from the lips of the priest speaking from the pulpit in the name of religion, and were addressed to persons of little instruction, and generally well disposed to follow the counsels of their cure's. I can conceive that these sermons may have had no influence whatever on the intelligent and instructed portion of the hearers; nevertheless, I have no doubt but these sermons must have influenced the majority of persons void of instruction, notwithstanding that by reason of the secrecy

in voting by ballot it has not been possible to point out more than 6 or 8 voters as having been influenced to the extent of affecting their will. According to the testimony of over 15 witnesses, a very large number changed their opinion in consequence of this undue influence. I may here state that in like cases, to annual an election a large number of cases of undue influence by a candidate, or an agent, is not required and that one single case, well proved, suffices, although the candidate availing himself of it may have had an overwhelming majority."

Taking, the evidence as a whole, it appears clear that a general system of intimidation was practiced; that as a consequence undue influence was exercised and the electors did not consider themselves free in the exercise of their elective franchise. (Vide Mayo election case, 1857; Longford election case; Galway cases; case of county of Bonaventura.)

The principle of all the decisions in all these cases is that the priest must not appeal to the fears of his hearers, nor say that the elector who votes for such a candidate will commit a sin or incur ecclesiastical censures or be deprived of the sacraments. And the court annulled the election and declared it void.

The committee have quoted extensively from the decision in this case, inasmuch as the principle it lays down, as well as the principle of the authorities it cites, is applicable to some extent to the case at bar.

The majority report then goes on to say that the colored militia organizations were agencies for intimidation:

The evidence is clear that throughout the district, and in nearly every precinct of the district, these organizations existed. They were armed with the State arms for the most part, but many had private arms. They went to their political meetings with arms in their hands, and at many of the polling places they appeared on election day in organized force.

So intolerant were they against individuals of their own race who differed with them politically that they uttered against them the most terrible threats, and, in some cases, resorted to actual violence. They denied the right of free speech; they tore tickets from the hands of voters and substituted others; they interfered with the domestic peace of colored Democrats by persuading their wives to leave them, and left no device that could intimidate unemployed to coerce men of their own color into voting the Republican ticket. Evidence clear and indisputable is found in the record of this state of facts, and of the widespread influence which this mode of electioneering produced in the minds of the colored voters.

It will not suffice to meet these facts by saying that both sides resorted to this system of tactics. The record does not sustain the charge of intimidation generally against the Democratic party of South Carolina. The proof is clear that they pursued the policy of conciliation for the most part. Especially was this the course that characterized the campaign of contestant.

The report further cites evidence to show that the religious and social organizations of the colored people joined in this course of intimidation. The preachers threatened to turn out of the church those who voted for contestant. Social ostracism was also invoked.

The minority, after examining the evidence, say in their views:

There is nothing in the record to show either social ostracism or fear was preventing the colored voters from supporting Hampton. On the contrary, the "policy" we have described, according to the evidence of General Hampton, according to all the witnesses called by the contestant, according to the majority report, was "conciliating" them, and they were promising to support the Democratic candidates until Governor Chamberlain's proclamation appeared.

It is true that there were some members of the State militia still in possession of State arms, but there is nothing in the case evidencing, an improper use of them.

We submit there is nothing in this case to justify the expulsion of Mr. Rainey upon the score of intimidation or social ostracism.

The minority further call attention to the following:

The Democratic committee called upon the supporters of General Hampton to adopt the following pledges:

"SUMTER, S. C., *October 25, 1876.*

"The Democratic executive committee recommend the adoption of the following pledge:

"J. D. BLANDING,
Chairman Democratic Executive Committee.

"A. W. SUDER, *Secretary.*

"We, the undersigned, citizens of Sumter County, hereby pledge ourselves (each for himself) that we will not assist or extend any favor to any person of either race or color who shall vote for the Republican State or county ticket at the election on 7th November next; and that we will, in all business transactions, give the preference to such persons as shall vote the Democratic State and county ticket at said election."

"EXHIBIT A."

"DARLINGTON COUNTY,———TOWNSHIP:

"We hereby pledge ourselves to each other that we will not rent or let lands or houses, nor advance supplies on credit, to any person who shall vote the Radical ticket at the election to be held on the 7th of November next; nor will we employ as a mechanic any person who shall so vote at said election, or keep in his employment those who do so vote; nor will we employ in any capacity such persons as may be designated by the executive committee of the Democratic party for this county, in a list to be furnished by said committee."

This, in the opinion of the minority of the committee, was sufficient when coupled with the fact that armed bands of contestant's supporters were riding about the country, to justify intolerance among colored men toward their fellows who supported the oppressors of their race.

(4) The majority report thus disposes of the claim of contestant that he should be declared elected:

But contestant, whose pacific and manly course during the election, as shown by the record, and whose consummate ability in the management of his cause, or rather the cause of his people, has won the highest respect and sympathy of the committee, sets forth and shows that the intimidating influences set on foot by the Republicans did not reach or affect the entire district; that troops were sent into but four of the eight counties that constitute the district, and he contends that the intimidated counties and precincts should be thrown out and the peaceful counties and precincts counted, which, being done, would elect him and entitle him to the seat. And he cites the cases of Wallace *v.* Simpson, Sheldon *v.* Hunt, Sypher *v.* St. Martin, Darrall *v.* Bailey, 2d Bartlett, pp. 699 to 754.

It is very true that these cases were decided by a Republican Congress. They do lay down the doctrine contended for by the contestant. Party expediency might now suggest that the Republican party that made these precedents ought to be bound by them. If we should treat these decisions as containing the true doctrine of elections, if we could regard them as other than expressions of partisan intolerance, there would be no difficulty in reporting a resolution awarding the seat in contest to the contestant.

But in the first place the undue and illegal influences exercised by the Republican upon the colored people through their social, religious, and semimilitary organizations extended nearly throughout the entire district; and in the next place we find troops sent into four counties the aggregate vote of which is 21,691, while in the other four weaker counties, where there were no troops, the vote was but 12,987. To exclude 21,691 votes out of a total of 34,678 votes and count the residue and declare a result would be to permit an election by a minority. This is admissible, it is true, where the election was fair, and all had an opportunity to vote as they chose and failed only through apathy. Such is not the case here where 34,678 voters cast their ballots. But a very large portion of these, sufficient to have changed the result, cast their ballots under such undue and illegal influences as to utterly destroy the fairness and freedom of the election. Under such circumstances we can not admit that it would be right to permit a minority to elect. In the case of Sypher, cited above, the report of the committee which laid down the doctrine of minority elections was expressly overruled, vide McCrary's Law of Elections, pp. 324, 325, 326.

The true rule in such cases seems to your committee to be, that a minority can only elect where the majority, with full opportunity and facility to vote as they choose, unrestrained and untrammeled by undue influence, refrained through apathy or neglect from voting. But when undue influence, terrorism, intimidation, or illegal influences have been brought to bear upon the great mass of the voters, and they have been influenced, and have voted subject to these influences, although the full and accurate extent of such influence can not be arrived at, the entire election should be voided, although a minority may have voted, free from such influences, and for this reason: The entire people in such case evinced a desire to vote. The right of the majority to rule is fundamental. In such a case the will of the majority is defeated, not from apathy, but from undue influence. The true remedy is to void the election, remove the undue influences, and give the majority that opportunity to rule which is its undoubted right.

In accordance with the reasoning of their report the majority of the committee recommend the following:

Resolved, That there was no free, fair, and peaceable election in the first Congressional district of South Carolina in November, 1876, and that neither Joseph H. Rainey nor John S. Richardson is entitled to the seatr from said district in the Forty-fifth Congress by virtue of said election, and that said seat is hereby declared vacant.

The minority favored resolutions confirming the title of sitting Member to the seat.

On June 13[1] the report was called up, but the House refused to consider it. Again, on June 17, the House refused to consider—yeas 103, nays 126. So Mr. Rainey remained in possession of the seat.

926. The South Carolina election case of Tillman *v.* Smalls in the Forty-fifth Congress.

The removal of the poll from the place prescribed by law was a violation of a mandatory provision justifying its rejection.

Discussion as to whether or not the mere presence of United States troops near the polls constituted undue influence justifying rejection of the return.

Nearly half the votes of a district being rejected, the Elections Committee, in an inconclusive case, favored a declaration that the seat was vacant.

On June 8, 1878,[2] Mr. Thomas R. Cobb, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the South Carolina case of Tillman *v.* Smalls.

The sitting Member had been returned by an official majority of 1,438 votes, but the correction of an admitted error increased this to 1,738 votes.

Contestant attacked this election on the same general grounds urged by the contestant in the case of Richardson *v.* Rainey.

Certain peculiarities in this case may be noticed, however:

(1) "At one precinct," says the majority report, "the law in its mandatory provisions was clearly violated by the removal of the voting place a half mile from the place where it had been fixed by the commissioners of election under the law. And this was done by the two Republican commissioners without the consent of the other member of the board, who was a Democrat. The legal notice of the election had been published for about two weeks in the county newspapers, informing

[1] Journal, pp. 1285, 1286.

[2] Second session Forty-fifth Congress, House Report No 916.

the public that Edgefield, box No. 2, would be held at the county treasurer's office. The Democratic manager and supervisor of the election at box No. 2 had no notice of the removal until the night before the election. This illegal act upon the part of Republican election officers was done, as the evidence shows, for the fraudulent purpose of enabling colored Republicans to repeat their votes. This poll should be thrown out." The majority base this conclusion on section 114 of McCrary's Law of Elections.

The minority views, presented by Mr. John T. Wait, of Connecticut, denied that the voting place had been changed without proper notice.

(2) The majority report quotes the report of the adjutant-general of the Army to show that Federal troops were stationed at polling places where were cast an aggregate of 15,622 votes, or nearly one-half of the entire number of votes polled in the district. The majority say:

> Your committee believe that under the rules of law to which we have referred, and the principles which should govern in the decision of such cases, that the election at these 22 precincts where troops were at or near the polls on the day of election should be declared void. * * * If your committee is correct in its conclusions, and the votes of these 22 precincts are thrown out, no one will contend that this election ought to stand. It will not be insisted, we presume, that when nearly one-half of the votes cast at an election for a Member of Congress are thrown out for the causes herein alleged, that the remainder of the votes should be looked into and the election determined by them. For, as in this case, when the evidence shows that a large class of the voting population which voted at other precincts in said district than those at which troops were stationed were more or less influenced by the presence of said troops within the county where they so voted, there is no way by which you can determine the will of a majority of the voters. Therefore the entire election should be set aside.

The minority of the committee call attention to the fact that the exclusion of all the precincts where troops were stationed would still leave a majority of 452 votes to sitting Member. But the minority decline to admit that the returns of the precincts in question should be thrown out, saying:

> Circumstantial evidence tending to show intimidation would be competent, and evidence that troops were stationed in the vicinity of the polls would be competent as tending to show intimidation; and where this is shown as one fact tending to prove intimidation, less evidence aliunde will be required to establish the fact that intimidation actually existed. But intimidation and violence to such an extent as to set aside an election can not be presumed in this country from the simple fact of organized bodies of troops being stationed near the polls. But if this evidence was followed by other evidence showing that but a portion of the vote in such precincts was polled, or that a considerable number of the electors did not vote by reason of fear of military interference, a case would be presented where the House, to say the least, would have to carefully consider the question whether the election must be set aside on account of intimidation.

The majority of the committee in this case, as in the case of Richardson *v.* Rainey, reported a resolution declaring the seat vacant; but the case was never reached in the House and Mr. Smalls continued to hold the seat.

927. The California election case of Wiggington v. Pacheco in the Forty-fifth Congress.

State canvassers being a court of record, their signed record, approved by the State courts, gives prima facie title, although at variance with their formal proceedings.

Ex parte affidavits were not admitted to impeach the legal record of canvassing officers in determining prima facie title.

On October 17, 1877,[1] the House decided that Romualdo Pacheco of California, should be sworn in as a Member, and that the papers in his case and that of the contestant should be referred to the Committee of Elections.

On January 31, 1878,[2] Mr. John T. Harris, of Virginia, submitted the report of the majority of the Committee on Elections in the case of Wiggington *v.* Pacheco. The official returns had given to sitting Member a majority of one vote over contestant. Several questions of law arose.

(1) As to the prima facie title: By the law of California the returns of the various voting places were returned to the county clerk at the county seat, where they were required to be canvassed by the board of supervisors. The report says in regard to the functions of this canvassing board:

This board of supervisors is not a board simply created for the purpose of canvassing the returns of an election, and which ceases to exist upon that duty being discharged; but it is an official body of a continuing character, required to keep a record of its proceedings, holding sessions day after day—on one day signing and attesting the proceedings of the day next preceding, etc. Its character is sufficiently shown in the opinion of Mr. Justice Rhodes, at the beginning of that opinion, on page 34, part first, of the record. As to this there can be no doubt, and it is an important fact to be noted.

The duties of this board touching the matter of elections are thus defined by the statute:

"SEC. 4046. Subdivision 3. To establish, abolish, and change election precincts, and to appoint inspectors and judges of elections, canvass all election returns, declare the result, and issue certificates thereof.

"SEC. 4030. Subdivision 1. The clerk of the board must record all the proceedings of the board.

"SEC. 4029. The clerk of the county is ex-officio clerk of the board of supervisors. The records must be signed by the chairman and the clerk. The clerk must be paid such compensation as is provided by law in full for all services as clerk of the board."

This board having this jurisdiction, the statute further provides as to the manner of canvassing the returns in the following sections:

"SEC. 1281. The canvass must be made in public, and by opening the returns and estimating the vote of such county or township for each person voted for, and for and against each proposition voted upon at such election, and declare the result thereof.

"SEC. 1282. The clerk of the board must, as soon as the result is declared, enter on the records of such board a statement of such result, which statement must show—

"1. The whole number of votes cast in the county.

"2. The names of the persons voted for and the proposition voted upon.

"3. The office to fill which each person was voted for.

"4. The number of votes given at each precinct to each of such persons, and for and against each of such propositions.

"5. The number of votes given in the county to each of such persons, and for and against each of such propositions."

Here, then, we have an official board, having a jurisdiction defined by law, required to keep a record, which is to be signed by its chairman and the clerk.

The supreme court of California, in the litigation over this very case, said of this record thus made (see p. 34 of the record in this case):

"A record kept and authenticated in the manner provided by those two sections (4030, 4029) is the evidence of the proceedings of the board, and is the only evidence thereof in cases where the proceedings are required to be entered of record."

Then the statute further provides that this record shall be certified to the secretary of state, as will appear by the following sections:

"SEC. 1344. The clerk of each county, as soon as the statement of the vote of his county at such

[1] First session Forty-fifth Congress, Journal pp. 24, 25.

[2] Second session, House Report No. 118; First Ellsworth, p. 5.

election is made out and entered on the records of the board of supervisors, must make a certified abstract of so much thereof as relates to the vote given for persons for Representative to Congress.

"SEC. 1345. The clerk must seal up such abstract, indorse it 'Congressional Election Returns,' and, without delay, transmit it by mail to the secretary of state."

And from the certified copies or abstracts of these records from the various counties the secretary of state makes his certificate to the governor, showing the person having the highest number of votes in the district.

The contestant claimed that in the county of Monterey the return of the clerk, which gave him 986 votes, should have given him 988 votes. In proof of this the contestant offered certain affidavits which the committee disregarded because they were ex parte.

But there existed as a part of the record in the case an affidavit, introduced by the sitting Member, from the county clerk, wherein that official set forth that the board of canvassers met, tabulated the returns for Congressman, giving contestant a total of 988 votes, ascertained the results for county officers, passed an order directing the clerk to issue certificates to said officers, and then adjourned sine die. About an hour after adjournment, and before the pencil minutes of the result had been transcribed on the records of said board of canvassers, the following occurred, as described in the affidavit of the clerk:

Mr. St. John, a member of said board, returned to the office and stated to me that he thought a mistake had been made in the vote for Congressman; that Mr. Scott and Mr. Carter only had 986 votes for Mr. Wigginton. We looked over the figures which I had made and found that they had been added correctly. I then gave to Mr. St. John a copy of my figures of the vote for Congressman, and suggested to him that he compare the same with the figures of the vote as the same had been kept by Mr. Scott, and said that he would in that way find out where or in which precinct the difference was, and if there was a mistake, we would correct it in the morning.

After supper that night I wrote up the minutes and transcribed the statement made in pencil to the minute book. On the morning of November 14 Mr. J. W. Leigh and myself were in the clerk's office. Mr. St. John came in and stated to me that the difference in the figures was in San Lorenzo precinct. I got the tally list from San Lorenzo precinct, and Mr. St. John, Mr. Leigh, and myself examined the same. We found that Mr. Wigginton had only received 27 votes, whereas the tabulated statement and the minutes, as they stood then, had allotted to Mr. Wigginton 29 votes in said precinct. The tally list was in all respects regular. The 27 was in marks in figures twice and written twice.

We all three felt fully convinced that Mr. Wigginton had received in the precinct only 27 votes, and the clerk had made a mistake in putting down 29. I then and there changed the vote, as entered on the minutes, from 29 to 27, and the total vote from 988 to 986, and thereafter, and on the same day, the chairman of said board signed the minutes.

That on or about the 15th day of November, 1876, I made an abstract of statement of so much of said vote as related to persons voted for for Representatives to Congress, and duly certified the same to the secretary of state of California; that said statement so certified as aforesaid only gave Mr. Wigginton 27 votes in said San Lorenzo precinct, and only gave him 986 in the county; that the minutes of said board, in relation to said vote, have not been changed since the same were signed by the chairman as aforesaid; that said minutes had not been changed since I made and forwarded the abstract as aforesaid; that the minutes of said board now show 27 votes in San Lorenzo precinct and 986 votes in the county for Mr. Wigginton, and that said abstract of statement, so forwarded as aforesaid, contains a full, true, and correct statement of the vote for Representative of Congress, as the same appears entered in the records of said board of supervisors at the present time.

The committee thus discuss the statement of the clerk:

From this it will be seen that the 2 votes in question occurred in putting down the vote of San Lorenzo precinct; that in making a pencil memorandum, to be transcribed to the record, the clerk put down for contestant 29 votes, and afterward changed it to 27 votes in the manner described in the affidavit, and for the reasons therein set forth.

It must be borne in mind that the contestant nowhere attempts to prove, in the manner pointed out by the statute in reference to contested elections, that he received 29 votes in San Lorenzo precinct. He relies upon the evidence disclosed in the mandamus proceedings in the supreme and district courts of California to prove that the count made by the board of supervisors showed that he received 29 votes in that precinct. The president of the board and the clerk having signed a record showing only 986 votes in Monterey County for contestant, and this record having been duly certified to the secretary of state, and the supreme court of California having decided, after a careful examination of all the facts as they appeared in contestee's petition and contestant's answer, that the record thus certified to the secretary of state must stand, under the laws of California, until set aside or shown to be erroneous by a contest, under the statute in such cases made and provided, your committee are of the opinion that the truth or falsity of the clerk's return is not put in issue in this contest, and that the record thus certified by the clerk in the manner required by the law of California must stand. If contestant had felt himself injured by that record it was his duty and privilege to show its falsity in the manner pointed out in the statute.

The committee contend that the record "imports verity," although they say—

We do not contend that the committee or the House can not go behind it and ascertain the real facts; but we do contend that it must be presumed to be correct until the contrary is proven; and it is incumbent on the contestant to prove that it is not correct.

This proof contestant had not submitted in a satisfactory manner. The minority of the committee in their views announce their concurrence in this portion of the report; but Mr. William M. Springer, of Illinois, who signed the report of the majority, filed dissenting views giving reasons why the vote should be counted as actually canvassed rather than as returned by the clerk.

928. The case of Wiggington v. Pacheco, continued.

The vote of a person residing without a precinct was rejected.

As to the degree of evidence required to justify rejection of a vote for disqualification on account of residence.

A person does not acquire a legal residence in a place by being stationed there while in the military service of the United States.

(2) Questions of law arose as to the qualifications of certain persons who voted either for contestant or sitting Member:

(a) The majority of the committee rejected the vote of Charles Gilbert, who they thought undoubtedly voted for sitting Member, because he resided for thirty days preceding the election at Alvah Mitchell's house, and Alvah Mitchell was not allowed to vote in the precinct because he did not live therein. A witness swore that he knew the line and that the Mitchell house was not in the precinct.

The minority quote the testimony, which did not attempt to fix Gilbert's residence except in connection with living in the Mitchell house, and say:

But this is not sufficient to prove residence at Mitchell's house. The rule of law on this subject is this:

"Nor has the mere statement by a witness that a voter was or was not a resident, without giving facts to justify his opinion, been considered sufficient to throw out such a vote. The testimony shows a number of instances where a witness would state positively the residence or nonresidence of a voter on some theory of his own, or some mistake of fact, when other testimony would show with entire clearness that the vote was legal."

What constitutes a legal residence is generally imperfectly understood by witnesses. It is not sufficient for a witness to say that a man resides in this or that place, but facts should be given to show that the place named was the actual legal residence. It is very easy for witnesses to mistake the place

where a man may be staying temporarily for his actual residence; or, in other words, to speak of the place where he may be temporarily at work as his residence, his home, or where he lives. This kind of evidence is not and never should be regarded as sufficient to prove a man an illegal voter, and hence we contend that this evidence is wholly insufficient to prove Gilbert to have been an illegal voter.

(*b*) The majority set forth a second question, as follows:

Charles Waterman voted at Mayfield, Santa Clara County. He was a single man. He lived in Mayfield four or five years. Six or eight months before the election he sold his interest in the hotel business; said, "the people of Mayfield might go to thunder; he wanted nothing more to do with them, and left there. He said, "he left this town for good." He took employment in a circus, and traveled from place to place in California and Oregon. He returned to Mayfield on the morning of the election. His vote was challenged. He swore it in, and left the town on the same day. It is conclusively shown that he voted for Mr. Pacheco. The law of California says, "that place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning." Waterman having left Mayfield "for good," as he declared when he took his departure, if he should afterward conclude to return, he must acquire his residence again the same as if he had never resided in the place. Under the law of California, and by his own declaration, he was not a resident of the precinct in which he voted. His vote must be rejected.

The minority strongly dissent:

There is absolutely nothing to indicate any purpose on his part to change his residence, other than the statement of a witness that he said he left this town "for good" when he went with the circus in the spring. To permit this loose kind of testimony, an attempted repetition of what a person said eighteen months before, to have the effect to disfranchise a voter, and perchance to determine the right to a seat in the House of Representatives, will not do. Such a precedent or rule can only work mischief. Such testimony is considered by courts and authors to be the most unreliable and least worthy of consideration, and for reasons which are too familiar to need to be repeated here. Waterman, as before stated, was challenged as a voter. He was sworn and interrogated touching his right to vote. He knew where his residence was, what his intentions were when he went away with that circus, and upon his sworn statements, coupled with the fact that notoriously he had been a resident there for years, his vote was received. Now it is proposed by the majority to say that that was an illegal vote, with no other evidence to warrant it than the statement of a witness, made eighteen months after he professed to have heard it, that Waterman said about the time he went away with the circus that he was going "for good."

If this man's vote can be held to be illegal, it will be the declaration of a principle that will practically disfranchise hundreds of men who temporarily leave their homes to follow pursuits requiring them to travel from place to place. Such men habitually go home to vote, especially at Presidential elections. They will travel hundreds of miles to exercise that privilege, and are too honest to vote where they can not legally do so. This is manifestly one of this class of cases, and there are others like it which appear in this record.

(*c*) The vote of Moses Atkinson also caused division in the committee, as he divided his residence between a ranch and a hotel, and this raised a question as to the words in the statute as to residence of one who came into a precinct for "temporary purposes only."

(*d*) The law [1] of California provided:

A person must not be held to have gained or lost residence by reason of his presence or absence from a place while employed in the service of the United States or of this State.

F. C. Kelley, in the signal service of the United States Army, came to Campo in March, 1875, in the course of that service, and voted on November 7, 1876.

[1] Art. II, sec. 4, of California Const. of 1879 has a provision like this.

He had never been to California until he went there in the United States service. The report says:

Aside from the statutory provision, the well-recognized rule of law governing in cases of this kind is this: "That the fact that an elector is in the Army does not disqualify him from voting at his place of residence; but he can not acquire a residence so as to quality him as a voter by being stationed at a particular place while in the service of the United States. (People *v.* Riley, 15 Cal., 48; Hunt *v.* Richards, 4 Kans., 549; Biddle *v.* Wing, Clark & Hall, 504; McCrary, see. 41.)

The person in question, having gone to California in the military service of the United States, his legal residence remained at the place of enlistment, and he could not acquire a residence in California while in that service. His vote must be rejected. He testified that he voted for Mr. Pacheco, and upon this point there is no dispute.

The minority did not dissent from this conclusion.

929. The case of Wiggington v. Pacheco, continued.

A person brought to a place. by committal to jail and followed by his family nevertheless did not acquire a voting residence.

Regular naturalization papers, attacked by parol proof that they were obtained by fraud, were held to justify the vote given by the bearer.

As to the degree of evidence required to prove the ballot of a disqualified voter who does not testify to his own vote.

It being impossible to prove how a disqualified voter cast his ballot, the vote was not deducted.

(*e*) A similar principle is invoked in the case of Pedro Parris:

Pedro Parris voted in Ventura precinct, Ventura County. On the 9th day of June, 1876, he was a resident of Ojai or Cañada precinct, in that county. Was there arrested, charged with grand larceny, and on the 14th day of June was committed to the county jail, in default of bail, to await the action of the grand jury. The jail was in Ventura precinct, where he voted. After he was committed to jail his family moved into Ventura precinct. He was released from jail within fifteen days prior to the election. His vote was challenged but sworn in. It is clear that he voted for Mr. Pacheco. The principle must be applied to this person as was applied to Mr. Kelley already referred to.

(*f*) Thomas S. Methvin, a former resident, had moved to Arizona, with his family, and the minority claim, that as he had gone there with no purpose of returning, he had lost his residence and his vote should be rejected. The majority, while admitting doubt as to residence, found doubt also as to how he voted, and declined to reject his vote.

(*g*) contestant asked that the vote of John Peterson be rejected because he was an alien, his naturalization papers having been fraudulently procured. The fact that the papers were fraudulently obtained appeared in testimony given by Peterson himself in the course of this contest. The majority say:

His papers were issued by a court of competent jurisdiction, were regular in every respect, and upon the evidence before the court at the time the court decided rightly. Your committee are of the opinion that papers issued in this manner can not be attacked in a collateral proceeding. And if this could be done, Peterson's oath would have little weight in such a contest, for he either swore falsely before the court or in the contest. He was corroborated before the court, but his evidence in the contest denying his citizenship stands unsupported.

The minority join issue sharply, saying:

Now, here is a clear, palpable case of procuring fraudulent naturalization papers. In the majority report the singular doctrine is asserted that because these papers were issued by a court of competent

jurisdiction and were regular on their face, they can not be "attacked collaterally;" that is to say, if, by means of perjury, a man can commit a fraud upon the court and upon the law, and thereby get his papers, he can get the benefit of that fraud, and when he presents himself as a voter his vote must be received. Just what is meant by the majority by saying that the papers can not be attacked collaterally is not very clear. We can conceive of nothing that can be meant except that somebody would have to go into court and in a direct proceeding set aside the papers for fraud. We can not believe that this House will ever indorse such a preposterous doctrine. The rule of law is stated by McCrary, section 21, just the reverse of what is here ruled by the majority. Parol evidence is competent to prove the fraud, and when it is proven the vote is rejected. This was dearly an illegal vote for Wigginton and must be rejected.

(3) Certain questions arose as to how sundry voters cast their votes, it being essential to determine from whom to deduct the illegal votes.

(*a*) As to Charles Gilbert, a witness testified that Gilbert always said he was a Republican, asked for a Republican ticket, took one, folded it as the law required, and, in witnesses's "honest belief," voted it. The majority say:

In the absence of the voter's own evidence, it would be difficult to prove more certainly than is done in this case for whom a person voted. A person can not be compelled to state for whom he voted; and the Supreme Court of the United States has expressly decided that where a witness can not be compelled to answer he need not be called. (6 Peter's Repts., 352, 367.) But Mr. Pacheco might have called the voter, and if he had not claimed his privilege he could have made it clear for whom he did vote. Mr. Pacheco not having done so, nor having shown his inability to procure his deposition, we may infer that Gilbert, if produced, would have corroborated the witness whose deposition is in the record. Gilbert did not reside in the precinct where he voted, and his vote must be rejected.

The minority dissent.

Again, this evidence does not prove that Gilbert voted for Pacheco. The substance of the evidence is that he associated with Mitchell, a Democrat; that he took a Republican ticket and folded it up, and the witness says he honestly believes he voted, although no witness testifies that he did vote.

The logic of the majority on this subject in respect of this vote is, to say the least, singular. There is an evident feeling that the proof is weak and needs propping to make it stand, and this singular argument is presented: "The contestant could not prove how the voter voted any better, except by calling him as a witness; but if he called him as a witness, he was not bound to testify for whom he cast his vote. If he could not be compelled to answer, he need not be called." Then the majority proceed to say: "But Mr. Pacheco might have called the voter, and if he did not claim his privilege, he could have made it clear for whom he did vote." And not having called him, the inference is drawn that Gilbert would have corroborated the witness whose deposition is in the record. It is unnecessary to comment on this. It is quite as fair to infer that, from the fact that contestant did not call Gilbert, he knew that Gilbert would not corroborate the other testimony as to residence or voting, and it is certainly quite as incumbent on the contestant to produce the voter as a witness as upon the contestee—more so, indeed, for on the contestant rests the onus.

Hence we say that there should not be deducted from Pacheco a vote on account of Charles Gilbert.

(*b*) The minority held that the evidence did not show for whom J. A. Scott voted, and that for this reason, as well as the reason that his residence was established, urged that his vote should not be deducted. He was on the register of voters, and the minority held that the evidence was not sufficient to show that he was not a legal voter.

But the majority held otherwise.

1. He was not a legal voter. It was stated in the evidence that he was a Republican, and was "voted" by those who were working for Mr. Pacheco. Mr. Scott's deposition was taken by Mr. Pacheco's attorney. He was not asked how he voted. The proof that he voted for Mr. Pacheco is sufficient to shift

the burden upon the party seeking to sustain his vote, and inasmuch as the elector was produced and sworn and no effort was made to show for whom he voted, it may be assumed from all the evidence that he voted for the sitting Member. (McCrary, secs. 293, 294; Cushing's American Parliamentary Law, secs. 199, 210.)

(*c*) An issue was joined as to how Jesus Yorba voted. The majority say:

Jesus Yorba voted in San Diego, but was a resident of Los Angeles. It is alleged that he voted for Mr. Wigginton. It is proven that he had not resided in the precinct where he voted thirty days previous to the election. But the evidence is conflicting as to the candidate for whom he voted. Yorba, was a Democrat and went to the polls and voted with one Angle Smith, also a Democrat. Yorba was what is called "a native Californian," and Smith was a half-breed American and Californian. It was proven that the native Californians, as a class voted for Mr. Pacheco, including those who claimed to be Democrats, and were unwilling to acknowledge that they would vote for a Republican. And one witness gave it as his opinion that Jesus Yorba, voted for Mr. Pacheco. In the midst of this conflicting evidence it is not certain for whom he did vote. His vote, although illegal, can not be deducted from the vote of either of the parties. (Record, pp. 99, 100, 101, 104, 107.)

The minority contended:

The proof is that he was a Democrat and was voted by Angle Smith, a strong Democrat, who was actively supporting Wigginton, and electioneered for Wigginton all day. According to all rules on the subject this would be sufficient to establish that he voted for Wigginton. Certainly, according to the ruling of the majority in some of the cases presented by the contestant, it is amply sufficient. The reason given by the majority for holding that the proof will not warrant finding that he voted for Wigginton is that he was a native Californian, and it is asserted that they as a class voted for Pacheco. But that will not suffice, for it does not appear that they as a clam we Democrats. If that were clearly proven, the proposition would not be without some force. But even then it is fully answered by the fact that Angle Smith, who was a Democrat, who voted for Wigginton and electioneered for Wigginton and went to the polls with Yorba, was one of these same natives—a half-breed American and Californian.

This is an illegal vote for Wiggington, and should be deducted.

(*d*) Witnesses testified that Gustave O. Perret, who voted without being naturalized, was in consultation with Democratic leaders just before he cast his ballot, that a distributor of straight Democratic tickets gave him his ballot, but could not swear that he cast that ticket. The minority, without arguing the question, held that this vote should be rejected from among the votes credited to contestant.

The majority report contended that while there was doubt about Perret's right to vote, it was not shown for whom he voted.

930. The case of Wigginton v. Pacheco, continued.

The entry of the fact of challenge on a ballot by election officers was not held to be a distinguishing mark justifying rejection of the ballot.

Discussion as to what constitutes a distinguishing mark when made by the voter on his own ballot.

Violation of a law that no tickets should be folded or exhibited near the polls did not invalidate the election.

A voter may not, by subsequent oral testimony, contradict the plain expression of the ballot, although circumstances corroborate the testimony.

Ex parte affidavits were not admitted, even to prove lost testimony valid in form.

(4) As to distinguishing marks on ballots, certain questions arose.

(*a*) The majority thus set forth a position from which the minority do not dissent:

The law of California on the subject of marked ballots is as follows:

"SEC. 1206. When a ballot found in any ballot box bears upon the outside thereof any impression, device, color, or thing, or is folded in a manner designed to distinguish such ballot from other legal ballots deposited therein, it must, with all its contents, be rejected."

There were six ballots voted for Mr. Pacheco upon which the judges of election indorsed the names of the voters and the words "Challenged because not in the precinct thirty days—challenge disallowed," and then signed one or two names of the inspectors of the election. While the strict letter of the law would exclude these ballots, yet the spirit of the law is evidently otherwise. If the voter had placed this indorsement upon the ballot, or any mark whatever by which it could be distinguished from other ballots, they should be rejected. The law was made to protect the voter, and not to disfranchise him.

(b) In a similar case the majority say:

George M. Clark voted for Mr. Wigginton at San Diego. He wrote his own name on the bottom of the ticket with a lead pencil. (Record, pp. 100–105.) The law of California in reference to marked ballots is as follows:

"SEC. 1206. When a ballot found in any ballot box bears upon the outside thereof any impression, device, color, or thing, or is folded in a manner designed to distinguish such ballot from other legal ballots deposited therein, it must, with all its contents, be rejected.

"SEC. 1207. When a ballot found in any ballot box bears upon it any impression, device, color, or thing, or is folded in a manner intended to designate or impart knowledge of the person who voted such ballot, it must, with all its contents, be rejected."

These provisions were evidently intended to secure to the voter absolute secrecy as to his ballot, and to place it within his power to vote a ballot which could not be distinguished by the election officials, the challengers, or outsiders from any other ballots that were being voted. Section 1206 relates wholly to marks on the outside of the ballot, and can not be applied to the ballot in question, as it is conceded that this voter wrote his name on the face of the ballot. And it is very doubtful whether the strict letter of the other section (1207) applies to Clark's ballot. There was nothing on the face of the ballot "to designate or impart knowledge of the person who voted such ballot." The inspectors were not authorized to presume that Clark voted this ticket merely because they found his name upon it. If any presumption is to be indulged in, it is this: That the name written on the ballot was intended to be voted for, instead of the printed name next above it. Hence this ballot had nothing on it to designate or impart knowledge of the person who voted it. The person who voted it could identify it, and so could every voter identify his ticket if he had scratched one name and written another upon it. He would recognize his own handwriting. But the statute was not intended to place it out of the power of each voter to recognize his own ballot. It was intended to protect the voter in his right to vote a secret ballot. If there were any doubt as to the letter of the law, there can be none as to the spirit of it. There is no charge or suspicion of fraud, intimidation, or improper influences being exerted over the voter. It would certainly be perfectly legal for the voter to publish how he voted. The evidence in this case fails to disclose what was done by the inspectors with Clark's ballot. Nothing is said as to whether they counted or rejected it.

The minority take issue with this position:

This man wrote his name on his ballot for the express purpose of imparting knowledge of the fact that he voted that particular ballot. It is clear that under the statute of California that ballot should have been rejected. We quote the statute:

"SEC. 1207. When a ballot found in any ballot box bears upon it any impression, device, color, or thing, or is folded in a manner to designate or impart knowledge of the person who voted such ballot, it must, with all its contents, be rejected."

The evidence that he voted for Wigginton is distinct and emphatic. It was a marked ballot, Clark having written his name on it, so that it could be known that he voted it.

The following uncontradicted testimony makes these things clear:

"Q. Do you know George M. Clark, of the first ward?—A. I do.

"Q. Please state whether or not George M. Clark voted at the first ward precinct in this city on the 7th November, 1876.—A. He did.

"Q. For whom did he vote for Congressman?—A. For P. D. Wigginton.

"Q. If there was any mark upon his ballot at the time he voted which would distinguish it from other ballots after it was deposited in the box, please state what that mark was.

"(Objected to by attorney for Wigginton, on the ground that it presumes that the witness knew whether or not the ballot had a private mark on it at the time it was deposited in the ballot box, and on the ground that there has been no evidence offered or given tending to show that the witness possessed any such knowledge or information.)

"A. There was; his name was written on the bottom of the ticket.

"Q. If Clark said anything about it at the time he deposited the ballot, tell what he said.—A. He did. He had come to the polls two or three times to vote, and when near the polls James McCoy took him away; he came again just before the polls closed and voted; he then said that he had written his name on the ticket so that old Jim would know that he had not voted against his wishes.

"Q. If you were acting in any official capacity on that day, please tell what it was.—A. I was; I was one of the judges of election."

Thus it is apparent that this voter put this mark, his name, on the ticket for the express purpose of imparting knowledge of the person who voted it, bringing the case exactly within the provisions of the statute above quoted.

But the majority say that the name was written on the face of the ballot. Now, read again the statute and see if that makes any difference. The statute is, "when a ballot found in any ballot box bears upon it any impression," etc. It makes no kind of difference where that impression is placed. When such a ballot is found it must be rejected. If the device or impression were upon the back, as would seem to be the interpretation of the majority, then the ticket need not find its way into the box because it could be detected or seen before it went in; but it is clear that no matter where it is placed on the ballot, when such ballot is found it is to be rejected.

(5) As to certain irregularities the majority say, apparently with the concurrence of the minority:

The contestant alleges that there were such illegal practices at this precinct as to invalidate the whole poll. The law of California requires that no tickets shall be folded or unfolded or exhibited within 100 feet of the polls. This was done during the whole day at this precinct. But while the parties who violated the law may be punished, the law was not intended to provide that such conduct should invalidate the election. We can not see any good reason for rejecting this poll.

(6) As to the validity of a ballot the majority, apparently with assent of the minority, find as follows:

Pablo Rios voted at Wilmington, Los Angeles County. He arrived at the polls late in the day, and fearing they would soon be closed, took the first ticket he could find. It was a Democratic ticket, but he did not desire to vote for any person on that ticket except for George Hinds for supervisor of the county. He erased all other names on the ticket, and wrote Mr. Pacheco's name on the top at the right-hand side, opposite the names of the Presidential electors, which were erased. The judges returned this ballot as a vote cast for R. Pacheco for Presidential elector, and did not count it for him for Representative in Congress. Rios was called, and testified that he intended to vote for Pacheco for Representative in Congress. The evidence is that the names on the ballot, except that of Hinds, were erased, but there is no evidence that the words "for Presidential electors," or the words "for Representative in Congress," were erased. Upon the face of the ballot, according to the evidence, Mr. Pacheco was voted for for Presidential elector. There is no ambiguity about this. The law of California, in reference to counting obscure ballots, is as follows:

"SEC. 1201. No ballot or part thereof must be rejected by reason of any obscurity therein in relation to the name of the person voted for, or the designation of the office, if the board, from an inspection of the ballot, can determine the person voted for and the office intended."

An inspection of this ballot would show that the name of R. Pacheco appeared after the words "for electors of President and Vice-President of the United States." Can such a ballot be counted for the

contestee for Representative in Congress, or is it admissible for the voter to explain or contradict such ballot by final evidence after it has been cast? Mr. McCrary, in his work on elections (sec. 407), states the rule which should govern in cases of this kind as follows:

"While it is true that evidence aliunde may be received to explain an imperfect or ambiguous ballot it does not by any means follow that such evidence may be received to give a ballot a meaning or effect hostile to what it expresses on its face. The intention of the voter can not be proven to contradict the ballot or when it is opposed to the paper ballot which he has deposited in the ballot box." (See also People *v.* Seaman, 5 Denio, 409; State *v.* Goldthwait, 16 Wis., 552; People *v.* Fegurson, 8 Cowen, 102; People *v.* Cook, 14 Barbour, 259.)

When a ballot clearly designates the office to be filled and the name of the person voted for, no court has ever permitted the voter to contradict his ballot by evidence that he intended to vote for a different person, or for the same person for a different office.

Your committee do not feel at liberty to depart from the unbroken line of precedents in cases of this kind, although it is conceded in this case that the rule works a hardship to the voter. It is sometimes necessary to sacrifice the merits of a case in order to maintain an inflexible legal rule. This ballot seems to present such a contingency.

(7) The report thus disposes of a question of evidence:

The contestant alleges that two persons by the name of Smock and another whose name is not given voted at Bakersfield, Kern County, for Mr. Pacheco, who were not residents of the precinct for thirty days preceding the election. Depositions were taken in regard to these persons, in pursuance of notice in the contest, in due time, attorneys of both parties being present, and such depositions were properly forwarded by mail to the Clerk of the House of Representatives. But these depositions have never been received by the Clerk or any officer of the House. The contestant has obtained the ex parte affidavits of E. E. Calhoun, who was contestant's attorney, and of Samuel L. Cutter, who was contestee's attorney, at the taking of these depositions (Record, pp. 94, 95, and 96), which affidavits, sworn to October 18, 1877, after the assembling of the special session of Congress, set forth the substance of the lost depositions. If we were to consider as legal evidence these ex parte affidavits, one of them made by Mr. Pacheco's attorney, we should be compelled to reject the votes of these three persons. But we are not permitted to consider ex parte affidavits as a part of the evidence in the case.

The report further says that if the lost depositions were essential to the decision of the case, the contestant's remedy would have been to retake the depositions, giving due notice to the opposite party.

Thus this case turned principally on the disposition of 10 votes over which there was a division in the committee. The majority, as a result of their conclusions, found a majority of 4 votes for contestant, and reported that he was entitled to the seat.

The minority [1] found for sitting Member a majority of 6 votes.

The report was debated at length in the House on February 6 and 7, 1878 [2] and on the latter day a proposition of the minority to confirm the title of sitting Member was disagreed to, yeas 126, nays 137.

Then a proposition to declare the seat vacant was disagreed to.

The question recurring on the resolutions of the majority giving the seat to the contestant, they were agreed to, yeas 136, nays 125.

The contestant, Mr. Wigginton, then appeared and took the oath.

931. The Massachusetts election case of Dean v. Field, in the Forty-fifth Congress.

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[1] Minority views filed by Mr. Sohn T. Wait, of Connecticut. The differences over the 10 votes were not on strictly party lines.

[2] Journal, pp. 379, 384–387; Record, pp. 803, 826–837.

There being no doubt for whom the ballots were intended, the word "fourth" instead of "third," in the description of the Congressional district, did not invalidate the votes.

If the count of election officers is to be set aside by a recount, the petition for the recount should set forth specifically the reasons.

Discussion as to whether or not a result corroborated by Federal supervisors might be set aside by a recount by State officials.

Discussion as to the clause of the Constitution under which Federal supervisors of elections acted.

On February 21, 1878,[1] Mr. William M. Springer, of Illinois, submitted the report of the majority of the committee in the contested election case of Dean *v.* Field, of Massachusetts. This report, so far as its reasoning was concerned, was not concurred in by all the majority of the committee, since Mr. John T. Harris, of Virginia, chairman of the committee, and Mr. J. N. Williams, of Alabama, while sustaining the conclusion, expressly withheld assent to all the propositions therein set forth. Their dissent referred especially to the position taken in the report as to Federal supervisors.[2]

Sitting Member had been returned by an official majority of 5 votes over contestant.

As a part of that majority, but not involved in controversy, were 25 ballots thus discussed in the majority report:

> In the Eighteenth Ward of the city 25 ballots were cast designating the Congressional office and candidate as follows:
>
> "For Representative in Congress, Fourth district, Walbridge A. Field, of Boston."
>
> The election was held in the Third district, and Mr. Field resided in the district in which he was a candidate. Ought these ballots to be counted for the sitting Member? The questions involved in this point were ably discussed by counsel on both sides, and the authorities do not agree to such an extent as to leave the question entirely free from doubt. But your committee are of the opinion that a liberal interpretation of the law in the interest of enlarged suffrage and the honest intentions of electors would warrant us in counting these ballots for the candidate for whom they were evidently intended.
>
> The election was in the Third district. The electors of that district had no legal right to vote in the Fourth district, much less to vote in the Third district for a Representative for the Fourth district. We must assume, then, that the persons who cast these ballots intended no violation of law, but that they were acting in good faith and were honestly endeavoring to express a choice for a Representative in Congress in the district in which they were entitled to vote. The office to be filled was that of "Representative in Congress." That is what the voter must have looked to when examining his ballot. The words "Fourth district" do not constitute a part of the legal designation of the office, and in this case we are inclined to regard the erroneous designation of the number of the district as surplusage.

The minority took the same view:

> In the Eighteenth Ward of the city 25 ballots were cast designating the Congressional office and candidate thus:
>
> "For Representative to Congress, Fourth district, Walbridge A. Field, of Boston."
>
> These 25 ballots were counted for Mr. Field as Representative to Congress from the Third district, both by the ward officers and the board of aldermen, and are necessary to the election of Mr. Field. The contestant avers that these votes were improperly and illegally counted for Field. They were legally counted if they clearly indicate the office for which the person is designed, and the intention

[1] Second session Forty-fifth Congress, House Report No. 239; 1st Ellsworth, p. 190.

[2] The minority views were presented by Mr. Milton A. Candler, of Georgia, a member of the majority party in the House.

of the voter as to that person can be ascertained from the ballot. Evidence may not be received to contradict the ballot nor to give it a meaning when it expresses no meaning of itself; but if it be of doubtful import, the circumstances surrounding the election may be given in evidence to explain it and get at the intent of the voter. (McCrary's Law of Elections, p. 299.) The office to be filled was Representative in Congress. The words "Fourth district" constitute no part of the designation of that office. The way it happened that the words "Fourth district" had been printed upon these ballots was explained by the person printing them, that he had neglected to take from his printing press the type containing these words, which had been used for printing ballots for Representative in Congress in the adjoining Fourth district. Walbridge A. Field was the candidate for Congress in the Third district; he resided in that district. There was no other Walbridge A. Field residing in that district or in the city of Boston. The ballots were cast in the Eighteenth Ward and Third district, and by law could only be cast by persons residing in that ward and district. Clearly, then, from these ballots and the evidence showing by whom they were cast, and the circumstances under which cast, it appears that they were cast for Walbridge A. Field, one of the candidates for Congress in the Third district for Representative in Congress from that district. The words "Fourth district" not rendering uncertain the office intended to be designated or the person voted for, we think that these 25 votes were legally counted for Field as Representative to Congress from the said Third district.

The issues in this case arose entirely over a recount of the votes by a committee of the Boston board of aldermen.

The Third district was situated entirely within the city of Boston. On the evening of election day the ballots were counted by the officers of the several wards in accordance with law. The results were then transmitted, with all the ballots and papers, to the city clerk. The majority report says:

These provisions of the law were strictly complied with, and there is no allegation of fraud, illegality, or irregularity of proceedings in conducting the election up to and including the canvass of the votes and transmission of the result by the ward officers. But it is alleged that the ward officers committed errors in making the count, and on account of these alleged errors the contest arises in this case.

There were three counts of the votes cast for Representative in Congress from the district in question. The first count was that made by the ward officers; the second was that made by the United States supervisors of election, appointed in pursuance of sections 2011 and 2012 of the Revised Statutes of the United States; and the third count was made by a committee of the board of aldermen of the city of Boston.

We have already pointed out the manner in which the first count was made. The second count was made by two supervisors of election appointed for each ward by the circuit court of the United States for the circuit in which the city of Boston is situated. These supervisors were appointed upon the recommendation of the respective candidates for Congress, or their friends, and were "of different political parties," as the law of Congress requires. They attended the election in each of the wards and personally supervised the election and the count of the votes, and counted those cast for Representatives in Congress. Section 2017 of the Revised Statutes of the United States makes it the duty of supervisors of elections to attend the election, count the votes, and remain with the ballot boxes until the count is wholly completed. They performed their duty and made return of the result to the chief supervisor of the election, as required by law.

The counts made by the ward officers and the United States supervisors substantially agree.

The count of the ward officers and the United States supervisors gave Dean, the contestant, a majority of 7 votes over Field. The count of the committee of the aldermen reversed the result, and found a majority of 5 votes for Field.

This recount by the aldermen was based on the following statute of Massachusetts:

SEC. 4. If within three days next following the day of any election ten or more qualified voters of any ward shall file with the city clerk a statement in writing that they have reasons to believe that the returns of the ward officers are erroneous, specifying wherein they deem them in error, said city

clerk shall forthwith transmit such statement to the board of aldermen or the committee thereof appointed to examine the returns of said election. The board of aldermen, or their committee, shall thereupon, and within five days, Sunday excepted, next following the day of election, open the envelope and examine the ballots thrown in said ward, and determine the questions raised; they shall then again seal the envelope, either with the seal of the city or a seal provided for the purpose, and shall endorse upon said envelope a certificate that the same has been opened and again sealed by them in conformity to law; and the envelope, sealed as aforesaid, shall be returned to the city clerk. Said city clerk, upon the certificate of the board of aldermen or their committee, shall alter and amend such ward returns as have been proved to be erroneous, and such amended returns shall stand as the true returns of the ward.

In accordance with this law a recount was had in response to a petition as follows:

To the city clerk of the city of Boston:

The undersigned, qualified voters of Ward 13, in the Third Congressional district, hereby state that they have reason to believe that the returns of the ward officers of said ward for Member of Congress in said Congressional district, at the election of November 7, 1876, are erroneous, in that all the ballots cast for Walbridge A. Field as Member of Congress were not counted and credited to him, and that more ballots were credited to Benjamin Dean as Member of Congress than were cast for him; and they ask for a recount of the vote of said ward for Member of Congress, in accordance with the provisions of section 4 of chapter 188 of the acts of the year 1876.

(Signed by 15 voters of the ward.)

The recount was made by a committee of three aldermen, two of whom were of the political party to which contestant belonged, and they found enough of what they considered errors to change the result of the ward counts.

This recount was objected to for two main reasons:

(1) Because it was not properly procured under the laws of Massachusetts, in that the petitioners did not specify wherein they deemed the returns in error.

The statement required by the 10 qualified voters must specify wherein the returns are in error. It is not sufficient to allege generally that the count made by the ward officers was not correct, or that they counted more votes for one candidate than he was entitled to, or less votes for another than he received.

This petition constitutes the jurisdictional fact in the case, and unless it complies with the statute no jurisdiction is conferred on the board of aldermen, or upon their committee, and all proceedings by them not founded on a petition which complies with the statute are utterly void and of no effect. The rule of law applicable in such cases is well established. McCrary, in his treatise on the American law of elections (sec. 280), says: "An application for a recount of ballots cast at an election will not be granted unless some specific mistake or fraud be pointed out in the particular box to be examined. Such recount will not be ordered upon a general allegation of errors in the count of all and giving particulars as to none of the boxes." (Kneass's case, 2 Parsons, 599; Thompson *v.* Ewing, 1 Brewster, 67, 97.)

In Skerret's case (2 Parsons, 509) the court of common pleas of Philadelphia held that the true rule "regulating such proceedings should be defined, so as to advance on the one hand substantial and meritorious and to arrest on the other futile and querulous complaints. It is not sufficient to state generally that A received a majority of votes, while the certificate was given to B, and therefore the complainants charge that there was an undue election. This is but a conclusion, and it is not for the pleader to state conclusions, but facts from which the court may draw conclusions. If fraud is alleged, the petition must state the manner in which the fraud was committed, the number of votes fraudulently received or fraudulently rejected. (See Carpenter's case, 2 Parsons, 537; Lelar's case, 2 Parsons, 548; Kneass's case, 2 Parsons, 553.)

It was held also by the supreme court of Pennsylvania, in the case of Gibbons *v.* Shepherd (2 Brewster, p. 2), that certainty to a common intent was required, that the petition should not be so loosely drawn as to permit the powers of sworn officers chosen by the people to be inquired into with-

out well-defined cause. McCrary, in section 283 of his work, says: "The same rule should be applied to a pleading of this character that is applied to all other similar pleadings. It should state in a legal and logical form the facts which constitute the ground of the complaint. Nothing more is required, nothing less will suffice." The supreme court of Illinois (1 Breese, 285) held "that an affidavit for a writ of attachment which does not comply with the statute confers no jurisdiction, and all subsequent proceedings are void." As the fourth section of the Massachusetts act is held to confer the jurisdiction upon the board of aldermen to count these votes upon the filing of a petition specifying the errors, if such petition does not comply with the statutes no jurisdiction is conferred.

The right of the board of aldermen or their committee to examine the ballots is not to be exercised except in certain cases and in the manner provided by the law above referred to. The statute gives no general right to substitute an aldermanic count for a ward count.

The majority further quoted a report of the city solicitor of Lynn, the Massachusetts legislative cases of Morse *v.* Lonnergan, etc.

The minority hold that the language of the petition was sufficient.

The complaint to be made is not as to the manner in which the election by the ward officers has been conducted, it does not go to any wrongful act of these officers, but is directed specifically to the ascertained result, the returns made by these officers. The object to be accomplished is to have an examination and count of the ballots by the board of aldermen. The complaint can only be as to the result of the count of the ballots by the ward officers.

This specification of error is to be by persons who were in no way connected with the count of the ballots; by persons who cast the ballots and who have reason to believe that there has been error in their count.

Statements by such persons could hardly be more specific than those filed in this case, "that all the ballots cast for Walbridge A. Field had not been counted and credited to him, and that more ballots had been credited to Benjamin Dean than were cast for him."

It is the opinion of your committee that these statements were sufficient in law to authorize the examination and count of the ballots cast in the several words by the board of aldermen.

(2) Because the Federal election law was supreme, and the result of the supervisor's count might not be reversed by the intervention of a recount authorized and conducted solely under State law.

The majority report went quite fully into this branch of the case, but there was dissent among the majority members on the committee, and also on the floor by members of the majority party in the House. A member of the minority party, Mr. Benjamin F. Butler, of Massachusetts, however, espoused on the floor the contention in favor of the constitutionality and binding effect of the Federal canvass.[1]

The majority report says:

Congress, in pursuance of its constitutional power to make regulations as to the times, places, and manner of holding elections for Representatives in Congress, or to alter State regulations on these subjects, enacted the foregoing provisions. They must be held valid and binding upon all the States. From the moment of the enacting of these provisions (February 28, 1871) they become a part of the election law of the State of Massachusetts, overriding all opposing State statutes made or to be made by the State, and the passage of the State law of April 20, 1876, authorizing an aldermanic count, so far as it provided for the taking of the final count of the votes for the Representative in Congress out of the supervision and scrutiny of the United States supervisors of election was an evasion if not a nullification of the Federal law. After Congress had provided for the appointment of two supervisors of election for each voting place, and had required such officers to count the votes for Representative in Congress, and to remain with the ballot boxes until the count was wholly completed, and the certificates made out, it is not competent for any State to provide another board of canvassers, who may take possession of the ballot boxes, exclude the Federal officers, and secretly count the votes and declare a different result.

[1] On this point, see speeches of Messrs. Candler, Mills, Walsh, and Butler, Record, pp. 1792, 2039, 2046, 2084.

As the counting of the votes is now admitted to be the most important function to be performed in reference to an election, laws relating to this part of the election machinery must be strictly construed and rigidly enforced. The count made by the aldermen was made in secret, three or four days after the election, partly in the nighttime, and the United States supervisors and all other persons except the three aldermen were excluded from the room and were not permitted to see what was being done. A count made under such circumstances is in derogation of the acts of Congress and is of no validity whatever.

The minority, after quoting the sections of the Revised Statutes (secs. 2011–2019) which were enacted as amendments to the act of May 31, 1870, "to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," [1] say:

These provisions of law were not enacted by Congress in pursuance of its constitutional power to "make or alter" regulations as to the manner of holding elections for Representatives in Congress.

They are not certainly to operate even to the supervision of an election for a single polling place in a city or county which may constitute only a part of an election district, but shall only operate when a certain number of citizens shall make known in writing to a United States judge their desire to have the election "guarded and scrutinized."

The manner of holding such an election is in no way regulated.

These officers are designated as "supervisors of elections." They are appointed by the judges of the Federal courts as instruments in the process of "enforcing the rights of citizens of the United States to vote in the several States;" not managers of an election, but guardians and scrutinizers of an election managed by others, officers of the States.

They are to attend at all times and places for holding elections for Representatives in Congress and for counting the votes at such elections in order that they may challenge votes and inspect and scrutinize the manner in which the voting is done, but they are not to receive or decide upon the legality of any vote or regulate the manner in which the voting is done. On the day of election and at the places of holding the election they are to take, occupy, and remain in such position as will best enable them to see each person voting, scrutinize the manner in which the voting is being conducted, and at the closing of the polls they are to put themselves in such a position in relation to the ballot boxes, for the purpose of engaging in the work of canvassing the ballots, as will enable them to fully perform their duties in respect to such canvass herein provided, but they are not to be in position enabling them to receive a vote, conduct an election, or control a ballot box.

Each of these supervisors is required "personally to scrutinize, count, and canvass each ballot in their election district cast;" not as a board of election managers, to ascertain the number of ballots cast and for whom cast, and as such board to make returns thereof to the State officer who shall certify that result, or the House of Representatives, who shall judge of that return; but each one personally is to scrutinize, count, and canvass each ballot cast in his voting precinct, and make "such certificate and return of all such ballots" as may be directed and required by the chief supervisor from whom he received his appointment. They make returns only of what they have seen in the management of the election to the chief supervisor appointed by the judge of the circuit "in order that the facts may become known." "Become known" through these supervisors, these witnesses for the courts having jurisdiction of the offenses created in these acts, enacted to "enforce the rights of citizens of the United States to vote in the several States of the Union, and for other purposes."

Further than the returns made, which do not in terms show a count made by these supervisors, except as to the returns from the Eighteenth Ward, the evidence does not show that the supervisors counted the votes in the wards comprising the election district. So that, in the determination of the value of those returns as evidence in this case, their only value is in their official character.

The undersigned, believing that they are not counts made and results ascertained in pursuance of any law made "to regulate the manner of holding elections for Representatives in Congress," hold that they are insufficient to set aside the result found in this case according to the law of the State of Massachusetts, the certified return of the board of aldermen.

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[1] The Federal election laws have since been repealed.

(3) The majority of the committee also endeavored to show that the committee of aldermen did not follow the law in making their recount; but the minority joined issue on this question of fact.

In accordance with their conclusions the majority reported resolutions declaring contestant entitled to the seat.

The report was debated at length in the House and with a considerable breaking of party lines on March 14, 15, 26, and 27, 1878,[1] and on the latter day the question was taken on substituting the minority resolutions, which affirmed the title of sitting Member, for the majority resolutions, which proposed to award the seat to the contestant. On this vote there appeared yeas 120, nays 119, whereupon the Speaker voted in the negative, and the vote stood yeas 120, nays 120. So the motion to substitute failed.

On March 28 the question recurred on the resolutions proposed by the majority, and there appeared yeas 123, nays 123, whereupon the Speaker voted in the affirmative, making yeas 124, nays 123, so the resolutions were agreed to.[2]

Thereupon Mr. Dean, the contestant, appeared and took the oath of office.

932. The Florida election case of, Finley v. Bisbee in the Forty-fifth Congress.

Officers of election being guilty of frauds and forgeries, the returns were rejected.

Returns being rejected for fraud by election officers, no act of the said officers may be admitted as proof aliunde of the vote.

Returns being rejected, the evidence of the voters as to how they voted is not always accepted in proving the vote aliunde.

A contestee was not allowed the votes he proved aliunde when contestant, because of uncertainty of proof, could not be credited with any of the votes he undoubtedly received.

Both the returns and the vote were rejected in a case wherein contestee's proof aliunde gave him a greater vote than was returned by a dishonest election board favorable to him.

The testimony of a voter as to what ballot he cast depends for its value on the intelligence of the witness.

On February 5, 1879,[3] Mr. Thomas R. Cobb, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Florida case of Finley *v.* Bisbee. In the first session of the Congress, at the organization of the House on October 15, 1877,[4] the Clerk had announced that while there had been certain legal proceedings in regard to the returns, Mr. Bisbee plainly had the prima facie certificate, and therefore had been enrolled.

The precinct returns were conceded by both parties to show the election of the contestant, Finley, by a majority of 5 votes, but the canvassing board had found from the returns a result favorable to Mr. Bisbee, and the certificate had been issued to him.

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[1] Record, pp. 1778, 1788, 2038, 2082–2095.

[2] Journal, pp. 743, 746–748.

[3] Third session Forty-fifth Congress, House Report No. 95; 1st Ellsworth, p. 74.

[4] First session, Record, p. 52.

Three main questions arose in the determination of this contest, the first of which was of especial importance. Indeed, in the reports and debates it was quite generally claimed that this point was decisive, although this was not admitted by all who discussed the question. The points were:

(1) As to the vote of Archer precinct, No. 2, in Alachua County, both parties to the contest admitted that the return was false and forged, and that the officers of election were guilty of the frauds and forgeries; and hence the committee were unanimous that these returns should be rejected.

The returns being rejected, a question arose as to how the true vote should be ascertained, provided it could be ascertained.

The contestant introduced testimony to show that the actual vote was 180 for Bisbee and 141 for Finley. The sheriff of the county was present when the tally sheet was made up, and therefrom made a memorandum which showed that result. Also announcement was publicly made by an election officer of the vote for governor, showing a similar party division. On the other hand, the clerk and one of the inspectors of the election testified that the vote for Bisbee was 398 and for Finley 137. The actual poll lists were extracted from the county offices between the time of the canvasses of the votes and the investigation of the case by Congress. The returns also disappeared. The majority say:

> At all events, they are not to be found; and in the opinion of your committee they were destroyed by some of the conspirators to cover up their crime. The poll list, tally sheet, and the return belonging to said poll are gone.
>
> Your committee is clearly of the opinion from the evidence that the election at this poll is tainted with frauds, the returns false and forged, whereby they showed that contestee got some 200 or 300 more votes than were actually cast for him, which were canvassed and counted for him by the returning boards.
>
> Your committee is therefore compelled to go behind these fraudulent returns and examine the evidence in the case, and ascertain the true vote, if it can be done, from the evidence.

In view of the conflicting testimony, neither the majority nor the minority believe that the state of the vote can be ascertained from the testimony of witnesses as to the footings of the tally sheets or the announcements of election officers. The minority thus voice the position on this point:

> We can not say that the officers of an election were false to their trust—guilty of gross frauds—and for that reason reject their returns, and at the same time say that the vote canvassed by them for Mr. Finley, as shown by a tally sheet kept by them, is sufficient proof, or any legal proof, that he received 141 votes at that poll. We think that this position of contestant can not be maintained on any principle of law or evidence. We cite the following authorities on this question:
>
> "When fraud or grow culpable negligence on the part of the officers of an election is shown, all their acts and doings are rendered unworthy of credit and must be disregarded." (See McCrary, sec. 303.)
>
> "We repeat, therefore, the opinion expressed in a former chapter, that a willful and deliberate fraud on the part of such an officer being clearly proven, should destroy all confidence in his official acts irrespective of the question whether the fraud discovered is of itself sufficient to change the result. The party taking anything by an election conducted by such an officer must prove his vote by evidence other than the return." (McCrary, sec. 431.)
>
> "Where the conduct of the election officers is such as to destroy the integrity of the return, and to avoid the prima facie character which they ought to bear as evidence, due and adequate proof must be demanded of each vote relied on." (Opinion of the court in Mann *v.* Cassada, 1st Brewster, p. 60. See also Thompson *v.* Ewing, a case from Pennsylvania courts, reported in 1st Brewster, 107; Weaver *v.* Given, 1st Brewster, 140; Givens *v.* Stewart, 2d Brewster, p. 2; Jenkins *v.* Hill, N. H. Reports, p. 144.)

These well-settled principles show that contestant in a case like this can not rely upon unofficial statements of the vote proven to be false, or a tally sheet also proven to be false, to establish his vote. Indeed, they go further and show that the returns being rejected for gross fraud on the part of the election officers, he can not rely upon any act of theirs, official or otherwise, to establish his vote.

A "tally sheet" is not mentioned in the laws of Florida. No such paper is required to be kept or returned. If such a paper was produced, it would be inadmissible as evidence, even if no question was made of its having been falsely kept.

But contestant seeks to establish his vote at this poll by the evidence of a witness who looked over such a paper and took down certain figures from it. When he insists, and the committee concurs, that the officer who kept it was so false to his trust and fraudulent in his conduct that his return of this poll can not be accepted as the truth, and when other and reliable evidence clearly shows that the figures on said tally sheet were false, certainly nothing in the rules of law and evidence will permit this.

A witness, Fleming, a member of contestant's political party, stood at the poll with pencil and paper noting those who voted. His evidence led the majority of the committee to believe that about 318 votes were cast. The list of Fleming was put in evidence by contestant. The minority views, signed by Messrs. Jacob Turney, of Pennsylvania, and J. N. Thornburgh, of Tennessee (one a member of contestant's party and the other belonging to the party of sitting Member), say:

Mr. Bisbee, having this list before him (the poll book at this precinct was lost or mislaid), called 283 voters on Fleming's list, who swear they, together with 8 others on this list, voted the full straight Republican ticket, including for Congress Mr. Bisbee. This would leave Mr. Finley 14 votes had he called the remainder of Fleming's list, and they had sworn they voted for him. The testimony does not show that there was but one Democrat among all the colored voters at this precinct, and he was appointed inspector at this poll. This clearly shows that the announcement made at the close of the poll, that Mr. Finley received 141 votes, Mr. Bisbee 180, is not true.

In fact Mr. Bisbee produced in all witnesses to show that 308 voters cast ballots for him. Mr. Finley, the contestant, proved no votes in this way.

Therefore sitting Member claimed 308 votes at this precinct. The minority views supported this claim strongly.

But the proof shows that an election was opened and held at a time and place established by law by officers legally appointed to hold an election at Archer poll, No. 2, and that many legal voters were there and voted. In such cases we find that we are remitted to such other evidence as may appear in the record to ascertain the vote for contestant and contestee. We cite the following authorities on this point:

"When a return is rejected, legal votes are not lost; they may be proven by secondary evidence, and when thus proven maybe counted." (McCrary's Law of Elections, sec. 302.) "In which case each candidate must prove, by calling the voters as witnesses or otherwise, the number of votes received by him." (Ibid., sec. 391.)

This rule was adopted, and the testimony of the voters held conclusive, in the following cases: Reed *v.* Julian (2d Bartlett, 823, 828, 832); Washburn *v.* Voorhees (idem, 54, 60, 62, and 64); Lloyd *v.* Newton, Clark's & Hall's R., 520; Vallandigham *v.* Campbell (1858) (1st Bartlett, 223, 228, 229, and 230). See also report of Mr. Lamar, which was adopted by the House; Reed *v.* Kneas (Brightly, 366, 371, 372).

In the case of The People ex rel. Judson *v.* Thatcher, reported in 7th Lansing N. Y. Reports, the court held that the testimony of the voters was higher evidence than the returns (pp. 280, 281, 282, and 286).

In the case of Washburn *v.* Voorhees, Hamilton Township was returned voting as follows: Washburn, 143; Voorhees, 498. Washburn called the voters themselves and showed that 27 more votes were cast for him than were returned; the returns were set aside, and the evidence of the voters taken establishing his vote. Mr. Voorhees, who received according to the returns 498 votes, made no effort to establish his vote. The evidence incidentally showed that four persons voted for him; these only were counted for him. The committee, in citing the authorities upon which they base their decision, say:

"But the rejection of a return does not necessarily leave the votes actually cast at a precinct

uncounted. It only declares that the return having been shown to be false shall not be taken as true, and the parties are thrown back upon such other evidence as is in their power to show how many voted and for whom. So that the entire vote, if sufficient care be taken and the means are at hand, may be shown and not a single one lost, notwithstanding the return is rejected. It is found, as has already been stated, that 170 votes were cast at this precinct for Mr. Washburn. There was also the testimony of four persons that they voted for Mr. Voorhees."

In Reul *v.* Kneass, 584 (Brightly's L. Cases, 366, 372), the court, in answering an objection urged to testimony of voter, said:

"Let the doctrine be once established as constitutional law that an elector can not be heard in such a case to prove how he voted in order to establish the falsity of an election return, and the suffrage of every man in the country is placed under the control of the election officers, who may make him appear to have voted exactly as they please. According to this doctrine, if 500 out of 600 voters in a given district should vote for one candidate and their votes should all be returned as given to another, no adequate means exist in any body, legislative or judicial, in the Commonwealth to relief against so crying a wrong; for refusing to hear the testimony of electors to prove how they voted, the establishment of fraud in such a case would be impossible." (Brightly's L. Cases, 371, 372.)

In Vallandigham *v.* Campbell (1858) there were three reports, and the report submitted by Lamar and signed by four Members was finally adopted by the House. (1st Bartlett R., 223, 228, 229, 230.)

In this report of Lamar's there is an elaborate review of all the authorities, English and American, upon the questions of the admissibility of the declarations and testimony of voters as to their qualifications and for which candidate they voted. (Id., 230.)

The majority of the committee combat this position.

But there is still another view of this question assumed by the contestee. He insists that he has proven by 308 persons that they voted for him at Archer, No. 2. He claims that he has proven this by the mouths of the voters, outside of the returns, and that therefore he is entitled to have them counted for him in case the returns are set aside for fraud. And as the contestant has failed to introduce any witnesses to testify that they voted for him at said poll, that therefore he, contestant, is not entitled to have any votes counted for him at said poll, thereby giving contestee 308 majority at said poll instead of 258 majority fraudulently returned for him by his political friends, thus enabling him and them to succeed by their own wrongs to a greater extent than their criminal acts standing alone would justify. But the statements of these 308 witnesses will hardly sustain this assumption by the contestee. A large number of them do not testify that they voted for contestee, but that they voted the Republican ticket; many of them could not read, as we have already said, and therefore they had to depend upon others for the kind of tickets they voted, and were liable to be deceived; but however this may be, your committee is of the opinion that this view of the case can not be sustained under the proof. The proof shows that contestant did get votes at said poll, and that he probably got somewhere from 136 to 141. Your committee admits that if there was no evidence other than the returns, they being fraudulent and void, proving that the contestant received votes at said poll, then it would be unquestionably right to count the vote clearly proven to have been cast for contestee. But when the proof shows that a large number of votes were, in point of fact, cast for one candidate, as for the contestant in this case, but the number not being sufficiently certain to enable them to be counted, it seems to your committee to be manifest injustice to count the votes of his opponent, thereby increasing his majority to the full number of votes so counted. There is no rule of law or equity that will justify such action, but it would be a clear case of uncertainty in the proof, and stands in the same position as to uncertainty as the other positions assumed, and the entire vote must be rejected.

Your committee has therefore come to the following conclusions as to this precinct:

First. That the result of the election as shown by the returns is false and fraudulent.

Second. That from the other evidence in the case it is impossible to ascertain the true vote of said poll.

The vote must therefore, in the opinion of your committee, be entirely rejected.

The majority insist that as the poll was in charge of election officers, a majority of whom belonged to sitting Member's party, it was not probable that the true vote for contestant was swelled in the returns.

The minority views maintain that the evidence of the voters is sufficient as to how they voted. Although illiterate, they recognized the Republican ticket by the way the flag was placed on it, the flag on the Democratic ticket being placed in a different way. Also the tickets were given to them by officers of their political clubs, and these officers distributed none but straight Republican tickets, bearing Bisbee's name.

933. The case of Finley v. Bisbee, continued.

A voter being qualified as to naturalization, his vote was not rejected because he did not produce his papers at the polls as required by the State constitution.

The acts of election officers being presumed to be correct, a vote should not be rejected unless it is positively proven that the voter was disqualified as to registration.

(2) A question arose as to the votes of certain foreign-born persons, which were received without the production of naturalization papers. The majority report thus states the case:

The qualifications of voters in Florida are prescribed and defined in section 1 of Article XIV of the constitution of that State, as follows:

"SECTION 1. Every male person of the age of twenty-one years and upwards, of whatever race, color, nationality, or previous condition, who shall at the time of offering to vote be a citizen of the United States, or who shall have declared his intention to become such in conformity to the laws of the United States, and who shall have resided and had his habitation, domicile, home, and place of permanent abode in Florida for one year, and in the county for six months next preceding the election at which he shall offer to vote, shall in such county be deemed a qualified voter at all elections under this constitution." (See acts of 1868, containing the State constitution, p. 211.)

The third section of the same article of the constitution, and the one on which the contestee relies, does not create any additional qualifications for voters, but only prescribes a regulation. It reads as follows:

"SEC. 3. At any election at which a citizen or subject of any foreign country shall offer to vote under the provisions of this constitution, he shall present to the persons lawfully authorized to conduct and supervise such election a duly sealed and certified copy of his declaration of his intention, otherwise he shall not be allowed to vote. And any naturalized citizen offering to vote shall produce before said persons lawfully authorized to conduct and supervise the election the certificate of naturalization, or a duly sealed and certified copy thereof, otherwise he shall not be permitted to vote." (Acts of 1868—constitution, sec. 3, pp. 211–212.)

In the opinion of your committee it is clear that section 1 of Article XIV prescribes and defines all the qualifications of voters, and equally clear that section 3 does not create any additional qualification.

The qualification prescribed by section 1, in regard to foreign-born persons, is, that at the time they offer to vote they shall either be citizens of the United States, or shall have declared their intention to become such; while section 3 does not create any additional qualification, but only undertakes to prescribe the mode of proof, in case the right of such persons to vote shall, at the time they offer to vote, be disputed.

Such is the reasonable interpretation of these two sections of the constitution of Florida, when taken and construed together.

Moreover, this is the construction given by the first legislature in the State of Florida, which convened under the constitution of 1868, and it is to be observed that very many of the members of said legislature were also members of the convention that formed the constitution, and your committee are advised that this construction has been acquiesced in by every legislature that has convened since that time.

The legislature of 1868 treated and construed the third section of Article XIV of the constitution as being merely directory, as will be seen from the sixteenth section of the act of August 6, 1868, which provides as follows:

"SEC. 16. If any person offering to vote shall be challenged as not qualified, by any inspector or by any other elector, one of the board shall declare to the person challenged the qualifications of an elector. If such person shall claim to be qualified, and the challenge be not withdrawn, one of the inspectors shall administer to him the following oath: 'You do solemnly swear that you are twenty-one years of age; that you are a citizen of the United States (or that you have declared your intention to become a citizen of the United States according to the acts of Congress on the subject of naturalization); that you have resided in the State one year, and in the county six months next preceding the election; that you have not voted at this election, and that you are not disqualified to vote by the judgment of any court;' and if the person challenged shall take such oath he shall be allowed to vote." (Pamphlet acts 1868, p. 5, sec. 16.)

It is shown by the testimony in this case that none of these alien-born voters, except one, were challenged; that their naturalization papers were not demanded; that they were allowed to vote without question, and that they were in fact (with the exception of 7), at the time they voted, either naturalized citizens of the United States, or had declared their intention to become such, as required by section 1 of Article XIV of the constitution of the State. And your committee are of the opinion that, as they are proven to have possessed the qualification of citizenship or of having declared their intention to become citizens as required by the constitution, their votes should not be rejected.

The majority say it is the settled law of elections that where persons vote without challenge they are presumed to be entitled to vote and that the election officers receiving the votes did their duty properly and honestly. The section requiring the presentation of a certificate prescribed only a regulation, and according to McCrary "the right to vote must not be impaired by the regulation." Furthermore, the evidence showed that the larger portion of these aliens had been naturalized, and therefore section 1 of the fourteenth amendment to the Federal Constitution guaranteed that no State law should "abridge the privileges or immunities" of these naturalized citizens.

The minority combat this proposition, saying in their views:

Now, contestant concedes that a vote cast by a person not registered is illegal. And it is too well settled to be disputed. Registration is a "necessary prerequisite" to be complied with by the voter before he can legally vote. The constitution of Florida makes another "necessary prerequisite" of a foreign-born person before he shall vote. It tells him he shall present to the officers of the election his duly certified and sealed "naturalization papers" or his "declaration of intention" (where he has not taken out his final papers), "otherwise he shall not be allowed to vote."

And it seems to us that the same principle must be applied in the case of foreign-born persons who did not present their papers, as the law required, to the officers at the election that we have applied to unregistered voters. The requirement of the constitution is mandatory. It requires a certain thing to be done by a foreign-born person, "otherwise he shall not vote."

It is urged by contestant that they were not challenged, and had they been required so to do, that in most cases they could have produced the papers the constitution required. We might say the unregistered voters were not challenged. They, too, could have registered if they knew the law required it and they desired to do so. Each has failed to do what the constitution of the State has commanded before they can legally vote.

This is not something the law requires of the officers of election. It is a requirement of the citizen to qualify him to vote. The constitution of the State challenged his vote unless he complied with the supreme law of the State.

"The right of suffrage is not a natural right nor is it an absolute unqualified personal right. It is the right derived in this country from constitutions and statutes. It is regulated by the States, and

their power to fix the qualifications of voters is limited only by the fifteenth amendment to the Constitution, which forbids any distinction on account of 'race, color, or previous condition of servitude.'" (McCrary, sec. 3, and cases therein cited.)

"But the election franchise, like other rights, is not that of unrestrained license. In a government of law, the law must regulate the manner in which it must be exercised. The time and occasion and mode of voting are to be prescribed by the legislature, except in so far as the constitution has a voice of its own on the subject, and therefore it is that laws have been created for election officers, regulating the hours of the day during which the election shall be held, and the proof necessary to establish the right to vote. * * * The elector's privilege is not, therefore, a mere constitutional abstraction, but it is to be exercised in subordination to law, and on proof of title of the person claiming its exercise. The right, however well founded in fact, may be lost for want of such evidence of titles as the law demands." (Opinion of court in case of Batturs *v.* Megary, Brewster Rep., vol. 1, p. 171; see also 2d Bartlett, 831.)

In Pennsylvania persons not assessed for taxes were required by the laws of the State to answer certain questions under oath, concerning tax, age, and residence, and also to prove their residence by the oath of a qualified voter.

In the following cases it was distinctly held that a vote cast without complying with the statute was illegal and could not be counted. (Mann *v.* Cassady, 1st Brewster, p. 12; Myers *v.* Moffett, 1st Brewster, p. 230; Weaver *v.* Given, 1st Brewster, p. 141; Sheppard *v.* Gibbons, 2d Brewster, pp. 117–129.)

In Brightly's Leading Cases, p. 492 (note), the author says:

"Votes received from electors whose names do not appear on the assessment list without the preliminary proof required by law were formerly held to be prima facie illegal and to be rejected from the count unless adequate proof were made on the trial of the legality of such vote. (Mann *v.* Cannada and Weaver *v.* Given.) But the modern and better opinion seems to be that such votes being illegal when received can not be made legal by the production of evidence of qualification on the trial which ought to have been but was not produced to the election officers."

He cites Sheppard *v.* Gibbons and Myers *v.* Moffett.

In the case of Sheppard *v.* Gibbons, the court says:

"A vote prima facie illegal must be disallowed if the voter did not at the time of offering it produce the preliminary proof required by law. (Brightly, p. 558 and 572. See Covode *v.* Foster, 2d Bartlett, 600 et seq., and Wright *v.* Fuller, ibid, 159 and 160.)

Again, the statutes of Wisconsin provide that no person, not registered, should be allowed to vote unless he produced his own affidavit and the affidavit of a householder of the district of his residence in the district. In a case reported in 21st Wisconsin, page 566, it is held that the affidavits must be produced or the vote is illegal and must be thrown out.

This is an important case, and all the principles arising under section 3, article 4, constitution of Florida, concerning foreign-born voters are decided.

The minority further cite the case of Bancroft *v.* Slumpf (23d Wis., 630), and urge that the 74 votes of foreign-born persons, who voted without complying with the conditions of the constitution, should be deducted from contestant's vote.

934. The case of Finley v. Bisbee, continued.

As to the sufficiency of certified copies of registration lists as evidence of the qualifications of voters.

Until the contrary is proven, election officers are presumed to have tested the voter's qualifications by a required oath.

Criticism of the rule of proportionate deduction of illegal votes the nature of which is unknown.

Evidence is not admitted on a point as to which there was a total failure to plead in the answer.

(3) As to the votes of certain persons who were not registered.

The law of Florida provided for a registration of the legally qualified voters in

each county, and that "no person not duly registered according to law shall be allowed to vote." Also further sections of law provide:

SEC. 8. No person shall be entitled to vote at any election unless he shall have duly registered six days previous to the day of election.

Section 9 provides:

That the county commissioners shall meet at the office of the clerk of the circuit court within thirty days preceding the day on which any election shall be held and examine the list of registered electors, and erase therefrom the names of such persons as are known or may be shown to their satisfaction to have been dead, or ceased to reside permanently in the county, or otherwise become disqualified to vote; *Provided,* That if any person whose name may be erased shall on offering to vote at any election declare on oath that his name has been improperly struck from the list of registered voters, and shall take the oath required to be taken by persons challenged, such person shall have the right to vote.

Section 10 provides for furnishing the election officers at each precinct with a revised list of the registered voters of the county.

On these provisions of law the sitting Member based an objection thus set forth in the minority views:

The sitting Member insists that a large number of persons at various polls in eleven of the counties of the district voted, never having been legally registered. He introduces, first, the poll list, showing who did vote at each of the polls where such illegal votes were cast; then produces either a certified copy of the original registration book, including the names of all persons who had been striken off, or he produces a copy of the revised list of registration, together with a list of the names striken off; thus presenting a certified copy of the names of all persons who have ever been registered since the adoption of the new constitution in 1868. By comparing the poll list with the list of registration so produced, we find that many persons have voted who have never been registered. If they were sworn at the polls as the statute demands, and took the oath that they had been registered and had been improperly stricken off, then they must have sworn falsely, for the record itself, the highest evidence, shows that they never were on the registration book and hence were never stricken off. The contestant in this case was the contestant in the Forty-fourth Congress, in the case of Finley *v.* Walls. He was given his seat upon a decision that the votes not found on the revised list were not sworn as the law directs. In this case they never were registered, and such oath, if taken, would have been false. Their votes could not be received even if sworn. In that case the officers of the election were called and proved how many persons voted at each poll who were not on the revised registration list supplied by the clerk. In this case the voters, as shown by record evidence, never did register. In the former case, where it was not ascertained for whom the legal votes were cast, they were deducted from the vote each candidate received, according to a rule which seems now well established. It is proper here to notice an objection made by contestant in regard to the evidence concerning the names that had been "stricken off." He insists that this is no longer a record, and cannot be introduced as evidence. This might be true if in "striking off" or "erasing" the name of a voter from the "registration book" it was so obliterated that the name could not be ascertained; but such is not the fact. The name "stricken off" is not so defaced that it can not be made out. In fact, we find in some cases the only striking out that is done is the writing at the end of the name the words "removed," or "dead," or "convicted of felony," etc. (See Record, pp. 708–728.) Again, the proof shows in regard to the county of Alachua that the clerk of the circuit court, in order to prepare the revised list for the officers at the various polls at this election, handed his "registration book" to the printer to prepare the revised lists necessary. But instead of printing a revised list, he printed the names of those who were stricken off as well as those who had not been stricken off. A pen had been drawn through the names of those stricken off, but they were still legible. (See evidence of Clerk Webster, Record, p. 137.)

The clerks of the circuit courts furnish in the record of this case lists of names of all persons who have ever been registered in their county since the adoption of the new constitution in 1868. They certify that they are true and correct; they include the names of those who had once been registered, but are dropped or "stricken off" when revised lists are prepared to send to the officers holding an

election. We think this evidence legitimate and proper. From these registration lists and the poll lists we can, by comparison, clearly ascertain the names of all persons who have voted but have never been registered. We also hold that persons who have never been registered could not legally vote. Upon this question we cite the following authorities:

Finley *v.* Walls, Forty-fourth Congress:

"If election officers receive a vote without preliminary proof, which the law makes an essential prerequisite to its reception, such vote is as much an illegal one as if the voter had none of the qualifications required by law."

Brightly's L. Cases, 453, 492, note.

State *v.* Hilmoutel, 21st Wis.. 566.

State *v.* Stumpf, 23d Wis., 630.

16 Mich., 342.

Registration is, under the constitutional laws of Florida, an essential prerequisite before voting. The law tells the elector, unless you are registered you shall not vote. It tells the officers of election they shall not receive it. Hence, such illegal votes cannot be counted either by the courts or by unbiased legislative bodies, even after they are put in the ballot box.

The majority in their report do not admit the legality of the contestant's argument, and say:

The contestee offers in evidence the certified copies of the registration lists of the counties; also the poll lists of the precincts of said counties; and he invites a comparison of the names on the poll list with the names found on the registration list, and insists that the votes of all persons whose names appear on the poll list as having voted, but whose names are not found on the registration list, be declared void, for the reason that such votes are illegal.

Your committee does not agree with this view of the question. If a person vote in a county in Florida, having all the qualifications of a voter of said county except that his name has never been registered in said county, his vote, in the opinion of your committee, would be illegal, or if the name of such person having once been on the registration list of said county, but having been erased therefrom by the board of commissioners, afterwards cast his vote without having first taken the oath that his name had been improperly stricken "off from" the list of registered voters, his vote would also be illegal. But suppose we examine the poll list and find the name of a voter thereon as having voted, and we then turn to the registration list and find his name is not on that, can it therefore be said that he voted illegally? Certainly not. If a person votes at an election, his vote is presumed, under the law, to be legal until the contrary be proven in a legal way, for the reasons—

First. That the acts of an officer or officers of an election within the scope of this authority are presumed to be correct and honest until the contrary is made to appear, and therefore that they as such officers would not receive an illegal vote.

Second. That the presumption is always against the commission of a fraudulent or illegal act, and therefore that a man would not cast an illegal vote. (McCrary, sec. 87–440; Little *v.* Robbins; Gooding, *v.* Wilson.)

The majority further say that while the certified copy of the poll list is evidence that the voter cast his vote, a certified copy of the revised registration list was not evidence that his name had never been on the registration list for it might have been erased. The law of Florida did not provide for making a record of names of persons erased from the registration lists.

The fact can not be proven by the record, and certainly can not be proven by the certificate of the clerk attached to what purports to be a copy of a record which has no legal existence, for the clerk can only certify to records in such case, and his certificate to a fact in this case, outside of the records legally in his custody and of which he is legally authorized to give certified copies under his hand and seal, amounts to no more than the certificate of a private individual to a given fact.

The sitting Member introduced the evidence of two witnesses who had examined the poll lists, registration lists, and other papers, and who gave the results of their examinations. The majority say:

These statements made by the witness are inadmissible. The papers themselves are the best and only evidence of what they contain, if they are admissible for any purpose. The committee must make the comparison and can not take the statements of the witness as to the result of his comparison.

Your committee is of the opinion that this proof is insufficient to prove that these persons voted illegally whose names are not found on the registration lists of their respective counties. If they took the oath that their names had been improperly erased from the registration list—and the proof thus far is insufficient to overcome the presumption that they did—their votes are legal. The contestee undertakes to overcome the presumption in favor of the legality of this class of votes in another way. On some of the poll lists of the precincts in these counties is found at the end of some of the names of the persons voting these words, "Not sworn." At the end of others the word "Sworn." Now, it is contended by contestee that whenever you find a name on the poll list of any precinct with the words "Not sworn" written after it, which name is not found on the registration list of the respective county, that the vote of such person is illegal. This position can not be maintained, for reasons which we have heretofore stated. But we will further say that the law does not authorize the election officers, or either of them, to write the words "Not sworn" or "Sworn" on the poll list after the names of the voters who have voted and whose names are not found on the registration list of the county in which they vote, whether such persons were sworn or not before they voted. The writing of these words are therefore unofficial acts, and not a part of the poll list under the law, and not evidence, and can not be made so by a certified copy of the poll list, as is here attempted to be done. It would be a very dangerous rule, indeed, which would permit everything which appears on the face of a record to become evidence, whether placed there by authority of law or by the unofficial acts of irresponsible persons. How these words came to be written on these poll lists or by whom they were so written the evidence does not show. But it is enough for your committee to know that they were not placed there pursuant to any law and can not be considered as evidence.

Your committee is, therefore, of the opinion that the evidence does not prove that the votes cast by persons whose names were not found on the registration lists of the counties in which they voted are illegal. The evidence does not prove that they did not take the oath required by law in such case.

The minority, holding that the votes in controversy should be deducted, laid down this rule:

Where the proof shows for whom such illegal vote was cast, we deduct it from the candidate who received it. Where it is not shown for whom such illegal votes were cast, we adopt the well-settled rule which was followed in the case of Finley *v.* Walls, Forty-fourth Congress. This rule is laid down by Mr. McCrary in his Law of Elections, section 298 (see authorities there cited), as follows:

"In purging the polls of illegal votes the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest number."

Of course, in the application of this rule, such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each.

The majority report says:

In purging the polls of illegal votes the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest number. (McCrary on Elections, p. 223; Shepherd *v.* Gibbons, 2 Brewster, 128; McDaniel's Case, 3d Penn., L. F., 310; Cushing's Election Case, 583.)

Of course, in the application of this rule, such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each. (McCrary, p. 223.)

This is, perhaps, the best rule that can be adopted in such case. It is manifest, however, that it may sometimes work a great hardship; for the truth might be, if it could be shown, that all the illegal votes were cast for one of the candidates, while it is scarcely to be presumed that they would ever be

divided between the candidates in exact proportion to their whole vote. But the rule that would deduct them all from either one of the candidates, in the absence of proof as to how the illegal votes were cast, is much more unreasonable and dangerous. The above rule is perhaps the safest one to be adopted in a court of justice, where there is no power to order a new election, and where great injury would result from declaring the office vacant. But it is manifest, as we have already said, that it might work a great hardship. And in a legislative body, having the power to order a new election, it is safer, in the opinion of your committee, and more conducive to the ends of justice, to order such new election than to reach a result by the application of such a rule. (McCrary, pp. 224, 225.)

A question as to pleading is thus disposed of by the majority report:

Contestee undertakes to prove that certain devices were resorted to in this county by certain persons to compel persons to vote the Democratic ticket by numbering tickets which they gave to said voters, with threats that if they did not vote the Democratic ticket they would be discharged by their employers, etc. There is nothing in the answer which will justify such proof. There is no allegation in the answer that can under any rule of pleading known to your committee be construed so as to admit such evidence. We are disposed to extend the rule in this case as far as possible, in order to let in all the evidence, but when there is a total failure to plead, as is the case here, we can not consider the evidence in determining a fact which tends to change the vote of either candidate. Your committee will say, however, that the proof on this point wholly fails to sustain such an allegation were it averred.

In accordance with their conclusions, the majority of the committee recommended the following resolutions:

Resolved, That Horatio Bisbee, Jr., is not entitled to a seat in this House as a Representative in the Forty-fifth Congress from the Second Congressional district of Florida.

Resolved, That Jesse J. Finley is entitled to a seat in this House as a Representative in the Forty-fifth Congress from the Second Congressional district of Florida.

The minority reported in favor of sitting Member.

The report was fully debated on February 20, 1879,[1] and on that day the question was tried on the majority resolutions, which were agreed to, yeas 131, nays 122.

Thereupon Mr. Finley, the contestant, appeared and took the oath.

935. The Missouri election case of Frost v. Metcalfe in the Forty-fifth Congress.

On so difficult a question as that of residence strong testimony is required to destroy the presumption that election officers have permitted none but qualified electors to vote.

The Committee on Elections declined to count votes of persons prevented from voting by an erroneous dropping of their names from the registration.

The Committee on Elections declined to reject or purge a poll because of the bad conduct of United States marshals.

On February 25, 1879,[2] Mr. John T. Harris, of Virginia, from the Committee on Elections, submitted the unanimous report of the committee (the minority concurring in the conclusions) in the Missouri election case of Frost *v.* Metcalfe.

Sitting Member had been returned by an official plurality of 19 votes. Con-

[1] Journal, p. 477; Record, pp. 1670–1683.

[2] Third session Forty-fifth Congress, House Report No. 118; 1 Ellsworth, p. 289.

testant sought to overturn this result by a number of objections. Certain of these involved questions discussed, as follows:

(1) Contestant alleged that 6 illegal votes were cast by negroes not residents of Missouri. The report says:

They do not regard the proof as sufficient to show that the 6 votes in question were not legal voters. It wholly fails to show that the residence of these colored men was not at their place of voting. Neither does the evidence show that they voted for contestee. It would be a dangerous doctrine to the right of election to permit the solemn act of the sworn officers of the law to be set aside upon such testimony. It is to be presumed that they did their duty. A majority were of the same politics of the contestant, and the evidence shows they sought to be watchful and careful in the discharge of their duty. It may be, and often is, difficult to determine the home or domicile of a boatman, or one who is constantly engaged in steamboating or on railroads, but as the law contemplates every man has a domicile or residence, it is often only known to the party himself. It is a question of intent, known alone to the party. It is to be presumed the election officers sifted these voters and came to correct conclusions. The evidence is not sufficient to show they did not.

(2) While considering the question of defective registration lists the report says:

While on this branch of the subject your committee will dispose of the complaint made by contestant that by reason of the errors in copying the registration list he lost many more votes than contestee. To count votes which were never offered at any poll is carrying the doctrine further than we ever knew it. To authorize this committee to count a vote, four things are requisite—first, the person offering to vote must have been a legal voter at the place he offered to vote; second, he must have offered his vote; third, it must have been rejected; and, fourth, it must be shown for whom he offered to vote. These requisites do not exist in these cases; therefore your committee will not further consider them.

(3) Contestant alleged:

That the conduct of judges and United States supervisors and marshals at said precinct No. 77, in handling and tampering with the ballots and the tallies, tainted the return from that poll with fraud, and rendered the result so uncertain that said poll must be wholly rejected.

The committee say:

The contestant asks that the whole poll at No. 77 be set aside and discarded, because the return was tainted with fraud by handling and tampering with the ballots and tallies.

The only evidence on this subject is given by the deputy United States marshal, Wortman. The contestant does not call any of the judges or officers conducting the election, a majority of whom were Democrats, to sustain this charge. As before said, the law presumes public officers did their duty. The returns are in due form and were duly counted. According to the showing of this witness, the falling out of the ballots was purely accidental. Then why not have called some of the officers to prove these facts if they existed? The failure to call them raises the presumption that they would not sustain the charge. They do not occupy the position of parties charged with fraud testifying in their own behalf, but they are presumed to be impartial and disinterested, or, if partial, a majority of them are presumed to lean toward contestant, therefore would have been willing to tell the truth in his behalf.

To set aside a formal and regular return made by sworn officers of both political parties, upon such evidence, would set a dangerous precedent and render popular elections but a name and a mockery.

(4) Contestant alleged:

That said marshals were wholly unnecessary and were appointed solely for the purpose and in number sufficient to make reasonably certain the election of Metcalfe.

Eighth. That the money promised them by the Government was used simply as a bribe for votes for Metcalfe. That many of them were Democrats, who, to obtain the position, were compelled to promise and pledge that they would vote for Lyne S. Metcalfe.

The committee said:

Your committee deprecate the appointment of United States marshals under any pretext. If they are intended as conservators of the peace, the power of the State is ample for that purpose. If they are in any manner to interfere in the elections, it is clearly a violation of the laws of the States for them to do so. But the law of the United States warrants the appointment of deputy marshals, and the same must be respected until altered or repealed. It does not limit the number. The question in this case is, Was the conduct of the marshals such as to invalidate the whole election? It can not with any strong reason be urged that this committee shall make an estimate from conjecture how many voters they changed by their conduct. Nor would it be safe or warranted that the parties alleged to have been bribed, would, but for such bribe, have voted the other way. If the conduct of these deputy marshals was such as to pollute the whole vote of the district, then the committee could not sift the good from the bad voters and declare a result, but would be compelled to find there had been no fair expression of the popular will, and that no legal election had been held.

The testimony of the witnesses called by the contestant to prove bribery and fraud on the part of those marshals is very vague and unsatisfactory. Some 8 were introduced, who do prove that they were appointed with the promise expressed or implied that they would vote for Metcalfe, but 5 admit they voted for Frost; 2 say they voted for Metcalfe, but they preferred him and were in no way influenced by the office. One did not vote at all. So that the evidence, so far as it goes, tends to repel the presumption that the 728 deputy marshals were influenced in their votes by reason of their appointments. To say the least of it, the testimony is not very reliable, coming as it does from men who confess their own abasement and degradation.

There is nothing in this evidence that would justify your committee in transferring any votes from Metcalfe to Frost or deducting any from Metcalfe; much less would it justify them in setting aside the whole election.

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

On February 25, 1875,[1] this report was presented in the House, but was not acted on then or thereafter.

[1] Journal, p. 525; Record, p. 1893.

Chapter XXXI.

GENERAL ELECTION CASES, 1880 AND 1881.

936. The Arkansas election case of Bradley v. Slemons in the Forty-sixth Congress.

Interpretation of the law limiting the time of taking testimony in an election case.

Testimony taken after the legal time, objections to which were part of the record, was rejected.

A party to an election case may object to testimony as it is completed, although he may have appeared and cross-examined.

On March 8, 1880,[3] Mr. Samuel L. Sawyer, of Missouri, from the Committee on Elections, submitted the report in the Arkansas case of Bradley *v.* Slemons.[4]

The sitting Member had been returned by an official majority of 2,827 votes.

At the outset the committee disposed of a question as to time of taking evidence:

At the very threshold of our inquiry we are met with an objection by the contestee to the consideration of any portion of the evidence taken by the contestant in the counties of Chicot and Hempstead, for the reason that the forty days allowed by law to contestant in which to take testimony in chief had expired before the taking of evidence in said Chicot and Hempstead counties commenced.

Protests of contestee were duly entered on the record against the taking of such testimony. Contestant, however, contends that, as he commenced taking testimony on the 18th day of February, 1879, the forty days allowed him commenced running from that day, and this view, if correct, will entitle him to the benefit of the testimony taken in those two counties.

Section 107 of the Revised Statutes provides that the time allowed for taking testimony shall be ninety days, and it shall be taken in the following order: The contestant shall take testimony during the first forty days, the returned Member during the next forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period.

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[1] Also prima facie case of Bisbee *v.* Hull. (Vol. I, sec. 57.)

[2] Additional cases in the third session of the Forty-sixth Congress:

O'Hara, *v.* Kitchen, North Carolina. (Vol. I, sec. 730.)

Herbert *v.* Acklen, Louisiana. (Vol. I, sec. 751.)

McCabe *v.* Orth, Indiana. (Vol. I, sec. 752.)

The Iowa Members. (Vol. I, sec. 525.)

[3] Second session Forty-sixth Congress, House Report No. 427; 1 Ellsworth, p. 296.

[4] All the committee concurred in the conclusions of this report and the law except Mr. James B. Weaver, of Iowa, who filed minority views.

In order to settle definitely from what time the forty days allowed to contestant in which to take his testimony in chief should begin to run, it is provided by the act of Congress upon the subject of contested elections, approved March 2, 1875, that section 107 shall be so construed as to require that, in all cases of contested elections, the testimony shall be taken within ninety days from the day on which the answer of the returned Member is served upon the contestant. (Statutes 1875, chap. 119, sec. 18, p. 338.)

The answer of contestee to contestant's notice of contest was served on contestant on the 29th day of January, 1879 (p. 6). The time, then, for taking contestant's testimony in chief expired on the 10th day of March following. The taking of testimony by him in Chicot and Hempstead counties was commenced in Chicot County on the 20th day of March, ten days after the expiration of the time allowed to him, and was closed in Hempstead County on the 28th day of March. The provisions of the statutes referred to can not be disregarded, and contestant, without leave of the House, was unauthorized to take further testimony in chief after the 10th day of March, when his time for that purpose expired.

The law is intended to, and does, furnish each party ample opportunity for taking testimony, if ordinary diligence is used; and especially is this the case, when it is considered that a party may take testimony at two or more places on the sameday. This wise provision of the law furnishes a strong reason against an extension of time in ordinary cases like the present. (Boles *v.* Edwards, second session Forty-fifth Congress; Vallandigham *v.* Campbell, Thirty-fifth Congress; Carrigan *v.* Thayer, Thirty-eighth Congress.)

No application was made to the House by contestant for an extension of time, and the question is now clearly presented whether, without any cause whatever being shown therefor, the testimony thus taken out of time shall be admitted and considered. Another important fact may be considered in this connection. It appears from an examination of the record of the testimony that the time actually consumed by contestant in taking the entire testimony returned, including that taken beyond the time allowed by law, was only eighteen days; thus establishing the fact beyond controversy that he could, by the use of ordinary diligence, have taken the entire testimony within the time allowed him by law without trespassing upon the time allowed to contestee. In view of these facts, no reason exists why the committee should consider the testimony taken in Chicot and Hempstead counties, or should recommend that it be considered by the House.

The minority views dissented as follows:

The evidence taken in Chicot and Hempstead counties was taken after the forty days from the service of contestee's answer on the contestant had expired, but no protest was entered or made by contestee, so far as it appears in the record, until the depositions had all been taken, signed, and certified. Contestee appeared and cross-examined the witnesses without making objection. He entered his objection just as the depositions were ready to be sealed and transmitted. I submit to the House whether contestee by his appearance and cross-examination, without objection, did not waive all right to object to the testimony on this ground.

As to the merits of the question the committee discussed questions of fact principally; but a few questions of law were involved.

937. The case of Bradley v. Slemons, continued.

Abandonment of the polls by intimidated judges was not of itself considered sufficient to invalidate a poll.

Failure to hold an election in two townships, no reason being ascertained for such failure, did not affect the general result.

Election officers being robbed of the ballot boxes and returns by unknown masked men, the general result was not affected therefor.

(1) As to the vote of Melton Township, the following appeared:

The testimony shows that a short time before sunset, the time fixed for closing the polls, one of the judges of the election, J. D. Currie, was threatened with an arrest by a United States deputy marshal unless the polls were then closed and the votes counted; that quite a number of colored men crowded around the polls, some with guns in their hands and others having them stacked within a convenient distance, a guard being placed over them; that such was the demonstration the judges considered it

unsafe to remain and accordingly left, the ballot box having been thrown out to one of the colored men, a supervisor of the election for that precinct, which was afterwards returned to its place upon the table. After the judges had proceeded a short distance they concluded to return and endeavor to count the votes. Upon their return it was ascertained the deputy marshal had left, that the ballot box was in the possession of the colored men, who asserted their intention of retaining it, and such was the excitement it was believed to be unsafe to remain longer, and the judges accordingly left. (Pp. 85, 86, 88, and 89.) Mr. Nixon, one of the judges of the election at this precinct, estimates the vote cast at about 115.

There is no pretense that the election was an unfair one, or that the voters were intimidated, nor is there a particle of evidence connecting contestee or any of his friends with the transaction. The county clerk, Mr. Nivens (p. 36), testifies that the ballot box was brought to him by a United States deputy marshal securely locked, and still remains in that condition. It is not pretended that the ballot box had been tampered with, and the vote could easily have been ascertained had the proper exertion been made.

(2) As to failure to hold elections or failure to make a return, the report says:

It also appears there were no returns from Barraque or Dunnington townships, the inference from the testimony being that no election was held in either of those townships, and no reason is assigned for the failure to hold an election. It will not, however, be seriously contended that the result of the election can in any manner be affected by the failure of these townships to hold an election.

In Washington Township it appears from the evidence that an election was held, and that the judges, while on their way with the ballot box to make return, were assaulted by masked men and the ballot box was taken from them. It does not appear who those men were, nor what their party affiliations, nor can any presumption arise from the relative strength of the political parties to which, if to either party, those desperadoes belonged, as the testimony shows (p. 192) that the strength of the Democratic and Republican parties in that precinct was about equal. Hence neither party can be held responsible for the disgraceful and criminal act, nor can the result be in any way affected.

938. The case of Bradley v. Slemons, continued.

The circulation of fraudulent posters among the voters does not, in the absence of proof of effect or of complicity of the opposing party, justify rejection of the poll.

Judges of election not appearing and the voters neglecting to choose others, the House declined to take into account the preferences of the said voters.

The pleadings in an election case should be free from personalities.

(3) The report thus sets forth the facts as to the main point in the case:

We come now to the consideration of the most important point made by contestant in his brief and argument, the circulation of false and fraudulent posters in Chicot County a few days before the election, announcing John A. Williams, a well-known Republican, as the candidate of that party for Congress in that district. The object was evidently to deceive the Republican party in that county, and thus induce that vote to be cast for Williams, and to lessen the vote it was supposed would otherwise have been cast for contestant. It was a shallow device, dishonorable to those engaged in the transaction, and deserves the emphatic condemnation of every friend of free and fair elections; and if the testimony was sufficient to establish the complicity of contestee with an act so dishonorable, and we were satisfied that its effect upon the voters produced a result different from that which otherwise would have occurred, we would not hesitate to recommend that the election be set aside and a new one ordered.

After examining the evidence, the report concludes:

This evidence fails to satisfy us that the circulation of the posters produced any considerable effect upon the voters; certainly not to the extent of preventing any great number from voting. The general apathy and indifference to the result, testified to by contestant's witnesses, clearly and satisfactorily indicate the reason for the smallness of the vote, and, in connection with the testimony of other witnesses heretofore alluded to, afford the only satisfactory answer to the question why contestant, claim-

ing to be the Republican candidate, received so cold a support from the party, The total vote received by Williams was cast for him in Chicot County and reached the number of 90.

Suppose we assume (which is by no means certain) that the 90 votes cast for Williams would otherwise have been given to contestant. We have no means of computing the number who were so much confused as to prevent them from voting for contestant, as the testimony affords no light whatever upon the subject. It is entirely a matter of conjecture, a mere guess, as liable to be wrong as right, and in view of this state of the evidence contestant insists it is the duty of the committee to find that the confusion of the voters was so great as to prevent 1,265 Republicans from voting for him who would otherwise have done so, which, added to the vote he claims he should have received in Jefferson and Hempstead counties, would be sufficient to overcome the majority returned for contestee; not only that, but to count for him a number of votes that were never cast sufficient for the purpose, and to accord to him the seat now occupied by the sitting Member.

(4) The report, while not admitting the validity of the testimony as to Hempstead County generally, considers one question raised as to that county:

We now come to the testimony taken in Hempstead County, which it will be remembered is subject to the same objection heretofore mentioned. The evidence, however, shows (pp. 57, 58) that the judges of the election were not present at polling place No. 2 in Ozan Township, and that the voters there assembled erroneously concluded there could be no election; that 350 voters, with tickets for contestant in their hands, expressed a desire to vote for him; that at Saline precinct the polls were not opened for the same reasons; that 204 voters, having tickets for contestant, expressed their wish to vote for him, making 554 votes which contestant contends should be counted for him.

We concede there may be circumstances under which a legal voter being deprived of the privilege of casting his ballot, it may nevertheless be counted. Judge McCrary, in his work on elections (p. 99) says: "To require each voter belonging to a class of excluded voters to go through the form of presenting his ballot, and having a separate ruling in each case, would be an idle and useless formality." But the present class is not of the character entitling their votes to be counted. The voters assembled at the two precincts, in the absence of the judges of election, as has been shown, could have elected judges and proceeded with the election. It was, partially at least, their own neglect, arising perhaps from an ignorance of the law, which prevented an election being held in each of the precincts named.

No fraud, intimidation, or other misconduct being alleged or shown, preventing the holding of an election, if the voters in the absence of the regularly appointed judges fall to avail themselves of the privileges the law affords, their votes can not be counted.

In accordance with the principles thus set forth the committee, with but one dissenting voice, recommended this resolution:

Resolved, That William F. Slemons is entitled to retain the seat he now occupies as Representative from the Second Congressional district in the State of Arkansas in the Forty-sixth Congress.

The report was debated in the House on March 30 and 31[1] and on the latter day the proposition of the minority, that the seat be declared vacant, was disagreed to, ayes 30, noes 152, the yeas and nays being refused. The question then recurring on the resolution of the committee, it was agreed to, ayes 149, noes 21.

At the outset of this case the report thus treats of a subject not strictly involving the merits of the case:

Before commencing the discussion of the merits of the controversy, we deem it proper to express our disapproval of that portion of contestee's answer to contestant's notice of contest which indulges in personalities. The practice itself is unbecoming the dignity of the House, and we regret the necessity has arisen of imposing on the committee the duty of calling attention to the subject.

[1] Journal, pp. 926, 927; Record, pp. 1969, 2006, 2007.

939. The Pennsylvania election case of Curtin v. Yocum, in the Forty-sixth Congress.

The State constitution providing that no elector should be disfranchised because not registered, the House refused to reject votes cast by nonregistered persons without certain affidavits required by statute.

Discussion of mandatory and directory law as related to the acts of voters and election officers.

On May 8, 1880,[1] the House began consideration of the Pennsylvania contested election case of Curtin *v.* Yocum.

Sitting Member had received an apparent majority of 80 votes, as shown by the division returns. The contestant's efforts to overcome this majority rested entirely on the disposition of certain votes cast by persons in violation of the registration law of Pennsylvania. The constitution of Pennsylvania, newly adopted and not yet construed by the courts, provided qualifications of voters as to age, citizenship, residence, and payment of taxes; and further provided:

SECTION 1. All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State; but no elector shall be deprived of the privilege of voting by reason of his name not being registered.

A registration law of the State also provided for making of registration lists by the assessors, and as follows:

And no man shall be permitted to vote at the election on that day whose name is not on said list, unless he shall make proof of his right to vote as hereinafter required.

SEC. 10. On the day of election any person whose name shall not appear on the registry of voters, and who claim the right to vote at said election, shall produce at least one qualified voter of the district as a witness to the residence of the claimant in the district in which he claim to be a voter for a period of at least two months immediately preceding said election, which witness shall be sworn or affirmed and subscribe a written or partly written and partly printed affidavit to the facts stated by him, which affidavit shall define clearly where the residence is of the person so claiming to be a voter; and the person so claiming the right to vote shall also take and subscribe a written or partly written and partly printed affidavit stating—

After specifying what these affidavits shall set forth the law continues:

The said affidavits of all persons making such claim , and the affidavits of the witnesses to their residence, shall be preserved by the election board, and at the close of the election they shall be inclosed with the list of voters, tally list, and other papers required by law to be filed by the return judge with the prothonotary, and shall remain on file therewith in the prothonotary's office, subject to examination as other election papers are. If the election officers shall find that the applicant possesses all the legal qualifications of a voter he shall be permitted to vote, and his name shall be added to the list of taxables by the election officers, the word "tax" being added where the claimant claim to vote on tax and the word "age" where he claims to vote on age; the same words being added by the clerks in each case, respectively, on the lists of persons voting at such election.

SEC. 12. If any election officer shall refuse or neglect to require such proof of the right of suffrage as is prescribed by this law, or the laws to which this is a supplement, from any person offering to vote whose name is not on the list of assessed voters, or whose right to vote is challenged by any qualified voter present, and shall admit such person to vote without requiring such proof, every person so offending shall, upon conviction, be guilty of a misdemeanor, and shall be sentenced for every such offense to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not more than one year, or both, at the discretion of the court.

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[1] Second session Forty-sixth Congress, House Report No. 341; 1 Ellworth, p. 416.

SEC. 13. * * * Whenever a place has been or shall be provided by the authorities of any city, county, township, or borough for the safe-keeping of the ballot boxes, the judge and minority inspector shall, after the election shall be finished, and the ballot box or boxes containing the tickets, list of voters, and other papers have been securely bound with tape and sealed, and the signatures of the judge and inspectors affixed thereto, forthwith deliver the same, together with the remaining boxes, to the mayor and recorder of such city, or in counties, townships, or boroughs to such person or persons as the court of common pleas of the proper county may designate, at the place provided as aforesaid, who shall then deposit the said boxes and keep the same to answer the call of any court of tribunal authorized to try the merits of such election.

This being the state of the law, it appeared that many persons whose names did not appear on the registration lists voted. It also appeared that none of the required affidavits of the said persons were on file in the required place, the prothonotary's office; but it did appear that some such affidavits had mistakenly been placed with the tickets and lists of voters in the ballot boxes, which, under the law, went to a depository other than the prothonotary's office. It further appeared that these votes in question were far more than enough to overcome sitting Member's majority, were it shown that they had generally been cast for him.

Several questions were discussed in connection with this state of facts:

(1) Was a vote cast by an unregistered person who did not give the affidavits required by the law, nevertheless a legal vote.

The majority report, presented by Mr. William M. Springer, of Illinois, and concurred in by seven of his associates, held that such votes were not legal, since the law was mandatory:

The authorities are uniform to the effect that all statutes are mandatory which can not be disregarded without ignoring the legislative intent. The will of the legislature can not be carried out unless this provision of the statute is complied with and to disregard it is to disregard one of the safeguards which the law-making power of Pennsylvania deemed necessary for the protection of the ballot.

It is contended by counsel for the sitting Member that the requirements of sections 3 and 10 above set forth are merely directory, and a disregard of them does not invalidate the vote cast without compliance with its provisions. But your committee can not agree to this view of the law. The true line of distinction as to whether a statutory provision is mandatory or merely directory in its nature is laid down in Smith on Statutes and other well known authorities.

The report then quotes Smith, Cooley on Constitutional Limitations, and People *v.* Schoemerhorn (19 Barb., 558). There being no Pennsylvania decisions since the adoption of the new constitution the report reviews decisions under the old constitution and then says:

Now, with all due respect for those who differ with us, we submit that there can be no directory provisions in a statute in regard to that which the statute itself forbids being done at all.

"Construction can never abrogate the text; * * * it can never fritter away its obious sense; * * * it can never narrow down its broad limitations; * * * it can never enlarge its natural boundaries." (Story on Constitution, sec. 407.)

"The right rule of construction is to intend the legislature to have meant what they have actually expressed, unless some manifest incongruity would result from doing so, or unless the context clearly shows that such a construction would not be the right one." (Jackson *v.* Lewis, 17 Johnson, 475.)

The result of all the authorities is that all constitutional provisions in statutes defining what the voter himself must do, both as to qualifying himself as an elector and furnishing the quality and quantity of evidence thereof which the law demands, is mandatory, jurisdictional, and in the nature of conditions precedent, while those which merely relate to the conduct of the election officers may or may not be directory according as they may or may not appear to affect results, and according as they may or may not seem to have been regarded by the law-making power as essential and necessary safeguards against

the mischief the statute was intended to prevent. Thus in Morris *v.* Haines (2 N. H., 246), where the statute required State officers to be chosen by a check list, and by delivery of the ballots to the moderator in person; and it was held that the requirement of a check list was mandatory, and the election in the town was void if none was kept. The decision was put upon the ground that the check list was provided as an important guard against indiscriminate and illegal voting, and the votes given by ballot without this protection were therefore as much void as if given viva voce.

The following is the concluding portion of the opinion:

"If, at an election of Representative, the check list be flung aside and votes are indiscriminately crowded into the ballot box without an inspection by the moderator it must be obvious to all observing citizens that every evil which the statute was designed to remedy is likely to happen, and that two prominent provisions of it will be trampled under foot. Votes so given and received are neither given nor received in conformity to the essential requisitions of the statute, and such requisitions being violated the votes must be void. They would be no more void if given viva voce rather than by ballot. If such a neglect of the statute will not render the whole proceedings void, what neglect will have that operation? The whole balloting, therefore, in this manner is vitiated. No Representative can thus be duly elected."

A portion of the minority, in views signed by Messrs. W.A. Field, of Massachusetts, E. Overton, jr., of Pennsylvania, and J.H. Camp, of New York, also agreed that the statute was mandatory:

To the general reasoning of the report of the minority of the committee we assent. We think, however, that the registry law of 1874 is a valid law under the constitution of 1873. We think also that the requirements in that law of affidavits from persons not on the registry list in order to enable them to vote are mandatory, and that the requirements for the return of papers, affidavits, etc., are directory; that as it is made a crime on the part of the election officers to permit a non-registered person to vote without requiring the legal proof of qualifications, the strong presumption is, in the absence of evidence, that such officers have properly performed their duties in that respect.

The general minority views, signed by Messrs. W.H. Calkins, of Indiana, J. Warren Keifer, of Ohio, and J.B. Weaver, of Iowa, contended that the law was directory merely:

We do not believe that the provisions of the constitution relating to the registry of voters is mandatory in so far as it affects the right of a nonregistered voter to vote if he is otherwise qualified. The clause of the constitution in terms excludes any such conclusion. The words "but no elector shall be deprived of the privilege of voting by reason of his name not being registered," found in section 1, article 8, to my mind settles the question. They are plain and admit of but one interpretation, and, applying the acknowledged rule to them that the ordinary import of words shall be taken to be their meaning, leaves no room for doubt.

But the law passed to carry out the section seems to be imperative, and it is a matter of some difficulty to decide whether it is repugnant to that clause which would seem to limit the power of the legislature to disfranchise an elector for nonregistration who is otherwise qualified. Now, we admit that registry laws are salutary and ought to be maintained in all proper cases and by all proper methods, but to maintain them constitutional restrictions must not be disregarded.

The foregoing clause of the constitution is, in our judgment, a limitation on the power of the legislature of the State, and it can not pass a registry law whereby a voter shall be deprived of suffrage, if otherwise qualified, by reason of nonregistration. This, it seems to us, was the very purpose of the clause. If left out, the section would be perfect. It was to prevent the legislature from disfranchising qualified voters that it was inserted.

The new constitution of Pennsylvania was made whilst all the adjudicated cases respecting the old constitution and the laws passed thereunder were in full force and well known to the members composing the constitutional convention. It must be conclusively presumed that it was in the light of these past judicial constructions that the convention acted in framing the new constitution, and in all cases where the provisions of the old were adequate they were ingrafted into the new; but where they had been found to be deficient, and did not meet the will or wish of the people, they were taken down, altered, or amended.

A glance at the constitution of 1838 and its amendments shows that it was silent as to registry laws. Article 3, sections 1, 2, and 3, of the old constitution are among the changed and altered provisions of the new, and it must be presumed that the old constitution, and the judicial constructions given it on the subject of suffrage and elections, were not in harmony with the sentiment of the people of the State. Hence the provisions relating to registration. This is the only material change made. In view of this the act of 1839, section 65 et seq., referred to in the majority report, is not in point and can have no weight in determining the question before us, because the whole power relating to registration under the old constitution resided in the legislature; it was unrestricted by constitutional barriers; if it saw fit, as it did, to make an imperative registration law, there was no limitation on its power under the constitution of 1838. This was held in the case of Patterson *v.* Barlow (60 Penn. St. Rep., 54). This case expressly overrules Page *v.* Allen (58 Penn. St. Rep., 338), holding otherwise.

In the case of Patterson *v.* Barlow, supra, the supreme court of the State held the rule announced by Chief Justice Shaw, of Massachusetts, in the case of Capon *v.* Foster (12 Pick., 485), namely, that an imperative registration law, not forbidden by the constitution, was a reasonable regulation, under which the right to vote might be exercised, and was not therefore an additional test to the qualification of electors. (See Brightly Contested Election Cases, No. 2, p. 51.)

The new constitution expressly fixes and determines the right of all qualified nonregistered voters to vote by saying, "But no elector shall be deprived of the privilege of voting by reason of his name not being registered." We therefore conclude that all provisions of the law set out in the majority report and cited in this, so far as it attempts (if that is held to be its proper construction) to hold the elector responsible for the act or omission of election officers regarding registration, or so far as it restricts his right to vote if he is otherwise qualified, is an additional test of his right to vote, is repugnant to that sacred privilege reserved to each citizen.

The minority then quote Cooley and State *v.* Smith (67 Maine, 328), and conclude that the law was directory merely so far as the voters were concerned. "It is the duty of the election officers to comply with this law," says the views. "It is imperative on them, and if they fail they subject themselves to the penalties provided in section 12 of the registry law." But to allow a nonregistered voter to vote without requiring him to comply with the law, if he is otherwise qualified, is quite a different question. If he refuses to comply on being requested then it is clearly the duty of the officers to refuse his vote, because he refuses to obey a reasonable regulation prescribed by the legislature and he hurts no one but himself. But if he is allowed to vote without being required to file the affidavits, and is otherwise qualified, his vote is not an illegal one."

The minority considered that the Pennsylvania case of Wheelock (1 Norris, 297–299) sustained this view, but the majority denied this.

940. The case of Curtin v. Yocum, continued.

Failure of an election officer to perform a certain duty does not establish the presumption that he has failed as to other duties.

The showing prima facie by contestant of enough illegal votes to change the result does not shift the burden of proof to contestee.

Contestant having prevented the evidence by which contestee sought to answer contestant's charges, the House declined to permit contestant to profit thereby.

(2) The minority thus set forth the next question arising:

The contestant assumes that having shown a discrepancy between the registry lists and the poll lists, and the further fact that affidavits were not on file in the prothonotary's office corresponding to the excess of names on the poll lists, therefore all persons thus voting were prima facie illegal voters. In other words, that it must be presumed the officers of election failed to perform all their duties by the failure to return affidavits of nonregistered voters to the prothonotary's office.

The rule of law is that a public officer is presumed to do his duty the contrary not appearing. Under the law there were several acts required to be done by the officers. The first one was to ascertain whether a person offering to vote was registered; if he was not, to require an affidavit of himself and also of a registered voter to certain facts; to see that it was subscribed and sworn; to take and keep it till the election was over, and then return it to the prothonotary's office with certain other papers. To show that the last act was not performed does not show that the rest were left undone or that proof of failure in this one particular is proof of a failure in all. It doubtless does overcome the presumption as to the particular act, but we doubt whether it can be extended any further. We are not ready to assent to the proposition that because the election officers failed to return the required affidavits to the office of the prothonotary therefore they must be presumed not to have required them at all.

Happily, however, it appears in the testimony submitted that in nearly every instance direct proof was made that the officers did require the affidavits, but that they mistook their duty and, instead of returning them to the prothonotary's office, sealed them up in the ballot boxes with the tickets, and deposited the boxes with the nearest justice of the peace to the polling place, as required by law.

At this point an important and interesting question of evidence presents itself, namely, as to whether the burden of proof shifts from the contestant to the contestee after contestant has shown prima facie a sufficient number of illegal votes thrown which, if cast for contestee, would wipe out his majority

We can not perceive that the well-known rule contended for applies. To illustrate it we admit that in a case where A is sued on a promissory note by B—plea, payment. To support his plea A offers proof that on the day of or a day subsequent to the maturity of the note he paid B a sum of money equal to the amount due. B admits the receipt of the money, but alleges it was paid for another purpose. The burden now shifts to B, and he must show by preponderating evidence that it was applied on some other debt or for some other purpose than the payment of the note.

But the declaration in contestant's notice is that the contestee received a sufficient number of illegal votes to more than counterbalance his returned majority. Proof that tends to show a number of illegal votes cast in excess of the returned majority for the contestee is not of itself evidence that contestee received them. It does not even raise a presumption to that effect; and when contestee is disconnected with such vote—when he has no lot or part in bringing it about and exerts no influence in having it cast—he certainly can not be placed in the position of being compelled to prove a negative in order to maintain his seat. Such a doctrine simply overturns all rules of evidence. We can conceive of cases which might be different, but these cases are not applicable to the one at bar.

(3) Evidence showed that in many precincts the affidavits of the nonregistered voters were placed in the ballot boxes, so that the truth as to how the voters in question cut their ballots might have been ascertained by an inspection of these ballots. But the time during which the ballots were required to be preserved expired during the time allowed contestant for taking testimony and before the time when sitting Member could legally take testimony. But when sitting Member asked the court for an order for the further preservation of the ballots, counsel of contestant appeared and opposed this motion, "and procured the court to deny the prayer thereof," in the words of the minority views. The minority say further:

In the face of these facts, and knowing the necessity of preserving the papers contained in the ballot boxes so that the truth might be ascertained, what excuse can be urged for the contestant in resisting and defeating their preservation? Did not his act compass their destruction? Is he not here asserting the illegality of this vote and asking the House to unseat the sitting Member, when he himself was a party to the destruction of the very evidence which would have settled the question? Does he not stand in the position of the spoliator of documentary evidence asking to take advantage of his own wrong? How can we say the result is left in doubt when the contestant himself contributed largely thereto? We think it safe to stand on the elementary rule that one asking equity must do equity.

The majority dissented from this, implying that the extraordinary diligence of contestant in endeavoring by other evidence to supply the facts met this objection.

941. The case of Curtin v. Yocum, continued.

The House declined to declare the seat vacant because illegal votes, cast at a few precincts, but decisive of the general result, could not be segregated.

Where the nature of illegal votes could not be shown, the House preferred to reject the precinct poll rather than apportion pro rata.

Objections to the pro rata method of purging the polls of unsegregated illegal votes.

(4) The majority, in view of the difficulties of the situation, proposed the following solution:

It is true that the record fails to disclose for whom these persons voted, and if the failure is to be charged to anyone, the contestee is equally at fault with the contestant. They are, therefore, both in such default that neither has the right to claim the seat when it appears that there are illegal votes in the returns unaccounted for which are greater in number than the returned majority of the sitting Member. The people of the district have rights which can not be compromised by any failure, whether avoidable or unavoidable, either of the contestant or the contestee. They have the right to be represented by the person, and no other, who has received a majority of the legal votes of the district.

It having been determined that a large number of persons voted at the election who did not comply with the statute as to the proof of their right to vote, and the number of such ballots cast being largely in excess of both the returned majority of the sitting Member or the revised majority which he claims in his briefs, and the evidence not showing for whom such votes were cast, we must determine upon what rule the polls must be purged of such illegal nonregistered votes. McCrary, in his Treatise on Elections, section 300, page 225, lays down the following rule:

"It would seem, therefore, that in a case where the number of bad votes proven is sufficient to affect the result, and in the absence of any evidence to enable the court to determine for whom they were cast, the court must decide upon one of the three following alternatives, viz:

"1. Declare the election void.

"2. Divide the illegal votes between the candidates in proportion to the whole vote of each.

"3. Deduct the illegal vote from the candidate having the highest vote.

"And it is clear also that where in such a case no great public inconvenience would result from declaring the election void and seeking a decision by an appeal to the electors, that course should be adopted."

It will be seen from all the authorities that where a new election can be held without injury it is the safest and most equitable rule to declare the election void and refer the question again to the people in all cases where there are a greater number of illegal votes proven, but for whom they voted does not appear, than the returned majority of the incumbent. In this case, it appearing that a number of votes many times greater than the official majority of the sitting Member were illegally received, counted, and returned, in violation of the constitution and mandatory statutes of Pennsylvania which were adopted for the purpose of securing the purity of the ballot box and preventing frauds at elections, and the true result of the election by the legal voters of the district has not heretofore been ascertained, and can not, from the nature of the case, be ascertained upon the facts presented in the record, your committee recommend that the election be declared void, in order that the people of the Twentieth Congressional district of Pennsylvania may have an opportunity of again expressing their choice for a Representative in Congress.

The minority views join issue on this view:

Referring to the point that because at certain polls and precincts 1,000 and more illegal votes were polled—being illegal because they were not registered, and no affidavits were filed as required by law—that therefore the vote at all of the other precincts must be set aside, is a doctrine we can not assent to. Admitting for the sake of argument that those votes were illegal, we maintain that the true rule is, where illegal votes have been cast, to purge the poll by first proving for whom they were thrown, and thus preserve the true vote; if by the use of due diligence this can not be done, and the result is still left in doubt, then to throw the poll out entirely. We think this is a safer rule to maintain the purity of the ballot box than the

other one, which apportions the fraud between the parties. This rule ought to be applied in all cases where the fraudulent vote is considerable and permeates the whole poll, and not in cases where it is scattering and inconsiderable. In those cases it may be justly inferred that the result would not be affected by retaining the poll unpurged. The authorities cited by the majority of the committee, and an almost unbroken line of authorities in Pennsylvania, support this view.

During the forty days which the contestant had for taking testimony he could have introduced in evidence every ballot cast at the polls of which complaint is made. He could, by an inspection of the contents of the ballot boxes, have ascertained whether the affidavits had been filed as required by law; by making a comparison between these and the registry lists and the poll list he could have ascertained the exact truth; and as each ballot was numbered, he could have ascertained for whom each illegal vote was cast. He did not do this, but actually aided in the destruction of all these papers, so that the contestee could not show the true state of affairs. He can not, therefore, be said to be within the rule of having used due diligence to purge the polls of illegal votes. He can not bring himself within the McCrary rule of deducting pro rata the illegal vote at each poll, for this would increase the returned majority of contestee by many hundreds. He can not insist on the true rule we have laid down, for that would leave a large majority of polling precincts throughout the Congressional district unchallenged, and would increase the contestee's majority to near 600.

He is therefore driven to the last resort, that of asking that the election be declared void because of the uncertainty of the result, as he claims, in certain specified polling districts. This can not be allowed, according to my view, for the reasons stated.

If the rule contended for by contestant is adopted, we maintain it must be applied to the polling precincts where contestant alleges the fraud occurred. Then each party is left to prove his vote by calling the voters in the rejected precincts. If they do not, they must stand on the vote of the other unchallenged precincts, and can not be heard to complain of their own negligence.

To apply either of these rules, as we have seen, confirms the title of contestee to his seat as a Member.

The majority of the committee presented a resolution declaring the seat vacant; but in the debate the first speaker for the majority side intimated that this solution was proposed when it was thought that the case might be decided in season to have the new election at the time of the local election in February in Pennsylvania. But as this time had passed, and a new election would be inconvenient, it seemed to him that the contestant should be declared elected.[1] The majority members did not generally concur in this idea, however.

The minority reported a resolution confirming the title of sitting Member to the seat.

The report was debated at length on May 8, 10, and 11,[2] and on the latter day the question was taken on substituting for the majority proposition the following proposed by the minority:

That Seth H. Yocum is entitled to retain his seat in the Forty-sixth Congress as a Member from the Twentieth Congressional district of the State of Pennsylvania, and that Andrew G. Curtin is not entitled thereto.

Mr. William M. Springer moved to insert the word "not" after the words "Yocum is," and on that question the yeas were 75, the nays 114.

Then the minority substitute was agreed to, yeas 113, nays 75.

Then the majority proposition as amended was agreed to.

So the minority views prevailed.

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[1] Speech of Mr. F. E. Beltzhoover, of Pennsylvania. Record, pp. 3151, 3152.

[2] Record, pp. 3142, 3179, 3182, 3241–3251; Appendix, p. 156.

942. The New York election case of Duffy v. Mason, in the Forty-sixth Congress.

Illustration of a notice of contest deficient in the particularity of its specifications.

Participating in a subsequent agreement as to evidence the contestee was held to have waived his objections to the sufficiency of notice.

On May 21, 1880,[1] Mr. Walpole G. Colerick, of Indiana, from the Committee on Elections, submitted the report in the case of Duffy *v.* Mason, from New York. Sitting Member had been returned by an official majority of 736 votes.

At the outset a preliminary question arose as to the sufficiency of the notice of contest. The report quotes the notice and discusses it:

NOTICE OF CONTEST.

Hon. JOSEPH MASON,

Hamilton, Madison County, New York.

SIR: Please take notice that I shall, in the manner provided by law and the rules and precedents of the House of Representatives of the United States, contest your election and your certificate of such election as a Member of the Forty-sixth Congress of said United States from the Twenty-fourth Congressional district of the State of New York, on the following grounds, to wit:

First. That you did not receive a majority of the legal votes cast at the election held in said Congressional district on the 5th day of November last, but, on the contrary, that I did receive a majority of such votes.

Second. That your election was effected and procured by force, fraud, intimidation, promises of favor, corruption, the buying of votes and voters, and other corrupt and illegal means used by you and in your behalf; and that your certificate of election as such Member of Congress was and is based upon and the result of such force, fraud, intimidation, promises of favor, the buying of votes, and other corrupt and illegal means used by you and in your behalf.

Third. That your election was procured by illegal votes and illegal voting in your behalf, and by your procurement or the procurement of those interested in your election.

Fourth. That your certificate of election is invalid for the reasons stated in the second specification herein.

Fifth. That I was, on said 5th day of November, 1878, legally elected as such Member instead of yourself, and am entitled in your stead to a seat in said Forty-sixth Congress.

Dated Pulaski, December 23, 1878.

SEBASTIAN DUFFY.

The contestee insists that the grounds of contest are not stated with that precision and certainty required by the statute which authorizes and regulates the procedure in contests of this nature. The objections urged by the contestee are presented in his answer, as follows:

"II. Your notice in writing served upon me December 26, 1878, is insufficient and incomplete under the statute and practice in such case made and provided, in that it does not specify particularly the grounds upon which you rely—that is to say, your charges that my election was procured by force, fraud, intimidation, promises of favor, the buying of votes and voters, and other corrupt and illegal means used by me and in my behalf, and that my election was procured by illegal votes and illegal voting, and by my procurement or the procurement of those interested in my election, and grounds of contest therefor, respectively, do not state who was forced to vote for me, and what fraud contributed to my election, and who was intimidated, or in what manner, place, town, city, or county such intimidation was had, and to whom or in what manner promises of favor were made, and what votes and voters were bought or where and when such votes or voters were so bought, and what other corrupt and illegal means were used by me and in my behalf, and by what illegal votes and illegal voting by my procurement or the procurement of those interested in my election you were prejudiced, and who were so

[1] Second session Forty-sixth Congress, House Report No. 1568; 1 Ellsworth, p. 361.

interested, and in what election district, town, city, or county such persons reside and perpetrated such acts complained of."

The statute provides:

"SEC. 105. Whenever any person intends to contest an election of any Member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice, in writing, to the Member whose seat he designs to contest, of his intention to contest the same, and in such notice shall specify particularly the grounds upon which he relies in the contest." (U.S. Rev. Stat., p. 18.)

McCrary, in his Law of Elections, section 343, referring to this statute, says:

"A good deal of discussion has arisen as to what is to be understood by the words 'specify particularly the grounds on which he relies.' It is evident, however, that these words are not easily defined by any others. They are as plain and clear as any terms which we might employ to explain them. Cases have arisen, and will again arise, giving rise to controversy as to whether a given allegation comes up to the requirement of this statute, and it must be for the House in each case to decide upon the case before it. It may be observed, however, that this statute should receive a reasonable construction, one that will carry out and not defeat its spirit and purpose. And perhaps the rule of construction which will prove safest as a guide in each case is this: A notice which is sufficiently specific to put the sitting Member upon a proper defense and prevent any surprise being practiced upon him is good, but one which fails to do this is bad." (Wright *v.* Fuller, 1 Bartlett, 152.)

"The Houses of Congress when exercising their authority and jurisdiction to decide upon 'the election returns and qualifications' of Members are not bound by the technical rules which govern proceedings in courts of justice. Indeed, the statutes to be found among the acts of Congress regulating the mode of conducting an election contest in the House of Representatives are directory only, and are not and can not be made mandatory under the Constitution. In practice these statutory regulations are often varied and sometimes wholly departed from. They are convenient as rules of practice and of course will be adhered to, unless the House in its discretion shall in a given case determine that the ends of justice require a different course of action. They constitute wholesome rules not to be departed from without cause." (Ibid., sec. 349.)

While it is true that this statute should receive a liberal construction, yet it will not do to permit parties to disregard its provisions. The House, in sanctioning in its violation in cases heretofore determined, has created precedents that are now frequently and pertinently cited to justify similar infractions. This practice, if tolerated, will finally result in the virtual abrogation of the statute. The only safe course to pursue is to require at least a substantial compliance with its provisions. We think that the notice of contest in this case is clearly insufficient. It is too indefinite and uncertain in its allegations. As was said in the case of Bromberg *v.* Haralson (Smith's Digest of Election Cases, p. 355)—

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

But the contestee in this case is justly estopped by his own act and conduct from assailing the sufficiency of the notice of contest, and its defects have been by him waived. The record contains the following agreement:

UNITED STATES OF AMERICA:

In the matter of the contested election of Joseph Mason, Representative-elect to the Forty-sixth Congress from the Twenty-fourth Congressional district, State of New York:

It is hereby stipulated and agreed, by and between Sebastian Duffy and Joseph Mason, contestees, through their respective attorneys, that all affirmative evidence heretofore given or which may hereafter be given be, and remain, in this contest as a part of contestant's case, and that contestee, in consideration of this consent and stipulation on his part, have sufficient time after the expiration of the statutory limit of ninety days in which to give evidence in answer to such new matter so put in

evidence, to the end that simple and exact justice be done to all parties, and that contestant have reasonable time to put in evidence in rebuttal only to such evidence as the contestee may give after said ninety days shall have expired. * * *

Dated April 10, 1879.

S.D. WHITE,

Attorney for Duffy.

JOHN J. LAMOREE,

Attorney for Joseph Mason, Oswego County.

D. N. WELLINGTON,

Attorney of Joseph Mason for Madison County.

That such defects may be waived has been determined by at least two decisions of the House. (See Otero *v.* Gallegos, 1 Bartlett, 178; Bromberberg *v. Haralson*, Smith's Digest of Election Cases, p. 356.)

If these defects had not been waived we would feel fully justified, by reason of the insufficiency of the notice, in dismissing this case or excluding the evidence offered in support of the alleged grounds of contest.

943. The case of Duffy v. Blason, continued.

Evidence of the unsworn declarations of voters as to their intimidation is hearsay and inadmissible.

Rumors that certain employees have been intimidated are not considered in an election contest.

Legal voters may not be disfranchised because members of political committees may have violated the law in assisting said voters to reach the polls.

The committee therefore proceed to investigate the grounds of contest, the following questions being developed:

(1) It was charged that a certain employer of labor had improperly influenced the votes of his employees. All the witnesses except three admitted that they had no personal knowledge of the existence of such a system, and that their only information was derived from rumors.

The committee say:

It is our duty to reject all the evidence that has been offered relative to the existence of the rumors to which we have alluded, as it is clearly incompetent, and we must, for the same reason, discard all evidence relating to voluntary statements made by persons not under oath or witnesses, as all such hearsay evidence is inadmissible.

The rule that we apply in rejecting this evidence is stated in 1 Greenleaf on Evidence, page 115, thus:

"Hearsay evidence is uniformly incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who speak from their own knowledge. That it supposes something better that might be adduced in the particular cases is not the only ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practiced under its cover, all combine to support the rule that hearsay evidence is wholly inadmissible."

None of the evidence excluded by us comes within any of the exceptions to the rule above stated, and this rule has often been applied by the House of Representatives in cases of this character.

The application of this rule results in the rejection of all the evidence introduced by the contestant in support of the first ground of his contest, save that rendered by Daniel Sweeney, Alexander Lemmon, and Hiram Hammond, all of whom were, at different times prior to 1878, employed in the factory, and who claim that they were discharged from their employment by reason of their political sentiments and affiliations.

Daniel Sweeney testifies that in the fall of 1862, eighteen years ago, he was discharged by Kingsford because he refused to vote for Wadsworth, the Republican candidate for governor of the State of

New York; that he had worked in the factory for fourteen years continuously, and it was the only occasion that he was ever spoken to by Kingsford on the subject of voting. (See Record, p. 202.)

Alexander Lemmon testifies that in 1873 or 1874 he was requested by Kingsford "to go to the polls and peddle tickets for him," and that he was discharged from his employment because he was accused of "peddling Democratic tickets with the Republican heads on." (See Record, p. 144.)

Hiram Hammond testifies that in 1876 Kingsford expressed his desire that witness should vote for Hayes for President, which he promised to do, but voted for Tilden, and that in the latter part of December, 1878, at the close of the year's work at the factory, he was discharged from his employment. (See Record, p. 987.) That he had worked at the factory "off and on" for fourteen years, and that the occasion to which he alludes is the only time that Kingsford ever talked to him on the subject of politics (p. 993).

These are the only instances, extending over a period of sixteen years, where it is shown by competent evidence that Kingsford or any other person interfered in any manner with the employees of the factory in the free and unrestrained exercise by them of the elective franchise. There is no evidence in the record that we have discovered showing a single instance of such interference on the part of Kingsford or any other person connected with the management of the factory relating to the election in controversy.

There was also evidence to show that the four were discharged for other than political causes.

The committee say as to the alleged system of improper influence:

If we accept as true the rumors that prevailed as to its existence, still the evidence is incomplete, as it wholly falls to furnish any data by which the number of voters affected by it can be ascertained; and, even excluding the ballots of all the voters then employed at the factory, which are estimated by witnesses at 150 to 200, it would not affect or change the result of the election.

(2) A statute of New York forbade any candidate or other person to promote the election of such candidate by furnishing entertainment to meetings of electors, by paying for the attendance of voters at the polls, or by contributing money for any other purpose intended to promote an election, except for defraying the expenses of printing, etc., or for conveying the sick, poor, or infirm electors to the polls. The report thus discussed the point made by the report in this connection:

The contestant seeks to hold the contestee responsible for the acts of the members of the committees representing the Republican party in the district who violated this statute, and in the absence of any proof showing, or tending to show, that the contestee directed or authorized the expenditure of the money contributed by him for the purposes forbidden by the statute. A principal is not liable for the illegal acts of his agent unless done at his instance or with his knowledge and assent. Good faith and innocence are always presumed. If A intrusts B with money to be used by him for certain lawful purposes, and B, without the knowledge and consent of A, diverts the money from the purposes to which it was to be applied and uses it for immoral and illegal purposes, A can not be held liable for the misconduct of B. That the contestee had the right to contribute and pay to these committees money to be used by them for purposes authorized by the statute is not controverted by the contestant, and in the absence of opposing proof the presumption exists that he did not authorize its expenditure for purposes prohibited by the statute. If the statute was violated, its offenders are by the provisions of the statute subject to punishment. Under the rigid, illiberal, and unreasonable construction placed upon this statute by the contestant it is even unlawful for a candidate or his friends to rent a hall for a political meeting, procure music, or employ a, speaker to discuss the political issues, because it may tend to promote the election of the candidate; and if such a meeting is held, in disregard of this statute, the legal voters who attended it are subject to punishment therefor by the forfeiture of their votes, regardless of the result that may have been produced by the charms of the music or the eloquence of the speaker; or if a legal voter, who is too indifferent or indolent to attend the election, is conveyed to the polls in a carriage provided for that purpose by the committee of the party of which he is a member, it affords sufficient cause for challenging his vote to show that he was neither "sick,

poor, or infirm," and that he was able to walk or pay for his ride to the polls. To so construe the statute is absurd. If the person who attends such meeting or is so conveyed to the polls is a legal voter, his vote must be received and counted. We can not punish legal voters by disfranchising them because members of political committees have possibly violated the statute, as construed by the contestant. The evidence wholly fails to show that the money was used to corrupt or improperly influence the voters. The supreme court of New York, in the case of Hurley *v.* Van Wagner, 28 Barb., 109 (1858), in construing this statute, said:

"A person who pays money for his board, or railroad or steamboat fare, while going to or from a political meeting, or who pays for the use of a room for such meetings, or for the lights or attendance thereat, in one sense contributes money to promote the election of a particular ticket or candidate. But is it a contribution of money in the sense intended by the act? Did the legislature intend to prohibit and punish as a misdemeanor every expenditure of money which might indirectly promote or be intended to promote the election of particular candidates? Public meetings, large assemblies of the people, constant and almost universal intercommunication, one with another, and journeys from one part of the country to another, are the usual and customary means by which the election of particular candidates is made, and they necessarily involve the expenditure of large sums of money which may be said to be contributed. Is this the evil that the act was designed to suppress? If it was, it may be safely said to have utterly failed of its object, for during the twenty-nine years it has been upon the statute book hardly one attempt has been made to enforce it; and the evil practice, if it be one, has gone on and gained additional strength with each additional year. I infer, therefore, that these are not the contributions in money forbidden by the act. If the payment of a sum of money for the use of a room in which to hold a public meeting for political objects, or for the lights used thereat, or for the attendance of a person to prepare such room and keep it in proper order, is a contribution of money to promote an election within the meaning of the statute, so is the money a man may expend upon himself in the payment of tavern bills and the expenses of transportation, in going to and returning from such meetings, equally a contribution of money to promote an election; because all such expenditures tend to the same result, and the money is disbursed for the same object, and that is to aid in the election of a particular candidate or ticket. It is not possible to discriminate between them, so that to adopt the construction claimed is to impute to those who framed the law the most absurd intentions, or to give it an effect which they could not have contemplated."

Even if the law justified us in excluding the ballots of those voters who were conveyed to the polls, although neither "sick, poor, and infirm," yet we would be unable from the evidence to compute their number or determine for whom they voted; nor could we ascertain from the evidence whether the orators, under pay, who addressed public meetings in rented halls, converted lukewarm Democrats or indifferent Republicans into "stalwarts," and, if so, what ones, or how many.

944. The case of Duffy v. Mason, continued.

In absence of evidence to te him, a returned Member is presumed innocent as to acts of agents of his party.

Improper acts by a candidate's friends without his participation are of effect only so far as they are shown to have actually affected the result.

Discussion of the qualification as to residence of students who voted in the college town.

(3) Contestant charged that votes were bought in the interest of sitting Member; but the evidence on this point consisted mainly of proof as to the existence of rumors. One witness named Hollingsworth did state to different persons, as appeared from the evidence, that he received money for voting for sitting Member. But the committee say that even conceding Hollingsworth's statement to be true, it did not affect the contestee, as the evidence failed to connect him in any manner with the transaction.' "A candidate can not and ought not," says the report, "to be held responsible for all the imprudent and censurable acts of indiscreet friends, who, in the zealous advocacy of his election, resort to improper means of securing that

result without his knowledge, and which he, if consulted, would condemn, unless the voters affected by such means are sufficient in number to change or render uncertain the result of the election."

(4) The contestant insisted that certain students at Madison University voted illegally at Hamilton. The report cites and discusses the constitution of New York on this point:

"SECTION 3, ARTICLE 2. For the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of the State or of the United States, or of the high seas, nor while a student of any seminary of learning, nor while kept in any almshouse or other asylum at public expense; nor while confined in any public prison."

Prior to the election in controversy a case was tried before Judge Wallace, of the United States district court, at Syracuse, N.Y., wherein a student at St. Bonaventure College, at Allegany, Cattaraugus County, New York, was indicted for illegal voting. Judge Wallace, in referring to the provisions of the constitution above cited, said:

"Of course, the defendant was not a resident of both Orleans County and Cattaraugus County; he could reside in one county only for the purpose of exercising the right of suffrage. It appears indisputably that until September, 1875, he was a resident of Orleans County, and was a legal voter there. Now, the presumption of the law is that he continued to be a resident of that county, in the absence of evidence to the contrary, and the whole case may therefore be determined by ascertaining whether or not he acquired a new residence in Cattaraugus County—whether the evidence adduced overcomes the legal presumption to which I have referred. And it is at this point that the bearing and effect of the constitutional provision found in section 3 of article 2 of the constitution of this State becomes important. The language there employed is: 'For the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while a student of any seminary of learning.' By force of this language it is clear that defendant neither lost his residence in Orleans County nor gained a residence in Cattaraugus County merely because of his appearance in the latter place as a student at the college. Now, I do not pretend to instruct you that this constitutional provision precludes a student from acquiring a residence at the place where he is attending college, but the fact must be established by evidence other than that which is afforded by this sojourn in the place as a college student. A change of residence may be effected by a change of location with the intent to make that location a new home, as distinct from an intent to return when some temporary purpose is accomplished. But a change of residence is not effected by intention alone, nor by change of location alone. Both must occur. And the intent must be evinced by consistent acts which denote an abandonment of the former residence and the selection of a new home. You may find here that defendant never intended to return to Orleans County as his home, from his declarations and his conduct, but you must also find, before you can decide that he can acquire a new residence, that he intended to make Cattaraugus County his future home, and evinced that intent by corroborative acts. It therefore follows, if the evidence does not disclose any circumstances which distinguish his case from that of the ordinary one of a college student, intent upon prosecuting his studies, but who has left the paternal roof to mark out his own future for himself, it fails to meet the requirements of the law for the acquisition of a new residence, and the main question in the case will turn upon your conclusion upon the subordinate one. In conclusion, it is appropriate to remind you that, although the defendant may have conscientiously believed he had acquired a residence in Cattaraugus County, and was exercising a lawful right in voting there, his violation of the law is not thereby purged of the criminal intent which is the essential element of every crime. Every citizen is presumed and required to know the law." (See Record, p. —.)

The evidence in this case shows that it has been customary for many years for the committees of the different political parties in Madison County to secure the attendance of these students of Madison University at the polls as voters. (See Record, p. 714.) Some years as high as 75 students or more of the university voted at the village of Hamilton (Record, p. 710), while the number who voted at the election in dispute was 14. One of the witnesses, Edward D. Van Slyck, testifies that the reduction in number at the election in controversy was due to Judge Wallace's opinion, above set forth, "which

was taken as the guide and became the decisive ground upon which they claimed their right to vote," and that the contestee advised the students "that no one should vote unless he was perfectly satisfied that he was a legal voter, and advised them to keep strictly within Wallace's opinion." (See Record, p. 710.)

The report continues to the effect that although the burden of proving that these students whose votes had been received were not legal voters was on the contestant' he had introduced no testimony tending to establish that fact. After the election several of the students were arrested and arraigned before C. M. Dennison, United States Commissioner. He discharged them. The evidence convinced him that each had absolutely and entirely severed his connection with his former home, and had gone to Hamilton with the intention of making that his only home and residence, at least while in attendance at the university, and had so remained there the time required by law to become a voter. The commissioner thereupon gave the opinion:

In my opinion there could be no question but that each of these young men would have been a legal voter at Hamilton had he gone there in the manner in which he did and performed the same acts which he did, were it not for the fact that they came within the classes of persons enumerated in article 2, section 3, of the constitution of this State, and that the determination of these cases turns wholly upon the meaning of that section. It is claimed by the prosecution that this section of the constitution is prohibitory, and that no person can possibly gain a residence while a student of any seminary of learning. I can not concur in this doctrine. This section of the amended constitution is the same as in the constitution of 1840, and, substantially, in my opinion, a simple enunciation of the common law, and meant rather as a protection than as a prohibition, and is not intended to prevent any class of persons from changing their place of residence and gaining a new voting residence, but rather to protect persons who shall leave their actual permanent residence with an intention of going temporarily in some of the occupations or callings in said section enumerated, and at the completion of said purpose to return to their actual residence, and being thereby disfranchised during such absence. In my opinion this section of the constitution is not intended to disfranchise any citizen of the State of New York, but rather to protect every citizen of the State in the full exercise of the right of elective franchise. It is further claimed by the prosecution that these cases are parallel and at all fours with the case of "The United States against McCarthy," decided by Judge Wallace January, 1878. The defendants in these cases had the opinion of Judge Wallace in that case and examined the same carefully and took legal advice thereon before offering to vote, and upon such examination and advice concluded that their cases did not come within that decision, and that there was nothing contained therein which would prevent their voting, and they all voted after challenge and took the oaths required by law. These defendants are all candidates for the ministry, and, in my judgment, acted conscientiously and with great care, and, as I construe the law, were entirely correct in their conclusion that they were legal voters of the place where they voted. It is ordered that each of the defendants be, and they are, discharged." (See Record, pp. 1170, 1171.)

The committee concluded that the evidence was wholly insufficient to authorize them to determine that the students in question were illegal voters.

As a result of their conclusions the committee reported resolutions confirming the title of sitting Member to the seat.

The House, without debate, agreed to the resolutions.[1]

945. The Minnesota election case of Donnelly v. Washburn, in the Forty-sixth Congress.

A committee being unable to reach a decision, this fact was reported, with accompanying minority views.

[1] Record, p. 3636.

Discussion of the degree and kind of evidence necessary to prove bribery in an election case.

On June 16, 1880,[1] the results of the investigation into the Minnesota contested election case of Donnelly *v.* Washburn were presented to the House from the Committee on Elections. The committee did not come to a conclusive result. Ten of the fifteen members supported a resolution declaring that Ignatius Donnelly, the contestant, was not entitled to the seat; but a resolution declaring William A Washburn, the sitting Member, entitled to the seat had the support of only seven out of the fifteen members.

No report was made from the committee; but two sections of the committee were authorized to present views.

Mr. Van H. Manning, of Mississippi, presented views in favor of seating the contestant. These views were signed also by Messrs. S. L. Sawyer, of Missouri, R. F. Armfield, of North Carolina, F. E. Beltzhoover, of Pennsylvania, and W. G. Colerick, of Indiana, while it was announced that Mr. E. C. Phister, of Kentucky, concurred in a portion of the propositions set forth in the views.

Mr. J. Warren Keifer, of Ohio, presented views sustaining the proposition that sitting Member was entitled to the seat, and these views were signed also by Messrs. E. Overton, jr., of Pennsylvania, W. H. Calkins, of Indiana, John H. Camp, of New York, and W. A. Field, of Massachusetts.

The case was not acted on, Mr. Washburn retaining the seat through the Congress.

The discussion in the two "views" involved not only a large number of questions of fact, but also the discussion of several important law questions.

(1) Contestant charged widespread and extensive bribery. The evidence of this consisted of testimony like the following:

Charles Berens, a Democrat, the postmaster of the village of North Prairie, Morrison County (situated about 100 miles from Minneapolis), testifies (p. 300, printed testimony) that prior to the election of November 5, 1978, he wrote and mailed a letter directly to the sitting Member, Washburn, in which he said that he would give his support at the election to him, Washburn, for $50. This letter evidently reached the sitting Member, for Berens testifies that he received a letter in reply to it from Keith, the postmaster at Minneapolis, a political friend of the sitting Member, in which Keith said "he was glad that Berens would work that way." He, Keith, further stated that he would give Berens's letter to J. V. Brower, one of the Republican United States land officers at St. Cloud, and that Brower would attend to the matter. J. V. Brower testifies (p. 246):

"Charles Berens wrote a letter to Minneapolis demanding $50 for which he was to support General Washburn [the sitting Member]. The letter was sent to me by some one in connection with the campaign; I can't say whether by the committee or by General Washburn or by some one for them."

Brower admits the receipt of $50 from Washburn or his committee, and may have got more. Berens (p. 300) and Brower (p. 246) both agree that Brower visited North Prairie, Morrison County, and called on Berens. Berens says: "Brower said I should work for Washburn and he would see me all right." He says Brower did not pay him any money because he, Brower, did not trust him—he thought he was supporting Donnelly. Brower testifies:

"I advised General Washburn [the sitting Member] or some one for him, after I had been advised that no arrangements of that character could be entered into [that is, the purchase of Berens's support for $50], or words to that effect, that he should not enter into such arrangements with Charles Berens, or anyone else."

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[1] Second session Forty-sixth Congress, House Report No. 1791; 1 Ellsworth, p. 439; Journal, p. 1516; Record, p. 4621.

Here it is clearly established that there was a negotiation between a Democratic voter and Mr. Washburn, the sitting Member; the one to sell his vote (for his vote is implied in his "support") for $50 and the other to buy it. The letter is answered for Washburn by Keith, his friend; the proposition is accepted with thanks, and the letter is delivered to a Federal official, who goes, with the letter and with Washburn's money, or the money of Washburn's committee, in his pocket, to see the party and consummate the transaction. The offense of bribery was complete when one party offered to sell his vote and the other agreed to buy it. (See Russell on Crimes vol. 1, p. 159; Hardinge *v.* Stokes, I M. & W., 233.) Brower reports to Washburn, or some one for him, that the "arrangement" could not be entered into.

There is no denial of this testimony and no attempt to impeach Berens or Brower.

Certain wood choppers voted practically unanimously for sitting Member, and it was alleged that they were bribed by one of their employers, who was also paymaster of a railroad controlled by sitting Member. The views favorable to contestant say:

The testimony of George C. Morton (p. 125), John Mulvey (p. 120), Arthur. T. White (p. 305), and E. P. Webster (p. 297) shows that these 80 or 90 wood choppers were urged and requested by Webster and White, the wood contractors, to vote for Washburn; they were told that if they voted for Washburn they would be paid (p. 125) from $1.65 to $2.20 each for their votes; they did vote, and they voted for Washburn, and they were so paid; and they refused to vote at all unless they were paid (p. 297). The total sum paid by Webster and White to these men for their votes was $160 or $170 (p. 307). It further appears, by the admission of Webster, that the contractors expected to be repaid this money (p. 297) so paid out for these votes.

It also appears (see p. 121) that in addition to the 80 or 90 wood choppers so bribed to vote for Wasburn, the contractors Webster and White gave two trappers their board for a week on condition that they would vote for Washburn; and they did so vote.

George C. Morton testifies (p. 126) that White told him in the presence of Webster that they, Webster and White, were to get $200 for their services at the election in behalf of Washburn. The money paid out by them for votes was repaid to White, one of the firm (see p. 127), by Main Hale, of Minneapolis, the business manager of the contestee, Washburn, eight days after the election, by a check for $182; and the check was cashed for White by one George B. Webster, the paymaster of the Minneapolis and St. Louis Railroad Company, of which the contestee, Washburn, was and is president. White admits (p. 307) that he was repaid the sum of $168 or $172, being the money so paid for these 80 or 90 votes, by said George B. Webster, paymaster of contestee's railroad company. There was no connection between the St. Paul and Pacific Railroad, for which the wood was cut, and the Minneapolis and St. Louis Railroad, of which contestee is president.

There was also the case of one Shagren, who testified that he was given money in sitting Member's office to vote and work for sitting Member. The money was given by the business manager of sitting Member, and in the presence of sitting Member's brother.

Also Bernard Cloutier, whose experiences are thus described:

Cloutier went to Washburn's office, and there met Charles W. Johnson and Doctor Keith (the postmaster at Minneapolis, and the same party who thanked Charles Berens for his offer to sell his support to Washburn for $50). Johnson wanted Cloutier to go out and electioneer for Washburn. Cloutier said he would do so if he was paid for his time and expenses. Thereupon Johnson told him to start out. The next day Johnson met Cloutier at the post-office and paid him $30. The following Wednesday Cloutier met Johnson again at Washburn's office. "I told him I wanted some more money. He asked me how much I wanted, and I told him I wanted $20. He [Mr. Johnson] went into the next room and commenced talking with Mr. Washburn, the sitting Member. He came back and handed me $20."

The witness, Cloutier, states in his cross-examination that he was in favor of Mr. Washburn in the first place; but it appears by his examination in chief that he had made up his mind to take no part in the election, because he had been previously promised bribes which were not paid; and thereupon he

was paid $50 to convert him from that position of neutrality and indifference into a warm supporter of the sitting Member. In other words, the payment of that sum of money secured to Mr. Washburn a support and influence which he would not have had without it.

The views favorable to the contestant also give a ŕesuḿe of much other testimony tending to show bribery, the voter sometimes acknowledging that he received money, and sometimes others testifying that they had heard him make such acknowledgment, and conclude that bribery is proven.

The views favorable to sitting Member deny that the testimony shows what it is claimed to show, and thus speak of it:

It will be found by an examination of the record that there is very little, if any, testimony which would be received or considered in any court of justice in this or any other civilized country. The testimony may be, generally, denominated hearsay. In so far as it relates to the question of bribery or illegal voting, very little of it rises even to the dignity of hearsay when scrutinized. It is understood that certain members of the committee, in order to arrive at the conclusion reached by them, have considered all, or very nearly all, of such incompetent testimony found in the record. With the single exception that in the case of a voter who has voted for the sitting Member, declarations of the voter are inadmissible. There are authorities, though they even are doubted, to the effect that the declarations of a voter, though hearsay evidence, are competent to prove his want of qualification to vote. It is seldom, if ever, proper to regard hearsay statements as competent evidence. Regarding the testimony as affecting the voter, and no other person, his statement as to his qualification to vote may be taken as an admission against him. The ordinary rules of evidence apply as well to election contests as to other cases. (See McCrary's American Law of Elections, see. 306.) We do not think it necessary to cite many authorities in support of this proposition.

There follow citations from Cushing (see. 210) and the Congressional cases of White *v.* Harris, Ingersoll *v.* Naylor; New Jersey case, Reid *v.* Julien. The views favorable to sitting Member then continue:

It is proper to observe that much of the hearsay evidence relied upon consists only of conclusions drawn from conversations held after the election, which are always unreliable, and, as a general rule, even though the testimony would otherwise be competent, are regarded as very dangerous, if at all admissible, in a court of justice. Of this latter class of testimony, a learned judge has said:

"No class of testimony, perhaps, is more unreliable, and a more frequent cause of error in courts of justice, than the narration of conversations, real or pretended. The meaning and intention of a person in a conversation often depend much upon gesture, attitude, mode of expression, or peculiar attending circumstances, known, perhaps, to but few present. A conversation may not be fully heard by the witness, imperfectly recollected, or inaccurately repeated, when the omission or addition of a single word, or the substitution of the language of the witness, under color of bias or excitement, for the words actually used, might change the sense of an entire conversation. This is apparent from the irreconcilable contradictions daily manifested in the narration of the same conversations from the mouths of different witnesses. The liability to error in this kind of testimony would be greatly increased by allowing witnesses to add their own conclusions, or understandings, from the conversation related, or their inferences as to the understanding of the parties to the conversation. Such latitude would break down an important barrier which protects judicial investigation from error and falsehood. The understanding or inferences of witnesses are very frequently formed from bias, inclination, or interest. And a witness's understanding or inference from a conversation or transaction rests entirely in his own mind, and his consciousness of falsehood would be incapable of proof, so that there could be no possibility of convicting a witness of perjury on the ground of such evidence." (Judge Bartley, 3d Ohio St., p. 412.)

It may be further noted that the charge of bribery, like that of fraud, must be proved and not presurned. This is a universal rule of law when it is sought to convict a party of a crime. There is a difference of opinion among members of the committee as to what rule should prevail in a contested election case in proving the crime of bribery. Some members of the committee maintain that it should be proved, as in criminal cases, "beyond a reasonable doubt." Others are satisfied with the rule which requires the testimony to be "clear, satisfactory, and convincing," but all should agree that so serious an offense as bribery should be proved and not presumed.

The views favorable to contestant say:

It must not be forgotten that bribery is a secret crime; both the parties to it are equally interested in keeping it secret; and when detected, both are ready to give ingenious explanations of it. If they have acknowledged to third parties the receipt of the bribe, they are ready to declare, when called to the witness stand, that they were in favor of the bribe giver before the money was offered, or that they voted for his opponent, or that the money was paid by some one else, some nameless party, for some other purpose. Under these circumstances, when it is shown that in an election over 300 cases of bribery and attempted bribery are proven, the presumption is not violent that for every case that was, by accident or the indiscretion of the parties, brought to the light, there were others that were never revealed.

946. The election case of Donnelly v. Washburn, continued.

Should participation of returned Member in bribery unseat him, although the bribed votes be not enough to change the result? '

Argument that bribery on the part of a returned Member does not constitute a disqualification justifying his exclusion.

May a returned Member, already sworn but found disqualified, be excluded by majority vote?

Discussion of English and American election law as related to bribery.

Distinction between qualifications and returns and election as related to jurisdiction of the Committee on Elections.

(2) As to the effect of the bribery alleged, the views favorable to contestant take the following position:

It is a clearly established principle of law, both in England and the United States, that bribery committed by the sitting Member, or "by any agent of the sitting Member, with or without the knowledge or direction of his principal, renders the election void." (See Felton *v.* Easthorpe, Rogers's Law and Practice of Elections, 221.)

"In England bribery is an offense of so heinous a character and so utterly subversive of the freedom of elections, that, when proved to have been committed, though in one instance only and though a majority of unbribed voters remain, the election will be absolutely void." (Cushing's Par. Law, p. 70, sec. 189; St. Ives, Douglass, 11, 389; Coventry, Peckwell, 1, 97; Maine on Elections, 345.)

"Freedom of election is violated by external violence, by which the electors are constrained, or by bribery by which their will is corrupted; and in all cases where the electors are prevented in either of these ways from the free exercise of their rights the election will be void without reference to the number of votes affected thereby." (Cushing's Par. Law, p. 68, sec. 181.)

The same doctrine was affirmed by the House of Representatives in the recent case of Platt *v.* Goode, Second Congressional district, Virginia. (See Contested Elections, 1871–1876, p. 650.)

The report, adopted by the House, declares:

"The bribed votes should not be counted. The record furnishes no method for their elimination. Their acceptance can only be avoided by applying the rule of law, so well known and of such general adoption that it need scarcely be repeated here, that when illegal and fraudulent votes have been proven and the poll can not be purged with reasonable certainty, the whole vote must be rejected."

But your committee do not think it necessary to rest the decision of this case upon this principle of law, although they believe that the evidence shows conclusively not only that bribery was committed in a multitude of instances, but that a great number of these cases were traced home to the sitting Member. They are of the opinion that the evidence shows that the contestant had a majority of the legal votes cast and returned.

The views favorable to sitting Member thus discuss the question:

As it is not claimed, even by the contestant, that enough bribed votes were cast to change the result of the election in the district unless all numbered ballots (2,282) cast for contestee are rejected because they were numbered, and unless the entire vote (538) cast for him in Isanti County and the total vote (832) given for him in Polk and Kittson counties are thrown out on account of alleged defective returns,

it would seem to be unnecessary to go into the question of bribery, save for the purpose of vindicating the sitting Member.

As it is very clear, and it will be admitted that the polls can be purged of all the alleged bribed votes or the entire vote of certain voting precincts wherein the alleged bribery occurred can be thrown out without affecting Mr. Washburn's majority, the rule contended for and quoted by the author of the majority report of the committee (p. 16), taken from the minority report in Platt *v.* Goode (Con. Elec. Cases, 1871–1876, p. 650), would still give Mr. Washburn his seat.

The English cases cited from Cushing's Parliamentary Law (p. 70, sec. 189, and p. 68, sec. 181) do not go to the extent, as we apprehend, of holding that the whole election in a district where there are several voting places is void because of the bribery at one of those places of an insufficient number of votes to affect the result, but they do go to the extent of holding that an election in a particular voting place may be declared void.

The rule undoubtedly is in this country that where bribery, fraud, or intimidation is so interwoven with the vote of any voting precinct that it can not be eliminated from the aggregate vote cast with certainty, the whole vote of the precinct may, and perhaps should, be rejected. The unassailed votes in other voting places would, however, still stand. Fraud or bribery does not vitiate what it does not impregnate.

If bribery were proved (as it is not) and brought home to the contestee, we should not draw any fine legal distinctions to save him his seat.

The American cases cited in contestant's brief (Abbott *v.* Frost, Con. Elec., 1871–1876, p. 594, and Platt *v.* Goode, supra) are all to the effect that before a Member can be unseated by reason of his own bribery of voters it must appear that his majority was obtained by such means.

To find that a candidate received an untainted majority of the votes cast, and on that find that he was not elected for the reason that other votes were rejected on account of bribery or other cause, would be a bold absurdity. In a contested election case in either branch of the Congress of the United States the sole question is one of fact in the light of the law, viz, Who of the parties to the case was elected, if either? The question in no possible case can involve the fitness of the sitting Member to hold his seat. In England, where there is no written constitution on the subject of expelling a member, it may be found that the practice has grown up of inquiring into the whole conduct of a Member in the course of a contestation, and if he is found unworthy, or rather ineligible, to hold his seat from any good cause, he may be unseated or kept out of a seat, notwithstanding he may have received a clear majority of the honest votes cast in the election. This under some circumstances would only be another mode of expulsion.

Our Constitution provides the mode, and it is the only one pointed out, for purging the House of a Member who, for crime or other cause, is unfit or unworthy to hold his seat. The Constitution provides that the House may "with the concurrence of two-thirds expel a Member." (Con., Art. I, sec. 5, par. 2.)

Bribery or other crime committed by a Member, and which did not affect or influence the result of his election, could in no sense be construed to render his election void. Such has been the holding in several of the States. (3 Watts & Serg., 338; Brightly's Elec. Cases, 134; McCrary on Elec., sec. 229.) Cushing, in his work on elections, questions the application of the English rule in this country in relation to the effect of bribery by the candidate or his agent in an election on the right or power to declare an election void (sec. 190). An examination of the English rule as stated by Cushing in his work on elections will make it clear that the principle the Parliament proceeds on in declaring an election void is not that the sitting member was not duly elected, but that by his evil conduct he has rendered himself unworthy of being elected and of holding a seat in the British Parliament. The election of a member under such circumstances is declared void as a punishment to the member and as a mode of condemning evil practices, and also to preserve the purity and freedom of elections in that country generally. (Cush., p. 70, secs. 189, 190, 191.)

Most, if not all, of the English cases put the rule on the ground that bribery works a disqualification of the Member to be elected to and to occupy a seat in the body to which he was elected. The basis of the English rule which allows in a contested-election case arising over the election of a member of the House of Commons a finding, where it is proved that the person actually receiving the highest number of votes was guilty by himself or his agent of bribing only a portion of his majority, that he was not elected, must be kept in view to enable a clear distinction to be drawn between the rule which obtains in England and the true rule in the American Congress.

At common law bribery at elections of members of Parliament was a crime. (Rex *v.* Pitt, 3 Burrows, 1335, etc.; 1 Russell on Crimes, 155.) The punishment at common law for such bribery was found inadequate, and hence the passage of the statute known as "the treating act," of 7 W. III, chap. 4 (1695), which provided that if any candidate, after the issuing of the writ for an election, should give or promise any money or entertainment to any elector he should be incapable to serve for that place in Parliament—that is, upon that election. The punishment provided by this act was fixed to remedy the defects of the common law, which, while it punished bribery, etc., in elections, provided no disqualification to hold an office, and such had been the holding of courts and legislative bodies.

It appears from good authority—Jacobs (author of the Law Dictionary), who, after citing statutes, 2 Geo. II, c. 24 (1731); 9 Geo. II, c. 38; and 16 Geo. III, c. 11, which attached some penalties to election bribery in the shape of fines, says: "But these statutes do not create any incapacity of sitting in the House. That depends solely upon the treating act above mentioned," referring to the act of 7 W. III, c. 4. (See Jacobs's Law Dictionary, title Parliament, VI (B3), vol. 5, p. 76, ed. 1813; see Russell on Crimes, 155, 159*a*, ed. 1845.)

The act of 5 and 6 Vict., c. 102, extends the treating act of W. III, and makes it include the acts of the agents of the candidate as well as of himself, and makes such acts, whether of himself or of his agents, "directly or indirectly," sufficient to disqualify. The agent is a well-known and recognized element in British Parliamentary elections of which we know nothing in this country. The candidate selects him in that country, and hence there is no hardship in holding the principal responsible for his acts; otherwise all amenability for criminal conduct at elections there would be avoided.

There are other English statutes upon the subject of treating, etc., at elections, and making candidates responsible for the action of their agents as well as their own acts, which must be kept in mind in reading Rogers, Douglas, and other English authorities whose comments are upon cases, governed by these statutes, which are not authority for us.

That bribery by a candidate for an elective office (in the absence of a statute making it a disqualification) does not disqualify to hold the office at the common law was held by the Court of Queen's Bench in Regina *v.* Thwaits, 18 Eng. Law and Eq. Reports, 219, 221, in a proceeding in the nature of a quo warranto to try the title to an office, where acts were shown which were by the court held to amount to bribery, but which did not affect votes enough to change the majority, and the respondent was therefore held entitled to retain his seat as a member of a municipal council.

The same doctrine is held in Pennsylvania as to a sheriff, in Com. *v.* Shaver (3 Watts and Sergeant, p. 338).

The English rule laid down by Cushing in his excellent work, without giving either the origin or reason of the rule, is calculated to mislead persons in this country.

It is quite demonstrable that the rule owes its existence to disqualifying statutes of England, and can have no application to questions arising in the Congress of the United States under our present Constitution and laws.

In the Galway election case (2 English Reports (Moak's ed.), pp. 711, 723), where it was argued that bribery, treating, and undue influence were not disqualifications at the common law, and that the act of 17 and 18 Victoria, chapter 102, repealed all the earlier acts making them a disqualification, and itself only made these acts a disqualification by the thirty-sixth section, "after they had been found guilty of the acts by an election committee," the court, taking a different view, gave the opinion, not that the common law made these acts a disqualification, but that, to quote from the opinion of the judge announcing the decision of the court—

"The true construction of the statute itself is that the commission of any of these offenses ipso facto disqualifies the candidate from being elected, or annihilates his status as a candidate."

The theory of the English cases is that a candidate is for the particular election in which the candidate or his authorized agent violates the disqualifying statutes ineligible to an election. No such rule obtains under the Constitution and laws of the United States as to Representatives in Congress.

An examination of all the cases cited in Rogers, Douglas, and other English authorities where a member of Parliament has been unseated for bribery, treating, etc., by himself or his agents, where the votes thus affected were less in number than his majority, will show that in every case the decision rests upon special English statutes, with which we have nothing to do.

Bribery in procuring an office is made a disqualification for holding the office by the constitutions of the States of Massachusetts, New Hampshire, Vermont, Rhode Island, Maryland, Missouri, Arkansas, Texas, California, and Florida.

Bribed votes should undoubtedly be rejected, but unless they are numerous enough to change the majority the candidate receiving the majority should be declared elected. (See 3 Arch. Cr. Pro., 470[4]–570[10].)

It is said that in some of the States in this country where bribery in elections is made by constitutional provision a disqualification to hold an office, and bribery is proved against the candidate receiving the highest vote, the election should be declared void, even though the bribery did not affect the result. (Cush., secs. 190, 191.)

In some of the States it is held that prior conviction of the disqualifying crime is necessary before such a rule can be applied by a legislative assembly. It is not admitted that either the organic act of a State or its legislature can prescribe disqualifications of any kind for a Member of the House of Representatives of the United States, but it may be proper to state here that the constitution of Minnesota (sec. 15, art. 4) gives full power to the legislature of that State to render ineligible to hold office any person guilty of crime, and that legislature has not made bribery of voters a disqualification to hold office, but it has only made it a misdemeanor, punishable by fine and imprisonment in the county jail (Stat. Minn. 1878, p. 5, sec. 66.)

It may be observed that under no provision of the Constitution of the United States does crime committed by a Member in his election disqualify him from taking and holding his seat.

The reason for the English rule wholly fails in the case of a Member of the House of Representatives.

Justice Johnson, of the Supreme Court of the United States, in an early case, in speaking of distinctions between American and English legislative bodies, said:

"American legislative bodies have never possessed or pretended to the omnipotence which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under the specious appearance of merited resentment." (6 Wheaton, 231.)

No case has been found in this country where any such rule (in the absence of an express constitutional provision) as is claimed to exist in England has obtained in the House of Representatives of the United States, or in any of the States of this Union, but there are a number of cases, as already appears, where the rule is entirely disregarded.

McCrary in his excellent work on American Law of Elections does not refer to or recognize any such rule, but all through his work it is taken for granted that no such rule has ever had any application to a contest in the House of Representatives of the United States.

It is true the Constitution of the United States makes "each House the judge of the elections, returns, and qualifications of its own Members." (Art. I, sec. 5.)

In judging of the election of a Member, the House deals alone with the question of the number of votes the Member received, and if it appears that he has a majority of the votes cast, excluding all illegal and void votes cast, and a full and fair election has been held by which such majority has been obtained, or at least the majority would not have been affected by any unfairness or improper practices in the election, then the conclusion is irresistible that such Member has been duly elected.

In judging of the returns of its Members, the House deals with the formal returns, at least preliminarily, on which a Member is expected to be admitted to a seat in the first instance.

In judging of the qualifications of a Member, neither the question of election nor returns is involved. The qualifications of a Member of the House of Representatives are fixed by the Constitution of the United States, as follows:

"No person shall be a Representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen." (Art. I, sec. 2.)

Of these prescribed qualifications the House is the exclusive and final judge.

If before a person has been sworn in and taken his seat the House were to decide that he did not possess the constitutional qualifications, he could not be admitted to a seat. Even if sworn in as a Member it would probably not require an expulsion to vacate his seat if the House were to adjudge him without requisite constitutional qualifications entitled to hold a seat.

The power to expel a Member is given to meet cases of Members admitted to seats who would, under the Constitution, be qualified to sit, but for other than constitutional causes would be disqualified or unworthy to be a Member of the legislative body in the judgment of two-thirds of the House. (Art. I, sec. 5.)

The Committee on Elections, under the rules of the House, have only jurisdiction to consider such petitions, etc., touching elections and returns as shall come into question. Such has been the rule of the House since November 13, 1789.

We here quote the rule adopted at that date with a slight amendment of date of November 13, 1794:

"It shall be the duty of the Committee on Elections to examine and report upon the certificates of election, or other credentials, of the Members returned to serve in this House, and to take into their consideration all such petitions and other matters touching elections and returns as shall or may be presented or come into question and be referred to them by the House." (Con. Manūal] and Digest (Smith), Rule 75.)

Under the above rule this case was referred to the Committee on Elections.

It will be observed that under it the committee is given no power to consider questions of disqualifications of a Member to hold his seat where it appears that he has been duly elected.

The new rule of the House, adopted March 2, 1880, relating to the powers of the Committee on Elections, is as follows:

"All proposed legislation shall be referred to the committees named in the preceding rule, viz: Subjects relating (1) to the election of Members; to the Committee on Elections." (Rule XI.)

By neither the old nor the new rules, it will be seen, has the Committee on Elections any power except such as relates to the election of Members.

The conclusion is irresistible that the committee has no right to report against a sitting Member who, as in this case, two-thirds of the committee find in effect was duly elected.

947. The election case of Donnellyv. Washburn, continued.

Does a numbering of the ballots by election officers who know it to be illegal justify rejection of the poll for intimidation?

Decision that the word "ballot" means secrecy of the vote.

Argument that right of a State to regulate time, place, and manner is derived from the Federal and not the State constitution.

Argument that intimidation should be shown from testimony of persons affected thereby and not from favoring conditions.

(3) Contestant alleged intimidation whereby many voters who would not otherwise have done so were caused to cast their votes for sitting Member.

The views favorable to the contestant describe the method:

In seven precincts of Minneapolis the judges of election placed a number on the back of each ballot to correspond with the number of the voter on the poll list. Let us consider the purpose of this numbering of the ballots.

At the session of the legislature of Minnesota in January and February, 1878, a special law had been enacted, providing that in cities containing more than 12,000 inhabitants the ballots should be numbered. This law applied, and was intended to apply, only to the cities of St. Paul and Minneapolis, where the workingmen were very numerous, and where alone the required population existed. It was felt by many that this provision of law was oppressive and unconstitutional, and at the spring election in St. Paul, held immediately after the law was passed, a party offered to vote without having his ballot numbered; he was refused, and he brought an action at once in the district court of Ramsey County, in which St. Paul is situated, to test the validity of the act. The court decided (see Brisbin *v.* Cleary et al., printed testimony, p. 74) that the act was unconstitutional, inasmuch as the constitution of Minnesota, section 6, Article VII, provides that "all elections shall be by ballot;" that the ballot implies secrecy, and that this law requires every man "to vote, in effect, a ticket with his name indorsed on it;" and in case of a contest the ballots are to be made public. "This law," says the court, "furnishes the means of ascertaining exactly how every elector voted; that is its acknowledged purpose."

This decision of the district court of Ramsey County was the unanimous decision of a full bench of three judges; it was appealed to the supreme court, and was affirmed by the supreme court subsequently to the election. (See Northwestern Reporter, vol. 1, p. 75, foot p. 825, Brisbin *v.* Cleary et al.,

being an appeal from the district court of Ramsey County, in the same case referred to above.) The supreme court sustain the decision of the district court of Ramsey County, and say:

"The statutory provision with regard to the numbering of tickets, above quoted, clearly interferes with and violates the voter's constitutional privilege of secrecy. It is therefore an unconstitutional provision. The voter can not be required to submit to its application the ticket offered by him. * * * The defendant's demurrer was properly overruled, and the order overruling the same is accordingly affirmed."

This decision was made subsequently to the election in controversy, but it is not retroactive in its effect upon this case.

It declares that the word "ballot" means secrecy and absence of every external mark whereby the elector who has cast the same can be identified. A ticket identified by placing the voter's name, or a number indicative of his name upon it, is not a "ballot" in the sense of the constitution, and has therefore no right to be placed in the ballot box. When the court decided that such identified tickets were not "ballots," it certainly follows that they are not entitled to be counted as "ballots."

The views also allege that the numbering was done for a corrupt and fraudulent purpose. The election judges in the two cities of St. Paul and Minneapolis decided not to number the ballots, but in the precincts in question the judges reversed the decision. Of the twenty-one judges in these seven precincts only one was a friend of contestant. The views continue:

If the numbering of the ballots had been the result of an innocent mistake on the part of the judges of these seven precincts; if they had been ignorant of the decision of the district court of Ramsey County declaring such numbering unconstitutional; if there was no evidence to show fraud or intimidation, we should not be in favor of casting out the votes of these precincts simply for the reason that the ballots had been numbered. This was the view taken by the election committee in the case of McKenzie *v.* Braxton, seventh district Virginia (Contested Elections, 1871–1876, p. 20). The committee (McCreary, chairman), says:

"Although it would be possible, from the numbering of the ballots, to ascertain how each person voted, it is not claimed in this case that this was done, or that the tickets were voted for any such purpose, or for any improper or unlawful purpose whatever".

The question of intent therefore is the true question at issue, and all the circumstances in the case under consideration point to a corrupt intent:

1. A cloud of bribery surrounds the vote of the whole city, which the contestee has made no effort to dissipate.

2. There is evidence showing a widespread conspiracy among the employers of labor to corrupt and, where they could not corrupt, to intimidate their workmen.

3. The testimony shows that the workmen were intimidated, and that they believed that they would lose their means of subsistence if they voted against Washburn.

4. The judges of election knew that the numbering of the ballots had been declared unconstitutional by a court of record second only to the supreme court in dignity, by the attorney-general of the State, by the city attorney of St. Paul, and by the county attorney of Ramsey County, and even by the attorney who had defended the constitutionality of the law in the district court had advised judges of election not to number the ballots.

5. They had been told by their own law officer, whose opinion they had requested, that it would be unconstitutional to number the ballots, inasmuch as it violated the secrecy of the ballot.

6. They knew that the supporters of Mr. Donnelly believed that the numbering of the ballots would prevent a free and fair election, and would result in the intimidation of the workmen.

7. They had deliberately voted by a large majority not to number the ballots.

There can be but one explanation of the intent with which they reversed this deliberate action. It was done to prevent a fair election and to give the employers of workingmen an opportunity to still further intimidate them by preserving a record of how the men voted whose means of life depended upon the good will of those who employed them. The workingmen well knew that the ballot boxes could be opened at any time in any real or pretended contest and the character of their votes revealed.

The views favorable to contestant proceed to quote statistics to show that this numbering of the ballots actually effected a loss to him, and conclude by citing with comment the following:

"In William *v.* Stein (38 Ind. Rep., p. 90) the court held that numbering of the votes cast violates the secrecy of the ballot as much as if the law had required the voters to vote viva voce, and McCrary (American Law of Elections, sec. 446) says: 'Votes must be cast in the manner provided by law. Under a statute requiring that the manner of voting shall be by ballot, votes given viva voce can not be counted."

"Upon an elaborate review of the authorities the conclusion is reached, upon what seems to be good ground, that in this country the ballot implies absolute and inviolable secrecy, and that this doctrine is founded in the highest considerations of public policy; that the term 'ballot' implies secrecy, and that this mode of voting was adopted mainly to enable each voter to keep secret his vote is clear." (McCrary on Elections, sec. 413, p. 112, and authorities there cited; Cooley, Constitutional Limitations, pp. 506, 507, and 604.)

"The chief reason for the general adoption of the ballot in this country is that it affords to the voter the mean of preserving the secrecy of his vote. And this enables him to vote independently and freely, without being subject to be overawed, intimidated, or in any manner controlled by others, or to any ill will or persecution on account of his vote. The secret ballot is justly regarded as an important and valuable safeguard for the protection of the voter, and particularly of the humble citizen against the influence which wealth and station may be supposed to exercise. * * * All devices by which the secrecy of the ballot is destroyed by means of colored paper used for ballots, or by other similar means, are exceedingly reprehensible, and whether expressly prohibited by statute or not should be discountenanced by all good citizens." (McCrary on Elections, see. 194; People *v.* Pease, 27 N.Y., pp. 45 and 81.)

We have therefore reached the conclusion that the votes cast in the seven precincts where the ballots were numbered should be deducted, not alone because they were so numbered, but because such numbering was corruptly done, with an intent to intimidate the workingmen residing in those precincts, and because it was part of a general conspiracy of the friends and supporters of Mr. Washburn to prevent a free and untrammeled expression of the preferences of the voters.

The minority, favorable to sitting Member, antagonized the above conclusions:

Your committee need not, for the purposes of this case, turn aside to consider whether this law is unconstitutional or not, and it may be regarded, so far as the election of State, county, and municipal officers in the State of Minnesota are concerned, as unconstitutional. But we hold, first, that in so far as this law related to the judges of the election in the election of a Member of the House of Representatives of the United States it was constitutional; and, second, whether it is to be regarded as constitutional or not constitutional, the numbering of the ballots affords no reason, in the light of the law and the precedents, for rejecting the vote as cast. The legislature of a State does not acquire its right or power to make a law regulating the manner of holding elections for Representatives in Congress from the constitution of the State, but this right and power is derived exclusively from the Constitution of the United States. Section 4, Article I, of the Constitution of the United States is as follows:

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

This provision of the Constitution of the United States has been under consideration in a very recent case in the Supreme Court of the United States (exparte Seibold).

An examination of the opinions delivered by Judges Bradley and Field, the former for the majority of the court and the latter for the two dissenting judges, will show that on the question of the derivation of the power of the legislature to make laws regulating the manner of holding elections for members of Congress, all the judges agree that the legislature obtains its power from, and solely from, the provision of the Constitution just quoted. The State legislature is not responsible to the State, nor controlled by the State constitution, in its action in regard to the manner of holding Federal elections. In case of a conflict between the act of a legislature and the constitution of the State in matters purely of a Federal character the act of the legislature will prevail, provided it is not in conflict with the Constitution of the United States. This point was distinctly decided in the contested election case of Baldwin *v.* Trowbridge (Contested Election Cases in Congress, 1865 to 1871, p. 46).

The syllabus of that case reads as follows:

"Where there is a conflict of authority between the constitution and legislature of a State in regard to fixing the place of elections, the power of the legislature is paramount."

The case arose over the constitutionality of an act of the legislature of the State of Michigan, passed February 5, 1864, which undertook to give to Michigan soldiers, while in the service of the United States during the late war, the right to vote at all elections authorized by law, whether at the time of voting they were within the limits of the State of Michigan or not. The constitution of the State of Michigan in express terms required the electors to reside in the State three months and in the township or ward in which they offered to vote ten days next preceding such election. The act of the legislature was declared by the Michigan courts unconstitutional, and yet Mr. Trowbridge, the sitting Member in that case, was allowed to retain his seat, although be was elected by the the vote of soldiers who were absent from the State, and who voted in accordance with the act named.

The views further contend that although numbered the votes should be counted, citing McCrary (see. 312) and the cases of Giddings *v.* Clark, McKenzie *v.* Braxton, and Finley *v.* Bisbee. The views further say:

There is not an iota of testimony in the whole record which it can be pretended tends to show that one of the electors in such precincts was influenced by reason of the ballots being numbered. The industry of contestant would have discovered some such evidence if the fact existed. The testimony does show that one eccentric or cowardly man, a lawyer (Robinson), refused at the polls to vote because the judges proposed to number the ballot (pp. 135, 137–138). This man disclosed the fact that he was a sort of Democrat, and that he did not want any person to know for whom he voted. The conclusion from his testimony is irresistible that he wanted to maintain his standing as a Democrat and at the time vote for Mr. Washburn, and that by this means Mr. Washburn lost the vote of one cowardly lawyer.

All of the alleged testimony in the record on the subject of intimidation, if, indeed, any of it could be called competent testimony, is so utterly shadowy that it does not deserve a critical review here.

We should, in the consideration of the charge of intimidation, keep in mind the salutary rule of law, repeatedly affirmed by the House of Representatives, that where it is alleged that a large number of persons have been deterred from voting by violence or intimidation, the testimony of those persons should be produced, or at least some of them. The opinions and impressions of others are not sufficient (McCrary's Election Laws, 430–441; Norris v. Handley, 42d Cong.).

The rule of law universally recognized where elections are held by the people is, that those who may have voted, and yet did not when they could have done so, are bound by the result (McCrary's Election Laws, secs. 445–448; 10 Minn., 107).

The attempt on the part of members of the committee to work out some sort of demonstration from a comparison of the votes cast on different years in the city of Minneapolis is exceedingly farfetched, and hardly deserves notice.

948. The election case of Donnelly v. Washburn, continued.

As to the validity of a supplemental return proven by the election officers and not by the best evidence, i. e., the ballots themselves.

Discussion of the validity of a return made by a canvassing board irregularly organized.

Was an official acting without authority of law on a canvassing board an intruder or a de facto officer?

If the contestant shows a return illegal, does the burden fall on contestee to prove the vote when contestant has not attacked it in his notice?

(4) A question as to supplemental returns:

Through an error of the secretary of the State of Minnesota, in not furnishing the proper blanks to the election officers, there were a number of instances where the votes polled for candidates for Congress were not returned and counted by the county canvassing boards (p. 320). The omission to make full returns occurred in Minneapolis, and in Steam, Morrison, and Douglas counties. The contestee does

not dispute the right of the contestant to count the votes cast in the counties of Stearns and Morrison, in each of which counties the contestant received a majority. Nor do we understand that any serious objection can be made to counting the vote in Leaf Valley precinct, in Douglas County (p. 270), where the contestant claims, to have received all the votes.

Supplemental returns were made on the 12th day of November, 1878, by the election officers of the precincts in the city of Minneapolis, where they had omitted to make the returns for Member of Congress immediately after the election. These precincts were first precinct, First Ward; second precinct, Second Ward; and third precinct, Fourth Ward. The majority for Washburn in these precincts was 714 (pp. 348, 349). We see no valid objection to these supplemental returns. They were made by the proper officers and within the time required by law to canvass and make returns. The supplemental returns from the three precincts of Minneapolis were duly canvassed by the county canvassing board (pp. 348–351); but it is hardly necessary to waste time in considering the validity of these supplemental returns. They were put in evidence by the contestant (pp. 58–63). The testimony clearly and unmistakably, independent of the supplemental returns, shows the vote as cast for Member of Congress in these precincts. It must be observed that all the witnesses who testified on the subject of the vote in these precincts agree that the vote for Member of Congress was duly canvassed, though not returned.

Asa R. Camp, one of the judges of the election of the second precinct of the Second Ward in the city of Minneapolis, testifies to the vote cast for Congress in that wad (p. 322). And he testifies also that the supplemental return, as made, is true in all respects (p. 323).

Isaac McNair, one of the judges of the election in the same precinct and ward, testifies that the vote was canvassed by the judges of election for Member of Congress; and he also gives the vote from recollection and memorandum, as it appears by the supplemental return (pp. 323, 324).

Thomas F. Andrews, another one of the judges in the same precinct, swears to the same state of facts (pp. 325, 326).

John M. Williams, one of the clerks of election of the second precinct of the Second Ward, testifies to the same facts stated by the judges of election (pp. 326, 327).

Charles Thielen, a judge of the election of the first precinct of the First Ward of the city of Minneapolis, testifies to the canvass of the votes in that precinct and to the correctness of the supplemental return (pp. 327, 328).

Other election officers proved the vote in the same way. The views favorable to sitting Member say:

Some complaint is made that the contestee did not have the ballots counted in the ballot boxes, and offer proof of the result of such count in this contest; and certain members of the committee think this would have been the best and highest evidence of how the vote stood. The contestee has given the vote as cast in these three precincts, as found by the officers who held the election, on an actual count of the ballots made by them as soon as the polls closed. It is hard to conceive how it is possible for a new count of the ballots by unauthorized persons long after the election would constitute higher evidence of the true state of the vote in these precincts than we have already given. It would be exactly the same character of evidence, but given by persons not authorized under the law to make the count.

The views favorable to contestant say:

It is very clear that the election officers of the precincts had performed their duties on the night of the election; had dissolved, and were functus officio, and had no right to make any such supplemental returns. Mr. Washburn claimed majorities in each of these precincts, and he therefore undertook to prove the votes cast aliunde. In strictness of law it was his duty to have proved the votes cast by the best evidence, to wit, by counting the ballots in the ballot boxes; and he took some preliminary steps to that end, issuing a subpoena duces tecum, to the officers who had charge of the ballot boxes to appear at a time named, in order that the ballots might be counted; but * * * for some reason he refused to count the ballots.

(5) A question as to the legality of the canvassing board.

The views favorable to contestant said:

The statutes of Minnesota (see. 19, p. 58, revision of 1866) provide that the county canvassing board of each county shall consist of the county auditor and two justices of the peace, to be by him selected.

In the case of Isanti County the canvass was made, the votes counted, and the return made by the county auditor, one justice of the peace, and the judge of probate of the county. (See p. 69, printed testimony.) It is true that subdivision 3, section 1, title 1, chapter 3, volume 1, Bissell's Statutes of Minnesota, provides that "words purporting to give a joint authority to three or more public officers or other persons shall, be construed as giving such authority to a majority of such persons or officers." If the county auditor had selected two justices of the peace and one had failed to attend, then the majority present might, under this law, have gone on and acted; but in the case of Isanti County the county auditor did not select two justices of the peace as the law required. The board of canvassers therefore was never constituted as required by law, and never having had a legal existence, there could be neither majority nor minority of it.

In the contested-election case of Howard *v.* Cooper, of Michigan, Thirty-sixth Congress (see Contested Elections, 1864–65, p. 282), the Committee on Elections say:

"Your committee have rejected the vote of the township of Van Buren. The law requires that the board of inspectors shall be constituted of three persons in number. The proof is clear that there were but two. And as there w no board of inspectors known to the law, your committee see no way by which any legal effect can be given to the returned vote. They have therefore deducted it."

In this case it was shown that there was a statute of the State of Michigan precisely the same as that just quoted from Minnesota, giving a majority of a board the power to act for the whole board; but the committee did not consider that it was sufficient to permit them to receive and count the return.

But if we will suppose that the board of county canvassers of Isanti County had been duly constituted as required by law, and that a majority had the power to act for the whole board, nevertheless the return could not be received, for it appears upon its face that a third party, not a member of the board, a stranger not qualified to act, an usurper without color of authority, intruded himself into the deliberations of the board and acted as one of them, and in all cases where the county auditor and the justice of the peace differed in opinion he gave the casting vote, and thus decided the action of the board. The statutes of Minnesota show that a judge of probate has none of the functions of a justice of the peace, and the constitution of the State (sec. 7, Art. VI) provides that a probate court "shall have no other jurisdiction except the estates of deceased persons and persons under guardianship." There is no testimony to show that this judge of probate was at the same time a justice of the peace, and if he had been, his exercise of the office of justice of the peace would have been incompatible with the spirit of the constitution of the State.

The views go on to cite the cases of Jackson *v.* Wayne, Easton *v.* Scott, and Sloan *v.* Rawls. The views further cite the English case of The King *v.* The Corporation of Bedford Level (6 East., 368) to show that the principle of the de facto officer does not apply in this case, and the views say:

Here the judge of probate did not claim to be a justice of the peace; he did not exercise the duties of the office under color of law; he did not exercise them at all; he distinctly claimed that he was a judge of probate and nothing else. It has never been pretended, in any court in the world, that when A B asserts himself to be the incumbent of one office a presumption of law arises that he holds another, an entirely different and (as in this case) an incompatible office.

A party claiming to be a judge of an election precinct, or a sheriff, or a judge may deceive and mislead innocent third parties to their damage; and hence the law wisely says that he who deals with such officers shall not be required to go back and inquire into every particular of their title. But in this case there is no pretense that anyone was or could have been misled by the declaration of the judge of probate that he was the judge of probate.

The views further say:

Neither is this a collateral proceeding between third parties. The validity of the return itself and the right of the judge of probate to act are the very questions in issue. The canvassing board of Isanti County was part of the machinery by which the votes cast for Member of Congress in that district is to be brought to the knowledge of the House of Representatives, "the sole judge of the election returns of its Members."

The views further show that in the Congressional cases already cited the boards impeached were only precinct boards. The case was therefore much stronger in the case of a county canvassing board. The case of Delano *v.* Morgan is further cited. The views then conclude:

It became the duty of the sitting Member to prove by a counting of the votes in the ballot boxes that the votes were actually cast as claimed by him and by proper testimony that they were duly counted by the precinct officers. As he has failed to do this, the presumption of law is that he was unable to do it. There was no obligation upon the part of the contestant to prove or disprove votes that had no existence before the committee in any legal return, while Mr. Washburn well knew that the fact of any such vote being cast in the county was denied by contestant and that the burden of proof was on him to prove it. The committee has no way to ascertain the votes cast except by the official return, and, where this is manifestly void, by testimony showing what the vote really was.

The views favorable to sitting Member antagonize this position:

There is nothing in the evidence offered by the contestant tending to show that the vote of this county was not cast as returned, was not counted as returned, or was not canvassed as returned, except what appears on pages 68 and 69 of the record. There it is made to appear that there was a complete abstract of the vote made as cast in the several election districts of the county, and duly certified to by the auditor of the county and district, whose certificate is attested by one A. B. O'Dell, who designates himself judge of probate, and Jonas Burch, who signs himself as justice of the peace. Had O'Dell signed and attested the auditor's certificate as justice of the peace there would have been no objection to counting this vote. This is a mere irregularity, which does not vitiate the returns; and if it did, the vote is not to be rejected unless the contestant shows it to be illegal. (McCrary's Election Laws, sec. 302, and cases there cited.)

The statute of Minnesota (Bissel's Revision, vol. 1, p. 172, sec. 28) provides:

"The county auditor and two justices of the peace of his county, by him selected, constitute the county canvassing board, and on or before the tenth day after the election said board shall proceed to open and publicly canvass the several returns made to the auditor's office."

Section 40 of the same Revision of the Statutes (p. 176) is as follows:

"The abstracts of the votes for Members of Congress and electors of President and Vice President shall be made on one sheet, and, being certified and signed in the same manner as in case of abstracts of votes for county officers, shall be deposited in the said county auditors office, and a copy thereof, certified as aforesaid, shall be inclosed, directed to the secretary of state, and indorsed on the outside of the envelope with these words: 'Abstract of votes for (naming the officers) returned to the auditors office of (inserting the name of the county) county,' and the said auditor's signature; and the said auditor shall forward the same to the secretary of state within eleven days after such election."

The statutes of Minnesota require nothing of the county canvassing board but to compile the returns made to the auditor of the county, and the auditor to certify to the same. The justices of the peace selected by the auditor to constitute with him the county canvassing board are not required to do anything more toward certifying to the truth of the abstract than to attest the signatures of the auditor. The statutes of Minnesota provide a form for the abstract and for the certificate, and in that form the two justices of the peace sign their names under the word "attest" to the left of the signature of the auditor. (See Bissells Statutes, p. 174; also Young's Minnesota Statutes, 1878, p. 46.) The real purpose of selecting justices of the peace as a part of the county canvassing board and to assist the auditor of the county is doubtless that they shall be present to prevent the auditor in making up the abstract of votes, if so disposed, from committing any fraud. The board has no authority either to accept or reject any returns made to the county auditors, in their estimate of the votes, for any informality in holding an election or making returns thereof. The following is the law of the State on this subject:

"No election returns shall be refused by any auditor for the reason that the same are returned, or delivered to him, in any other than the manner directed herein; nor shall the canvassing board of the county refuse to include any returns in their estimate of the vote for any informality in holding any election, or in making any returns thereof, but all returns shall be received and the votes canvassed by such canvassing board and included in the abstracts; provided there is a substantial compliance with the provisions of this chapter." (Sec. 37, Bissel's Statutes, p. 175.)

For an authoritative construction of this section see 18 Minn., 351.

The views further say that it nowhere appears that the man who signed himself as judge of probate was not in fact a justice of the peace, and continue:

The most that can be said for this certificate to the abstract of the vote is that it is informal, and this the statute of Minnesota, in express terms, provides shall not be a good ground for setting it aside. We quote from the section of the statute which prescribes the form of an abstract of votes for county canvassers:

"The following is the form of the abstract of votes provided for herein to be used by all county canvassing boards, but no election shall be set aside for the want of form in the abstracts, provided they contain the substance." (Sec. 33, Bissel's Statutes, p. 173.)

See also form of abstract and certificate, Young's Minn. Stat., 1878, page 46.

This single item of evidence against counting the vote of Isanti County is that the auditor's certificate has not been duly attested. It can not be said that the abstract of the vote was not canvassed by the proper officers and in accordance with the law of the State. But if it even appeared that but one justice of the peace acted with the county auditor in making up the abstract and canvassing the vote of the county there would be no legal objection to it under the laws of that State. Subdivision 3, section 1, title 1, chapter 3, Bissel's Statutes, page 118, reads as follows:

"Words purporting to give a joint authority to three or more public officers, or other persons, shall be construed as giving such authority to a majority of such officers or persons."

We do not think it is even important to rely upon this excellent provision of the statute of Minnesota. But if there should be any doubt about it, the general principle of this statute makes it clear. It has frequently been held, in the absence of such a statute as we have just quoted, that where a certificate is by law required to be made by a board of officers composed of three or more persons, it is sufficient for a majority of such board to join in such certificate. (See McCrary's Law of Elections, sec. 158, where the subject is discussed; also Niblack *v.* Walls, Forty-second Congress, where it was held that if less than a majority sign the certificate is not good.) In the case of Niblack *v.* Walls the committee say:

"The committee are of the opinion that where the law requires the certificate to be made by three officers, a majority at least must sign to make the certificate valid."

Much stress is laid upon the fact that one of the attesting witnesses to the certificate of the abstract of votes was a mere intruder. While it may be true that where an intruder into a board, which had a duty to perform requiring some judicial action, and it appeared that such intruder participated in the determinations of such board, and was allowed a voice in the deliberations of the board, would render the acts of such board invalid, yet, as in this case, where the alleged intruder is not shown to have performed any duty, or attempted to perform any duty, other than to sign his name in the place of a justice of the peace, as a mere witness to the certificate of an officer, attached to an abstract of votes not shown to have been illegal or improperly made, it is hard to conceive how such signature could invalidate the acts of the other officers, who had legal authority to act.

The case of Delano *v.* Morgan (2 Bartlett, p. 171) is said to be in point, and to sustain the claim of the contestant that this certificate to the abstract of votes is not good, and that the whole vote should be thrown out. There is no possible analogy between the two cases.

The views then discuss the cases of Delano *v.* Morgan and Howard *v.* Cooper, and then say:

It has already been made to appear that the notice of contestant does not directly attack the vote of this county. If, in the notice, the contestant intended to charge that the vote was not cast, it was his duty to offer proof in support of the charge. The record is silent. If he, by his notice, intended to Claim that the vote was not counted, he should have proved that claim. If, by his notice, he intended to allege that the votes of the several voting districts of the county were not returned by the county canvassing board, it was his duty to have offered proof of that. If, by his notice, he intended to deny that the vote of this county was not canvassed, on him rests the burden of proof of that. He contents himself by simply claiming that there is a failure to have a suitable number of duly authorized persons sign the certificate to the abstract by way of attesting it.

The defect in the returns from Morrison County, where the county auditor wholly fails to sign the certificate, and only one justice of the peace signs it, is not regarded by the committee (pp. 284, 304).

Before leaving this subject it may be proper to go further into the question of the duties of canvassing officers. Such duties, under the statute as it exists in the State of Minnesota, are purely ministerial. The canvassing board has only the right to cast up the votes as they appear from the returns of the officers of the different precincts of the county. They have no judicial power. In the case of the State *v.* Stearns (44 Missouri, p. 223) the court, after holding the duties of such canvassing board to be purely ministerial, say:

"When a ministerial officer leaves his proper sphere and attempts to exercise judicial functions, he is exceeding the limits of the law and guilty of usurpation. To permit a mere ministerial officer arbitrarily to reject returns at his mere caprice or pleasure is to infringe or destroy the rights of parties without notice or opportunity to be heard; a thing which the law abhors and prohibits."

McCrary, in his work on Elections (sec. 82), says:

"The true rule is this: They must receive and count the votes as shown by the returns, and they can not go behind the returns for any purpose, and this necessarily implies that if a paper is presented as a return and there is a question as to whether it is a return or not they must decide that question from what appears upon the face of the paper itself. Thus in New York it has been held that the duties of the canvassers were "to attend at the proper office and calculate and ascertain the whole number of votes given at any election and certify the same to be a true canvass." This is not a judicial act, but merely ministerial. They have no power to controvert the votes of electors.

In a case in 22 Barbour (p. 77), the following language is used:

"They (the canvassers) are not at liberty to receive the vote of anyone outside of the returns themselves; their duty consists in the simple matter of arithmetic."

McCrary also says that the doctrine that canvassing boards and return judges are ministerial officers, possessing no discretionary or judicial power, is settled in nearly or quite all of the States of the Union.

It has been directly settled by decisions in the State of Minnesota. (2 Minn., p. 180; 10 Minn., p. 107; 18 Minn., p. 351.)

See McCrary's Law of Elections, sections 81, 82, 83, 84, and 85.

Even though the return must be set aside the election must stand unless the party who attacks it shows fraud or other illegality in the election. (McCrary's Election Laws, secs. 306 and 364–369.)

It is hard to conceive how a mere ministerial board of officers can be rendered illegal and all its acts declared to be void simply because one person does not sign himself as an attesting witness to a certificate annexed to an abstract by such designation as to show affirmatively that he was a proper officer to do so.

The views further contend:

We do not admit, but deny that the burden was at all under the notice of contestant thrown upon the contestee to prove the vote of Isanti County. The contestee has, however, himself made the proof. As already appears, the notice of contestant does not attack the fact that the vote was cast. He simply undertakes to allege that it was not cast, etc., as provided by law, leaving the fact of its being cast to remain unchallenged. The contestant, moreover, directly admits in his brief, in effect, that the vote was cast as returned and counted. While he says the burden rested upon the contestee to prove this fact, and that the contestee declined to do so, he does say, quoting his exact language, "Had he done so the contestant was prepared to show the grossest irregularities in the conduct of the election in said county." He thus admits that the vote was cast, but seems to think that when contestee offered proof of the fact, which he himself has already proved (as well as the contestee), that it would open the door for him to offer proof of the grossest irregularities in the conduct of the election in that county, notwithstanding the fact that there is not a word in his notice of contest which indicated any kind of irregularities in the election in that county, but he failed to do so. This county gave to the contestee, Mr. Washburn, a majority of 401, nearly 200 in excess of the majority which certain members of the committee find was the majority of the contestant after rejecting all the votes as indicated in its views. It is thus made to appear that on what could not be dignified as a technicality of the law it is proposed to unseat the sitting Member and to seat a man who was not, as is admitted by himself in his printed argument, elected.

It should be noted, in conclusion, on this point, that the law makes it the duty of the committee or the House to send for and tabulate the original precinct returns if the true vote can not be ascertained from the return. (McCrary, etc., sec. 345.)

(6) A question arose as to certain unorganized counties, but it involved only a construction of the law of Minnesota.

In accordance with the above discussions one party in the committee found a majority of 230 for Donnelly, the contestant; the other party found that at most the majority of sitting Member could not be reduced below 2,232.

949. The Massachusetts, election case of Boynton v. Loring, in the Forty-sixth Congress.

A notice of contest being defective, but objections thereto not being pressed, the committee examined the case.

A voter having cast a ballot he would not otherwise have voted in order to free himself from a prosecution, the vote was rejected.

In absence of evidence for whom a man voted or that he was improperly influenced, the House declined to reject the vote because of a suspicious remark of the voter.

On December 20, 1880,[1] Mr. William H. Calkins, of Indiana, from the Committee on Elections, submitted the report in the Massachusetts contest of Boynton *v.* Loring. Eleven members of the committee concurred in the result, while one member dissented. Mr. J. B. Weaver, of Iowa, filed minority views.

At the outset a preliminary question arose as to the specifications in the notice of contest, the committee stating that had the objections alleged against the notice of contest been pressed before the committee they would undoubtedly have been sustained. As it is, the committee content themselves with reaffirming the view taken in the recent case of Duffy *v.* Mason.

As to the merits of the case, several questions of fact were examined; and also a few questions of law were discussed, as follows:

(1) As to a vote given under duress, the report says:

> As to the vote of Sheedy MacNamara, he probably voted under the idea that he would be able to enlist the active support of certain prominent citizens of the town in his behalf in getting him discharged from a prosecution for the violation of some of the laws of Massachusetts then pending against him. If his testimony is to be considered of sufficient weight to establish anything, it would seem to show that he applied to one or more of the select men for their influence in getting the prosecution dismissed, and offered for this influence to vote a certain ticket. Giving this testimony due weight, if it shows anything it shows simply that he voted a ticket that he would not have voted had he been free from the charge thus hanging over him. We do not think we could count his vote for the contestant, but would rather throw it out entirely as being tainted and not a perfectly free ballot.
>
> It is claimed that some man as he voted said, "Here's a vote for Sheedy." It is also claimed that Sheedy MacNamara influenced certain of his friends, this being one of them, to vote the ticket upon which the name of the contestee was printed, under the idea that by so doing Sheedy was to escape prosecution, and that therefore the vote of the man who shouted at the time he voted "Here's a vote for Sheedy" should be counted for the contestant. In this view of the case we can not agree. The evidence is entirely insufficient to establish the fact that the man voted, or if he did vote, for whom he voted, or that he was improperly influenced to vote as he did.

Mr. Weaver, in his minority views, deducts not only the vote of MacNamara, but also of his brother-in-law, who, as he voted, said: "Here is a vote for Sheedy."

[1] Third session Forty-sixth Congress, House Report No. 18; 1 Ellsworth, p. 346.

950. The case of Boynton v. Loring, continued.

Persons not possessing the constitutional qualification of electors may not complain of a technical illegality by which registration officers keep their names off the lists.

The presumption that sworn officers did their duty must obtain unless it is clearly shown that erasures from the ballot were made by them.

(2) Among the qualifications of voters was one that the voter should be able to read and write in the English language; and the registry law of 1874 was designed to more effectually carry out this provision of the constitution. The majority thus set forth a point developed in this connection:

We have nothing to do with the policy of the law, but simply to enforce that which the people of Massachusetts enacted into statutes for their guidance. It is strenuously urged that persons whose names had been upon the registry lists previous to the general election of 1878, and had been recognized as voters, and had voted at several preceding elections, could not be subjected to the test of being required to read and write in the presence of the registration officers as a condition to being registered. We can not agree to this construction of the law relative to the duties of the registration officers. We think that it is a reasonable regulation that the officers in charge of registration should see to it that persons offering to vote possess the necessary qualifications; and we can not see that, because persons not qualified to vote have been allowed to violate the law on one or more occasions, they can be heard to plead such violation as a bar to the enforcement of the law against them thereafter. Whenever the disqualification of voters appears, it is clearly the duty of the registration officers to refuse to register them. If the registration officers refuse in an illegal way to register this class of persons or give a wrong reason for their refusal, still this would give such persons no right to vote while they admit that they are clearly disqualified under the constitution. We therefore hold that all persons who could not read and write, as required by the constitution of Massachusetts, were not legal voters, and can not be heard to complain of any technical violation of law by the registration officers, whereby they were deprived of registration while admitting at the same time that they did not possess the constitutional qualifications of electors.

(3) In Haverhill 42 printed ballots were found with Boynton's name erased. The report says:

We do not think the evidence sufficient to justify us in finding that the votes were originally thrown for Mr. Boynton and afterwards corruptly changed. The presumption that the sworn officers of the law have done their duty must obtain until the contrary clearly appears.

951. The case of Boynton v. Loring, continued.

Discussion as to what constitutes a compliance with a mandatory law that the designation of the office shall appear "clearly" on the ballot.

As to the extrinsic evidence which sustains the sufficiency of the designation of the office on a ballot.

Reference to a discussion of alleged disfranchisement under the educational qualification of a State.

(4) A question as to the sufficiency of certain ballots is thus discussed in the report:

It is admitted that 138 ballots were counted for the contestee, the designation upon which ballots was as follows: "For Representative, sixth district, George B. Loring, of Salem." It is claimed that under the law of Massachusetts this was not a sufficient designation of the office, and that the ballots should not have been counted for the sitting Member as votes for the office of Representative in Congress from the Sixth Congressional district of Massachusetts.

The law of Massachusetts, chapter 7, section 13, is as follows: "No vote shall be counted which does not clearly indicate in writing the office for which the person voted for is designed." The word "writing," as it occurs in that section, under another statute of Massachusetts is allowed to include printing, as well as any other mode of representing words and letters. We do not think the law of Massachusetts changes the general rule with reference to the designation which must appear upon all ballots in order to make them effectual. The words, "No vote shall be counted which does not clearly indicate," etc., adds nothing to the general rule of law, which requires the election officers to reject any vote when either the name of the person intended to be voted for or the office which the voter intended the person voted for to fill does not appear from the ballot itself. That is to say, where there is such ambiguity in the writing or printing of the name of the person voted for, or of the office for which he is a candidate, that it is impossible to tell from the ballot itself what the name of the person intended to be voted for is, or the office which the voter intended him to fill, the ballot must be rejected, and no extrinsic evidence can be heard to supply the defect.

The public law of Massachusetts created the Sixth Congressional district. There was no other "sixth district" in which any of the voters of Groveland lived except the "Sixth Congressional district," nor did they live in any other sixth district, nor was there a Representative office to be filled in any sixth district in which the town of Groveland was situated except the Sixth Congressional district.

So it seems to us, in the light of the public law of Massachusetts creating this Sixth Congressional district, and the geographical location of Groveland, and the ballot itself, with the designation of "Representative sixth district," all considered together, makes the designation sufficient on the ballot to indicate the office which the voter designed when he cast the ballot, and is within the true interpretation and meaning of the law of Massachusetts, when it declares that "the ballot shall clearly indicate the office for which the person voted for is designed."

Judge Cooley, in his work on Constitutional Limitations, lays down the following general proposition as being the law relating to this subject:

"Every ballot should be complete in itself, and ought not to require extrinsic evidence to enable the election officer to determine the voter's intention. Perfect certainty, however, is not required in these cases. It is sufficient if an examination leaves no reasonable doubt upon the intention, and technical accuracy is never required in any case. The cardinal rule is to give effect to the intention of the voter whenever it is not left in uncertainty.

* * * * * * *

"The name on the ballot should be clearly expressed and ought to be given fully. Errors in spelling, however, will not defeat the ballot if the sound is the same; nor abbreviations, if such are in common use and generally understood, so that there can be no reasonable doubt of the intent. * * *"

The report then quotes Cooley on the subject of extrinsic evidence. Evidence of such facts as might be called the circumstances surrounding the election—who were the candidates, their residence, etc.—would be evidence of this kind.

The minority views say as to the ballot in question:

It is claimed, and we think with much propriety, that under the laws of Massachusetts this was not a sufficient designation of the office, and that the votes should not have been counted. The law of Massachusetts, chapter 7, section 13, is as follows: "No vote shall be counted which does not clearly indicate in writing (or printing) the office for which the person voted for is designated." The plain meaning of this law is this: The office must be "clearly indicated" on the ballot itself, and can not be made to appear by other and extrinsic testimony. The law is clearly mandatory, and the counting of such ballots is inhibited.

(5) The minority views discuss at length alleged disfranchisement under the educational qualification of the Massachusetts constitution. In the debate, also, this feature of the case was the subject of much discussion.

In accordance with their conclusions as to fact and law, the majority of the committee reported a resolution confirming the title of sitting Member to the seat.

Mr. Weaver, with his views, presented a resolution declaring contestant entitled to the seat.

The report was debated January 20 and 21, 1881,[1] and on the latter date the proposition of the minority was disagreed to, only 13 voting aye.

The resolutions reported by the majority were then agreed to without division, the yeas and nays being refused.

952. The Florida election case of Bisbee v. Hull, in the Forty-sixth Congress.

Instance wherein the House unseated a returned Member belonging to the majority party and seated a contestant belonging to the minority party.

The House does not reject an unassailed return because the State canvassers may have refused to count it.

The parties having agreed that a return should be counted, and testimony being unsatisfactory, the House refused contestant's claim that the canvasser's rejection should be approved.

Returns counted on mandamus of a State court; and unassailed, were counted without regard to the jurisdiction of the court to order the canvass.

The numbering of ballots through an honest blunder of election officers does not cause their rejection in absence of evidence of intimidation.

On January 18, 1881,[2] Mr. J. Warren Keifer, of Ohio, from the Committee on Elections, submitted the report of the committee in the Florida case of Bisbee *v.* Hull.[3] In the original canvass by the State board of canvassers Mr. Hull, the sitting Member, had been returned by a majority of 12 votes. The report thus states the facts in this case:

> The first canvass was made on December 21, 1878, by the State canvassing board, composed of the secretary of state, the comptroller, and the attorney-general of the State of Florida; and thereupon, on the same day, the governor of that State issued to Noble A. Hull a certificate of election. (Record, p. 500.) By virtue of this certificate Mr. Hull was admitted to a seat in the House.
>
> It will be noted that in this first canvass the vote of only 15 of the 17 counties was canvassed; that the vote of Brevard and Madison counties was not canvassed.
>
> The State canvassing board met again on January 8, 1879, and, in obedience to the mandate of the supreme court of Florida, again canvassed the vote of the second district of Florida and included in the canvass the returned vote from the county of Madison, no return being before the board from poll No. 4 of Madison County.
>
> The vote thus canvassed from Madison County was, Hull 938, and Bisbee 1,151; majority for Bisbee, 213. The result of this second canvass showed Mr. Bisbee's majority to be 201, the State board of canvassers having found and certified Mr. Hull's total vote to be 10,578 and Mr. Bisbee's total vote 10,779. (Record, pp. 218–220.)
>
> The opinion of the supreme court of Florida, pronounced by the chief justice, on the question of canvassing the vote of the county of Madison, will be found in the record (p. 221).
>
> On this final canvass Mr. Bisbee applied to the governor of Florida for a certificate of his election, which was referred by the governor to the attorney-general of the State, who, on January 10, 1879, gave his opinion to the governor favoring in most emphatic language Mr. Bisbee's right to such certificate. (Record, p. 228.) Mr. Bisbee's application was, however, refused.

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[1] Record, pp. 797, 827–835.

[2] Third session Forty-sixth Congress, House Report No. 86; 1 Ellsworth, p. 315.

[3] There had been a question over the prima facie right to this seat. (See sec. 57 of Volume I of this work.)

The vote of Brevard County was never canvassed by the State canvassing board, for reasons assigned in writing by the board on December 23, 1878. (Record, p. 220.)

Parties and their attorneys agree that poll No. 4, Madison County, was never returned to the county canvassing board, and hence it was never canvassed; and it is in like manner agreed that the true vote cast at this poll was, Hull 129, and Bisbee 186; majority for Mr. Bisbee, 57. (Contestee's brief, p. 14; and Record, pp. 25, 27, 28.)

It is also proved, as admitted, that there was no return of the votes cast at Cow Creek precinct, Alachua County, and that the true vote cast there was, Hull 24, Bisbee 2; Hull's majority, 22. (Record, p. 242; and contestant's brief in reply, p. 4.)

It is also an admitted fact in the case that at Long Swamp or Whiteville poll, Marion County, 93 Democratic ballots were fraudulently substituted for a like number of Republican ballots, thereby making a difference in the vote as canvassed of 186 votes against Mr. Bisbee.

The contestee (brief, p. 37) agrees that this fraud was committed, and that at this precinct "134 votes should be counted for contestant and 41 for contestee."

The vote returned and canvassed was 134 for contestee and 41 for contestant.

An agreed statement fixes the vote of Brevard County at 116 for Hull and 41 for Bisbee. (Record, p. 487.)

The committee therefore found contestant's majority to be about 350.

The committee discuss the following questions:

(1) As to Madison County—

Without deciding the question of the jurisdiction of the supreme court to issue a mandamus to compel the State canvassing board to canvass the vote of Madison County, the committee, on the returns and testimony now before it, find that the board had no legal right to reject the returned vote of the county in their first canvass, and that Mr. Bisbee is now entitled to have such vote counted for him.

The testimony discloses no objection to the returns and none is known to exist. The returned vote of Madison County was rejected by the State canvassing board on the sole ground that one of the precincts (poll No. 4) had made no returns.

No case can be found where in a contest before the House of Representatives the vote shown by an unassailed return has been rejected on the ground of a failure of some other body to canvass it.

The vote of poll No. 4 having been ascertained indisputably, it must of course be counted.

(2) As to Brevard County—

While it is true that the contestant insists that the vote of this county should now be wholly excluded, as it was by the State canvassing board, in view of the agreement signed by the parties and also on account of the unsatisfactory character of the testimony the committee conclude that the vote of this county should be counted and as fixed in said agreement. (Record, p. 487.)

(3) Objection was made to counting the vote of three precincts in Alachua County. This vote was put in evidence by sitting Member, who nevertheless objected to it. The report says:

They are signed by all the officers of the election; they are perfect in form, clear and explicit in the statement of votes cast, and have all been adjudged by the unanimous opinion of the supreme court of Florida, in a case before it, to be good and valid returns of the election at these polls. They are by law the primary legal evidence of the votes cast and unless assailed are conclusive. The counsel for contestee, in their brief, have not assailed these returns, nor sought to impeach them upon any ground whatever. They argue that they should not be counted simply because the county canvassing board, in their first count, did not count them, and that the supreme court, under whose orders they were canvassed, had not jurisdiction to compel the board to canvass them. In answer to this it is sufficient to say that the returns, being unassailed, are conclusive evidence before this committee; and it is our duty to count them, no matter whether the supreme court of Florida had or had not jurisdiction to order them counted. The assault here made is not upon these returns, but upon the jurisdiction of the court, which we are not called upon to maintain or defend. We therefore overrule this objection to these three polls, and hold that the votes returned from them must be counted.

There is nothing in the testimony which in the least seeks to impeach the regularity of these returns.

And a certificate of election made in obedience to a writ of mandamus has the same legal force as in any other case. (McCrary on Elections, secs. 335, 345.)

Besides, the county canvassing board of Alachua County were expressly prohibited by statute from rejecting these returns, and the supreme court of Florida so held.

(4) Sitting Member averred that at Arredonda pollballots for contestant were marked by the election officers—

and that the act of marking the ballots rendered them illegal and intimidated voters from voting for contestee. (Record, p. 6.)

Counsel for contestee, in their brief, have not alluded to this objection, and it is therefore fair to presume that in their judgment it could not be sustained. In their oral argument it was suggested that if the contestee was injured—that is, lost votes by reason of the marking of the ballots—the returns should be rejected, while they admitted that the marking of the ballots did not, per se, vitiate them. We are unable to find any evidence in the record that contestee was injured by numbering the ballots. He received the highest vote that any of the local candidates on his ticket received at that poll.

Two of the election officers were sworn, and their testimony is, in substance, that they numbered the ballots to correspond with the numbers opposite the names on the poll list at the request of a United States supervisor because the latter thought it was necessary to make the election legal, and they did not know to the contrary, and without any improper motives. (Record, pp. 231–233, 235–236.)

Counsel for contestee admitted before the committee, in argument, that the ballots were not marked with the design or purpose of affecting the fairness of the election to the injury of contestee. It is evident that such was not their intention. It does not appear that it was generally known among the electors that the ballots were being marked, nor is there any evidence this contestee lost a single vote by it. Only one voter is called as a witness (except the inspectors) to prove that the numbering of the ballots influenced his vote, and he testifies that it did not influence his vote. (Testimony of Aaron Huey, Record, pp. 483–484.)

It can scarcely be claimed that the evidence is sufficient to prove that the contestee was injured by the numbering of the ballots. On the other hand, the return shows that contestant ran behind his local ticket 31 votes at this poll (Record, p. 488); and Inspector Tucker, a Democrat, and sheriff of the county, testified that contestant received less votes than the local ticket. (Record, p. 233.)

We therefore conclude that the contestant has as much cause to complain of the numbering of the ballots as the contestee.

The same objection is made to one poll in Orange County by contestant, and testimony was adduced to sustain it. But we think the testimony insufficient to prove that contestant was injured, if any person, by the marking of the ballots at this poll.

In accordance with these conclusions the committee reported the following:

Resolved, That Noble A. Hull is not entitled to retain his seat as a Member of the Forty-sixth Congress of the United States as a Representative of the Second Congressional district of the State of Florida.

Resolved, That Horatio Bisbee, jr., is entitled to a seat as a Member of the Forty-sixth Congress as Representative of the Second Congressional district of the State of Florida.

The case was debated very briefly in the House on January 21 and 22, 1881,[1] and on the latter day the resolutions were agreed to without division, and Mr. Bisbee appeared and took the oath.

It may be noticed that Mr. Hull, who was unseated, was a Member of the majority party in the House, and Mr. Bisbee was a member of the minority party.

[1] Record, pp. 836, 837, 865.

953. The North Carolina election case of Yeates v. Martin, in the Forty-sixth Congress.

A true return should be counted, although delivered by an election registrar when the law specifies one of the judges.

An election being opened after the legal hour and evidence showing only half the registration as voting, the poll was rejected, although essential harm was not shown.

On January 25, 1881,[1] Mr. Emory Speer, of Georgia, from the Committee on Elections, submitted the report of the majority of the committee in the North Carolina case of Yeates *v.* Martin.

The certificate of the secretary of state showed that sitting Member had received 51 votes more than contestant.

But the committee were unanimously of the opinion that the county convassing board had wrongfully rejected the returns of Providence Township, which gave contestant a majority of 39 votes. The majority report says:

> The action of this board seems to have been arbitrary and unjustifiable. There was no allegation of fraud or irregularity in the conduct of the election. It was not disputed that Mr. Yeates received a majority of 39 votes at this precinct, but the canvassing board for the county refused to count this return because the registrar of the election at Providence Township delivered the returns to the county canvassing board when the friends of the contestee insisted that one of the judges of the election was the proper party to deliver those returns. The judges of the election in this case appointed the registrar, who carried up the returns and delivered them conformably to law. To reject this return in this county was manifestly illegal, and the evidence shows that the contestant is entitled to have 39 votes added to his aggregate vote by the rectification of this error, this being contestant's majority in that precinct. Indeed, it is distinctly admitted by the contestee, on page 29 of his brief: "We do not regard this objection sufficient to justify the rejection of the return."

The minority views, presented by Mr. W. A. Field, of Massachusetts, give the same opinion more fully:

> Section 21, chapter 275, acts of North Carolina of 1877, is:
>
> "The judges of election in each township, ward, or precinct shall appoint one of their number to attend the meeting of the board of county canvassers as a member thereof and shall deliver to the member who shall have been so appointed the original returns, statement of the result of the election in such township, ward, or precinct; and it shall be the duty of the members of the several township, ward, or precinct boards of election to attend the meeting of the board of county canvassers for such election in the county in which they shall have been appointed as members thereof."
>
> And by section 23 a majority of the members shall be sufficient to constitute such board. While for certain purposes the registrar and judges of election act together as a board of election, yet there are certain duties which by statute pertain to the registrar alone and certain others which alone can be performed by the judges of election. If the registrar refuses or neglects to perform his duties, the justices of the peace may remove him and appoint another in his place; but if the judges of election fail to attend, the registrar shall appoint some discreet person to act as such. We think , therefore, that section 21 requires the judges of election to appoint one of their own number to attend the said meeting of the board of county canvassers and deliver the returns; that the registrar is excluded, and that a registrar could not act as one of the board of county canvassers and is not the person designated by law to deliver the original returns to such board.
>
> But if the returns be delivered by any person, and it be shown to be the true return, we know no reason why it should not be counted, and it is not disputed that the returns from Providence Township truly showed that Mr. Yeates had 39 votes over Mr. Martin. We think these votes should be counted for Mr. Yeates.

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[1] Third session Forty-sixth Congress, House Report No. 123; 1 Ellsworth, p. 384.

The counting of Providence Township left to sitting Member a majority of 12 votes. The remaining questions in the case caused generally sharp divisions in the committee.

(1) The majority of the committee decided that the returns of South Mills precinct, where sitting Member received a majority of 64 votes, should be rejected, for the following reasons:

(a) Because the election was not commenced until three hours after the time fixed by law. The report says:

> McCrary on Elections lays down the general principle that if the deviation from regular hours is great, or even considerable, the presumption will be that it has affected the result, and the burden will be upon him who seeks to uphold the election to show affirmatively that it has not. Under the circumstances of this case we hold that the statute of North Carolina was so far disregarded as to vitiate the election at that precinct. The obvious purpose of the law is to give all voters an opportunity of costing their ballots. Not only were the voters of that precinct deprived of two-fifths of the time allowed them by law, but the evidence discloses the fact that only about one-half of the vote of the precinct was polled at the election, the registration of that precinct being 764 and the vote cast only 390.

The report further quotes Parson's Select Cases and Chadwick *v.* Melvin, from Brightley's election cases, in support of this contention. In the debate [1] Mr. Speer elaborated this question more fully. The report also advances this reasoning:

> The soundness of this rule is indisputable; otherwise the door is opened for unmeasured frauds. Suppose, for instance, in a heated election, one party should by accident be prevented from polling its heavy vote until late in the afternoon, how easy would it be for a partisan board of managers to defeat a man who otherwise would be the choice of the people. And, again, by refusing to open the polls at the time fixed by law in the forenoon of election day, and by delaying for three or four hours and systematically challenging the voters, and consuming as much time as possible with each voter, it would be easy to procrastinate, so that the hour of closing the polls should arrive and a large vote remain unpolled.

The minority say:

> When polls are closed before the hour prescribed by law, it may be that voters, without any fault of their own, are excluded from voting, because they have a right to expect that the polls will be kept open according to law; but when polls are not opened at the hour required by law, but are opened in season to give ample time to any voter to vote, and the delay has arisen from the fact that all the election officers have not attended, and some time is necessary to fill these vacancies according to law, and there has been no manifest abandonment of the attempt to hold an election, it is the duty of a voter to wait until the polls are opened. To hold otherwise would invite a minority to bring about a delay in opening the polls, in order to invalidate the election. Such laws necessarily imply that some time must be taken on election day to fill such vacancies, and the voter has no right under either the Constitution and laws of the United States or of the State to deposit his ballot immediately on reaching the polling place, and no rights of his are violated by compelling him to wait until the polls are opened in the lawful manner, provided there is time enough left for all to vote who desire to vote. No case has been shown to the committee in which a failure to open the polls at as early an hour as the law requires has been held to affect the election at such polling place. The cases all relate to closing the polls too soon. This election at South Mills ought not to be declared void on account of the delay in opening the polls. The only direct injury proved by the delay in opening the polls is: John C. Linton, pages 30, 31, testifies that he waited for the opening of the polls; that his business called him away, and he left; he would have voted for Yeates. He had heard of one other person who would have voted for Yeates if the polls had been seasonably opened. The last is hear say, which we reject. We reject Linton because he should have waited if he desired to vote.

Mr. Field elaborated this argument more fully in the debate.[2]

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[1] Record, p. 972.

[2] Record, pp. 974, 975.

954. The case of Yeates v. Martin, continued.

As to what constitutes a majority of election officers competent to hold a valid election.

Election officers being sworn by an unauthorized sheriff, who was an officious intruder, the poll was rejected.

A State law forbidding a candidate to act as election officer, participation of contestee as an acting officer, was occasion of a division of opinion in the Elections Committee.

The State law forbidding a device on the ballot, the words "Republican ticket" were held sufficient to cause its rejection.

Evidence to justify counting of rejected votes should be the best, i.e., of the voters themselves.

(*b*) Because a quorum of the board of election officers was not present. Two judges of the four were present, and the report points out that two is not a quorum of four.

The minority say:

By section 9, chapter 275, acts of North Carolina, 1877, already quoted, the judges, with the registrar, "shall open the polls and superintend the same until the close of the election."

"Sec. 20. When the election shall be finished, the registrars and judges of election, in presence of such of the electors as may choose to attend, shall open the boxes and count the ballots, etc."

The registrar and judges of election constitute a board for the purposes of opening the polls, superintending the election until the close of it, and for counting the ballots. And on general principles a majority of this board could act upon the matters on which they are authorized to act together, and the registrar and two judges are a majority of this board. Besides, if the third inspector is held to have acted under the authority of the registrar, this, so far as the rights of these persons are concerned, should be taken as an appointment, and three judges are a majority of four, even if the four judges be taken to be a board separate from the registrar.

Chapter 108, Battle's Revised Laws of North Carolina, section 2, clause 2, is:

"All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority."

(*c*) Because the election officers were not sworn.

The majority say:

The law requires that the inspectors should be sworn by some person authorized to administer an oath. They were not so sworn, but the sheriff, who was a mere intruder and who made himself extremely officious on that occasion, presumed, outside of his limited powers, to administer the oath. The returns were signed and certified by persons who really were not election officials under the laws of North Carolina, and any other citizens present had the same right with them to receive votes and certify and send up a return.

The minority admit that the officers were not properly sworn; but state that there is no evidence that any of these officers acted unfairly or improperly except in the adjournment for dinner and testimony that one judge had taken liquor. The minority views say:

The officers acting must be taken to be de facto officers. The omission to take the oath will not vitiate the election. (Sec. 79, McCrary on Elections, and cases cited.) The principle is well established that the acts of public officers being in by color of an election or appointment are valid so far as the public is concerned.

In the debate [1] the cases of Howard *v.* Cooper, Jackson *v.* Wayne, and Easton *v.* Scott were cited by the majority in favor of their rejection of the returns.

(*d*) It was objected that the board adjourned an hour for dinner, the box being given over to the charge of one of the election officers who had been imbibing spirituous liquors, and that bribery and intimidation were resorted to. The majority did not consider it necessary to consider these objections as controlling, the other objections being sufficient to justify rejection of the vote.

(2) The majority report of the committee rejected the returns of Hamilton precinct, where sitting Member received a majority of 64 votes. But only 7 Members concurred in this. Thus this view did not command a majority, the committee being 15 in number. Messrs. William G. Colerick, of Indiana, and Samuel L. Sawyer, of Missouri, who were among the 9 Members concurring in the majority report, expressly dissented from the proposition to exclude the vote of Hamilton precinct. The majority report says:

At Hamilton precinct likewise the contestee received a majority of 64 votes, and the contestant objects to the vote being counted, for the reason that the contestee acted as the registrar of the election. The law of North Carolina (Laws of 1876–77, sec. 5, p. 517) is mandatory on this subject. It declares "that no person who is a candidate for any office shall be a registrar, or judge, or inspector of an election." It is impossible for us to conceive of a provision more distinct in its terms or one which is from necessity more mandatory than this. It is conceded by the contestee in his brief that he did for a time act as registrar at this precinct. In the interest of the purity of elections, the committee are compelled to reject the vote of a precinct where a practice so reprehensible has been adopted by the claimant of this honorable and responsible office. No man should be permitted to be judge in his own case or take advantage of his own illegal act. The evidence fails to show that the conduct of Mr. Martin was justifiable, fair, and impartial while acting in this important official character; and even if it should be held that this conduct on the part of the contestee did not of itself vitiate the result of the poll at that precinct, it will be admitted that the contestee, who conducted his own election in this way, must have affirmatively shown that no illegal advantage was taken because of his action.

The minority views objected to this view:

It is not contended that Mr. Martin was appointed either registrar, or judge, or inspector of elections. So far as appears, these offices were all filled by other persons, who were present and performing their duties. Mr. Martin acted in the presence of the poll holders. Mr. Carraway was the acting registrar. Mr. Martin checked off some names on the registration book when on the side of the counter where the people came to vote, and at one time came around the counter where the judges of election were, but did not check off any names while there. Then it seems that he did not act corruptly, and that the election was fairly conducted, and that he took no part in receiving votes or keeping the poll book, and there is no evidence that any person was permitted to vote who was not entitled to vote, or, being entitled, was prevented from voting, or that any votes were improperly received or counted, or that Mr. Martin's conduct had any effect whatever upon the election. This conduct of Mr. Martin may have been an act of indiscretion, but, in the absence of any evidence that it produced any effect upon the election, we do not think that any weight should be attached to it.

(3) The committee declined to count for sitting Member 108 votes rejected at Merry Hill precinct because the words "Republican ticket" were printed on them. This portion of the majority report on this question was actually written by Mr. Field, who was also author of the minority views.[2]

The law of North Carolina provided:

The ballots shall be on white paper and may be printed or written, or partly written and partly printed, and shall be without device.

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[1] Record, p. 1046.

[2] This appeared in the debate. Record, p. 973.

There was also the provision that any ticket which "shall have a device upon it" shall "be void."

The counsel for contestee had cited an Indiana case, Napier *v.* Mahew (35 Indiana, 275), to show that these votes should be counted. But the Indiana law required a ballot to be folded by the voter, and that it should be put into the box unopened. Therefore, words on the inside of a ticket specifying the party were not on the same basis with words on ballots not required to be folded. The majority report says:

> The North Carolina statute is express that the ballots shall be without device, and that if the ticket shall have a device upon it, it shall not be numbered in taking the ballots, but shall be void. This difference in the statutes renders the Indiana decisions inapplicable, and the sole question is, Are the words "Republican ticket" on the inside of a ballot a device within the meaning of the North Carolina statute? With the policy of the statute we have nothing to do; one purpose of the statute may have been to prevent bystanders from knowing from observation how the voters voted. No statute can altogether prevent this; experts can easily distinguish between different kinds of white papers, and the printing of the ballots of the opposite parties would ordinarily be done at different printing offices with different type and ink, and the arrangement of the names of the persons and of the office, the punctuation, and the place on the ticket of the printed matter would ordinarily be different and apparent to a well-trained eye. The intention of the statute could be easily evaded if it did not also prescribe the size of the ticket and the size of the type, which the North Carolina statute has not done. Still the statute, such as it is, must be enforced, even if some provisions have been omitted that are necessary completely to appreciate its intention.
>
> Another purpose of the statute may have been to compel, as far as is possible, the voter to select the persons he votes for independently of any contrivances on the ticket calculated to inform or misinform him of the opinions of the persons voted for, because devices are often contrived to mislead. Either way, we think that words prominently printed on a ticket and intended to designate or describe it, and which have a distinct meaning in themselves, such as, if untrue, might mislead the voter, and whether true or untrue would render the ticket easily distinguishable, must be held to be a device within the meaning of the law. (McCrary on Elections, sec. 401.) These votes were rejected by the State authorities, and we think rightfully.

The minority views do not antagonize this view, but on the floor in debate it was urged that the printing of the words "Republican ticket" on the ballots was procured fraudulently by contestant's friends, and therefore that the rejection of the ballots sustained that fraud.[1]

(4) Sitting Member claimed that 154 votes which the managers at Goose Nest precinct had declined to receive should be counted. The division of opinion as to these votes arose from the terms of the registration law, the majority taking one position on this question of fact, and the minority the opposite position.

The sitting Member had offered the testimony of one William A. Johnson, a by stander, who declared that he saw 154 ballots offered for sitting Member and rejected by the judges. The committee do not fully credit the testimony, and point out that sitting Member should have supported his case with the best evidence, which would have been the testimony of the men whose ballots were refused. So the majority declined to count the votes.

In accordance with their reasoning the majority of the committee find for contestant a majority of 156 votes, and report resolutions declaring him elected.

[1] Record, p. 1040.

The report was debated in the House on January 27 and 29, 1881.[1] On the latter day a substitute proposed by the minority and confirming the title of sitting Member was disagreed to, yeas 110, nays 117.

Then the majority resolution declaring sitting Member not elected was agreed to, yeas 117, nays 106. The resolution seating contestant was agreed to, yeas 115, nays 103.

Thereupon Mr. Yeates appeared and took the oath.

955. The Senate election case of Lapham and Miller in the Forty-seventh Congress.

A legislature is not precluded from its constitutional power to elect a Senator by the fact that it may not do so on the date fixed by law.

The fact that less than a quorum of one house of a legislature is present in the joint meeting does not prevent the election of a Senator under the act of 1866.

A quorum being actually present in a joint meeting of a legislature for election of a Senator, it is not necessary that a quorum actually vote.

Conviction under sections 1781 and 1782 of the Revised Statutes, and not merely accusation, is required to raise a question of qualification against a Senator-elect.

The allegation of mere rumors of bribery is not sufficient to cause the Senate to investigate the election of a Senator.

In 1881[2] the Senate considered the case of Elbridge G. Lapham and Warner Miller, of New York. On October 11, 1881, the day on which Messrs. Lapham and Miller took their seats, a memorial was presented remonstrating against their admission until certain allegations affecting their elections had been investigated. October 21 the memorial was referred to the Committee on Privileges and Elections. December 12 the committee reported back the memorial and asked that it lie on the table, and that the committee be discharged from its further consideration. It was so ordered December 13. The statement of Mr. Hill, in the nature of an oral report, shows the nature of the allegations of the memorial and the reasons for the action of the committee:

> I am instructed by the Committee on Privileges and Elections to report back to the Senate certain memorials from members of the legislature of New York affecting the right of the present Senators from that State to occupy seats in this Chamber and to ask that the memorials lie on the table and the committee be discharged from their further consideration.
>
> In deference to the memorialists, and at the special request of some of them, it is proper that I should state briefly and generally the reasons which authorize this conclusion.
>
> The memorials set forth five reasons as grounds why these gentlemen should not be allowed to sit here. The first alleges that the legislature did not proceed in separate bodies to vote upon the question until the third Tuesday after notice of the vacancy was communicated by the governor. The facts are such as to create some controversy as to whether they did proceed on the second Tuesday or the third Tuesday after the notice; but, in any view, the committee are unanimously of the opinion that the legislature was not deprived of its constitutional right to elect Senators to this body.
>
> The second allegation is that at one of the joint sessions of the general assembly a quorum of the State senators was not present. It is not alleged that there was not a quorum present of each body on

[1] Record, pp. 971, 1036–1052.

[2] Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 697; First session Forty-seventh Congress, Record, pp. 70, 71.

the days the respective elections took place, but it is alleged or claimed that under the act of 1866 the failure of either body to be present with a quorum on any day deprives the legislature of the right to elect. The committee differ with the memorialists in that view. We think that one body of the legislature could not deprive the legislature of the right to elect by such absence, if unquestionably on the day of the election a quorum of each body of the legislature was present and voting. We think the reason alleged in this ground is not sufficient to invalidate the election.

The third ground alleged is that there was not a majority of the whole legislature actually voting for the Members chosen. In our opinion that is not necessary. There was a quorum of each house present in the joint assembly; there was a majority of that quorum actually voting for the Members chosen. In our opinion that was a valid election

It is alleged specifically in the memorial that the Stockton case is a precedent to the contrary. On examination it will be found that the Stockton case is not a precedent to the contrary. Mr. Stockton, of New Jersey, in the celebrated case so well known, was chosen, not by a majority, but he was chosen by a plurality vote, the legislature in joint session having declared before the election that a plurality should elect. The Senators now occupying the seats in question, from New York, were not chosen by a plurality vote; they were each chosen by a majority, a quorum of each body being present and a majority of the joint assembly voting. I will state that if the cases from New York were like the case from New Jersey, I do not think at this day any gentleman would regard the Stockton case as a precedent. Unquestionably the body that elects has a right to prescribe that a plurality may elect, and I think the report made by Senator Trumbull on that occasion is not only correct, but conclusive of the law of the case. The committee therefore are of the opinion that the ground is not sufficient to invalidate the election.

The fourth ground relates to Hon. W. Miller, and alleges that he is guilty of certain conduct in violation of section 1781 and section 1782 of the Revised Statutes which disqualify a Member from holding any office of honor, trust, or profit under the United States Government. It is sufficient to say that the Senator from New York has never been convicted of a violation of those sections of the Revised Statutes, and a simple inspection of the sections shows that it is conviction that disqualifies and not allegations by outsiders or third persons who do not prosecute. Therefore the committee overrule that ground and think it insufficient, conceding the facts alleged to be true for argument; we do not know anything about them.

The last ground is one of fact. Before I have alluded to what are called legal grounds or allegations that by legal operation the election is void. The last ground alleges that there were rumors of bribery in procuring the election of these gentlemen. The allegation of mere rumors of bribery is not sufficient, unaccompanied with evidence, to require investigation at the hands of the Senate or of its committees. It is alleged in this memorial that one State senator of New York is under indictment in that State for offering a bribe to a member of the house to vote in the Senatorial election. It is due to the Senators holding the seats that the committee should say that the indictment is not for a bribe offered to vote for either one of the present Senators. It is due also to state that while we find by reports that have been sent to us and investigations had that there were a great many scandals in connection with the Senatorial election in New York during the late session of the legislature, most of these scandal occurred before the two gentlemen now holding seats became even candidates before that body.

Chapter XXXII.

GENERAL ELECTION CASES IN 1882.

1. Cases in the first session of the Forty-seventh Congress. Sections 956–971.[1]

956. The Iowa election case of Cook v. Cutts in the Forty-seventh Congress.

A resolution granting further time for taking testimony in an election case was admitted as privileged.

Form of resolution providing for taking additional testimony in a case wherein contestant alleged that with due diligence he could not complete the evidence within the legal time.

A contestant desiring additional time for taking testimony presents his application by memorial.

On February 13, 1882,[2] Mr. William H. Calkins, of Indiana, from the Committee on Elections, to whom had been referred the Iowa contested case of Cook *v.* Cutts, as a question of privilege, reported the following resolution, which was agreed to by the House:

Resolved, That the contestant be granted further time to take testimony in this contest upon the following terms and conditions, namely:

First. Upon giving contestee notice of time and place and names of witnesses proposed to be examined not less than thirty days exclusive of day of service.

Second. Contestant shall then have ten days to take the testimony hereafter mentioned.

Third. Contestee shall then have fifteen days in reply.

Fourth. Contestant shall then have five days in which to take testimony in rebuttal; all periods allowed being exclusive of Sundays and holidays.

The testimony of contestant shall be confined exclusively to the examination of witnesses who may now be in possession of the books and pay rolls mentioned in contestant's subpoena duces tecum, here-

[1] Additional cases during this session are classified in other chapters:
Bayley *v.* Barbour, Virginia. (Vol. I, sec. 435.)
Stovell *v.* Cabell, Virginia. (Vol. I, sec. 681.)
Samuel Dibble, South Carolina. (Vol. I, sec. 571.)
Stolbrand *v.* Aiken, South Carolina. (Vol. I, sec. 719.)
Mackey *v.* O'Connor, South Carolina. (Vol. I, sec. 735.)
Smith *v.* Robertson, Louisiana. (Vol. I, sec. 750.)
Witherspoon *v.* Davidson, Florida. (Vol. I, sec. 753.)
Mabson *v.* Oates, Alabama. (Vol. I, sec. 725.)
Campbell *v.* Cannon, Utah. (Vol. I, sec. 471.)

[2] First session Forty-seventh Congress, Journal, p. 550; Record, p. 1088.

tofore served on W. A. McNeill, who testified on the 9th day of March, 1881, in this case as contestant's witness, and one Major Shoemake, who is mentioned in contestant's memorial as having knowledge of the same facts, which testimony has, as alleged, been discovered by him since his time expired to close his testimony, and which by the use of reasonable diligence contestant alleges he could not have ascertained in the time allowed by law.

When this testimony is taken the contestant may then take evidence tending to show for whom any illegal voter voted, which may have been disclosed by the testimony first herein allowed to be taken. All the evidence taken shall be directed and confined to the point above indicated.

This resolution was in response to a memorial of John C. Cook, the contestant, presented in the House by a Member on January 30,[1] and referred to the Committee on Elections.

957. The case of Cook v. Cutts, continued.

Report of an Elections Committee is sometimes presented by a Member belonging to the minority party in the House. (Footnote.)

Unidentified votes cast by disqualified persons were proven by testimony as to party affiliations of the persons and circumstances attending the voting.

As to validity of an answer with no proof of service except an ex parte affidavit.

On February 19, 1883,[2] Mr. F. E. Beltzhoover, of Pennsylvania,[3] presented the report of the majority of the committee, finding that contestant was entitled to the seat.

The sitting Member had been declared elected by a majority of 9 votes.

Both majority report and minority views assumed that the result of the contest really turned on the disposition of certain votes, 23 in number, alleged to have been polled at Muchikinock coal mines by colored miners who had not been in the State the six months required by the constitution of Iowa. The testimony was voluminous and somewhat conflicting. The majority of the committee felt confident that it sustained contestant's claim. The minority views, presented by Mr. William G. Thompson, of Iowa, opposed this contention.

Aside from this question of fact, the report develops the following question of law:

To prove for whom these votes were cast contestant issued subpoenas for all these men. The returns on the subpoenas show that only a very few (three) could be found. (Rec., 306, etc.) All those who appeared either under summons from contestant or as witnesses for contestee declined to disclose for whom they voted when asked by contestant; and all those who came in the May crowd refused to say whether they voted or not. (Rec., Geo. W. Lewis, 334; Jesse N. Carroll, 335; James Martin, 612; Geo. W. Lewis, 633; Hugh Lee, 643.)

It is shown generally that the men who employed these miners were favorable to Mr. Cutts; that they were brought to the polls by Republicans; that their votes were challenged by Democrats and Greenbackers (contestant's friends), and their votes urged and directed by Republicans. Republicans and men distributing Republican tickets gave them their ballots, etc. (Rec., 112, and from 326 to 391, inclusive.)

"When the voter can not, by reasonable diligence, be found, or, being found, refuses to state for whom he voted, it may be shown by circumstances. And here great latitude must be allowed." (McCrary on Elections, p. 306.)

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[1] Journal, p. 421.

[2] Second session Forty-seventh Congress, House Report No. 1961; 2 Ellsworth, p. 243.

[3] It may be noted that Mr. Beltzhoover was a member of the minority party in the House.

By the above circumstances the contestant has shown all that can be shown in any case, that these colored miners all voted the Republican ticket, on which was contestee's name.

In addition to this it is shown by a colored man who went with the last crowd that voted at Harrison Township poll that he and another man supplied the whole lot with tickets that were voted, and that they were Republican tickets; and this is nowhere denied. (Rec., 367.) This crowd voted just before the polls closed, as shown by the poll list (Rec., 349), beginning with No. 320 and ending with No. 388. This includes James Usher, James Byers, John Clark, Wm. H. Hues, Spencer James, John W. Jackson, Andrew Lewis, G. W. Randall, Hardin White, Joseph James, and D. F. Woodard, eleven in number.

In addition to this it is shown that these illegal voters all were Republicans, and in the celebrated "New Jersey cases" it was held that this alone was sufficient to warrant the conclusion that they voted their party ticket.

It is further shown by evidence and the poll list that all the colored men from the coal mines voted together, there being two crowds brought to each poll at different times; and to illustrate the testimony on this point we take the testimony of Thomas S. Barton (Rec., 712):

"Well, they came up in a wagon, with fifteen or twenty in it, a white man driving—a Republican—whooping and hallooing, 'Hurrah for Cutts!' They would get out of the wagon, march them up to a couple of men who had tickets for them—Republican tickets. After they got their tickets they would go up to the window where they voted, and they would vote just as fast as they could be sworn in, and then they would load them up and start back with them after another load, and went through the same performance next time."

The same is shown by numerous witnesses as to all the colored men at both polls; and that when Greenback or Democratic tickets were offered they were refused.

The testimony is voluminous and uncontradicted, and no one can read it without being convinced that all the colored miners voted for contestee.

We have no hesitation in concluding that twenty-three votes should be deducted from the contestee on account of the colored vote from Muchikinock.

As to certain other votes, claimed by contestee not to have been cast by qualified electors, the report holds first:

The contestee claims that certain persons not qualified voters voted for the contestant in various parts of the district.

There is a technical objection to this claim which, under former decisions, rests upon a valid foundation.

There is in the record no answer to contestant's notice. There is on file an answer, but no proof of service except ex parte affidavit, and this shows no personal service on contestant. It has been expressly held in Follett *v.* Dellano and in Boyd *v.* Kelso that this can not be accepted as proof of service. (2 Bartlett, 121.)

958. The case of Cook v. Cutts, continued.

As to efficacy of voter's admissions to prove an illegal vote.

An unofficial recount of ballots not kept inviolate is of no force.

As to the counting of ballots found in the box for township officers and not in the Congressional box.

The House is disinclined to give force to a point raised in debate but overlooked both in the report and views of the Elections Committee.

Instance wherein a returned Member belonging to the majority party was unseated and a contestant belonging to the minority party was seated.

Assuming, however, that the above objections were waived, the report thus discussed the objections:

(1) As to some of these votes there is no proof whatever that they voted except hearsay. As to others, there is no proof for whom they voted, except the voters' admissions, which, according to McCrary and the recent case of Cessna *v.* Myers, is insufficient.

In nearly all of them the proof relied on by the contestee consists of some statement of the voter made in casual conversation to a witness under circumstances making them neither competent nor reliable.

But even if the evidence be accepted as competent and sufficient to prove the facts claimed, in no case would the facts thus established be sufficient to show the vote illegal.

(2) The contestee claims that two votes should be added to his and two deducted from contestant on account of error in official count in Washington Township, Appanoose County.

All the evidence upon this point is that one witness, on April 18, 1881, counted the ballots then in the box, and found this change from the official count.

There are two insurmountable objections to this: First, there is not the slightest proof that the ballots counted April 18, 1881, were those cast November 2, 1880.

Under the authorities quoted in contestant's reply brief, page 2, being McCrary on Elections, and Gooding *v.* Wilson, decided in 1872, and we may add the recent case of People *v.* Livingston, 79th New York Court of Appeals, 289, all directly in point, this must be affirmatively shown before this second count can be received as evidence.

Not only this, but it appears affirmatively that the box was exposed, and, so to speak, in the possession of a party unfriendly to contestant, and not an officer, with the key in the box, until April 16, and that before this recount he predicted accurately the change that a recount would disclose.

The ballots were counted by one individual, and not produced and publicly counted before the officer taking the deposition.

Three of the election officers appear and testify to the correctness of the official count.

In accordance with their conclusions the majority found contestant elected, and reported resolutions seating him.

The minority views found sitting Member entitled to retain his seat.

The report was debated in the House on March 2, 1883.[1] During this debate Mr. A. A. Ranney, of Massachusetts, a member of the committee concurring in the minority views, advanced the proposition that the report and views had overlooked a controlling feature of the case, viz, the counting for contestant by the precinct officers of 34 ballots found in the box for township officers, whereas they should have been deposited in the box for Congressman. Mr. Ranney pointed out that the rejection of these votes would be decisive of the case in favor of the sitting Member, and held that they should be rejected. It might be that those casting these ballots had also voted for Congressman in the congressional box, in which case there would be a double vote. The cases of Washburn *v.* Ripley and The People on the Relation of Michael Hayes *v.* George Bates (11 Michigan) were cited, as well as McCrary, to show that the ballots in the wrong box should be rejected unless it had been affirmatively proven that they were put there by mistake.

Considerable stress was laid on this point by supporters of the minority views; but the supporters of the majority report were not inclined to accept as justified by the evidence a point which had escaped notice until after the case had been made up for the House.

On March 3, 1883,[2] the resolutions of the majority, unseating Mr. Cutts and seating Mr Cook, the contestant, were agreed to by the House, yeas 154, nays 81.

Mr. Cook thereupon appeared and took the oath. It may be noted that Mr. Cutts belonged to the majority party in the House, while contestant belonged to a minority party.

959. The Mississippi election case of Lynch v. Chalmers, in the Forty-seventh Congress.

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[1] Record, pp. 3638–3649.

[2] Journal, pp. 566–568.

A printer's dash separating the names was held not to be a distinguishing "device or mark" within the meaning of the State law.

The House does not consider itself necessarily bound by the construction which a State court puts on the State law regulating times, places, manner., etc.

The courts of a State have nothing to do with judging the elections, qualifications, and returns of Representatives in Congress.

Statement of the true doctrine as to construction of election laws as mandatory or directory.

Discussion as to whether State laws prescribing times, places, and manner become in effect Federal laws as to election of Congressmen.

On April 6, 1882,[1] Mr. William H. Calkins, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Mississippi case of Lynch *v.* Chalmers.

The vote returned by the county inspectors of election to the secretary of state showed a majority of 3,779 votes for sitting Member.

Contestants objections involved the discussion of several important and interesting questions of law:

(1) As to the form of certain ballots. The law of Mississippi provided:

SEC. 137. All ballots shall be written or printed in black ink, with a space not less than one-fifth of an inch between each name, on plain white printing newspaper, not more than two and one-half, nor less than two and one-fourth, inches wide, without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the ticket; but this shall not prohibit the ensure, correction, or insertion of any name by pencil mark or ink upon the face of the ballot; and a ticket different from that herein prescribed shall not be received or counted.

In Warren County 2,029 ballots were thrown out by election officers, most of them being because of the dashes in the ticket as printed:

REPUBLICAN NATIONAL TICKET.
For President,
JAMES A. GARFIELD.

For Vice-President,
Chester A. Arthur.

For Electors for President and Vice-President,
HON. WILLIAM R. SPEARS.
HON. R. W. FLOURNOY.
DR. J. M. BYNUM.
HON. J. T. STETTLE.
CAPT. M. K. MISTER, JR.
DR. R. H. MONTGOMERY.
JUDGE R. H. CUNY.
HON. CHARLES W. CLARKE.

For Member of the House of Representatives from the 6th Congressional District,
JOHN R. LYNCH.

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[1] First session Forty-seventh Congress, House Report No. 731; 2 Ellsworth, p. 338.

The majority of the committee find that there was no intentional violation of the law in the printing of these ballots or in the use of them. The report further says:

It is also proved that tickets precisely similar to those that are questioned in this contest, in so far as the printer's dashes are concerned, were printed and furnished to the opposing party in at least one of the counties in the Sixth Congressional district of Mississippi, and were unquestionably voted without a suspicion that they were obnoxious to the law. To further illustrate the entire good faith with which these tickets were printed and used, and how they would be regarded by practical printers, the testimony of Charles Winkley, one of contestee's witnesses, becomes very important; it is as follows:

"Cross-interrogatory 2. Are you a practical printer, and have you critically examined the "marks" so called, on the tickets of Lynch, rejected from Warren County? If so, were not these only the usual printer's dashes to be found generally in newspaper articles and upon tickets generally?

"Answer. I am a practical printer; I have not critically examined the tickets, but the dashes used are such as any printer of taste would either put in or leave out, according as he wanted to lengthen or shorten the ticket to suit the paper, or otherwise.

"Cross-interrogatory 3. If you were called upon generally to print tickets, without any special instructions, is it likely that you would have printed the tickets similar to those complained of and rejected from Warren County?

"Answer. I might or might not, just as it might have seemed to strike me at the time.

"And further deponent saith not." (Rec., p. 261.)

It further appears that printer's dashes, such as were used on the tickets in this case, are universally known among printers as punctuation marks; in fact most of the characters which appear upon these tickets are set down in Webster's Unabridged Dictionary under the head, "Marks of punctuation." It is known to the most casual reader of print that printer's dashes frequently occur in books, newspapers, and publications of all kinds, and to the common understanding to argue that they are of themselves "marks or devices" would not meet approval.

We have already found that they were not used or placed upon the tickets for the purpose of distinguishing them from any other ballots, nor as a device for that purpose, and not being of themselves devices we can not say that they are inimical to the statute. It is true that printer's dashes may be intended and used as a mark or device, and so may different kinds of type, or punctuation marks of different kinds. Arrangement of names and heading of tickets may also be made "marks and devices," and it seems to us that the reasonable interpretation of the law would be, first, in the use of these appliances, which are ordinarily used in printing, were they so arranged as that they become "marks and devices" and were they so used and arranged for that purpose and, secondly, was the unusual manner of their being used such as might or ought to put a reasonably prudent man on his guard?

This view of the law would be the extreme limit to which we think we would be justified in going under well-established principles of construction is like cases. No case has been called to our notice which goes this far.

What we have here remarked does not, of course, apply to the marks or devices ordinarily used on tickets, such as spread eagles, portraits, and the like; those would be considered "marks and devices" of themselves, and not necessary in the ordinary mechanical art of printing.

The majority further quote the California case of Kirk *v.* Rhoades (46 Cal., 398) to show that such small departures from the exact rule should not be allowed to defeat the will of the voter. The report dissents from the conclusion of the majority in the case of Yeates *v.* Martin.

The minority views, presented by Mr. Gibson Atherton, of Ohio, affirm adherence to the decision in the Yeates *v.* Martin case, and say:

The first and leading case on the subject of marked ballots was in Pennsylvania in the case of The Commonwealth *v.* Woelper (3 S. and R., 29). The opinion was delivered by Chief Justice Tighlman and concurred in fully in separate opinions by Justices Yeates and Gibson, and they all held that the law should be strictly construed as written. The court said:

"The tickets in favor of those persons who succeeded in the election had on them the engraving

of an eagle. The judge who tried the case charged the jury that these tickets ought not to have been counted. The case is certainly within the words of the law. The tickets had something more than the names on them. But is it within the meaning of the law? I think it is. This engraving might have several ill effects. In the first place, it might be perceived by the inspector, even when folded. This knowledge might possibly influence him in receiving or rejecting the vote. But in the next place, it deprived those persons who did not vote the German ticket of that secrecy which the election by ballot was intended to secure to them. A man who gave in a ticket without an eagle was set down as an anti-German and exposed to the animosity of the party. Another objection is that the symbols of party increase that heat which it is desirable to assuage. We see that at the election some wore eagles on their hats. The case thus falling within the words and practices of this kind leading to inconvenience, I think the court ought not exercise its ingenuity in support of these tickets. Let us at least prevent future altercations at elections by laying down such plain rules for the conduct of inspectors as can not be mistaken. I am for construing the by-law as it is written, and rejecting all tickets that have anything on them more than the names. This objection strikes at the root of the election, for the evidence is that all the tickets in favor of the defendants were stamped with an eagle. Whatever, therefore, may be the law on other points, it is clear, upon the whole, that the defendants were not duly elected."

The precise same doctrine was held in Oregon. The court says:

"Section 30, page 572, of. the Code provides that 'all ballots used at any election in this State shall be written or printed on a plain white paper without my mark or designation being placed thereon whereby the same maybe known or designated.' The voter in this instance is conclusively presumed to have had knowledge of this requirement and to have had it in his power to comply with it by using a proper ballot. It was a matter entirely under his own control, and if he chose to disregard the law, he cannot complain if the consequence was that his vote was lost." (The State *v.* McKinnon, 8 Oregon, 500.)

This fully sustains the Mississippi decision, even if we admit the distinction taken by the majority report that the voter is only bound to observe so much of the law as he could by the exercise of proper diligence in matters under his control. The California case cited by the majority, though it differs from the case of Perkins *v.* Carraway recently decided in Mississippi, as to the spaces between the names on the ticket, sustains Oglesby *v.* Sigman as to the marks. The court say:

"There are, however, other requirements of the Code within the power of the elector to control, and these, if willfully disregarded, should cause his ballot to be rejected. He can see, for instance, that his ballot is free from every mark, character, device, or thing that would enable anyone to distinguish it by the back, and if, in willful disregard of law, he places a name, number, or other mark on it, he cannot complain if his ballot is rejected and he loses his vote." (Kirk *v.* Rhoades, 46 Cal., 398.)

Also the Alabama case of Plato *v.* Damus was quoted; and the minority consider that a strict construction of the State law is best.

(2) But the supreme court of Mississippi had passed on the validity of these ballots; and thereby arose a question as to whether or not the House should be bound by the construction which the State court put upon the law. In the case of Oglesby *v.* Sigman the court held that the commissioners of election had the authority to reject the ballots in question; and that the ballots were properly rejected:

If the device or mark is external, and observed by the inspectors, they should not receive the ballot. If it is received, and on being opened is discovered to be of the kind condemned as illegal, it is not to be counted; but if the inspectors count such ballots in disregard of law and their duty the commissioners of election, assembled at the court-house, with time and opportunity afforded to scrutinize and correct, as far as may be done by the data furnished by the face of the returns, without a resort to evidence aliunde, should reject, as the inspectors should have done, ballots which the law says shall not be counted. The only safe guide as to what ballots are illegal because of devices or marks is the statute. It excludes any mark or device by which one ticket may be known or distinguished from another. A distinction between ballots by means of devices or marks instead of by means of the names

on them is what the statute aims to prevent, and we are not at liberty to confine the broad language of the statute to any particular description of devices or marks, for ingenuity would evade any Bach limit. The law should be enforced as written.

Two questions arose in regard to this decision:

(*a*) Was it an actual decision, or merely an obiter dictum.

The circumstances leading up to it were as follows:

On November 16, 1880, the contestant applied to one of the judges of the supreme court of Mississippi for an injunction to restrain the secretary of state from declaring contestee duly elected, basing the application on the allegation that certain unlawful deductions had been made from his vote. The judge declined to grant the injunction for the reason that the House of Representatives was the exclusive judge of the elections, returns, and qualifications of its own Members. This decision was rendered November 17.

The report further shows, as a later development:

By the Revised Code, 1880, of Mississippi, the following provision is made relative to the writ of mandamus:

"SEC. 2542. On the petition of the State by its attorney-general, or a district attorney, in any matter affecting the public interest, or on petition of any private person who is interested, the writ of mandamus shall be issued by a circuit court commanding any inferior tribunal, corporation, board, officer, or person to do or not to do an act the performance or omission of which the law especially enjoins as a duty resulting from an office, trust, or station, and where there is not a plain, adequate, and speedy remedy in the ordinary course of law."

Under this section the district attorney of Tunica County filed his petition in the circuit court of that county against the election commissioners to compel them to reassemble and reject 506 ballots which had been counted for the contestant, Mr. Lynch, and which were claimed to be illegal because they contained marks and devices in violation of the election laws. The petition was denied, and an appeal was taken to the supreme court of the State.

The case was submitted by counsel without brief or oral argument. In the debate attention was called to the fact that Lynch was not a party to the record and could not be heard.[1] The court passed upon the legality of the ballots, declaring that they were illegal because of the marks, and concluded:

We do not think that the commissioners of election can be required to meet and recanvass the returns of the election. Having made their canvass and declared the result, and transmitted a statement of it to the secretary of state, their connection with the returns ended. Any error committed by them is not to be corrected by requiring them to reassemble and correct it. The legality of their action may be the subject of judicial investigation in cases in which provision is made for contesting the election by an appeal to the courts of the State, but only in those cases.

The House of Representatives of the Congress of the United States is the judge of the elections, returns, and qualifications of its own Members, and the courts of the State have nothing to do with this matter.

This case might properly have been disposed of without considering any of the questions made by the record except that last mentioned, but the attorney-general informs us from the bar that doubts exist as to the proper interpretation of the election law of 1880, and that criminal prosecutions have been instituted against the commissioners of election of some of the counties for supposed violations of the law in reference to their duties, and we have complied with his request in declaring our view of the several questions presented by the record.

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[1] Speech of Mr. Calkins, Record, p. 3446.

The majority contended that the court did not have jurisdiction of the question as to the ballots, the proper persons to give it jurisdiction not being parties, and that the decision was a mere obiter dictum. The minority of the committee deny these positions:

But before proceeding to the consideration of that question we wish to dispose of two points of objection made by the majority report to the case of Oglesby *v.* Sigman (58 Miss. R.). They are, first, that the decision is a mere obiter dictum; and the second, that it is confessedly without jurisdiction. An obiter dictum is an expression of opinion by way of argument or illustration, and rendered without due consideration as to its full bearing and effect. To show the want of authority of an obiter dictum the majority quote from Carroll *v.* Carroll (16 How., 286–287).

The court say: "If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the common law, an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question to be determined to fix the rights of the parties and decide to whom the property belongs." There can be no doubt about the judicial mind being directed to the construction of the Mississippi election laws. The court say they considered them, and that they were asked to consider them. This decision is, therefore, not obiter as to the marked ballots, because it is one of the very points carefully considered and directly decided.

An obiter dictum is exactly what its term imports—a saying of the judge outside of and beyond the point decided. Therefore it can not be said that the decision of one of the very questions submitted, and to which the judicial mind was especially directed, is obiter.

But the majority say—

"First. The court declared in terms it had no jurisdiction of the subject-matter embraced in the first and second grounds stated in the opinion; but the court, after remarking upon its want of jurisdiction on the first two points stated in the beginning of its opinion, and having disposed of the third on the ground that the official duties of the election officers were at an end and that they could not be reassembled, proceeded to construe the law relative to distinguishing marks, and decide what were such by the terms of the Mississippi Code so far as it could do so, the same being confessedly not before them."

This is neither legally nor historically true of this decision. The court did not anywhere admit its want of jurisdiction, nor did it, after admitting that a decision of one point in the case might have been sufficient to decide the whole case, proceed to decide the other two points first stated. Historically, it decided first the two first points, and then the third. It is a general rule that where a court has decided one point which is decisive of a case it will not decide others, but this rule is by no means universal. (See Ram on Legal Judgments, 258–259, and the cases there cited.) But it is an unheard-of proposition to say where there are several distinct and vital points in a case, and the court decides them all, the opinion is not authority except on one point, if that would have been decisive of the case.

Thousands of cases can be found where all the points presented are decided, though the decision of one might have been sufficient. The most notable instance is the case of ex parte Siebold (10 Otto).

Continuing, the minority say:

The court was called on to compel, by mandamus, the election commissioners to make right a wrong they had committed. The first thing to be settled was whether he had done any wrong. If the court had decided that the commissioners did right in counting the marked ballots, that would have ended the case, and it would have been unnecessary to go further.

The court held, however, that the commissioners did do wrong, but that it had no power to make them reassemble and right that wrong.

It might be said the court could have stopped short with this declaration, but it did not. It proceeded to show what was the proper remedy for the wrong. It said the remedy was in a contested election. That in State cases this contest must be made before State tribunals and in Congressional elections before Congress.

To claim that this election can have no weight in a contested election before Congress because the court said Congress must settle Congressional contests would lead to the conclusion that it could have no weight in a contest before a State tribunal, because it said the State tribunal must settle State contests.

This question as to the nature of the decision was also much discussed in the debate.[1]

(*b*) What was the binding effect on the House of the decision of the State court construing the statute of the State?

The majority report says:

It is seriously contended by the contestee that the decision of the supreme court of Mississippi construing the sections of the election laws of that State ought to be followed by Congress, and that it is against the settled doctrine of both Congress and the Federal judiciary to disregard the decisions of State tribunals in construing their own local laws. This is too broadly asserted, and can not be maintained. It is true that where a decision or a line of decisions has been made by the judiciary of the States, and those decisions have become a "rule of property," the Federal judiciary will follow them. Not to do so would continually place titles to property in jeopardy, and disturb all business transactions. The rule as to all other questions is well stated in Township of Pine Grove *v.* Talcott (19 Wall., 666–667), as follows:

"It is insisted that the invalidity of the statute has been determined by two judgments of the supreme court of Michigan, and that we are bound to follow these adjudications. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. * * * The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of States where the cases arise; it must hear and determine for itself."

There is still another reason why Congress should not be bound by the decisions of State tribunals with regard to election laws, unless such decisions are founded upon sound principles, and comport with reason and justice, which does not apply to the Federal judiciary, and it is this: Every State election law is by the Constitution made a Federal law where Congress has failed to enact laws on that subject, and is adopted by Congress for the purpose of the election of its own Members. To say that Congress shall be absolutely bound by State adjudications on the subject of the election of its own Members is subversive of the constitutional provision that each House shall be the judge of the election, qualifications, and returns of its own Members, and is likewise inimical to the soundest principles of national unity. We can not safely say that it is simply the duty of this House to register the decrees of State officials relative to the election of its own Members.

The foundation of this contention is that if the Congress of the United States fails to enact election laws, and makes use of State laws for its purposes, it adopts not only the laws thus enacted, but the judicial construction of them by the State courts as well.

We do not agree that this is the rule except as it may apply to a "positive statute of the State, and the construction thereof, adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character." (Swift *v.* Tyson, 16 Peters, 1–18.) As to matters not local in their nature, the Supreme Court of the United States has uniformly held that the decisions of the State courts were not binding upon it.

Election laws are, or may become, vital to the existence and stability of the House of Representatives, and to hold it must shut itself up in the narrow limits of investigating solely the question as to whether an election has been conducted according to State laws as interpreted by its own judiciary would be to yield at least a part of that prerogative conferred by the Constitution exclusively on the House itself.

It may be stated generally that the House of Representatives will, as a general rule, follow the interpretation given to a State law regulating a Congressional election by the supreme court of a State, where decisions have been continued and uniform in such a way and for such time as to become the fixed and settled law of a State. The processes of determining the election and all questions relating to the honesty and bona fides of ascertaining who received the highest number of legal votes must of necessity forever reside exclusively in the House.

Where decisions have been made for a sufficient length of time by State tribunals construing election laws so that it may be presumed that the people of the State knew what such interpretations

[1] See speeches of Messrs. Atherton, Hammond, Tucker, and Calkins, Record, pp. 3333, 3380, 3426, 3445, 3446.

were would furnish another good reason why Congress should adopt them in Congressional election cases. But this reason would be of little weight when the election had been held in good faith before such judicial construction had been made, and where there was a conflict of opinion respecting the true interpretation of a statute for the first time on trial.

There is still another cogent reason why this House may, and perhaps should, disregard the decisions of State courts when such decisions are made in cases where there is confessedly no jurisdiction in the court to pass upon the question which it assumes to pass upon, or where the court assumes to pass upon questions not properly involved in the case before it.

We can not express in better language the effect which obiter dictum in judicial opinions should have on future decisions than that employed by Mr. Justice Curtis in Carroll *v* Carroll (16 How., 279–287). After considering the maxim at common law of stare decisis, the learned judge proceeds to discuss the thirty-fourth section of the judiciary act in connection with the maxim, and then says:

"And therefore this court, and other courts organized under the common law, has never felt itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties."

Citing some cases, he continues:

"And Mr. Chief Justice Marshall said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used.' If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relations to the case decided, but their possible bearing on all other cases is seldom completely investigated. The cases of Ex parte Christy (3 How., 292) and Jenness et al. *v.* Peck (7 How., 612) are in illustration of the rule that any opinion given here or elsewhere can not be relied on as binding authority unless the case called for its expression. Its weight of reason must depend on what it contains."

There is abundance of authority running through all the reports of the judicial opinions of the various States, and also through the reports of the Supreme Court opinions of the United States, that they will not be bound by the obiter of their own decisions, much less that of other courts. And where there is a conflict in the decisions of a State supreme court, other State courts and the Supreme Court of the United States will adopt, not the later, but that line of decisions which best speaks the reason and common sense of the proposition elucidated, except in those cases purely local, as pointed out in Swift *v.* Tyson, supra.

Another suggestion in argument needs greater amplification than we can give it now, which is: That by adopting the machinery of the States to carry on Congressional elections this House stands in the nature of an appellate court to interpret these election laws so far as they relate to Congressional elections; that it ought not in this view to be bound by the decisions of the State courts at all, unless the reasons given by them are convincing to the judicial mind of the House while acting in the capacity of a court.

It need, however, hardly be added that a line of carefully considered cases in the States, in which such courts have undoubted jurisdiction, so far as they would apply in principle, would go a long way toward settling a disputed point of construction in any State election law. In fact it may be said that it would probably be the duty of Congress to follow the settled doctrine thus established.

It now becomes necessary to review the opinion of the supreme court of Mississippi in Oglesby *v.* Sigiman. As will be seen by an examination of the case it was a mandamus proceeding, under a section of the Mississippi Code, to compel the commissioners of election in Tunica County to reassemble and recount the votes cast in that county on the 2d day of November, 1880, for Member of Congress in the Sixth Congressional district of Mississippi. The allegations, substantially, are that the election commissioners counted 506 ballots for the contestant in this case, Mr. Lynch, which had upon them marks and devices, and which were illegal under the provisions of sections 137, 138, 139, and 140 of the Mississippi Code, and ought to have been rejected instead of being counted as they were. A fac simile of the ballots challenged is set out on the record, and on the ticket is found certain printers' dashes which are similar to those challenged in the pending contest, and which are the distinguishing marks complained of. The Oglesby-Sigiman case "was submitted by counsel without brief or oral argument,"

as we are informed by the contestee's brief. The judge who delivered the principal opinion in this case closes the opinion of the court with this remark:

"The House of Representatives of the Congress of the United States is the judge of the elections, returns, and qualifications of its own Members, and the courts of the State have nothing to do with this matter.

"The case might properly have been disposed of without considering any of the questions made by the record except that last mentioned, but the attorney-general informed us from the bar that doubts exist as to the proper interpretation of the election law of 1880, and that criminal prosecutions have been instituted against the commissioners of election of some of the counties for supposed violations of the law in reference to their duties, and we have complied with his request in declaring our view of the several questions presented by the record."

The point, as remarked by the judge, on which the case might have been disposed of, was as to whether the official life of the election commissioners was functus officio, and they were therefore incapable of being brought together to perform official duties; which being determined in the affirmative, the court had nothing to do but to dismiss the petition, as it did when it refused to entertain a petition on behalf of Mr. Lynch, made on the 9th day of December, 1880, to prevent the governor of the State from issuing to the contestee a certificate of election as Member of Congress from the Sixth Congressional district of Mississippi, on the ground that it had no jurisdiction of the subject-matter of the action.

Had the Mississippi supreme court stopped here the question of how far the decision of State courts in construing their own election laws ought to bind this House would be free from embarrassment; but the court, after remarking upon its want of jurisdiction on the first two points, stated in the beginning of its opinion, and having disposed of the third on the ground that the official duties of the election officers were at an end and that they could not be reassembled, proceeded to construe the law relative to distinguishing marks, and decide what were such by the terms of the Mississippi Code so fax as it could do so, the same being confessedly not before it.

It is sufficient to say that if the argument sustaining the conclusions reached by the Mississippi court met our views of the true construction of the law, a further analysis of the opinion would be unnecessary, but, as we can not agree with the argument or the conclusion of the court, it becomes necessary to give some of the reasons why we do not concur and why we do not feel bound by it.

First. The court declared in terms it had no jurisdiction of the subject-matter embraced in the first and second grounds stated in the opinion. The third ground does not involve a construction of the law, and of course can not be considered in determining the question raised in the pending contest.

It is with great hesitation and reluctance that we feel compelled to disagree with the eminent gentleman who concurred in the opinion, and we do so in no spirit of unjust criticism, for we would much prefer to follow rather than dissent from it. Had the opinion been rendered before the election of 1880, or become one of settled law of Mississippi, we do not say but that it would have such weight with us that, though we might disagree with it in logic, we might feel compelled to follow it. We think that the decision is against the current of authority and contrary to the well-settled doctrine heretofore discussed; that it can be regarded as obiter dictum merely, and as the opinion of eminent gentlemen learned in the law, but not as a judicial construction of the code. It may happen, should the supreme court of Mississippi adhere in the future to the reasons advanced in this case, in cases where it has jurisdiction, that this House will adopt them; but until the happening of this event we can not say that the reasons given in the Oglesby-Sigiman case are controlling.

The general doctrine in construing election statutes is that they are to be construed liberally as to the elector and strictly as to the officers who have duties to perform under them. A statute directing certain things to be done by election officers ought to be followed by them with a high degree of strictness, but duties to be performed by the electors, as declared by statute, are directions merely, which, if not observed, it is true, may in some instances defeat his ballot; but when there is an honest intention to obey the law, and the voter is not put in fault by any laches or negligence which he, by the use of reasonable diligence, might or could avoid, or where there is no palpable intention of violating the law apparent, in order to maintain the inestimable right of voting, courts have generally adopted the most liberal construction.

In an almost unbroken line of precedents, from the foundation of the Government, in all the States this rule has been declared. (McCrary on Elections, sec. 403; Kirk *v.* Rhoades, 46 Cal., 398; Prince

v. Skillen, 71 Me., 493; People *v.* Kilduff, 15 Ill., 492; Millholland *v.* Bryant, 39 Ind., 653; The State ex rel. *v.* Adams, 65 Ind., 393; Pradut *v.* Ramsey (5 Morris), 47 Miss., 24, and many other cases not necessary to cite.)

In the debate Mr. Calkins, who drew the report, said:

While I am a Member of this House, whether short or long, wherever the State courts have construed their election laws so that they have become a part of the system of election laws in a State, I will follow them * * * even though I can not agree to the reasoning.

The minority views thus discuss this phase of the case:

If any rule of law can ever be regarded as settled, certainly the rule that Federal authorities would follow the construction of State statutes by State courts must be regarded as settled by a long line of able and unbroken decisions. The only exceptions made to this rule by the Supreme Court of the United States are where the State courts have made conflicting decisions, as in the case of the City of Dubuque, (1 Wall., 175), or in cases arising under the twenty-fifth section of the judiciary act.

From the time of the case of Shelby *v.* Gray (in 11 Wheaton, 361), through Green *v.* Neal (6 Peters, 291), Christy *v.* Pritchett (4 Wallace, 201), Tioga Railroad *v.* Blossburg Railroad (20 Wallace, 137), down to Elmwood *v.* Macey (2 Otto, 289), an unbroken line of decisions will be found.

The court say, in the case of Green *v.* Neal:

"The decision of this question by the highest tribunal of a State should be considered as final by this court, not because the State tribunal, in such a case, has any power to bind this court, but because a fixed and received construction by a State in its own court makes it part of the State law."

In the case of the Tioga Railroad Company *v.* The Blossburg Railroad (in 20 Wallace, 143) the court uses the following language:

"These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principles.

"See Jefferson Branch Bank *v.* Skelly (1 Black, 443); Gut *v.* The State (9 Wallace, 37); Randall *v.* Brigham (7 Wallace, 541); Secomb *v.* Railroad Company (23 Wallace, 117); Polk's Lessee *v.* Wendell (9 Cranch, 98); and Nesmith *v.* Sheldon (7 Howard, 818). Numerous other adjudications of that court could be cited to the same effect."

It is now maintained that this doctrine applies only as a rule of property. The only excuse for this new idea to be found in the decisions in the Supreme Court is where the court say they will not follow the last decision of a State court changing the construction of its laws after the first decision has become a rule of property; otherwise the Supreme Court of the United States would follow the new construction given by the State court. To say that the Supreme Court of the United States will only follow a State court "on a rule of property" is a total misconception of the principle announced by the court. But whatever may be the rule in the Supreme Court of the United States, Congress has in every case, without exception, followed this rule, and in the Tennessee cases in the Forty-second Congress, and the Iowa cases in the Forty-sixth Congress, extended the rule to following the construction of the State laws given by the governor of a State. The same rule was followed, and on the question of marked ballots, in case of Neff *v.* Shank in the Forty-third Congress and Yeates *v.* Martin in the Forty-sixth Congress. The game rule was followed in Bisbee *v.* Hull, and the doctrine broadly laid down as correct in Boynton *v.* Loring in the same Congress. We cite the Language of the committee in these cases.

This rule was first established in the Forty-second Congress in what is called the Tennessee cases, when the report was made by the Ron. G. W. McCrary:

"In a report from the Committee on Elections, adopted by this House April 11, 1871, in the matter of the Tennessee election (Digest of Election Cases, compiled by J. M. Smith, p. 1), the committee say:

"'It is a well-established and most salutary rule that where the proper authorities of the State government have given a construction to their own constitution or statutes that construction will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious working of our complex government, State and national, and your committee are not disposed to be the first to depart from it.'"

This decision was cited with approbation in the Forty-sixth Congress in the Iowa cases, and in the report on these cases, signed by Messrs Field, Keifer, Calkins, Camp, Weaver, and Overton, they say:

"We are not disposed to be the first to depart from it, and we certainly think that such a decision,

made in good faith and acquiesced in at the time by the people of the State, and followed by a full and fair election, should not be overthrown or questioned, except for the gravest reasons, founded on an undoubting conviction that it was plainly an error, and that the error had worked some substantial injury."

In the same case Mr. Beltzhoover says:

"2. The question whether the constitution of the State of Iowa 'must be amended in order to effect a change in the election of State officers,' is one which it is the exclusive right of the State to decide. The persons to whom the constitution and laws of Iowa confide this decision have made it, and their determination is a finality and is conclusive on all parties. The committee have not the right to review the decision."

The case of Curtin *v.* Yocum, in the Forty-sixth Congress, turned upon the construction of the constitution of Pennsylvania, and the minority report, which was made by Mr. Calkins and signed by Messrs Keifer and Weaver, relied upon the construction of the State court, and used this emphatic Language, speaking of an unregistered voter:

"We think this question, under the present constitution and laws of Pennsylvania, not an open one. The highest court of judicature of the State has decided it; at least, it has given a construction to that part of the new constitution under consideration, and we quote therefrom."

This minority report was adopted by Congress, and a Greenbacker was permitted to retain his seat in a Democratic House.

In the case of Bisbee *v.* Hull, in the Forty-sixth Congress, the decision of the supreme court of Florida was held to be conclusive by the committee and the House. When the admission of Mr. Hull, who held the governor's certificate, was under discussion, Mr. Calkins said:

"How can this certificate stand, even as establishing a prima fade right, when the basis upon which it rests has been swept away by a decision of the supreme court of the State of Florida?"

When the case was considered on its merits, the committee unanimously followed the decision of the supreme court of Florida, and a Democratic House unseated a Democrat and seated a Republican under it.

The report made by Mr. Keifer uses this emphatic language:

"The opinion of the supreme court of Florida, pronounced by the chief justice, on the question of canvassing the vote of the county of Madison, will be found in the Record, page 221.

"* * * 'As already stated, duly certified copies of these returns were put in evidence by the contestee; they are signed by all the officers of the election; they are perfect in form, clear and explicit in the statement of the votes cast, and have all been adjudged by the unanimous opinion of the supreme court of Florida, in a case before it, to be good and valid returns of the election at these polls.'" (17 Florida Rep., p. 17.)

Again, in the case of Boyntonv *v.* Loring, the report, which was prepared by Mr. Calkins, and signed by every member of the committee except Mr. Weaver, contains this clear and explicit announcement of the doctrine we contend for. It says:

"But it is not necessary for us to decide this question, and we do not, much preferring that the courts of Massachusetts shall first construe their own statutes, and when they have undergone judicial construction we would follow the decisions of the courts of that State."

The Committee on Elections is as much a continuing body in contemplation of law as a court, and should have as much respect for its own rulings as a court has for its decisions, and "stare decisis" should be our rule. Under the rule that Federal authorities follow the construction given by State authorities to their own statutes, two Tennessee Republicans were seated in the Forty-second Congress; Shanks, a Republican, was seated in the Forty-third Congress; Yocum, a Greenbacker; Bisbee, from Florida, and three Republicans from Iowa were seated in the Forty-sixth Congress. To undertake now to change this rule or limit it to a rule of property, may subject us to the same severe rebuke for oscillation administered to a State court by the Supreme Court of the United States. To say in one Congress we will follow the decision of the supreme court of Massachusetts in construing its statute when made, and in the next Congress refuse to extend the same rule to the supreme court of Mississippi, is glaring inconsistency or invidious distinction between States. If we have respect for ourselves, we should make no radical change of ruling that may subject us to the charge that we "immolate truth, justice, and law because party has erected the altar and decreed the sacrifice."

LIMITATIONS ON THE RULE.

But while the majority of the committee have expressed some views looking to a change in this rule, said to be essential to the preservation of our complex system of government, they do not go to that extent. They say:

"It need, however, hardly be added that a line of carefully considered cases in the States, in which such courts have undoubted jurisdiction, so far as they would apply in principle, would go a long way toward settling a disputed point of construction in any State election law. In fact, it may be said that it would probably be the duty of Congress to follow the settled doctrine thus established."

We have here two new limitations on the old rule. First, it must not be a single decision, but "a line of carefully considered cases." Second, the court must, in the opinion of Congress, when collaterally considering the subject, have had jurisdiction of the case. It is a new and somewhat startling proposition that the opinion of a supreme court is not to be considered authority until it has been repeated. If the citizens of a State acquiesce in a decision of their own supreme court it may and often does happen that the court is not called on to reaffirm its opinion, because no one doubts or disputes its first ruling on the subject, and yet Congress is now asked not to regard as authority anything less than a line of well-considered cases.

DO STATE LAWS BECOME FEDERAL LAWS?

Again, the majority report says:

"Another suggestion in argument needs greater amplification than we can give it now, which is, that by adopting the machinery of the States to carry on Congressional elections this House stands in the nature of an appellate court to interpret these election laws so far as they relate to Congressional elections; that it ought not in this view to be bound by the decisions of the State courts at all, unless the reasons given by them are convincing to the judicial mind of the House while acting in the capacity of a court."

The suggestion made in argument was that the State election laws became Federal laws when Congressmen were elected under them, and therefore Congress had the same right to review the decision of a State court in construction of these laws that the Supreme Court of the United States had to review the decision of a State court on any question arising under the twenty-fifth section of the judiciary act. This was an ingenious suggestion, but it is completely refuted by the Supreme Court of the United States in ex parte Siebold (10 Otto). The court say, "The objection that the laws and regulations, the violation of which is made punishable by the act of Congress, are State laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws." Again, "the paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no further." The great question in this case was whether Congress could make a law to punish a man for the violation of State election laws in Congressional elections, and the able opinion of the court would have been wholly unnecessary if the new theory now advanced were true, that the State laws become Federal laws simply because Congressmen are elected under them. Such an idea is wholly repugnant to the Constitution, which expressly provides that the States may make laws for the election of Congressmen while Congress may make, alter, or amend them.

The debate on this branch of the case was especially well considered and occupied a large share of the attention of the House.[1]

960. The election case of Lynch v. Chalmers, continued.

Although an uncertified return was rejected by the State canvassers the House counted it, sitting Member not having denied in his answer that the vote was cast as claimed by contestant.

Neither the House nor the Elections Committee is bound by the technical rules of the courts as to the admission of evidence.

[1] Especial notice should be taken of speeches by Messrs. Robson, Carlisle, and Calkins. Record, pp. 3427, 3433, 3442.

Certificates of canvassing officers, supplemented by certified transcripts by a chancery clerk, were held prima facie evidence of the votes at a poll whereof the primary returns were rejected.

Reference to a discussion of the return of United States supervisors as evidence of the vote cast.

(3) The commissioners of election of Bolivar County sent to the secretary of state a report in obedience to the following statute:

SEC. 140. The commissioners of election shall, within ten days after the election, transmit to the secretary of state, to be filed in his office, a statement of the whole number of votes given in their county for each candidate voted for for any office at such election, etc.

This return, which was duly signed by the three commissioners, gave Lynch 979 votes and Chalmers 301:

The following statement accompanied the foregoing returns:

"ROSEDALE, BOLIVAR CO., MISS.,
"November 4, 1880.

"TO HON. HENRY MYERS,

"Secretary of State, Jackson, Miss.:

"DEAR SIR: We have this day duly met and canvassed the returns of this county and complied with the law in every respect, as we construed the same after duly consulting the best legal authority in the county, and we now inclose to you our certified report of the same. We have thrown out the Australia precinct box, 30 Democratic and 192 Republican votes, because the returns were not certified to by the inspectors or the clerks. We have thrown out Holmes Lake precinct, because the box was not opened nor the ballots counted by the inspectors and numbered by the clerks and no returns nor tally sheet made. We have thrown out the Bolivar precinct, 45 Democratic and 311 Republican votes, because there was no certified return from the inspectors and clerks. The tally sheets sent in the box show the names of the electors of the Democratic and Republican parties of James R. Chalmers, John R. Lynch, G. B. Lancaster, M. Roland, James Winters, Fleming, and James White, but does not show for what office they were voted for. The tally is kept on four different sheets of paper. The total can only be guessed at and not ascertained correctly. We have rejected the Glencoe precinct vote—27 Democratic, 233 Republican votes—because the vote was counted out in part by all the inspectors and clerks and then discontinued until next day, when the count was finished by one inspector and one clerk and a very imperfect tally sheet and return sent in by those two not certified to.

"JNO. H. JARNAGIN,
"RILEY ROLLINS,
"W. A. YERGER,
"Commissioners of Election."

The majority of the committee determined to count the rejected vote of Australia and Bolivar precincts on the strength of the statement made by the commissioners, saying:

This duty being enjoined by statute, their certificate is evidence of the fact that the number of votes which they certify were given.

The minority assail this action of the majority:

But to accomplish even this reduction of the proper majority of Chalmers the votes claimed by contestant in Bolivar County at Australia and Bolivar precincts are counted. The returns of these precincts were rejected by the commissioners of election because they were not certified to. In other words, the commissioners had no legal evidence that the ballots returned in these boxes were ever cast by voters. They might have been stuffed in by anyone on the road from the precinct to the court-house. That returns not certified to can never be counted is stated by every writer on election cases.

After quoting McCrary the minority continue:

The majority of the committee do not deny this principle of law, but they contend that the votes, though rejected by the commissioners for a lawful reason, must now be counted, because the commissioners in their certificate to the secretary of state show how many votes were rejected.

"Under section 138 of the Mississippi code the inspectors of elections are required to send up to the commissioners the whole number of votes cast at the poll, and the commissioners, under section 140 of the code, are required to 'transmit to the secretary of state, to be filed in his office, a statement of the whole number of votes given in their county for each candidate.'

"This duty being enjoined by statute, their certificate is evidence of the fact that the number of votes which they certify were given."

The majority are mistaken in this statement of the duty of the inspectors under the law of Mississippi. Their duty under section 138 is not "to send up to the commissioners the whole number of votes cast," but "a statement of the whole number of votes," etc.; and by section 139 it is required that the statement shall be certified as correct by both the inspectors and their clerks. (See secs. 138 and 139, above set out.)

Now, it is clear that the certificate is essential to identify and make certain the return and that without the certificate it is no legal return and can not be counted or considered as evidence in any way.

Without the certificate the commissioners, who know nothing of their own knowledge as to the election, can certainly make no statement of the votes that would import verity as to the result.

The minority further say:

If these commissioners had undertaken to count and to transmit to the secretary of state a statement of votes not certified by the inspectors to them, this would have been clearly illegal, and yet when the commissioners of Bolivar County refused to receive and count returns not certified to them, and in the appendix to their statement to the secretary of state stated that they had rejected these votes because not certified, Congress is asked to count them without any other proof that they are good and valid votes except the appended statement of the commissioners as to the number of votes rejected and for whom they purported to be cast.

In the debate on the floor [1] Mr. Calkins called attention to the fact that in the case of Bolivar precinct—against which strong arguments had been directed by Mr. John G. Carlisle, of Kentucky [2]—the election was admitted on both sides to have been peaceable, orderly, and quiet; the officers counted the votes and sent the count, together with the tally lists and all the papers and ballots, to the commissioners, as the law required. But the returns were thrown out because the certificate of the result was not made by the election officers. The sitting Member, who had made the statement of the vote a part of his answer, did not deny that the vote was cast as claimed by contestant. It was true that the statement of the commissioners merely said that so many Republican and so many Democratic votes were rejected; but as Lynch was the only Republican candidate for Congress and Chalmers the only Democratic candidate for that office, it was presumable that these tickets contained each all the candidates of the party. Mr. Calkins admitted that the proof as to what votes Lynch got and what Chalmers got was not the best proof, but it stood uncontradicted. If not true, the other party could have shown its falsity. The friends of contestee had launched their whole argument against the machinery, not against the immutable facts.

(4) As to a precinct in Issaquena County, Hays Landing, a question arose which the minority views state thus:

Will Congress receive and count votes of which there is no evidence except the certificate of a chancery clerk as to what purports to be a transcript of election returns of record in his office, when there

[1] Record, p. 3444.

[2] Record, p. 3435.

is no law in Mississippi authorizing any record to be made of election returns by any officer and when neither the chancery nor circuit clerk nor any other officer in Mississippi is by law made the custodian of the election returns after they have been counted by the commissioners of election?

The majority in their report say of Issaquena County:

There are two statements in the record, which, taken together, enable us with reasonable certainty to arrive at the vote cast in three of the four rejected precincts of this county. The first is the certificates of election made by the commissioners of election to the secretary of state, and found on page 17 of the record.

HAYS LANDING.

They say with regard to this poll that they find 75 votes reported by the election officers; on four of the ballots all the names are scratched off, and they reject the poll because there was no separate list of voters kept. At page 89 of the record, Richard Griggs, clerk of the chancery court for Issaquena County, certifies, under the seal of said court, that the paper appearing on that page of the record is a true and correct transcript of the election returns made by the election officers as appears of record in his office, by which it appears Lynch received 34 votes and Chalmers 29 votes for Member of Congress. The commissioners of election for that county certify to the secretary of state that they rejected this precinct return, and the clerk of the court certifies that that return is on file in his office, a copy of which he gives. The two statements taken together are prima facie evidence of the vote received at that poll. The highest number of votes appearing on the tally list as certified by the clerk agrees with the number the commissioners say were returned from that poll. The commissioners are authorized by law to certify as a fact the number of votes cast; and the clerk of the court is authorized by law, as the keeper of public records, to give certified transcripts thereof.

For the reasons given in reference to Hays Landing precinct, we also count Ben Lomond and Duncansby precincts, by reference to which it will be seen that Lynch's vote was 332 and Chalmers's 20 in the former (Record, pp. 17 and 90), and 371 for Lynch and for Chalmers 45 in the latter.

The minority say:

Now, it is clear that the certificate of the commissioners to the secretary of state is not of itself sufficient to prove the votes rejected in this county, and the majority do not so pretend. It is equally clear that the certificate of the chancery clerk, if it was evidence for any purpose, would fully prove the vote by itself without any aid from the certificate of the commissioners, but the majority do not claim this for that certificate. But because the number of votes stated by the commissioner to have been rejected corresponds with the pretended certificate of the clerk we are asked to receive this as corroborating evidence. But in order to reach this conclusion the majority say that "the clerk of the court is authorized by law, as the keeper of public records, to give certified transcripts thereof." That is true when the clerk is "keeper of the record," but the election returns form no part of any public records in Mississippi, and therefore neither the chancery clerk nor any other officer is the keeper of election returns after they have been counted, and can give no certified transcripts thereof.

The law of Mississippi provided:

SEC. 105. The books of registration of the electors of the several election districts in each county and the poll books as heretofore made out shall be delivered by the county board of registration in each county, if not already done, to the clerk of the circuit court of the county, who shall carefully preserve them as records of his office, and the poll books shall be delivered in time for every election to the commissioners of election, and after the election shall be returned to said clerk.

After quoting the law the minority say:

From this it will be seen that neither the circuit clerk nor chancery clerk is the keeper of any public record which contains election returns, and that the certificate of Griggs in this case is a nullity. The law on that subject is as follows:

The law is well settled that statute certifying officers can only make their certificates evidence of the facts of which the statute requires them to certify, and when they undertake to go beyond this and certify other facts they are unofficial and no more evidence than the statement of an unofficial person. (Swetzler *v.* Anderson, 2 Bartlett, 374.) This rule of course applies to election returns and to all certifi-

cates which are by law required to be made by officers of election, or of registration, or by returning officers. They can only certify to such facts as the law requires them to certify." (Am. Law of Elections, sec. 104.)

In the United States district court, in the case of the United States *v.* Souder, it was held:

"In New Jersey a copy of the return of the township election filed with the clerk of the county and sent to the office of the secretary of state, accompanied by the clerk's certificate that it is a full and perfect return of said election as filed in his office, is not so made and certified and does not come from such a source as to constitute it an official paper." (2 Abbott, C. C. Rep., 456; 1 Greenleaf, sec. 498, "Certificates.")

In regard to certificates given by persons in official station, the general rule is that the law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. (Willes, 549, 550, per Willes, Ld. Ch. Justice.)

If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated.

But as to matters which he was not bound to record, his certificate, being extra official, is merely the statement of a private person, and will therefore be rejected. (Oakes *v.* Hill, 14 Pick., 442, 448; Wolfe *v.* Washburn, 6 Cowen, 261; Jackson *v.* Miller, 6 Cowen, 751; Governor *v.* McAffee, 2, Dev., 15, 18; United States *v.* Buford, 3 Peters, 12, 29; Childers *v.* Cutter, 16 Miss., 24.)

In the debate Mr. Calkins [1] displayed an executive document of Mississippi to show that in this case the offices of circuit clerk and chancery clerk were held by the same person. This also was admitted by the minority. He held that under the law the ballot boxes came into the office of this clerk, citing a section of law not quoted in the minority views. The circuit clerk, being the legal custodian of the papers, could certify them.

At the beginning of his speech, evidently with this question in mind, Mr. Calkins had said: [2]

Neither this House nor its Committee on Elections is or ever has been bound by the technical rules of the admission of evidence such as is applied in the courts. I announce this as a principle settled in the early Congresses, followed all the way down, and acted upon not only by the present Committee on Elections but by every one that has preceded it.

He then referred to the cases of Donnelly *v.* Washburn and Vallandigham *v.* Campbell, especially noticing the remarks of Mr. L. Q. C. Lamar, of Mississippi, in that case.

(5) There was a question of fact as to Kingston precinct, in Adams County, over which there was some division.

In accordance with the above conclusions the majority of the committee found that Lynch had a majority of 385 votes, made up as follows:

The corrected vote of the parties will stand thus:

	Lynch.	Chalmers.
Returned vote	5,393	9,172
Add rejected votes:		
Warren County	2,029	20
Deadmans Bend	85	15
Palestine	231	17
Australia	192	30
Bolivar	311	45
Hay's Landing	39	24
Ben Lomond	332	20
Duncansby	371	45
Rodney	247	92
Stoneville	315	60
	9,545	9,540
From which we deduct	.....	190
And add that number to Lynch's vote to correct the returns in Kingston precinct, Adams County	190	.....
Which makes total	9,735	9,350
Majority for Lynch	385	.....

[1] Record, p. 3445. Also Mr. Carlisle in opposition, p. 3436.

[2] Record, p. 3443.

Both the majority and minority discussed the effect of the returns of United States supervisors of election as evidence, but the decision of this was not considered essential.

In accordance with their conclusions the majority reported resolutions seating contestant.

The report was debated at length on April 26 to 29[1] and on the latter day[2] the question recurred on the first resolution of the majority, declaring sitting Member not elected.

As a substitute for this a resolution declaring contestant not elected was offered and disagreed to, yeas 104, nays 125.

Then the first resolution was agreed to, yeas 125, nays 71.

Then the second resolution of the majority, declaring contestant elected, was agreed to, yeas 124, nays 84.

Thereupon Mr. Lynch appeared and took the oath.

961. The Alabama election case of Lowe v. Wheeler in the Forty-seventh Congress.

A numbering of districts placed unnecessarily before names of candidates for Presidential electors was not held to be such distinguishing mark as to vitiate the ballot as to Congressman.

As to whether a distinguishing mark as to candidates for one office on a ballot invalidates the ballot as to other offices.

Reference to the Federal statute as to voting by ballot in its relation to State laws prescribing time, place, and manner.

On May 17, 1882,[3] Mr. George C. Hazleton, of Wisconsin, from the Committee on Elections, submitted the report of the majority of the committee in the Alabama case of Lowe *v.* Wheeler.

Upon the face of the official returns Mr. Wheeler had been declared elected by 43 majority, and received the certificate of election. The majority report thus sets forth the salient points of the case:

It is conceded that a much greater number of votes were received for Lowe than appears upon said certificate of the secretary of state, and it is practically admitted that if all the votes cast and received for Lowe had been counted and returned by the inspectors of the election the result would have shown the election of Mr. Lowe by a large majority.

As the case is presented to the committee, two leading and controlling questions arise for consideration and determination: First, as to the proper and legal form of the ballot; and, second, as to registration. The evidence discloses that in order to declare Mr. Wheeler elected by 43 majority the inspectors of the election at 14 out of nearly 200 precincts in said district had to reject and did reject in the count 601 ballots cast for the contestant.

The number of ballots so rejected is assumed in the arguments of contestee's counsel at about 515.

Several questions are discussed at length, both by majority and minority.

(1) As to the form of ballot.

The law of Alabama provided:

The ballot must be a plain piece of white paper, without any figures, marks, rulings, characters, or embellishments thereon, not less than 2 nor more than 2½ inches wide, and not less than 5 nor more than

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[1] Record, pp. 3316, 3376, 3415, 3441–3452.

[2] Journal, pp. 1151–1154.

[3] First session Forty-seventh Congress, House Report No. 1273; 2 Ellsworth, p. 61.

7 inches long, on which must be written or printed, or partly written and partly printed, only the names of the persons for whom the elector intends to vote, and must designate the office for which each person so named is intended by him to be chosen; and any ballot otherwise than described is illegal, and must be rejected.

Certain ballots were cast in this form:

FOR ELECTORS FOR PRESIDENT AND VICE-PRESIDENT:
State at large.
JAMES M. PICKENS.
OLIVER S. BEERS.
District electors.
1st District—C. C. MCCALL.
2d District—J. B. TOWNSEND.
3d District—A. B. GRIFFIN.
4th District—HILLIARD M. JUDGE.
5th District—THEODORE NUNN.
6th District—J. B. SHIELDS.
7th District—H. R. MCCOY.
8th Distfict—JAMES H. COWAN.
For Congress—Eighth district.
WILLIAM M. LOWE

These ballots were rejected, and the majority contend that they should be counted:

The contestee in this case insists that the expressions "1st district," "2d district," which appear on said ballot, do of themselves render the ballots illegal under said section 274, as amended.

This statute provides that the "ballot must be a plain piece of white paper, without any figures, marks, rulings, or embellishments thereon." We are unable to conceive how this form of ballot infringes upon either the letter or spirit of the statute. If we are to adopt the narrow and strained construction of this statute presented by the contestee, then we must assume that the legislature of Alabama intended to impair and destroy the integrity of the legal voting power of the State instead of securing it in its proper rights, because it would be impossible to prepare a ballot that would stand the test of such a construction and that could not be rejected at the caprice of a party inspector of elections for a reason as valid and strong as that presented in this case. Such a construction means simply disfranchisement of the citizen, and makes the law itself a fraud upon the freeman's boasted right of franchise. We quote with favor the following extract from the contestant's brief on this point:

"Does the use of the numerals or figures 1st, 2d, etc., make the ballot illegal? The intention of the statute is to be looked for before construing it. The word 'figures' must be construed in connection with the words 'marks, rulings, characters, embellishments.' If a construction so literal as that suggested by this objection be given this statute, no legal ballot can be written or printed, because the literal meaning of the word 'character,' for instance, would force one to print or write his ballot without making a letter, for a letter is literally a 'character.' A rejection of those ballots because they contained the letter 'o,' the 'figure' of a circle, used in spelling contestant's name, would not have been further from a correct construction of the statute than the one which holds that the numerals 1st, 2d, etc., are 'figures' within its meaning. The meaning is clear. The word 'figures' refers to 'embellishments, characters,' designs, pictures, or prints that would deprive the ballot of its secrecy. The ballot must not contain a flag, an eagle, or other device. It must be on plain white paper."

It has been a long-standing custom throughout the South, as well as the North, and especially in Alabama, to designate and form electoral tickets in just this way, and no one ever claimed before that it impaired the secrecy of the ballot or was subject to the feeble objection now made against it.

The act to amend 276 of the Code of Alabama declares that—

"One of the inspectors must receive the ballot, folded, from the elector, and the same passed to each of the other inspectors, and the ballot must then, without being opened or examined, be deposited in the proper ballot box."

The act to amend 286 of the Code of Alabama provides that—

"In counting out, the returning officer or one of the inspectors must take the ballots, one by one, from the box in which they have been deposited, at the same time reading aloud the names written or printed thereon and the office for which such persons are voted for; they must separately keep a calculation of the number of votes each person receives and for what office he receives them; and if two or more ballots are found rolled up or folded together so as to induce the belief that the same was done with a fraudulent intent they must be rejected; or if any ballot containing the names of more than the voter had a right to vote for, the first of such names on such ticket to the number of persons the voter was entitled to vote for, only must be counted."

We conclude, from reading and construing these sections together, that the rejected ballots were legal, and should have been counted.

Mr. Webster, in the Rhode Island case, stated admirably the two governing principles of the American system of suffrage:

"The first is that the right of suffrage shall be guarded, protected, and secured against force and against fraud.

"The second is that its exercise shall be prescribed by previous law; its qualifications shall be prescribed by previous law; the time and place of its exercise shall be prescribed by previous law; the manner of its exercise, under whose supervision (always sworn officers of the law), is to be prescribed. And then again the results are to be certified to the central power by some certain rule, by some known public officers, in some clear and definite form, to the end that two things may be done:

"First, that every man entitled to vote may vote; second, that his vote may be sent forward and counted, and so he may exercise his part of sovereignty in common with his fellow-citizens."

In a spirit as broad as this the bill of rights of the constitution of Alabama (sec. 34) declares that "the right of suffrage shall be protected by laws regulating elections," and prohibiting, under adequate penalties, all undue influences, etc.; and the constitution (art. 8, sec. 2) declares that "all elections by the people shall be by ballot."

The right of suffrage thus guaranteed by the constitution of Alabama can not be imperiled or destroyed by any legislative enactment whose construction makes this great constitutional right of the freeman to hang upon the caprice or whim of the partisan inspector of elections, which, if exercised, as in this case, must inevitably and for all time sacrifice all the substantial rights of citizen franchise to doubt, shuffling, and uncertainty.

The style in which they were printed does not violate the secrecy of the ballot. They were printed on plain white paper, without anything whatever upon them to betray their character or contents.

It is contended by the contestant that this peculiar construction of the law of Alabama had its origin in the following circular, issued and placed in friendly hands by the chairman of the Democratic committee, just before and on the day of election. The notice is at least significant:

"DEAR SIR: As soon as the polls are closed, inform the inspectors of the election that the Lowe tickets with Hancock electors on them are illegal. They contain the figures 1st, 2d, etc., designating the district. These are marks or figures which are prohibited by the election laws (see acts 1878–79, p. 72), and all such tickets should be rejected when the votes are counted, after the polls are closed.

[Indorsed on back in writing:]

"To be shown only to very discreet friends."

But we beg leave for a moment to refer to the bearing of the laws of the United States upon this question. Congress has the power (art. 1, sec. 4) "to make or alter" State regulations as to "the manner" of holding Congressional elections. In section 27, Revised Statutes, Congress has enacted that "all votes for Representatives in Congress must be by printed or written ballots." This provision as to the ballot is exclusive and supreme so far as it goes. The State can not alter it. See also sections 2012, 2017, and 2018 of the Revised Statutes. These sections relate to the appointment of supervisors and to the definition of their powers and duties in national elections.

The majority of the committee found that contestant had proven 601 votes as rejected in the manner discussed above.

The minority views, presented by Mr. F. E. Beltzhoover, of Pennsylvania, held:

If the legislature had merely prescribed the form of ballot, without declaring those cast in any other form to be illegal, or commanding their rejection, then, of course, it would be a question whether the requirement of the statute, that the ballot must contain only the names of the candidates and the designations of the offices, is directory or mandatory. And to the decision of that question such authorities as in McKenzie *v.* Braxton, Smith, 19, would be applicable. But when the law makes a ballot not cast in a prescribed form illegal and requires its rejection, there is no place for the question whether the statute is mandatory or directory. The ballot which is not in the prescribed form is illegal, and must be rejected, because the law in terms declares it to be illegal and commands its rejection.

The legislature of Alabama, exercising a power expressly conferred by the Federal Constitution, had prescribed the mode of choosing Presidential electors as follows:

"On the day prescribed by this code there are to be elected, by general ticket, a number of electors for President and Vice-President of the United States equal to the number of Senators and Representatives in Congress to which this State is entitled at the time of such election."

Under this statutory provision there could be no choice of "district elector" for the "first district" or "second district" or for either of the other eight districts designated. The ballots in question each contained the designations of eight different offices unknown to the law; that is to say, the offices of district electors for the eight districts of the State. They were deposited in the ballot boxes in violation of the requirement of the statute that the ballot shall contain only the names of the candidates and the designations of the offices.

It is submitted, as an incontrovertible proposition, that this statutory provision, for the choice of Presidential electors, makes the office of each and every Presidential elector an office for the State at large, and that the office of district elector is unknown to the law of Alabama. It is submitted, as a second incontrovertible proposition, that the ballots in question were ballots for two electors from the State at large, and for eight district electors, one for each of eight districts. If these two propositions are correct, so also must be the conclusion that eight of the offices designated on these ballots are unknown to the laws of the State, and that the designation of these eight offices was a violation of that requirement which excludes from the face of the ballot everything except the names of the candidates and the designation of the offices voted for, and that therefore, under the law, it was the duty of the inspectors to reject these ballots.

The minority contend that this provision for the law requiring the electors to be chosen by general ticket is peculiar to Alabama; and also claims that by the evidence the figures in question were shown to be in fact distinguishing marks.

Mr. A. A. Ranney, of Massachusetts, one of the majority, filed individual views, in which he says, in regard to the alleged distinguishing marks:

To sustain the objection made to the ballot by contestee would shock both the moral and the legal sense of every fair-minded man.

My conclusion is that the course pursued was a perversion of the statute, and the objection was seized upon as a pretext and induced by outside manipulation.

In any event, it would seem that the part which relates to the candidate for Congress may be regarded as a separate ticket.

A New York statute once required State and county officers to be voted for on separate ballots. At an election held under that statute a large number of ballots were cast for "Cook, for State treasurer," which had at the bottom of them "for county judge, Ezra Graves." These ballots were alleged to be illegal and the election contested. The supreme court in passing on the question said:

"I have not been able, after the most deliberate consideration of the objection raised, to perceive that there is anything in it. The ballot for every office on a ticket containing the names of more than one officer must be regarded as a separate ballot." (People *v.* Cook, 14 Barbour, 259, 299.)

The case was carried to the court of appeals and there affirmed. The court said: "The Speiman ballot, headed 'State,' had at the bottom 'for county judge, Ezra Graves.' Whatever effect this had on the candidate for county judge, it had none on the candidates on the State ticket." (People *v.* Cook, 8 N.Y., 4 Selden, 68, 85.)

962. The case of Lowe v. Wheeler, continued.

A vote received by election officers is presumed to be legal and is not to be impeached by a question of registration except on indubitable proof.

Instance wherein the minority views proposed that the poll should be purged of illegal votes by deductions pro rata.

(2) Sitting Member claimed that several hundreds of persons who were not registered as required by law voted, and that on this account 1,846 votes should be deducted from contestant's vote and 852 from his own vote.

The majority report thus discusses this question:

In regard to the registration of voters the facts as shown by the testimony do not sustain the claims made by the contestee. His testimony does not establish what he alleges it does. It is largely secondary and of a hearsay character at the best. The fact is that in many instances where he claims registration was not made it was made, and in few instances, if any, does he establish the identity of the voter wherein he claims nonregistration.

But whatever may be the facts upon this question of registration, we are clearly of the opinion that the constitution of Alabama does not make registration an absolute condition or prerequisite of voting, nor do the statutes of the State.

The provisions of the Alabama constitution (art. 8, sec. 5) in regard to registration is subject to two constructions: One making registration constitutionally essential to voting and the other making registration essential only "when it is so provided" by law. The latter construction is the one taken by contestant. It is the plainest and most satisfactory construction that can be derived after giving full force to all the words in the section. On the contrary the construction given by the contestee would eliminate the words "when it is so provided" and make the section read as follows:

"The general assembly may, when necessary, provide by law for the registration of electors throughout the State or in any incorporated city or town thereof, and no one shall vote at any election unless he shall have registered as required by law."

This reading of the section with the words "when it is so provided" eliminated is the construction given by the contestee to the entire section. But these words can not be properly eliminated. They stand out in the section to qualify and limit its meaning. They must be given due consideration. They declare, in effect, not that registration shall be a prerequisite for voting, but that, when the general assembly shall so provide, no person shall vote unless registered—meaning that the legislature may make registration a prerequisite for voting, and that when "it is so provided" no person shall vote without being thus registered.

But the legislature has not seen fit to make such provision. Registration is not a prerequisite. It is not compulsory. It is not even put down as one of the qualifications of an elector.

The registration law of Alabama contains the following provision:

"SEC. 233. *Registration on election day, and certificate.*—The assistant registrars shall be present at the voting precinct or ward for which they are respectively appointed, on the day of election, to register such electors as may have failed to register on any previous day in their precincts or wards, which registration must be done, in every respect, according to the form prescribed; and the assistant registrar shall furnish to each elector who may register on the day of election a certificate of registration, which shall be in the following form:

"I, _____, assistant registrar, do hereby certify that _____ has this day registered before me as an elector.

"(Signed) _____, *Registrar.*

"Which certificate, signed by the registrar, shall be sufficient evidence that such elector is registered; and in case such assistant registrar, for any cause, is unable to attend, or there be a vacancy in the office of assistant registrar for such precinct or ward, the county registrar shall appoint some competent person as assistant registrar for that day; and if no appointment be so made by 10 o'clock of that day, then the inspectors of election may appoint an assistant registrar, who may qualify and act as such for that day; but this section shall not apply to incorporated towns or cities having a population of more than five thousand inhabitants, except as is hereinafter provided by this chapter."

Every voter that complied with this condition complied with the requirements of the registry law of Alabama, and was as much entitled to vote as though he had been registered days before the election. In the face and eyes of such a provision, and in the absence of such proof as would show that the officers who had registration in their charge had deliberately violated their oaths, how are we to assume that this provision of law was not complied with in all cases of voters not embraced in the general registry? As to the presumption that the officers of the law charged with a duty performed it, we cite McCrary on Elections, page 231; to the election case of Finley *v.* Bisbee, volume 1, third session Forty-fifth Congress, House Reports.

We conclude, therefore, and we think rightfully, that the votes which the contestee claims should be thrown out on account of alleged nonregistration can not be deducted from contestant's votes; and, besides, that they could not be taken pro rata from the whole vote cast, because there is no evidence which establishes definitely and identically for whom they voted. It was held in Curtin *v.* Yocum, volume 2, House Reports of Forty-sixth Congress, where an elector votes without challenge, his vote can not afterwards be rejected, because his name may not be found on the registration list, but that it will be presumed the officers of the election did their duty till the contrary is proven.

Mr. Ranney, in his views, says:

There seems to be no decision of the State courts on the point raised, and the question becomes immaterial, unless the necessary basis of facts is first established. I am inclined, however, to the opinion that, under the constitution and the statutes passed thereunder (both being in harmony), that registration was designed as a reasonable regulation, although not prescribed as a qualification.

The question is not free from doubt, but, considering the object and purposes subserved by a system of registration, I am inclined to so hold.

It is quite doubtful whether the law of Alabama renders void a vote of a nonregistered elector when once cast and received. But for the purposes of the present case I may safely assume that registration was intended as a prerequisite, and so regard it.

Analogous questions were discussed in the case of Finley *v.* Bisbee in the Forty-sixth Congress and in Curtin *v.* Yocum in the Forty-sixth Congress. They furnish, however, no substantial authority beyond the general doctrine discussed, as the constitution and statutes of those States differ materially from those of Alabama.

While, for the purposes of this case, I assume that registration is a prerequisite in Alabama as a reasonable regulation, I find that the proof does not sustain the charge made by the contestee.

After quoting from documents to show the great interest in the election and the care exercised by sitting Member's party, Mr. Ranney says:

It is hardly probable that so many persons would openly violate the law or be allowed by sworn officers to do so. The penalty prescribed for the fraudulent voter is severe under the laws of Alabama, although it is said to be quite light comparatively as regards the officers of election. They had with them in each precinct, as must be assumed under the provisions of the law cited, full certified copies of the registration lists with the names of the electors alphabetically arranged thereon, and the assistant registrar of the precinct was required to be present at the polls with papers ready to register all electors who had not been registered prior to that day, and it may be assumed that he was present or that some other person was appointed by the inspectors to attend to that duty in his absence.

The vigilance exercised generally is illustrated by what was done in regard to the so-called marked ballots already considered. Similar activity is probable in respect to the registration and challenging.

It is not now claimed or shown that any of those who voted were not in fact qualified voters and entitled to vote otherwise or that any of them were challenged. No one of them is called as a witness to prove his identity or failure to register.

All this renders the claim of contestee very improbable. It would require proof of an indubitable character.

"It is the settled law of elections that where persons vote without challenge it will be presumed that they were entitled to vote, and that the sworn officers of the election who received their votes performed their duty properly and honestly, and the burden of proof to show the contrary devolves on the party denying their right to vote." (Report in Finley *v.* Bisbee, Forty-fifth Congress.)

We call attention to the case of Perry *v.* Ryan, 68 Illinois, 172.

"Where a person votes at an election without having been registered and without any proof of right, if it does not appear he was challenged or any objection made to his vote the presumption must be that he was a legal voter and was known to the judges of election."

In 83 Illinois, 498, where a registry law very similar to the law now under consideration was construed by that court, it was held:

"The presumption of the legality of a vote in no way depends upon the omission to challenge or object to it or any presumed knowledge of the judges of election, but it arises from the fact of its having been deposited in the ballot box. When once deposited, it will be presumed to be a legal vote until there is evidence to the contrary."

Mr. Ranney thus states his objections to the evidence:

Now let us see what the proof adduced is.

Contestee has procured and put in evidence certain papers certified to by the probate judges in five several counties, respectively, purporting to be copies of the registration lists for the precincts involved, and also of papers called the poll lists from the same precincts. His claim is that he produces certified copies of all the registration lists of these precincts, which show all the persons registered and qualified to vote in the same, and poll lists showing the names of all those who did vote as written down by the clerks at the election. By comparing these papers in each precinct named in his table, cited hereinbefore, he finds, as he says, and as witnesses who have compared them swear, 2,698 names in the aggregate on the poll lists which are not on the registration lists, and he contends that it follows that they were not registered, and their votes illegal.

The minority of the committee, in their report (p. 27) in Bisbee *v.* Finley, an analogous issue, said that "the evidence relied on was wholly inadequate, being altogether inferential." But we go further:

Now, in order to have this proof satisfactory and sufficient it must at least be shown by affirmative, competent, and credible evidence that the records contain copies of all of the original and supplementary lists of registration made out by the registrars and assistant registrars since 1875 and before the election of November 2, 1880, together with all that were made on election day at the polls by the assistant registrars, or those appointed in their place by the inspectors in the absence of the registrar. Unless we have copies of all the registration books and lists, we have not got the proper basis for comparison.

We must next have all of the requisite poll lists duly proved and properly authenticated.

Upon examining the copies certified to, we do not find, save in a few cases, what answers these requirements.

After showing wherein the registration and poll lists were defective as evidence, Mr. Ranney concludes:

We are asked to presume that all registrars did their duty; that judges of probate had all the papers which the law provided should be sent to them; that the poll lists not signed were the genuine and true ones, when they could be so easily manipulated without complicity on the part of the judges, in order to overcome all the presumption in favor of the legality of the votes cast. I can not do it in the face of so much evidence as appears to weaken those presumptions invoked by contestee.

There is another consideration which ought to be noted as a very strong reason at least why contestee should be held to the strictest rules of evidence, if not as justifying the claim that the ballots of voters not on the registration lists apparently should not now be rejected after they were offered and deposited without challenge or objection at the time. Under the law of Alabama, as already stated, any qualified voter, if not on the copy of registration lists with the inspectors conducting the poll, and challenged, may register at the time and on the spot, or take the requisite oath and then rightfully vote. If he is not challenged, and is allowed to vote without doing this, the failure of duty on the part of the registrar or inspectors may unjustly deprive the elector of his vote. The case would perhaps come within the spirit, if not the strict letter, of section 2007 of the Revised Statutes of the United States.

The remarks of Mr. Calkins in case of Curtin *v.* Yocum, although not in all respects applicable to this case, are pertinent and forcible, and we quote them:

"I call the attention of the Members of the House especially to the conclusion reached by Judge Briggs in construing this law. He says: 'By accepting the vote,' referring to the nonregistered voter who presents himself at the polls without an affidavit, etc.—'by accepting the vote without demanding the proof they deprive the voter of the opportunity of furnishing it.' To construe the law as contended for by my friend from Pennsylvania (Mr. Beltzhoover) makes it a mere trap, for the reason that the voter presumes, or he has a right to presume, that he is registered. He has lived in the precinct the time required by law; he has paid his tax; the assessor has been to his house; he knows his name ought to be on the registry list, and he goes up to the ballot box with the ballot in his hand. They take his ballot and deposit it in the ballot box, and afterwards, when he can not furnish the proof, it is contended his vote is an illegal one, while if the election officers had called his attention to it at the moment he could have supplied the evidence required and established his right to vote to the mode prescribed. But that evidence was not demanded. He voted knowing that he had a legal right to vote, but the legal evidence of his right was not required of him by the election officers. And applying the same doctrine as in Wheelock's case, 'you can not deprive the legal voter of the right to vote by reason of the failure of the officer to do his duty,' and it seems to me that the position is unassailable."

Regulations may be merely directory, and if the officer of election or the voter does not follow them they do not necessarily vitiate the vote when deposited and received.

The present case is a very strong one for the application of that rule, in the absence of any statute making registration a prerequisite, and where the system of registration is so imperfect and loosely managed.

The minority views contend that the majority have misconstrued the constitution:

It will be observed that the language of the constitution is that "the general assembly may, when necessary, provide by law for registration, * * * and when it is so provided no person shall vote unless he shall have registered as required by law."

Now, what do these words, "so provided," refer to? Plainly to registration. That is to say, the general assembly was authorized to provide by law for registration; to determine the mode and requisites of registration generally and particularly. The registration had reference to persons who were entitled under the constitution to vote. It has nothing whatever to do with the qualifications of the voter, because those qualifications are fixed by the constitution itself, and could not be interfered with by any act of the legislature. And therefore the concluding words of this section are unmistakable in their meaning, "no person shall vote at any election unless he shall have registered as required by law;" and that meaning is that the constitution having fixed the qualifications of the voter, this registration law was intended to furnish the evidence of the right of the party to vote, to wit, his being registered as a voter according to the forms and requirements of this act of the legislature. This act of the legislature was provided for by the constitution, not to determine the qualifications of the voter, but to furnish the qualified voters with the evidence that they were qualified and entitled to cast their ballots; and the constitution simply provides, and no other rational meaning can be attributed to it, that registration, and that alone, shall be evidence of the fact that the party is a qualified voter, and therefore any person who is not registered is clearly an illegal voter under the constitution and laws of the State of Alabama. Registration is the act of the voter. If he fails to register, it is his own fault, and he can not complain, nor can anyone else, if his right to vote is lost by reason of nonregistration.

After a careful examination of the testimony in this case, we believe that it conclusively shows that not less than 2,400 persons voted in this district who were not registered, and that not less than 1,000 of them voted for the contestant.

The minority views further say that if it be conceded that there was doubt as to how the nonregistered voters voted, the law from McCrary afforded a solution:

In purging the polls of illegal votes, the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest number. (Shepherd *v.* Gibbons, 2 Brewst., 128; McDaniel's case, 3 Penn., L. F., 310; Cushing's Election Cases, 583.) Of course, in the application of this rule such

illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each. Thus, we will suppose that John Doe and Richard Roe are competing candidates for an office, and that the official canvass shows:

	Votes
For John Doe	625
For Richard Roe	575
Total vote	1,200
Majority for Doe.	

But there is proof that 120 illegal votes were cast, and no proof as to the person for whom they were cast. The illegal vote is 10 per cent of the returned vote, and hence each candidate loses 10 per cent of the vote certified to him. By this rule John Doe will lose 62½ votes and Richard Roe 57½ votes and the result, as thus reached, is as follows:

	Votes
Doe's certified votes	625
Deduct illegal votes	62½
Total vote	562½
Roe's certified vote	575
Deduct illegal votes	57½
Total vote	517½
Majority for Doe.	

Applying this principle, we here submit a table showing the number of votes cast for contestant and contestee at various precincts, the number of nonregistered voters, and the pro rata of deductions from each party on account of the nonregistered voters.

The minority deny that the poll lists and registration lists are inadequate as proof.

963. The case of Lowe v. Wheeler, continued.

Discussion as to the evidence required to justify taking into account ballots rejected wrongfully by election officers.

As to the use of heavy type as a distinguishing mark on ballots.

In regard to minors and nonresidents as voters, the mere opinion of a witness, who does not state facts to justify it, is insufficient.

In regard to convicts as voters, the record of conviction is the only evidence acceptable to the House unless the record has been destroyed.

(3) The minority in their views objected strongly to the testimony by which the majority determined the number of ballots rejected, because of the figures designating the districts of the Presidential electors:

We think that none of the evidence by which he attempts to prove these facts is legal. The witnesses merely give their recollection on the subject. Many of them made out returns one or more days after the election was over, and in many cases they admit that even these returns were made out from hearsay, and many of them show by their evidence that their entire knowledge on the subject is hearsay.

The law of Alabama (see Code, par. 288, printed p. 1215 of the record in this case) provides that all rejected ballots shall be rolled up by the inspectors and labeled as rejected ballots, and that they shall be sealed up together with the other ballots, and securely fastened up in the box from which said ballots were taken when they were counted. The answer of the contestee distinctly alleged that where votes for William M. Lowe were discarded it was so stated in the returns made by the inspectors. In no instance did the contestant put these returns in evidence or give any reason for not doing so. Nor did he put the ballots which he claimed were rejected in evidence, nor does the record show that he gave any reason for not doing so.

Furthermore, not one of the 49 depositions was in any way certified by any commissioner.

None of the depositions has any certificate of any kind whatever.

It is provided in the Revised Statutes of the United States as follows:

"SEC. 127. All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify and carefully seal and immediately forward the same, by mail, addressed to the Clerk of the House of Representatives of the United States, Washington, DC."

The contestee objected to these depositions at the commencement of the present session of Congress on the ground that they were not certified according to law, and has persisted in that objection until the present time.

Again, none of these alleged depositions was reduced to writing in the presence of the notary.

The provision of the Revised Statutes of the United States is:

"SEC. 122. The officer shall cause the testimony of the witnesses, together with the questions proposed by the parties or their agents, to be reduced to writing in his presence and in the presence of the parties or their agents if attending, and to be duly attested by the witnesses respectively."

The corresponding provision of the judiciary act of 1789 is in the following words:

"And every person deposing as aforesaid shall be carefully examined and cautioned and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence."

The provision that the deposition must be reduced to writing in the presence of the officer is common to the contested election law and the judiciary act of 1789. It is obvious therefore that decisions of the Federal courts on the provision of the judiciary act for the writing out of the deposition will be authorities in cases which may come before this committee under the corresponding provision of the statute relating to contested elections.

In Bell *v.* Morrison, 1 Peters, 351, Judge Story, delivering the opinion of the court, held that under section 30 of the judiciary act a deposition is not admissible if it is not shown that the deposition was reduced to writing in presence of the magistrate.

The same doctrine is maintained by the following authorities: Edmondson *v.* Barret, 2 Cranch C. C., 228; Pettibone *v.* Derringer, 4 Wash., 215; Rayner *v.* Haynes, Hempst., 689; Cook *v.* Burnley, 11 Wall., 659; Baylis *v.* Cochran, 2 Johns. (N. Y.), 416; Summers *v.* McKim, 12 S. & R., 404; United States *v.* Smith, 4 Day, 121; Railroad Co. *v.* Drew, 3 Woods C. Ct., 692; Beale *v.* Thompson, 8 Cranch, 70; Shankriker *v.* Reading, 4 McL., 240; United States *v.* Price, 2 Wash. C. Ct., 356; Hunt *v.* Larpin, 21 Iowa, 484; Williams *v.* Chadbourne, 6 Cal., 559; Stone *v.* StillweU, 23 Ark., 444.

(4) Sitting Member also set up a counterclaim that a large number of ballots cast for contestant had his name, "William M. Lowe," printed in type so much heavier than the other names as to constitute, in fact, a distinguishing mark. The minority sustain this contention, saying:

The question here presented is a new question. It was not considered by the Committee on Elections in the Mississippi case of Lynch *v.* Chalmers. The differences between the statutory provisions of Mississippi and Alabama and between the ballots in the two cases are such that a decision in one of the cases will not necessarily furnish a precedent for the other. The Mississippi statute is in the following words:

"All ballots shall be written or printed in black ink, with a space not less than one-fifth of an inch between each name, on plain, white, printing newspaper, not more than 2½ nor less than 2¼ inches wide, without any device or mark by which one ticket may be known or designated from another, except the words at the head of the ticket; but this shall not prohibit the erasure, correction, or insertion of any name by pencil mark or ink upon the face of the ballot; and a ticket different from that herein prescribed shall not be received or counted."

As we have seen, the Alabama provision is that——

"The ballot must be a plain piece of white paper, without any figures, marks, rulings, characters, or embellishments thereon, not less than 2 nor more than 2½ inches wide and not less than 5 nor more than 7 inches long, on which must be written or printed, or partly written and partly printed, only

the names of the persons for whom the elector intends to vote, and must designate the office for which each person so named is intended by him to be chosen; and any ballot otherwise than described is illegal and must be rejected."

The provisions of the Mississippi law applicable to the case of Lynch v. Chalmers are: (1) That the ballot shall be without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the ticket, and (2) that a ticket different from that prescribed shall not be received or counted. The provisions of the Alabama statute applicable to the case now on trial are: (1) That the ballot must be without marks and must contain only the names of the persons for whom the elector intends to vote and the designations of the offices, and (2) that any ballot otherwise than as described is illegal and must be rejected. In the Mississippi case the grounds of objection to the ballots were that certain printer's dashes separated different headings of the ticket. In this case the grounds of objection are that the ballots contained the designations of eight offices unknown to the law and that they were so marked, by the use of peculiar paper, ink, and type, as to be readily distinguished from other ballots, even when folded. The differences between the two cases are too palpable to require or justify any comment.

What we have said is sufficient to show that these ballots are illegal, but there is other evidence in this case which makes their rejection still more imperative.

The evidence shows that Mr. Lowe's supporters used the marked ballots, together with violence and terrorism, to destroy secret voting.

The evidence shows clearly that the using of these ballots in the precincts where it is claimed they were rejected was for the unlawful purpose of preventing a secret ballot.

It is evident that with these ballots secrecy was impossible and that such ballots could be identified in the hands of the voters.

It is certain that when voters are abused, terrorized, and ostracized for not voting as their leaders dictate, the weaker classes will hesitate before going to the polls with ballots different from those ordered by their leaders.

(5) The sitting Member charged that certain persons not qualified as electors voted for contestant. The majority of the committee thus ruled on this point:

In regard to minors and nonresidents, the mere statement of a witness that an elector is one of this class seems to be the sole reliance of the contestee. This is not sufficient. The witness must give facts to justify his opinion.

In regard to convicts, the record of conviction is the best evidence and the only evidence to be accepted by the House, unless the loss or destruction of that record is shown. In no instance has the contestee produced the record or sought to account for its absence.

964. The case of Lowe v. Wheeler, continued.

The law providing for representation of both parties on the board of elections officers being violated and the vote being impeached, the House rejected the return.

The return being rejected, votes were proven aliunde on testimony of the voters, corroborated by a witness who saw them vote.

Confidence in the integrity of the poll being destroyed, the returns are rejected.

The returns being rejected, the vote aliunde was proven entirely by the testimony of the voters.

Instance wherein a return was rejected and count aliunde admitted without request for the same in contestant's notice.

(6) At Meridianville precinct every State officer was a member of sitting Member's party, in violation of the law, which provided for a representation of both parties. The box gave contestant 47 votes, but a witness, who was partially

corroborated, presented a list of 67 names of voters whom he saw take tickets for contestant and vote them. Also 55 voters testified that they voted for Lowe. So the majority consider that the evidence of fraud was such as to require the rejection of the return, and they credit the contestant with the 55 votes proven aliunde.

(7) As to Laniersville the majority report says:

> At this precinct, as at Meridianville, all the State officers, sheriffs, and clerks were ardent partisans of the contestee; the contestant had no friends among them. The poll list shows that 188 persons voted at this box. Yet, the inspectors, in defiance of law and mathematics, counted for contestee 142 votes and for contestant 57 votes, making 199 votes, or 11 more ballots in the box than names on the poll list. The blundering fraud is apparent on the face of the returns.
>
> The inspectors certify that on counting the ballots after the election there were 11 more ballots in the box than were names on the poll list, and that they deducted 2 Republican ballots and 9 Democratic ballots, because they were found folded together. But the certificate of the probate judge, also a partisan of the contestee, shows the vote cast and counted at this box as follows:
>
> "Ballots counted for Wm. M. Lowe, 56; ballots counted for Joseph Wheeler, 142."
>
> If this be the truth, there must have been not only 199 ballots, an excess of 11, but there must have been 210 ballots, an excess of 22 ballots. The fact, however, remains that only 188 names are upon the poll list, and that, therefore, only that number of voters could have legally voted and only that number of ballots could have been honestly counted. The inspectors, nevertheless, after deducting 11 votes in excess of the poll, return 57 for the contestant and 142 for the contestee. Who can give this return a fair and honest explanation?
>
> But the show of fraud on the face of the returns is made apparent, if not conclusive, by the evidence that the box was stuffed in the interest of the contestee, and the integrity of the election at that poll substantially destroyed.

The contestant called the voters, and 128 swore that they voted for contestant. So the committee credit him with that number. The minority object:

> The majority of the committee, however, reject this box, without a request to that effect in the contestant's notice, and then, still without a request, and without a particle of legal evidence, count for Mr. Lowe 128 votes, and give Mr. Wheeler none, although 132 votes were cast and counted for him, and Mr. Lowe's own witness swears that some 30 votes were cast for Mr. Wheeler.

In accordance with their conclusions as to law and fact, the majority of the committee find that the contestant actually received a majority of 847 votes, and accordingly report resolutions giving to him the seat.

The report was debated at length on June 2 and 3, 1882,[1] and on the latter day[2] a motion to recommit, with instructions to examine with reference to certain tissue ballots, was disagreed to, yeas 90, nays 129. Then the resolutions reported by the majority of the committee were agreed to, yeas 148, nays 3, not voting 140—the minority evidently attempting obstruction by refraining from voting.

Mr. Lowe thereupon appeared and took the oath.

965. The Alabama election case of Smith v. Shelley, in the Forty-seventh Congress.

Instance wherein votes of previous elections and nature of population were cited to establish a presumption as to the political preferences of the district.

When by a conspiracy of officials ignorant election officers were

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[1] Record, pp. 4455, 4491–4505.

[2] Journal, pp. 1397–1399.

installed and then their imperfect returns rejected contestant was permitted to prove the vote aliunde by oral evidence of inspectors, etc.

Distinction between proof required to set aside returns of sworn officers and that which will establish a vote aliunde when returns do not exist.

A contestant dying after a report in his favor, the House unseated the returned Member and declared the seat vacant.

Form of resolutions when a contestant who is entitled to the seat dies before the case is heard by the House.

On June 27, 1882,[1] Mr. W. G. Thompson, of Iowa, from the Committee on Elections, submitted the report of the majority of that committee in the Alabama case of Smith *v.* Shelley. At this election there had been three candidates, but the contest had been between sitting Member and contestant, the former being seated by a returned majority of 2,651 over contestant.

After reviewing the condition of the district, which had been constituted to relieve other districts of a preponderating colored population, and was therefore largely dominated by that class of population, the majority report claims that the colored voters were almost entirely Republican, and that the voters of the district were Republican by a large majority. Figures of the votes in other elections are cited to prove this, although the minority views, presented by Mr. F. E. Beltzhoover, of Pennsylvania, denied that any such assumption might be made.

The majority report charges a conspiracy, developed as follows:

> And your committee can not escape the conviction, from the testimony, that a thoroughly organized and preconcerted plan and purpose had been made and understood by and amongst the Democratic partisans and supporters of Mr. Shelley, that in all the precincts where the Republican majorities were large and Democratic voters very few that the Democratic inspectors of such precinct should fail and refuse to open the polls on the day of election, and thereby leave the work of so doing in the hands of colored voters whose education was such as to make it quite probable that some clerical error would occur, so as to furnish an excuse for rejecting the box entirely.
>
> Strong corroborative evidence of this is found in the further fact that the county supervisors refused to appoint any Republican in such precincts selected by the Republican county committees, but invariably selected one who was unable to read or write, or who, however honest in intention, would not be competent to make out the required returns in a proper and legal manner, or technically correct in all particulars, and the evidence conclusively shows that the Democratic supervisors, composed of the sheriff, probate judge, and clerk of the court of the county, did not fail to find a pretext for refusing to count such boxes, where, by sacrificing one vote for the Democrat, they would destroy 360 for the Republican. This the committee, however much they may admire the heroic effort for a fair vote and honest count, can not in this case allow the sacrifice.

This alleged conspiracy was operative at fourteen precincts, seven in Dallas County, four in Loundes County, and one each from the counties of Wilcox, Perry, and Hale. In these fourteen precincts the majority of the committee found that 4,029 votes were actually cast for Mr. Smith, and 282 for Mr. Shelley.[2]

It was by rejecting the returns of these votes that the canvassing officers of the several counties so changed the aggregate of votes in the district as to give an official majority for sitting Member.

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[1] First session Forty-seventh Congress, House Report No. 1522; 2 Ellsworth, p. 18.

[2] See remarks of Mr. Ranney, Appendix of Record, p. 627.

The conditions leading up to this rejection are thus set forth in the views of Mr. A. A. Ranney, of Massachusetts, one of those concurring in the majority report:

Under the election law of Alabama it is made the duty of the judge of the probate court, the clerk of the circuit court, and the sheriff of each county, thirty days previous to any election, to designate three inspectors to hold an election in each voting precinct, two of which shall be members of opposing political parties. The sheriff is made county returning officer, and it is made his duty to send to each of the precincts in the county ballot boxes for the purposes of the election, and he is the peace officer who is to be present, in person or by deputy, at each election precinct. (Ala. Code, sec. 258, art. 2; sec. 259.)

It appears that the judge of the probate court, the clerk of the circuit court, and the sheriff, whose duty it was to appoint precinct inspectors of election, in all of said counties, were Democrats in politics and supporters of the contestee; and the same officers are by law made the county supervising board to canvass the returns made by the precinct inspectors of election appointed by themselves.

The legal questions arising are satisfactorily shown in the following passage from Mr. Ranney's views descriptive of the proceedings in Dallas County:

It appears that previous to the election the officers whose duty it was to appoint precinct inspectors in Dallas County, one of whom should be of the opposing political party, were notified in writing and requested to obey the election law of Alabama in this respect, and give an opportunity to suggest some suitable men to act for the Republican party, but they refused to do so. One of them (the sheriff) stated "that if he received forty such notices he would pay no attention to them." (Depositions of Roundtree and Judge Wood.)

It appears that in seven precincts of Dallas County, to wit, Pine Flat, River, Mitchell's, Chillatchie, Cahaba, Martin's, and Lexington, about which testimony has been taken, and for each of them three inspectors were appointed, two of whom were white Democrats and one a negro, who was supposed to be a Republican on account of his color; that of the two white Democratic inspectors for each of the seven precincts it appears that they were not present on the morning of the election to open the polls, and the white Democratic inspectors, appointed by county authority, failing to be present, the colored electors present, under the election statute of Alabama, opened the polls and held elections in said precincts; that the returns made of the result to the board of county supervisors in Cahaba, Pine Flat, Mitchell's, River, Lexington, and Martin's were not in statutory form, and were for informality rejected, and the vote not counted by the board of county supervisors, and that the sheriff, the returning officer, refused to receive the ballot box from Chillatchie precinct because it was a cigar box, and it was not before the supervising board. (Record, p. 133.)

It appears that no box was furnished as required by law. (Record, p. 141.) The sheriff swears that he sent boxes. If he did the Democratic inspectors had them probably and did not produce them, as they did not act.

The returns being informal, irregular, and insufficient, and therefore defective, went for nothing, and the votes cast not being counted for the contestant or the contestee, and the ballot box from Chillatchie not being received, evidence is resorted to prove the actual vote, under the well-recognized and settled rule stated by McCrary in his work on Contested Election Cases (sec. 302, pp. 268 and 269; Littlefield *v.* Green, 1 Chicago Legal News, 230); Brightley's Election Cases, 493; McKenzie *v.* Braxton, Forty-second Congress; Giddings *v.* Clark, Forty-second Congress. (See sec. 304, p. 270, and sec. 81, p. 104, McCrary on Contested Election Cases.) In Alabama, where this contested election case arose, the supreme court of that State lay down the law of contested elections as follows:

"It is the election that entitles the party to office, and if one is legally elected by receiving a majority of legal votes, his right is not impaired by any omission or negligence of the managers subsequent to the election. (State ex rel. Spence *v.* The Judge of the Ninth Judicial Circuit, 13 Ala. Rep., 805.)

"Nor will a mistake by the managers of the election in counting the votes and declaring the result vitiate the election. Such a mistake may and should be corrected; the person receiving the highest number of votes becomes entitled to the office. (State ex rel. Thomas *v.* Judge of the Circuit Court, 9th Ala. Rep., 338.)"

The returns from Pine Flat, River, Mitchell's, Cahaba, Martin's, and Lexington precincts of Dallas County being declared irregular and informal, as not coming up to statutory requirements, were not counted by the board of county supervisors for either candidate for Congress, and the ballot box from Chillatchie precinct being refused by the sheriff was not before the board of county supervisors and was not counted by them; therefore, in such a case each candidate was required to prove the actual number of ballots east for him.

The contestant introduced evidence as to the votes cast for him at the seven precincts; but sitting Member introduced no proof whatever to rebut the proof made by contestant in this respect.

The method by which contestant sought to prove the vote cast was by taking the testimony of the inspectors, supervisors, and others who were present at the polls, saw the ballots cast, counted and tallied, and knew whereof they spoke.[1]

There were generally two or three witnesses to the main facts, and the vote as proved accorded with the reports of the United States supervisors; but these reports were not relied on as substantial evidence, and the competency of it was questioned somewhat in the committee.

The minority assailed this evidence:

As the returns from the precincts mentioned were rejected, and therefore not included in ascertaining the vote of the county, it was clearly competent for the contestant or contestee to establish the vote by evidence if at any of them a lawful election was held. The contestant attempts to establish his vote, and it is for us to ascertain whether or not he has succeeded.

As the sitting Member held the seat by a title prima facie sufficient, it is incumbent on the contestant to affirmatively prove this title defective. This rule is well stated in the celebrated New Jersey case (1 Bartlett, pp. 24 and 26):

"Before a Member is admitted to a seat in the House something like the judgment of a court of competent jurisdiction has been pronounced on the right of each voter whose vote has been received, and in order to overturn the judgment it must have been ascertained affirmatively that the judgment was erroneous. * * * When the polls are closed and an election is made, the right of the party elected is complete; he is entitled to the returns, and when he is admitted there is no known principle by which he can be ejected, except upon the affirmative proof of the defect in his title. Every effort to oust him must accomplish it by proving a case. The difficulties in his path can form no possible reason why the committee should meet him half way. The rule of reason requires that he should fully make out his case even though it require proof of a negative, and such is also a rule of Parliament in analogous cases."

The burden of proof being upon the contestant, by what character of evidence should he be required to prove his case? The ordinary rules of evidence must of course apply to election contests as well as to other cases. (McCrary on Elections, sec. 306.) One undeviating rule of evidence is that the best evidence must be produced of which the nature of the case will admit; that secondary can not be substituted for primary evidence unless it be shown that the litter is not within the power of the party, and the former should certainly not be substituted for the latter when it is apparent that the primary evidence is within the reach of the party and is by the law placed within his power.

Now, there are certain documentary evidences of the election which the law of Alabama provides should be preserved for the sole purpose of furnishing evidence of the vote in case of contest; these are the ballots which were cast at the election. The ballots cast at each voting place, together with one poll list, are required to be carefully sealed up in the ballot box and delivered into the custody of one of the inspectors, who is required to retain it for sixty days intact, and then to destroy the contents of the box, unless he is notified that the election of some officer for which the election was held will be contested, in which case he must preserve the box for such election until such contest is finally determined, or until such box is demanded by some other legal custodian during such contest. (Sec. 298, Code of Alabama.)

It will be seen that the ballots are required to be preserved expressly for the contestant. These

[1] Mr. Ranney's speech, Appendix of Record, p. 627.

are the evidences of the result of the election which the law provides. In addition to this the certified poll lists statements, etc., which are returned by the board of inspectors of each precinct and the county board of canvassers, are required to be retained intact in the office of the judge of probate. (Sec. 293, Code of Alabama.)

Now, if the returns are made by the board of inspectors and are attacked, or if insufficient or defective returns or no returns are made, will it be denied that these ballots are the best evidence of the result of the election, especially where it must be admitted from the nature of the case that the ballots in the box retained by law for the purpose of evidence are the genuine ballots which were cast at the election? And if it be true, as it is, that the ballots from the election at each of these precincts in Dallas County were placed in the custody of the Republican inspector by the Republican, that they were received from the hands of the voter by Republicans only, counted by Republicans only, placed in the box and sealed up by the Republicans only, will it be gravely contended that the contestant should be permitted to offer secondary and inferior evidence to prove what the vote was at the several voting places without having attempted to put these ballots in evidence, or furnish any reason or excuse whatever for his failure to do so? In no instance is any inquiry made for the ballots, nor is any effort made to produce them, not even where the testimony itself shows to whom the ballots were committed, and even in those cases where the person who had the ballots in his custody, as shown by the testimony, appeared and was examined as a witness by the contestant. Without showing that the ballots were not in his power to produce, contestant resorts to oral evidence. This he clearly could not do. Oral evidence can not be substituted for any instrument which the law requires to be in writing, and no proof can be substituted therefor so long as the writing exists and is in the power of the party. (Greenleaf on Ev., sec. 86, Vol. 1.)

In the contested election case of Spencer *v.* Morey (Smith's Digest, p. 449) it was admitted by both parties that no official returns could be found, because they had been abstracted or destroyed. This being the case, the minority of the committee say:

"The best evidence, viz, the returns, having been lost or destroyed, secondary evidence is then admissible to establish what was the contents of the written instrument, viz, the returns. We understand the rule governing the admissibility of secondary evidence with respect to documents to be that proof of their contents may be established by secondary evidence, first, when the original writing is lost or destroyed; second, when its production is a physical impossibility, or at least highly inconvenient (p. 480)."

In this case it is not shown that any of these conditions existed to justify the introduction of oral testimony. We can only conjecture why contestant failed to have the ballots produced, but we can not avoid the suspicion which the law itself creates that the failure to produce the ballots was because they would not conform to the imperfect returns or the unreliable testimony of the witnesses for the contestant. If this plain principle of law be not disregarded, it is unnecessary to further consider the testimony in relation to these precincts; but we think that an examination into the testimony produced will show that contestant has failed to establish the vote by satisfactory evidence.

As to a question of fact the majority contention, as voiced by Mr. Ranney, was—

It was contended at the hearing that inasmuch as the statute of Alabama provides that the ballot boxes with the ballots shall be kept by the inspectors for sixty days for use in case of a contest, contestant was bound, as his best evidence, to procure and put in evidence the ballots themselves when proving what the actual vote was. It is claimed, or appears, however, that in many, if not most, of the instances where there was occasion to do this, if important, the boxes had not been kept as required by law, but had gone and been allowed to go into other hands. Whatever may be the rule otherwise, it certainly could not apply in such a case.

I find that several of the parties named in this report, and charged with frauds upon the election law in the election in question, were duly presented to the grand jury and indicted for the same. Some of the boxes in question had been taken and used before the grand jury in their investigations. There is no record of any conviction or acquittal of the parties indicted. The fact of indictments having been found is of course no competent evidence to impeach the parties as witnesses, and the committee have not so considered it.

As a question of law, Mr. Ranney, in debate,[1] said:

It must be remembered that this is not a case, so far as regards the 14 precincts now being considered, where the contestant is attempting to overthrow and control the returns of sworn officers of elections, as against presumptions of verity. The rule of law is quite different in such a case.

In general, so far as the 14 precincts were concerned, the minority denied that conspiracy was shown and attacked the character of testimony offered to prove the vote. Many issues of fact arose, and there were apparently some attempts to defraud; but the essential legal principles of the case are the same throughout.

Contestant died before the case came to a hearing in the House, but there was no serious question about the following resolutions, as proposed by the majority, affording the right course of procedure:

Resolved, That Charles M. Shelley was not elected as a Representative to the Forty-seventh Congress from the Fourth Congressional district of Alabama, and is not entitled to retain the seat which he now occupies in the House.

Resolved, That James Q. Smith was duly elected as a Representative from the Fourth Congressional district of Alabama to the Forty-seventh Congress, and, having deceased, the seat is declared vacant.

The minority recommended resolutions confirming the title of sitting Member.

The report was debated in the House on July 20,[2] and on that day the resolutions of the majority were agreed to, yeas 145, nays 1, not voting 144. The minority evidently undertook to break a quorum, hoping to delay decision.

966. The Alabama election case of Strobach v. Herbert, in the Forty-seventh Congress.

Time and place of an election being fixed by law, the failure of officials to give a required notice was held not to justify rejection of the returns.

There being no doubt of the intent of the voter, the wrong spelling of a candidate's name does not vitiate the ballot.

The returns of the regularly constituted authorities will not be disturbed by presumptions raised by a census of voters by races.

On June 27, 1882,[3] Mr. Ambrose A. Ranney, of Massachusetts, from the Committee on Elections, submitted the report of the committee in the Alabama case of Strobach, *v.* Herbert.

The case involved the following points:

(1) It was claimed on behalf of contestant that the entire vote of Escambia County, where sitting Member received 634 majority, should be thrown out. The report thus disposes of this claim:

As to Escambis County, by the law of Alabama it is the duty of the sheriff, judge of probate, and clerk of the circuit court to give notice of an election and appoint managers. This duty the sheriff, judge of probate, and clerk of the circuit court of Escambia County failed to perform. But by the statutes of Alabama it is provided that when for any cause managers and other officers of election are not appointed the qualified electors present may elect them. It appears that this was done and the election held; and it further appears that on the 30th day of October, 1880, the chairman of the Congressional executive committee of the Democratic party gave contestant notice that this course would

[1] Appendix of Record, p. 627.

[2] Record, pp. 6269–6280; Appendix, pp. 522, 626; Journal, pp. 1681–1684.

[3] First session Forty-seventh Congress, House Report No. 1521, 2 Ellsworth, p. 5.

be pursued, and invited him to name the persons he desired as managers to represent them at the different boxes. Under these circumstances, as the law is well settled that when time and places of holding an election are fixed by law no notice by the officials is essential, your committee can see no good ground upon which to exclude the vote of Escambia County.

(2) It was claimed on behalf of contestant that 1,190 votes should be deducted from sitting Member's vote in Pike County, because the name was spelled Hebert instead of "Herbert." The report holds:

As to the alleged misnomer in Pike County, your committee find that the evidence does not establish that more than 50 votes were cast in which Mr. Herbert's name was spelled *Hebert.* They further find that these ballots were intended to be cast for Herbert; that they were printed *Hebert* by mistake of the printer; that no person of like name except contestee was being voted for or was a candidate, and they believe that under the law and the precedents these votes were rightfully counted for contestee. Indeed, Mr. Ingersoll, one of contestant's counsel, admits they should be so counted.

(3) Counsel for contestant claimed that certain votes should be deducted at two precincts in Butler County, but the report denies this claim:

The vote at these boxes is not assailed in the pleadings or by the evidence further than by a comparison with the census returns. This comparison does not show that the vote was unduly large, but simply that Herbert received more than the white vote and Strobach less than the colored vote. Your committee can not consent, for such reason as this, to disturb the returns of the regularly constituted authorities.

967. The case of Strobach v. Herbert, continued.

To vitiate the election of returned Member a general scheme of fraud must be proven both to have existed and to have been effective.

The Elections Committee felt bound to follow a State law as it stood, although inadequate to secure honesty from election officers.

The House sometimes determines an election case by permitting the contestant to withdraw his case.

Form of resolution permitting a contestant to withdraw his case.

(4) As to frauds the report says:

The only doubt which the committee has had in regard to this case is whether the irregularities and frauds alleged and appearing in evidence were not sufficient to render the election of contestee void.

Contestant has arrayed the schemes of fraud conceived and executed in the election held in August, 1880, and claims that the same practices were resorted to in the November election of that year. The committee have scrutinized closely the proof and evidence in this regard, and are impressed with the fact that this seems to have been so to a considerable extent. But applying the rules of law which obtain in election cases, it is not satisfactorily proved that there was any such general scheme of fraud which appears to have been successfully practiced in a sufficient number of cases as to change the general result.

(5) As to a final point:

The statute law of the State of Alabama has also been arraigned as wholly insufficient and inadequate to secure an honest election, and as a safeguard against fraudulent practices which seem to be so rife in that State. With this the committee have nothing to do, as a general principle. But it may be permitted to say that the charge seems to be true to a lamentable degree. The law seems to be quite severe as against the elector, but as regards the officers and managers of election there appears to be no adequate provision to insure fidelity and honesty of action or to punish derelictions of duty.

The committee have felt bound, however, to follow the law as it stands.

So the committee recommended the following:

Resolved, That contestant be allowed to withdraw his contest without prejudice.

This resolution was agreed to by the House.[1]

968. The South Carolina election case of Smalls v. Tillmmui, in the Forty-seventh Congress.

Discussion as to the sufficiency of returns and the validity of the State canvass based thereon.

The driving of voters from the polls by armed force in the majority of the precincts of a county caused the rejection of the returns of the entire county.

It being impossible to determine from the evidence what votes had been returned in the few honest precincts of a county, the entire county returns were rejected.

On June 29, 1882;[2] Mr. John T. Wait, of Connecticut, submitted from the Committee on Elections the report of the majority of that committee in the South Carolina case of Smalls *v.* Tillman.

At the outset the majority discussed a question as to the sufficiency of the returns and canvass on which the certificate of sitting Member was based; but did not assume to determine the case on the conclusions which they reached.

The South Carolina law of 1868 provided for a board of State canvassers, and three sections of that law provided:

SEC. 24. The board, when thus formed, shall, upon the certified copies of the statements made by the board of county canvassers, proceed to make a statement of the whole number of votes given at such election for the various officers, and for each of them voted for, distinguishing the several counties in which they were given. They shall certify such statements to be correct, and subscribe the same with their proper names.

SEC. 25. They shall make and subscribe, on the proper statement, a certificate of their determination, and shall deliver the same to the secretary of state.

SEC. 26. Upon such statements they shall then proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices or either of them. They shall have power, and it is made their duty, to decide all cases under protest or contest that may arise when the power to do so does not by the constitution reside in some other body.

Sitting Member claimed that under the above law "the certified copies of the statements made by the board of county canvassers" were the only legal data necessary to enable the State convassers to declare the result.

The majority report says:

Under the act of 1868 the precinct non delivered the boxes containing the ballots and the poll lists to the county board of canvassers within three days after the election, and this board counted them upon the following Tuesday and made up their statements, transmitting them by mail, one each to the governor, comptroller, and secretary of state.

In view of a contest before the House these provisions became the subject of severe animadversions, and in 1872 an act was passed providing that all elections shall be regulated and conducted according to the rules, principles, and provisions therein and "all conflicting" acts are repealed.

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[1].Journal, p. 1546.

[2] First session Forty-seventh Congress, House Report No. 1525; 2 Ellsworth, p. 430.

Now the principal provisions of this law are:

First. That the ballots shall be counted by the precinct managers as soon as the polls are closed, and that the boxes containing the ballots shall be sent to the county board; and, second, that a statement of the county board of canvassers should be sent by a special messenger, with the returns, poll lists, and all papers appertaining to the election, addressed to the governor and secretary of state. Under the law of 1868 the ballots were liable to be tampered with after the polls closed and during the interval before they were counted, and the county board of canvassers was wholly without check upon their statement.

The act of 1872 takes from the county board the counting of the votes and devolves that duty upon the precinct managers, and requires that it be done publicly at the closing of the polls. It also places a check upon the aggregated statement of the county board by requiring that the returns, poll lists, and all papers appertaining to the election be sent by a special messenger, addressed to the governor and secretary of state. To use the terms of the act itself, the "principle" contained in this "provision" is a check upon the opportunity of the county board to perpetrate fraud, and all acts in any way conflicting with the rules, principles, and provisions are repealed. It is unquestionable that if the State board is to make up its statement of the vote of the district solely upon the statements of the county boards, aggregating the votes of each of the counties, there is no check whatever upon the statements of the county boards, and the "rules and principles" are defeated, and there is no purpose whatever in sending by a special messenger "the returns, poll lists, and all papers appertaining to the election" to the governor and secretary of state. This provision is a part of a remedial statute, and is to be liberally construed, and all acts "in any way conflicting with its rules, principles, and provisions" are repealed. By no canon or rule of construction can this provision of the remedial amendatory act be thrown away.

But if the section 24 of the act of 1868 is not thereby repealed, the two acts must be construed in pari materia, and the State board of canvassers should make up their statement of the vote of the district from the certified copies of the statements made by the board of county canvassers, and from the precinct "returns, poll lists, and all papers appertaining to the election."

These, then, become together the data upon which the State board of canvassers make up their statement whereon the certificate is based. If it is based upon anything else, or only upon a portion of the data prescribed by law, it is without legal validity as regards the election of a Member of Congress; and this, wholly independently of the question as to whether this is done fraudulently, ignorantly, or is a mere casus omissus.

The party relying upon such a certificate must prove his vote aliunde. In this case there is a peculiar and most forcible illustration of the wisdom of this requirement that the precinct return and poll list shall accompany the statement of the board of county canvassers, for this board has no judicial authority. This is admitted by counsel on both sides. Yet in two counties they have assumed to exercise judicial powers in throwing out entire boxes and in not counting the vote polled for Congress at others, and without any pretense of cause. And in consequence of the failure of the county boards of these counties to send to the governor and secretary of state the precinct returns and poll lists, as they are specifically required to do by law, the official data is wanting upon which to add the vote at these several boxes. In the three counties of Edgefield, Colleton, and Barnwell the legal data by which the frauds of county boards of canvassers is intended to be detected and corrected, and which forms an important part of the basis on which the Member's certificate of election is based, has been deliberately withheld and suppressed. There is no official data by which to fix the vote at polls which have been fraudulently omitted from the count, in contravention of the plain letter of the statute, and the construction placed thereon for years past by the court of last resort in that State. And, on the other hand, there are polls which should be rejected from the count for gross illegalities and fraud in the management thereof and others for violence and intimidation; but, in consequence of the illegal suppression of the data required by law, it is impossible to ascertain how these polls were counted in the statement as made up by the State board from the aggregate furnished by these three county boards.

The principle is correct and sound, and is well settled, that when the reliability of the official statement is destroyed, whether for fraud, for ignorant neglect of legal duty, or because made up from insufficient, illegal, or fraudulent data, it must be disregarded as evidence. But the vote of the electors is not lost because the pretended statement of it is defective, illegal, and unreliable, but it may be proven aliunde.

It is clearly established that the State board had not "the precinct returns, poll lists, and all other papers appertaining to the election" before it at the time it made up its statement on which the certifi-

cate of election was given to contestee; and it is equally well established that that board made up its statement merely from the aggregated statement of the county board, without any of the legal data with which to correct their errors or detect their frauds. It is strenuously claimed for the contestant that these returns, poll lists, etc., were essential factors, and that the want of them destroyed the validity of the statement of the State board absolutely, whilst for the contestee it is urged that the law of 1868 remains unchanged as to the State board.

The committee has not deemed it necessary to decide this legal question, as there are other questions, both of law and fact, which enter into the case, and, as they think, control it.

The minority [1] do not agree to this, either as to fact or theory;

Our colleagues, the majority of the second subcommittee, will find themselves to have been wholly misled as to the facts in their statement at page 3 of their report, that these boards "assumed to exercise judicial powers in throwing out entire boxes, and in not counting the vote polled for Congressman at others, and without any pretense of cause." They did not throw out a single box, nor did they fail to canvass the vote for Congressman of any precinct from which the managers sent up any return to be canvassed.

The contestant's third charge is that from the three counties of Barnwell, Colleton, and Edgefield the returns and poll list were not forwarded to the governor and secretary of state by the chairman of the boards of county canvassers of those counties, as directed by law; and that this omission upon the part of the chairmen, whether originating in fraud or in ignorant neglect of legal duty, destroyed the reliability of the official statements by those boards of the result of the election in those counties, from which statements the board of State canvassers made up their statement of the result of the election in the Fifth Congressional district.

Strictly speaking, there is no competent evidence that there was any such omission as charged. As a matter of fact, however, it appears that the election officers in some counties of the State, having construed the requirements to forward the returns and poll list "to the governor and secretary of state," as imposing the duty of sending one set of those papers to the governor and a duplicate set to the secretary of state, the latter officer, just prior to the election, issued a circular to the effect that it was not necessary to send poll lists to the secretary of state, which instruction, it would seem, was understood by the chairmen of the boards of canvassers in the three counties named as dispensing with the necessity of sending up such papers at all.

If it be conceded, however, that these papers were not sent up from the three counties in question, as directed by law, and even if it were held—though there is no shadow of testimony to that effect—that the omission was willful, there are two propositions which, to the undersigned, appear to be too clear to admit of an intelligent difference of opinion as to them, viz: *(a)* That such omission can not be held to have the effect of invalidating the reliability of the official statements of the result of the election made by the county boards of canvassers, as contended by the contestant; and, *(b)* That such omission could not possibly have in any manner affected the rights of the contestant, for the reason that the State board of canvassers could not have considered those papers had they been sent up as directed.

(a) By reference to section 4 of the amendment to the election law of South Carolina, of March 17, 1872, quoted above, it will be seen that the duty of forwarding the papers in question is imposed, not upon the county board of canvassers, but, after its final adjournment, upon the individual who had been its chairman. Upon what possible principle can it be said that any omission of duty, whether fraudulent or merely negligent, upon the part of such individual, after the board of which he was chairman has finally adjourned and gone out of existence, shall destroy, or in any manner invalidate the reliability or legal effect of the concurrent, unanimous, official act of the entire board, Republican and Democratic members alike?

(b) The papers in question, it will be further observed, are directed to be forwarded, not to the State board of canvassers, but to the governor and secretary of state. The governor is not even a member of the State board; and, although the secretary of state is, yet not only is there no direction that the papers in question shall be submitted to, or considered by, that board, but as will be seen by reference

[1] Minority views by Mr. L. H. Davis, of Missouri; S. W. Moulton, of Illinois, and Gibson Atherton, of Ohio.

to the law prescribing the duties of the State board, quoted above, they are expressly and specifically required to make up their statement "upon the certified copies of the statements made by the board of county canvassers," and upon those statements it is enacted that they shall "proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices," etc.

Upon these grounds, therefore, we hold it to be clear, beyond the possibility of an intelligent difference of opinion, that the omission of the three individuals who had served as chairmen of the boards of canvassers in the three counties of Edgefield, Colleton, and Barnwell to send the returns and poll lists from those counties, after the adjournment of their respective boards, to the governor and secretary of state, is not even an element to be considered in this case. It has absolutely no possible bearing, either one way or the other, upon the rights of either of the parties to this contest. The sending of them up could not have benefited either, nor can the omission to do so justly injure either.

The majority appear rather to base their decision on other features of the case.

The sitting Member had received, by the official returns, a majority of 8,038 over contestant in the six counties of the district. The majority of the committee found that in fact contestant had received a majority of 1,489.

The following decisions brought about this result:

(1) The rejection of the entire returns of the county of Edgefield, which gave 6,467 votes to sitting Member and 1,046 to contestant.

The majority cite testimony to show that the partisans of sitting Member, who were the white voters principally, took possession of polls at precincts in this county, and by force and arms prevented contestant's supporters, who were largely colored men, from voting. Eleven precincts are enumerated where there was violence, varying from browbeating of voters at one poll while the local military company stood by, to the driving off of voters by squads of armed men at another poll. One supporter of contestant was killed. At two precincts the papers and poll lists of the supervisors were taken away. The report thus summarizes the action as to five other precincts, and to the county as a whole:

With the boxes containing the ballots, and from all but one of them the poll lists also, before them the county board refused to count or include in the statement the vote of five precincts, to wit, Etheridges Store, Perrys Crossroads, Colemans Crossroads, Caughmens Store, and Liberty Hill. In this they clearly transcended their powers under the law. The testimony most conclusively shows that in the county the whites were Democrats and the colored people were voting or trying to vote the Republican ticket. The testimony shows that 3,020 Republicans were at the polls in this county anxiously trying to vote and who were prevented by force from doing so. The contest was to keep the colored people from voting, for the nature of their vote was unquestionable. The census taken the year of this election shows whites over 21 years, 3,553; colored, 5,648. Yet it is claimed the contestee received 6,467 votes and the contestant only 1,046. Had every white voter in the county, therefore, actually voted for the contestee he could not have gotten this vote by 2,877, and the utter absurdity of the proposition that this or any considerable number of colored people voted for the contestee is fully established by the testimony; and this fact also illustrates the conclusiveness of the proofs which have induced your committee, after a thorough and careful consideration of the testimony, to conclude that there was no legal and valid election held in the county of Edgefield on the 2d of November, 1880; that the will of the electors was suppressed by violence and intimidation, and that the pretended count and canvass of the vote is involved in an inextricable confusion of fraud, and that the records which should establish the truth in regard to it have been illegally suppressed.

In the debate it was claimed by the minority that the majority had, by rejecting the whole county, rejected certain precincts, nine in number, against which there was no insinuation of irregularity. In answer to this it was replied that there was not a particle of evidence before the committee or the House, or returned by the

managers, to show how any one of the nine precincts voted.[1] So, it being impossible to purge the county vote, the whole was thrown out.

The minority denied that the testimony showed what was claimed by the contestant.

969. The case of Small v. Tillman, continued.

Evidence showing that a county was divided politically on the color line, incompatibility between the returns and the census was admitted to impeach the election and the returns.

Instance wherein returns of a former election were cited to corroborate proof of intimidation and fraud.

(2) By purging the vote of Aiken County. The official returns in this county had given Tillman 4,980 votes and Smalls 1,467. The majority, after making corrections, found this vote to be: Tillman, 3,409; Smalls, 1,058. This result was brought about by rejecting the returns of four precincts where intimidation was shown.

Thus, at Aiken Court-House red pepper was thrown in the eyes of voters, some were cut with knives, a piece of artillery was trained on the voters, and the local military company, either as an organization or as individuals, acted with the mob. There was evidence also that the ballot boxes were stuffed. At other places voters were driven off, ballots for contestant forcibly confiscated, shots were fired, and supervisors representing contestant's party were driven off.

The majority conclude as to this county:

> The statements represent this county as casting 6,447 votes, whereas by the census of the same year there were only 5,985 males over 21 years of age, so that if every elector had voted there are 562 more votes than voters, and this, too, in the face of the fact that hundreds of voters were excluded from the polls. The testimony shows that in this county the vote was essentially upon the color line, and according to the census of the same year there were only 2,873 white males over 21 years old, so that if everyone had voted for contestee it would require 2,107 colored votes to have given the contestee the 4,980 votes claimed for him.
>
> In 1876 both parties had a full national, State, and county ticket in nomination, and the campaign is historic, yet the whole vote of this county that year was only 4,820. The pretended vote of 1880 is an increase of 1,627, indicating an increase of more than 25 per cent of votes for a campaign in which only a national ticket was run, and yet as an illustration it may be noted that at Silverton precinct in 1880 not a single Republican vote is reported, while in 1876 it counted 232 for the present contestant and only 182 for present contestee. In 1876, at Aiken Court-House, the contestant received a majority of 327 over the present contestee, whilst in 1880 the present contestee is reported to have received a majority of 336.

(3) For similar reasons the majority rejected the returns of four precincts in Hampton County, where intimidation and fraud were considered to be proven. As to this county the majority conclude:

> It is a curious and very contradictory fact that, whilst it is claimed and certified that 4,165 votes were polled and counted in this county, the census shows that there were only 3,828 males over 21 years. This, too, in the face of the testimony that a large number of voters were driven from the polls without voting. By the census the white males 21 years old were only 1,381, whilst the vote certified for the contestee is 2,590, and this, too, when his friends and adherents were riding over the county on the night previous and on the day of election, uniformed and armed, threatening, beating, and shooting the colored people to prevent them from voting the Republican ticket.

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[1] See debate, Record, p. 6216.

There is absolutely no testimony of colored men voting the Democratic ticket which will in anywise explain the statement. The only attempt at an organization of colored Democrats is shown in the testimony of George Bellinger (p. 557), in which he says the largest number ever answering were 22, and in his statement of the officers is Daniel Platts, as vice-president, who testifies (p. 412) that he did not vote that ticket and joined a Republican club, in which he remained during the campaign. The utter failure of the colored Democratic club is fully shown on page 416. Indeed, it would be most extraordinary if any number of colored people should vote the Democratic ticket, in view of the overwhelming testimony of the lawless violence of "the red-shirt Democracy, "not only in this county but in four others of this district.

The only way by which such a statement of the vote of this county can be explained is by the method illustrated so well at Brunson's, as to the facts of which the Democratic manager and supervisor, as well as Republicans, testify. On the first count this box contained "something over 500;" the excess over the poll list "was near 200" (see testimony of Democratic supervisor, p. 101), whilst the manager (Democratic) who drew them out says, "that excess was about 232" (p. 100). And yet this box is certified to as containing 356 legal votes, and it is on such official statements that the contestee has received the certificate and now occupies a seat in the House as the Representative from this Congressional district.

(4) For intimidation Allendale precinct, in Barnwell County, was rejected.

970. The case of Small v. Tillman, continued.

The Elections Committee corrected a return wherein testimony of bystanders showed that partisan election officers had acted unfairly in drawing from the box an excess of ballots.

The House corrected the act of local canvassers who, without judicial power, threw out a poll.

The House took into account the loss occasioned by failure of election officers to open a poll at a regular polling place.

Polls being illegally closed, the House took into account the injury resulting to contestant thereby.

Although fraud and intimidation in a district had been very extensive, the House preferred seating contestant to declaring the seat vacant.

(5) The official returns of Colleton County had given Tillman 3,475 and Smalls 2,776. The conclusions of the majority of the committee were that Tillman was entitled to 3,385 and Smalls 3,760. The reasons for these changes are given in the report:

The testimony shows conclusively that the mode of managing this poll was most unfair; that the managers were under control of the Democratic county chairman, who was also chairman of the commissioners of election, who appointed all of the managers from one party, and appeared also as the attorney for the contestee. The following extracts show something of the methods resorted to:

Testimony of William A. Paul (p. 336):

"At the opening of the ballot box the managers found the box to contain 1,036 ballots; at the closing of the polls the amount of the poll list was 895 ballots; the excess found in the box was 141, according to my account. After the box was opened the managers were quite undecided as to how they would stir the votes up, and they were for some time devising a plan how they could mix them so as to take out the excess over the poll list and to take out a majority of Republican ballots if possible, which they succeeded in doing; and I found after they had commenced to draw the ballots from the box when they would draw out two Democrat ballots and destroy them they would draw out from five to six Republican ballots and destroy them also; and one of the managers was blindfolded who was required to draw the ballots, and turning his back to the table upon which the box was placed, the box being set into a large stick basket, the box not being able to hold the ballots after being thoroughly stirred, they then stirred the ballots into this basket, from which they drew the excess of the poll list. The manager

who was required to do the drawing deliberately passed the ballots through his hands; by so doing one ballot was easily distinguished from another; they succeeded nicely in carrying out their premeditated plan."

Also the testimony of Daniel Sanders (p. 370):

"Then came the confusion about the votes; both Republicans and Democrats crowded around the box; the box was opened in the presence of all; the law was furnished the managers how they should proceed before counting votes; the box was so full that the ballots could not be mixed according to law. The box was set into a stick basket; one of the managers tried to mix the votes in the box, and he failed to mix them, and then emptied the votes into the basket. Then the managers got confused how they would mix them; they stirred them up; they brought two-thirds of the tickets, as well as I could see; to the top were Republican tickets; then the managers commenced drawing; they drew for a while from the top, and, as well as I could see, the manager sometimes would draw from the bottom. All this occurred after counting the number of ballots in the box. There was, to my recollection, 140 ballots in excess of the names on the poll list; then the ballots were put back into the box—130 drawn out, to the best of my recollection. While drawing, or before drawing, they were stirred up again in the same basket; then one of the managers was blindfolded; he drew out about 20 Democratic ballots—would not be positive to that number—and the balance were Republican ballots."

It is clear that there were from 90 to 110 votes illegally taken from the contestant at this poll, and the same number illegally given to the contestee.

The entire conduct of the election in Colleton is most discreditable to those who had it in charge. Except one Republican on the county board, appointed by the governor, and who was outvoted by the other two, every election officer was appointed from the contestee's partisans, save one manager at Green Pond poll, and their sole purpose, apparently, was to subserve his interests. Three large Republican precincts—Adams Run, Ashepoo, and Bennetts Point—having been abolished, this vote was thrown to Gloversville and Jacksonborough. The Democratic managers at Gloversville did not open the poll on the day of election, and to Jacksonborough the commissioner sent the smaller of two sizes of boxes. At 1 o'clock this box was full of ballots.

It contained 618, and the managers refused to use another, though over 100 Republican voters were standing at the polls waiting to vote, and others were in sight approaching. Whilst neither the county nor State board had under the plain wording of the statute, which has been construed by the State court of last resort, any judicial power as to the vote for Congressman, yet they threw out this box, depriving the contestant of not less than 618 votes, and without any assigned, known, or apparent reason the board failed to canvass the 276 votes polled for contestant at Horse Pen. (Record, pp. 353–357, and 378, and following.)

Besides the failure to open the Gloversville poll, whereby contestant lost 400 votes, the testimony shows that he lost 700 more by the failure to open the Summerville poll, where a large number were actually present and listed; besides more than a hundred votes were lost by illegally closing the poll at Jacksonborough.

At Delams, also, the manager failed to open the poll, whilst at Sniders Cross-Roads, Smoaks Cross-Roads, and Carters Ford the supervisors were hindered and obstructed in the discharge of their official duties. At Maple Cane 26 Democratic ballots were stuffed into the box and 25 Republican were withdrawn, whereby the contestant lost that number of legal ballots, and the same number were left to be, and were, counted for the contestee.

At Bells Cross-Roads 31 of contestant's votes were withdrawn and a like number of fraudulent ones counted for the contestee. In this county alone it is shown that from 1,400 to 1,800 Republican voters were deprived of an opportunity of voting by failure to open and illegally closing polls, whilst 223 fraudulent ballots were stuffed into the boxes.

The minority in this county, as in other counties, take exceptions to the conclusions which the majority draw from the testimony. They also say:

The election law of South Carolina, as quoted above, provides that if more votes are found in the ballot box than there are names on the poll list all the ballots shall be returned to the box and thoroughly mixed together, and that one of the managers, or the clerk, without seeing the ballots, shall thereupon draw therefrom and immediately destroy as many ballots as there are in excess of the number of names

on the poll list. At a number of precincts in the Fifth Congressional district of South Carolina excessive ballots were found in the boxes and were drawn out by a blindfolded manager, as required by law. And the only testimony in the record tending to prove the above charge on behalf of contestant is the allegations of some of his witnesses that discrimination was made in drawing out this excess of ballots at certain precincts, through which the contestant lost more than his due proportion of the votes cast for him. On the other hand, as to every precinct save one against which this charge is made, the officer who drew out the excess, and one or more of the other officers who witnessed it, were produced, and testified that the drawing was in strict conformity with the requirements of the law, done publicly, without seeing the ballots, without discrimination, and with perfect fairness. And whether tested by their means of knowledge, their intelligence, their social standing and character, or any other of the tests which are applied in nonpartisan, fair, judicial investigation, where the witnesses irreconcilably differ, no man who will read the record can hesitate to believe that the witnesses produced on behalf of the contestee are entitled to superior credit. There is absolutely no unpartisan, nonpolitical test which can possibly lead to any other conclusion.

It is to be further observed here that there is no testimony whatever tending to fix the responsibility for the excess of ballots upon the contestee's adherents. Republicans charge it upon the Democrats, and the Democrats charge it upon the Republicans; but there is no proof, nor anything which is offered as proof, by either side upon the subject. No single witness on either side claims to have either seen or heard of a "tissue ballot," or any other device for the purpose of creating an excess.

In accordance with their conclusions, the majority reported these resolutions:

Resolved, That George D. Tillman was not elected as a Representative to the Forty-seventh Congress from the Fifth Congressional district of South Carolina, and is not entitled to retain the seat which he now occupies in this House.

Resolved, That Robert Small was duly elected as a Representative from the Fifth Congressional district of South Carolina in the Forty-seventh Congress, and is entitled to his seat as such.

The minority declined to concede that the election of contestant could be shown.

The report was debated on July 18 and 19, 1882,[1] and on the latter day a substitute amendment proposed by the minority and confirming the title of sitting Member was rejected, without division.

The question recurring on the first resolution proposed by the majority, it was agreed to, yeas 145, nays 1, the minority generally refraining from voting, to break a quorum, and the Speaker voting to make one.

Then the second resolution was agreed to, yeas 141, nays 5.[2]

Mr. Smalls then took the oath.

971. The Maine election case of Anderson v. Reed, in the Forty-seventh Congress.

There being no suggestion that sitting Member was implicated in alleged bribery, and the amount alleged not being decisive, the House did not give weight to the charges.

The House will not overrule the decisions of honest election officers on conflicting testimony as to qualifications of voters.

Common rumor of an indefinite amount of intimidation of workingmen by employers was disregarded by the House.

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[1] Record, pp. 6180, 6213–6237; Journal, pp. 1675–1679.

[2] Among those voting in the negative on the second resolution was Mr. William H. Calkins, of Indiana, chairman of the Committee on Elections. This may be taken as an indication that he thought the seat should be declared vacant, but it does not appear that he gave any reasons.

On July 18, 1882,[1] Mr. George C. Hazelton, of Wisconsin, from the Committee on Elections, submitted the report of the committee in the Maine case of Anderson *v.* Reed.

Sitting Member had been returned by a majority of 123 votes over contestant. The three objections urged by contestant were thus discussed by the committee:

(1) As to the charge of bribery, the report says:

No suggestion or intimation is made of any complicity or even knowledge on the part of the sitting Member. Whoever was bribed voted for the Member of Congress simply because his name was on the general ticket. The number of cases alleged by the contestant seem to be but 7, of which 1 is proved by the statement of the man bribed, which are not contradicted. The rest are in dispute and rest on rather vague evidence.

(2) As to the admission and rejection of certain votes. The law of Maine made it an essential prerequisite to the right of voting that the voter's name should be on the check list, which is the registry of the names of voters. The report says:

The contestant claims that a number of voters voted for Reed who had no right to, and another number who would have voted for Anderson were not allowed so to do. These numbers if added together he claims would overcome the 123 plurality.

It is to be observed in regard to all these cases that there are no allegations of fraud or willful wrong, only that the selectmen erred in judgment. It is an appeal from those who, especially in the towns, were perfectly conversant with the status of every voter to Congress, on evidence taken in depositions.

The nature of some of this evidence may be inferred from the following extracts from contestant's brief:

"At Falmouth it is both affirmed and denied that Dayen, Stone, and True, who voted for Reed, were nonresidents or paupers, and that the votes refused to Anderson of Murray, Reynolds, and Black were lawful ones (pp. 131 to 133, and 206–207, 215–217, and 293–294). The officials to decide were partisans of Reed.

"At Standish, McKenzie, a nonresident, voted for Reed. Cotton voted for Reed, and says he was not bribed (p. 291); though his father supposed it to be an admitted fact that he was (p. 150). Merrill, of Washington, voted for Reed at Brighton, where his residence is both denied and affirmed (pp. 160–162 and 315, 348, 364).

"At Westhook the evidence sharply conflicts as to the right of Hoegg and others to vote for Reed (pp. 117 and 249–250).

"At Otisfield, Pike and McNeil voted for Reed. It is positively affirmed and denied that they were nonresidents (pp. 51 and 330–335).

"At Gorham, Ney, Rowe, and Shaw, nonresidents, voted for Reed (p. 163). And Bacon and Hall's votes refused to Anderson (p. 162). An attempted explanation will be found on page 297. Ney's name was added on election day; and a witness says Hall admitted he was not a voter (p. 222)."

These examples will be found on pages 10 and 11 of contestant's brief.

An examination of the testimony will show that every case is a disputed one which has been settled on testimony more or less conflicting by men who, as selectmen of the town, were thoroughly familiar with all the facts, and in the open town meeting, in the presence of men who also knew all the facts. To overrule such decisions in the absence of any suggestion whatever of bad faith would need something more than conflicting evidence. There was another class of cases in Portland where it does appear that a small number of voters lost their rights because of a failure to look after their registry. But this is shown on both sides, and was evidently the result of carelessness on the part of the voter and such accidents as must occur in a registry of more than 7,000 votes.

It should be added that cases of similar proof were shown on the part of the contestee, both as to the class of omitted voters and as to the cases of bribery, but we have not deemed it necessary to particularize, because the contestant on the testimony does not make out his own case.

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[1] First session Forty-seventh Congress, House Report No. 1697; 2 Ellsworth, p. 284.

(3) "As to intimidation," says the report, "the evidence falls far short."

Third. As to the chance of intimidation, the evidence falls far short of substantiating the charge. It consists mostly of hearsay and rumors, and does not disclose a single instance of violence or even threatened violence. A common report "that men would lose their job" if they did not vote as their superiors directed, and the testimony generally referred to in contestant's brief (pp. 4 and 5) hardly constitute such an overthrow of men's wills and determinations as can be taken notice of by the law.

Therefore the committee recommended resolutions confirming the title of sitting Member to the seat. The resolutions were agreed to by the House without division on debate.

Chapter XXXIII.

GENERAL ELECTION CASES IN 1883.

1. Cases in the second session of the Forty-seventh Congress. Sections 972–983.[1]

972. The Mississippi election case of Buchannon v. Manning, in the Forty-seventh Congress.

Illustration of specifications so vague as to destroy the validity of the notice of contest.

Although insufficiency of the contestant's notice might preclude an award of the seat to him, it might not preclude declaration of a vacancy after examination of the testimony.

On January 29, 1883,[2] Mr. William H. Calkins, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Mississippi case of Buchanan *v.* Manning.

In his reply to the notice of contest sitting Member had objected—

that said notice is so insufficient and defective that I need not deny or admit the allegation therefor, for the reasons, to wit, said notice does not specify particularly the grounds upon which you rely and gives no reasons for failing to do so.

Second. The allegations are only conclusions of law and general averment of wrongdoing in some undefined portions of the district, by unnamed election officials of precincts not specified, in unnamed counties, or by persons not named or described, and in places and by means not specified, and in violation of laws and the rights of others not designated.

Third. Your allegations are so vague and uncertain that I am not informed as to the persons or officials whom you accuse of crimes, nor where committed, nor do you aver that such wrongdoings were not instigated by you, or that they were known to or acquiesced in by me, or that the result of the election was changed by reason of the matter set forth.

The first specification in contestant's notice was:

That in a portion of the counties comprising said district such persons were not appointed, neither was such representation given to the different political parties in said counties, in the appointment of county commissioners of election, as was designed and required by law.

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[1] Other cases in this session are classified in other chapters:

McLean, Missouri. (Vol. I, sec. 553.)

Jones *v.* Shelley, Alabama. (Vol. I, sec. 714.)

[2] Second session Forty-seventh Congress, House Report No. 1891; 2 Ellsworth, p. 287. It appears that the minority views received a number as a separate report (No. 1890) when presented in the House, Journal, p. 328.

The majority in their report seem to consider this specification as admissible:

The machinery of elections by the Mississippi code is placed in the hands of the governor. He appoints the county commissioners of election, who in turn appoint the precinct election officers. The precinct officers make return of the vote cast in the different precincts to the county board, who in turn make their report to the secretary of state.

By section—of the Mississippi election law the different political parties are to have representation on said board. It ought to be carried out in good faith, and the different political parties ought to be represented on the election board. It is a duty incumbent upon the executive to see that this provision of law is carried out. It has been found in many of the States of the Union that a provision in the election laws similar to this is a safeguard against frauds and ballot-box stuffing.

The second specification was:

That in a portion of the counties comprising said district, election districts were abolished and other election districts established, without complying with and in violation of law.

The majority report says:

This allegation is clearly insufficient, as being too vague and general. It would have been an easy matter to have named the precincts, and pointed out how the acts complained of tended to prevent a fair election.

The third specification—

That in a portion of the counties comprising said district the registration of voters was not conducted as required by law, thereby depriving a large number of persons (of lawful right) of the privilege of registering and voting.

is condemned by the report as "uncertain, vague, and wholly insufficient." The fourth specification is condemned for similar reasons.

The fifth specification:

That in several of the counties comprising said district a large number of persons lawfully entitled to register were refused registration, and that the registration and transferring of voters was discontinued many days prior to the time contemplated by law, thereby depriving a large number of persons lawfully entitled to register (or to transfer) from the right of registering and transferring and voting; and that in a portion of said counties the registration books were for a time removed from the place designated by law for their keeping, thereby depriving a large number of persons (of lawful right) of the privilege of registering (or transferring) and voting.

The report says of this:

This allegation is too general. The particular places and the acts complained of should have been specifically set out. The same may be said with reference to the sixth allegation in the notice of contest.

The seventh:

That at many of the voting places United States supervisors of election were not permitted to exercise the duties of their office, being prevented therefrom by the unlawful interference of other officers of election, or from other sources, in violation of law, and to such an extent as to prevent their ascertaining the result of the election and from performing other duties required of them by law; that no separate lists of the names of voters were kept by the clerks of election, as was required by law; that the polls were not opened at the time required by law, were not kept open continuously from 9 a.m. till 6 p.m., as required by law, and that upon the closing of the polls the counting of the vote and making up of returns was not done at the voting places nor at the time required by law.

The report concludes as to this specification:

The seventh ground of contest alleges that at many of the voting places United States supervisors of election were not permitted to exercise the duties of their office, and were prevented therefrom by unlawful interference by the other officers of election (we presume State officers). This charge is general, and it does not specify any particular voting place in the district where these acts occurred;

but, perhaps, if any such unlawful interference is shown to have existed at any of the voting places, the committee would be justified in considering the allegation amended so as to make it conform to the proof, unless it were shown that thereby an injustice because of the insufficiency had accrued to the contestee.

The eighth:

That at many of the voting places ballots were received and counted that were not lawful ballots in form and print; that inspectors of election rejected and refused to count ballots that were lawful after the same had been lawfully deposited in the ballot boxes; that inspectors of election (with knowledge of the fact at the time) permitted ballots to be voted that were not lawful ballots; that during the hours prescribed by law for voting, voters were harassed and disturbed in such manner as to prevent their voting in a free, fair, untrammeled, and peaceable manner.

This is also condemned:

The eighth ground of contest challenges the form and print of the tickets, but it is not pointed out specifically in what the illegality consisted. And the ninth, tenth, eleventh, twelfth, and thirteenth grounds of contest are open to the same objections.

The majority therefore hold that with the single exception stated, "under the uniform rulings of this committee and the House," and in accordance with the precedent in the case of Duffy v. Mason, "the notice of contest would be held clearly insufficient."

"We prefer, however," says the report, "not to rest our decision of this case upon the sufficiency of the pleadings, for if the testimony taken in the case develops the fact that the sitting Member was not elected, it would be our duty to so report, although the contestant might not be entitled to his seat, having failed to comply with the law with respect to the sufficiency of his notice."

The minority views, presented by Mr. William G. Thompson, of Iowa, also say on this point:

It will be observed that in the beginning the contestee claimed that the notice of contest was insufficient, and has insisted for that cause that the case should be dismissed.

In whatever manner any failure of proper notice might affect the right of contestant in this case (for insufficiency of pleading), if upon examination of the facts in the case it appear that the sitting Member is not entitled to a seat it is the duty of the committee to so report.

973. The case of Buchanam v. Manning, continued.

Discussion as to kind and quality of evidence needed to establish a general conspiracy against a ballot box in a district.

Discussion of the validity of census tables as creating presumptions in a case involving a constituency divided politically on the color line.

The proof of one corrupted vote going into a ballot box does not invalidate the whole.

The House is reluctant, on allegations of general conspiracy of election officers, to reject unimpeached returns because other returns are shown to be fraudulent.

Although illiterate election officers seemed to have been appointed purposely, yet the House was reluctant to reject their returns when the safeguard of Federal inspectors had existed.

As to the merits of the case, it appeared from the official returns that the vote of the district was divided among three candidates, as follows: Manning, 15,255; Buchanan, 9,996; Harris, 3,585.

The minority of the committee, who recommended resolutions declaring neither contestant nor sitting Member entitled to the seat, found from the census that there was probably a majority of 2,600 colored voters in the district, as compared with white voters, and became satisfied from the evidence that colored voters belonged to contestant's party, while the white voters were divided between sitting Member and the third candidate. The minority views say:

It is further clearly proven that quite a number of white voters did not go to the polls. (See evidence, Howze, p. 19; Newsom, p. 22.)

It is further proven that contestant received a number of white votes, and yet, according to the returns, the contestee is credited with 15,215 votes, which is manifestly impossible under the circumstances.

On the other hand, the contestant is credited with only 9,996 votes, while there are 19,800 colored voters in the district, who, according to the proof of contestee's own friends, were all solid for contestant, and came to the polls and voted or offered to vote.

This again is a manifest impossibility. This at once throws suspicion on the fairness of the count, and when the whole of the election machinery was in the hands of contestee's friends the burden of showing the fairness of the count should be upon him when a reasonable doubt of fairness has been established by the proof.

The minority conceive that a conspiracy existed, made possible by the appointment of election officers almost entirely of sitting member's party, although the other parties asked representation, and carried out through corrupt administration of the registration laws, through intimidation, through fraud aided by connivance with election officers, through establishment of new polling places, by the appointment of illiterate men to represent contestant's party on boards of election officers. The minority thus sum up:

First. The appointment of illiterate officers of election is such a manifest disregard of duty and violation of statute law as to render void the whole appointment of election officers. One of the essential duties of county commissioners and precinct inspectors is to sign and certify the returns, and their duty can not be performed by a person who can not read and write. Where three persons are named in a statute as necessary to perform an official duty, all must be appointed and all must act, though a majority may control. (See Ballard *v.* Davis, 2 George's Miss. Reports; also authorities heretofore cited.) Hence the appointment of illiterate inspectors and commissioners of election would vitiate the whole appointment and destroy the election.

Second. But we do not wish to rest our report on so technical a ground, and hence we hold that the appointment of illiterate inspectors and commissioners takes away from the return of the election officers that presumption of truth which otherwise it would have, and a party claiming a seat on the return of such officers must show the utmost good faith in the election.

Third. In the case before us, first, the action of the governor and State board, their refusal to allow the opposition party to name any of the election commissioners; second, the same action of the part of the county commissioners in appointing the precinct inspectors; third, the appointment of corrupt and illiterate officers; fourth, the systematic adjournments of the election without sufficient cause; fifth, the premature closing of the registration books, and refusal to register Republican voters, the erasing of names of Republican voters already registered, and the forgery of poll books; sixth, the failure to openly count the vote at the closing of the polls; seventh, the changing of polling places; eighth, the abandonment of ballot boxes during adjournment, and of their carrying off to private houses during adjournment; the interference with and exclusion of United States supervisors; ninth, the fact that these practices were in counties having large Republican majorities, are conclusive evidence of a conspiracy to defraud.

This being a conspiracy to defraud, there being proof of fraud at a number of precincts, and the illiterate inspectors leaving the door open to unlimited fraud, and there being no proof by contestee of good faith in the election, it must be set aside.

The majority of the committee do not agree to such propositions:

It has been strenuously contended that there is some evidence uncontradicted and which tends to establish a conspiracy among the Democrats of the district, which resulted in the returning of the vote as heretofore given for Manning, and the suppression of the true vote given for the contestant and Mr. Harris, the Greenback candidate. This is founded upon the fact that the colored vote in the district exceeded the white vote, and that it was solidly Republican, and that it was cast, or ought to have been cast, for Mr. Buchanan; that the white vote was divided between the sitting Member and the Greenback candidate, Mr. Harris. To establish this, census tables have been resorted to, and other evidence has been introduced tending to show that there was a general turnout of Republican at the election, while there was much indifference on the part of Democratic voters.

The case of Spencer *v.* Morey, decided in Forty-fourth Congress, Miscellaneous Cases, Volume V, page 438, adverted to by contestant in his brief, can not be regarded by us as an authority in this or any other case. So far as we have been able to study it, it stands alone in the line of contested election cases. We do not believe that proof of one corrupted vote going into a ballot box is like "a drop of poison in a bowl of water, which contaminates the whole of it, and can not be separated from that which remains pure."

The duty of the House is to separate the honest from the dishonest vote; to purge all ballot boxes of illegal votes; to administer a rebuke to the voters of any precinct who permit the voice of the people to be stifled or suppressed; and to enable the House to do this a contestant should produce testimony of specific acts in order to show the wrong which he complains of. It can not be done by general, vague, and uncertain allegations and charges. There is some proof introduced to establish these various points, but it is very general, and consists largely of the opinion of witnesses, and is not of such a character that the committee feel justified in finding that a general conspiracy against the ballot box was practiced. It seems to your committee that if any such practice prevailed the United States supervisors appointed for the purpose of preventing such frauds could and would have given information whereby they could have been specifically proven.

Your committee have not hesitated to recommend to the House the throwing out of all the boxes where frauds, intimidation, or ballot-box stuffing have been proven, but it would be unsafe to assume from the testimony in this case that other frauds had been committed by the election officers not specifically shown or proven in any tangible or definite manner.

As to illiterate election officers, the majority say:

There is no doubt in our minds, from the evidence in this case, that many of the Republican precinct inspectors were appointed as such because they could neither read nor write. This is, in our judgment, a clear abuse of the law, and without the supervisors' law, which enables the opposing party to have men of their own selection to guard the polls as supervisors, we would be strongly inclined to apply a corrective for this manifest abuse of power.

With tickets exactly similar in all respects, or as nearly so as they can be printed, and on the same kind of paper, it would not be a hard task for election officers, if they were so disposed, to cheat an illiterate man, who could neither read nor write, both in the vote and in the count. All good people ought to discountenance and cry down evil practices of this kind. We indulge the hope that it will not be repeated in the future.

974. The case of Buchanan v. Manning, continued.

Although many electors have suffered by arbitrary refusal of registration officers to do their duty, yet the House requires a contestant to show specifically the resulting harm.

Disregard of a law requiring party representation on election boards may contribute to establish conspiracy, but does not do so of itself.

Change of the place of an election may cause such confusion as to defeat the popular will.

Periodical firing of a cannon at a polling place during an election was held to be intimidation justifying rejection of the poll.

Instance wherein a contestant was granted leave to withdraw.

As to the registration, the majority report holds:

It appears in the evidence that very many electors in the various counties of this district were deprived of the right of voting because they were not registered. The registry law of Mississippi provides the manner in which registration shall be made. An unlawful refusal on the part of the registration officers to register a qualified elector is a good ground for contest; but in order to make it available the proof should clearly show the name of the elector who offered to register; that he was a duly qualified voter, and the reason why the officer refused to register him, and, under the statutes of the United States, if he offered to perform all that was necessary to be done by him to register, and was refused, and afterwards presented himself at the proper voting place and offered to vote and again offered to perform everything required of him under the law, and his vote was still refused, it would be the duty of the House to see to it that he is not deprived of his right to participate in the choice of his officers. Unfortunately, in this case the proof falls far short of that which is required to enable the House to apply the proper remedy. That there were many instances in which the officers of the registration arbitrarily refused to do their duty is apparent. That many electors were deprived of their right to vote in consequence of this action is also apparent; but in going through the testimony in this case the number thus refused registration and refused the right to vote if added to contestant's vote would not elect him. Neither is it shown sufficiently for whom the nonregistered voters would have voted had they been allowed that right.

As to the partisan election boards, the majority say:

We are not willing to go as far in this case as the majority of the committee did in the Forty-sixth Congress in the case of Donnelly *v.* Washburn.[1] It was there held—

"The very fact that in these seven precincts Mr. Donnelly had been deprived by the city council of Minneapolis of all representation among the officers conducting the election is, in itself, a very strong proof of conspiracy and fraud."

We may remark that there is abundance of testimony in this case showing that nearly one-half of the polls in some of the counties were under the exclusive control of the party friends of the contestee; and it is stoutly maintained by the contestant that the refusal to register qualified Republican voters, and that the appointment of incompetent Republican election precinct officers at other polling places, and various other acts and omissions on the part of the partisan friends of the contestee, taken in connection with the fact that at many of the precincts only Democrats were appointed election officers, afford a strong reason why the rule laid down in the Washburn-Donnelly case should apply in this.

The appointment of managers of election, in fairness and common decency, should be made from opposite political parties. A refusal to do so in the face of a statute directing it to be done may in some instances be evidence of fraud, and it might form an important link in the chain of circumstances tending to establish a conspiracy.

We are not satisfied that the evidence in this case establishes such a conspiracy.

As to changes of polling places, both majority and minority say:

There is evidence tending to establish the fact that some of the voting places were changed just prior to the election, and that much confusion was thereby caused among the voters. Many of them were not aware of the change, and in some instances they did not know where the new polling places were established. Just how far this affected the result of the election we are unable to tell from the evidence. We can, however, readily imagine how a resort to changing the polling places just before an election in a county would cause such confusion and unfairness as would defeat the popular expression of the will of the people through the ballot box.

The majority reject a precinct for the following act of intimidation at North Oxford precinct:

B. P. Scruggs testifies that he was United States deputy marshal on the 2d of November, 1880; that he lives in Oxford, State of Mississippi; that he was present at the election held there on that day;

[1] It is hardly accurate to speak of anything as decided by this case, where there was no report indorsed by a majority of the committee and no action by the House.

that within 20 steps from the entrance of the court-house, where the voting was being carried on, Mr. Keyes, a prominent Democrat of that place, and a member of the board of aldermen, was in charge of a cannon which was being fired, and that the witness protested against the firing of it; that he was told by Mr. Keyes that he had orders to fire it; that it was none of his business who gave him such orders; that they continued to fire the cannon until late in the afternoon; that the cannon was a regular 6-pound field piece. Witness also testifies that the Republicans were prevented from celebrating the victory gained by them because they were told by two prominent Democrats, Mr. Crawford and Mr. Skipwith, in the presence of Mr. Baker, chairman of the Democratic county central committee, that "they might have the right to do so, but they did not have the might," and to prevent a bloody collision, they abandoned it.

The minority found 11,715 votes which they considered so tainted as to justify setting aside the whole election.

The majority found only 1,994 votes for sitting Member and 1,455 for contestant cast in polls which ought to be rejected. So they recommend the adoption of the following resolution:

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

On March 2,[1] after brief debate and the reading of the report, the resolution of the majority was agreed to without division.

975. The Missouri election case of Sessinghaus v. Frost in the Forty-seventh Congress.

The House counted the ballots of qualified voters who were prevented from voting by conditions arising from a registration established by a city government.

May the State delegate to a municipality the power to regulate the manner of holding an election?

Officers of election having wrongfully denied qualified voters the right to vote, the House counts the rejected votes.

On February 17, 1883,[2] Mr. Samuel H. Miller, of Pennsylvania, from the Committee on Elections, submitted the report of the majority of the committee in the Missouri case of Sessinghaus *v.* Frost. The sitting Member had received a plurality of 197 votes on the face of the returns.

The objections of contestant involved two leading questions:

(1) A number of persons—155 in all—who were shown to have all been qualified voters under the laws of the State of Missouri, and who tendered votes for contestant, were refused the right to vote because their names had been stricken from the registration lists under the provisions of an ordinance of the city of St. Louis, which provided for a board of registration to be appointed by the mayor, and—

whose duty it shall be to meet with the recorder of voters, at his office, twenty days before each general, State, or municipal election, for the purpose of examining the registration, and making and noting corrections therein as may be rendered necessary by their knowledge of errors committed, or by competent testimony heard before the board; a majority of said board shall be necessary to do business, and the mayor shall be ex officio president thereof. They shall strike from the registration, by a majority vote, names of persons who have removed from the election district for which they registered, or who have died, and shall note the fact opposite the name of any person charged with having registered in a wrong name, or who for any reason is not entitled to registration under the provisions of this ordinance, which person shall be challenged by the judges of election when presenting himself to vote, and rejected

[1] Journal, p. 545; Record, pp. 3590, 3593–3606.

[2] Second session Forty-seventh Congress, House Report No. 1959; 2 Ellsworth, p. 381.

unless he satisfy said judges that he was entitled to register, and said board shall also place on said books the names of such persons as in their judgment have been improperly rejected by the recorder of voters.

After a discussion of the terms of the constitution and laws of Missouri, the majority of the committee found that the ordinance was of no binding effect:

The Constitution of the United States having declared that the legislatures of the several States shall provide for choosing Members of Congress, and the constitution of Missouri having authorized the general assembly, and that alone, to enact a registration law, we hold that the above ordinance has no binding force or effect, and is invalid.

We therefore rely upon the language of McCrary, section 11, that—

"In the absence of any positive law making registration imperative as a qualification for voting, it is a very plain proposition that the wrongful refusal of a registering officer to register a legal voter who has complied with the law and applies for registration ought not to disfranchise such voter. The offer to register in such a case is equivalent to registration. This would be held to be the law upon the well-settled principle that the offer to perform an act which depends for its performance upon the action of another person, who wrongfully refuses to act, is equivalent to its performance.

Mr. A. A. Ranney, of Massachusetts, a member of the committee concurring in the majority report, filed views which discussed the point more fully:

I should ordinarily hesitate long and deliberate with care, lest I might be mistaken, before I could decide against the validity of the city ordinances in question and under which the board of registration seem to have acted and which have been apparently in force and acted upon in the city and State so long. But the question is raised and argued on both sides with great ability. And I am forced to the conclusion that the acts of the board in striking off the names of the parties in question was unauthorized, illegal, and void; that under the Constitution of the United States, article 1, section 4, the State legislature alone had power to prescribe the manner of holding elections, subject to alteration and regulations made by Congress. That this power includes the whole machinery of elections, registration laws, etc., is too well settled to require argument.

I am unable to find any act of the legislature of Missouri which prescribes registration as a qualification or regulation and which was in force at the time in question and applicable to the city of St. Louis. Apparently the legislature recognized this as the state of the law and accordingly, as appears in the argument, passed an act to remedy the defect and provide for it in the year 1881. The charter of the city of St. Louis must be confined in its provisions to matters municipal, and it would be a great stretch of language and principles of law to hold that it extended beyond that and embraced authority to regulate the manner of holding elections in matters of State and Federal officers, so the city authorities could establish registration laws and prescribe the qualifications of voters and limit the right of exercising the elective franchise. It is more than doubtful whether the legislature, which is alone invested with authority of this kind, could thus delegate it any way.

The minority contended that the St. Louis ordinance was framed in conformity with the constitution and laws of Missouri and was valid.[1]

The majority further found:

But conceding (which we do not in this case) that the city ordinance relative to registration was constitutionally and legally enacted, and its provisions applicable to this election, we contend that these 155 votes should still be counted, and for the following reasons:

The oath prescribed for and taken by the judges of election precluded them from hearing or determining the case of any voter whose name is not on their list; therefore as to that class of voters they are not really judges of election. The law in that case has provided another set of judges, whose duty it is to hear competent testimony concerning the case of each and every man whose name is suggested by anyone should be stricken off, and after judicially hearing the case they shall by a majority vote determine whether that man is a voter or not.

[1] Minority views filed by Mr. Samuel W. Moulton, of Illinois.

So we say that if the judges of election could not receive the votes of these men they are not the judges of their qualifications to vote in any sense, their place for that purpose being filled by the board of revision. We hence conclude that if the only officers recognized by the city charter who had a right to judge of the qualifications of these 155 men have improperly, wrongfully, and fraudulently denied them the right to vote, that this House should remedy that wrong and count their votes for him whose name was on their ballots.

As to the propriety of counting these votes, the majority say:

The testimony shows that all of the above 155 men were legal and qualified voters, many of them being old residents, and that they did all in their power to entitle them to vote.

We hold that their votes should now be counted by the House. The said voters had done everything the law required of them; they had exhausted their remedy; they had registered and gone to the polls and offered to vote, but their names having been stricken off they were not allowed to vote.

The principle is well established and was adopted by this committee in the case of Bisbee *v.* Finley (present Congress) that where judges of election improperly refuse a qualified voter the right to vote his vote will be counted here. We submit the reason of that rule will apply as well to this case where the voter has done everything in his power and the primary wrongful act was committed by the registration officers.

McCrary on Elections, sections 10, 11, and 383, fully sustains this view in the following language:

"A case may occur where a portion of the legal voters have, without their fault and in spite of due diligence on their part, been denied the privilege of registration. In such a case if the voter was otherwise qualified and is clearly shown to have performed all the acts required of him by the law, and to have been denied registration by the wrongful act of the registering officer, it would seem a very unjust thing to deny him the right to vote. In elections for State officers, however, under a constitution or statute which imperatively requires registration as a qualification for voting, it may be that the voter's only remedy would be found in an action against the registration officer for damages." (See also secs. 11 and 383.)

It will be observed that Judge McCrary, after stating the general doctrine, says that—

"In elections for State officers, however, under a constitution or statute which imperatively requires registration as a qualification for voting, it may be that the voter's only remedy would be found in an action against the registration officer."

This refers exclusively to State officers, while the office for which it is intended to count these votes is not a State office, that the United States Constitution has given this body full control over the question as to who are its Members; and in the State of Missouri neither the constitution nor any statute in force in St. Louis makes registration an imperative prerequisite or qualification.

Also the majority find another reason:

Furthermore, these votes should be counted on another ground, following a well-established principle of law.

The proof in this case shows that the board of revision by whom the above voters were disfranchised acted at the outset and throughout their entire proceedings in absolute violation of not only the spirit but the letter of the law which gave them authority. The ordinance explicitly says that this board shall meet—

"For the purpose of examining the registration and making and noting corrections therein as may be rendered necessary by either their knowledge of errors committed or by competent testimony heard before the board, a majority of said board shall be necessary to do business."

By a resolution adopted at the beginning (heretofore cited) they declared they would neither hear testimony nor act upon the knowledge of the board. Thereafter names of voters were stricken off the list without even being read to the board, and merely upon the recommendation of an individual member, who, in many cases, as the proof shows, adopted without question, knowledge, or examination the reports of his unsworn and unauthorized deputies.

976. The case of Sessinghaus, v. Frost, continued.

As to what constitutes on a ballot a caption designed to deceive the voter.

The House counted ballots rejected by election officers under an erroneous construction of the law.

The intent of the voter being certain, the omission of a candidate's given name does not vitiate the ballot.

A small number of voters being driven from the polls by intimidation, the House counted their votes but declined to reject the whole poll.

(2) The majority determined to count certain votes for contestant for the following reason:

There were 23 ballots cast for contestant, but not counted, having this caption, viz, "Chronicle Selected Ticket," a ticket made up of names of persons on both the Republican and Democratic regular tickets. It was not, in the language of the law (see p. 1681), a ticket designed to deceive the voter. It showed plainly what it was, viz, a ticket selected by the Chronicle, an independent daily newspaper published in St. Louis. (See pp. 945–946.) This ticket had contestant's name on it for Congress from this district, and was, in some of the precincts, thrown out by the judges and not counted.

The supreme court of Missouri, in the case of Turner *v.* Drake (71 Mo., 285), construed this statute as follows:

"This is a proceeding instituted in the county court of Carroll County, contesting the election of defendant as recorder of deeds of said county. The county court quashed the notice of contest on the motion of defendant, from which action plaintiff appealed to the circuit court, where, upon a trial de novo, judgment was rendered for defendant, the notice of contest quashed, and the proceedings dismissed, from which plaintiff has appealed to this court.

"The only ground for contest alleged in the notice is that all the ballots cast for defendant, at the election which was held on the 5th day of November, 1878, were fraudulent and void because the caption of said ballots contained the words, 'Republican, Independent, Greenback.' The following is the form of the ballot as to State and county officers: 'Republican, Independent, Greenback; supreme judge, Alexander F. Denney,' etc.

"The claim that the ballots cast for defendant, of which the foregoing is a type, were fraudulent and void, is based upon section 1, acts of 1875, page 15, which is as follows:

"Each ballot may bear a plain written or printed caption thereon, composed of not more than three words, expressing its political character, but on all such ballots the said caption or headlines shall not in any manner be designed to mislead the voter as to the name or names thereunder. Any ballot not conforming to the provisions of this act shall be considered fraudulent, and the same shall not be counted.'

"We cannot, from the mere face of the ballot, declare, as a matter of law, that the words used in the caption were, in any manner, designed to mislead the voter as to the name or names thereunder. The words employed would indicate to the voter that he would find among those to be voted for Republicans, Greenbackers, and Independents, or persons who were candidates without party indorsement. We think the evident purpose of the legislature in the above enactment was to prevent one political party from using, as a caption to its ballots, the name of any other political party from that mentioned in the caption. A ballot with a caption using the words 'The Republican Ticket' which contains only the names of persons who represented the Democratic ticket would fall within the class of ballots interdicted by the law.

"The design of the statute is to prohibit the use of any words in the caption to a ballot which do not truly indicate the political character or party affiliation of the persons to be voted for, and any ballot which represents by the words used in the caption that it is the ticket of one party when in truth and in fact the persons whose names are contained in the body of the ballot represent another and different party is under the statute fraudulent and void."

Under this and similar decisions, it seems to us there can be no doubt that contestant is entitled to have counted for him these 23 votes.

(3) The majority also ruled as follows:

Evidence on pages 952 and 897 of the Record, which is uncontradicted, will be found showing that 10 votes cast for contestant were thrown out and not counted by the judges, merely upon the ground that the contestant's given name was not on the ballots. The proof shows that no other man by the name of Sessinghaus was a candidate at that election in that district for any office.

Hence we follow the unbroken chain of authorities as cited by McCrary and hold that these 10 votes should be counted for contestant.

(4) As to intimidation, the majority report that 20 votes should be counted for contestant for this reason:

As to precinct No. 39, the contestant urged persistently * * * that this precinct should be thrown out, but we are constrained to differ with him. We find that the evidence of intimidation hardly comes up to the standard provided by the precedents cited by McCrary, and hence we conclude that it must stand. We find, however, that 20 men (all colored) who were qualified and legal voters and duly registered, and who had done all that the law required of them, who were entitled to vote at that poll, went there and offered to vote, but were refused for various trivial reasons, many of them being frightened by abuse and driven from the poll.

(5) On questions of fact certain votes are counted for contestant because wrongfully excluded by election officers.

In conclusion, as a result of their decisions, the majority find a plurality of 172 for contestant, and report resolutions for seating him.

The minority concluded that sitting Member was entitled to retain the seat.

The report was debated in the House on March 2,[1] and on that day the resolutions of the majority were agreed to,[2] yeas 126, nays 110.

Accordingly Mr. Sessinghaus appeared and took the oath.

977. The Florida election case of Bisbee, jr., v. Finley in the Forty-seventh Congress.

Contestant's testimony being delayed by dilatory action and intimidation, the House considered a portion taken after the legal limit.

Discussion as to certain testimony alleged not to be strictly in rebuttal.

On February 19, 1883,[3] Mr. Ambrose A. Ranney, of Massachusetts, from the Committee on Elections, submitted the report of the majority of that committee in the Florida case of Bisbee, jr., *v.* Finley.

At the outset consideration may properly be given to a preliminary question concerning the taking of evidence. Contestee claimed before the committee that a portion of the contestant's evidence was taken after the expiration of the first forty of the ninety days allowed by statute for the taking of testimony, and that some of that which was taken during the ten days allowed for rebuttal was not strictly in rebuttal, and that all such should be rejected and not considered by the committee. The majority report finds that during the first forty days contestant took testimony as fast as he could, but that much time was consumed on the part of sitting Member by useless and dilatory cross-examination. Also violence and disorder prevented contestant's attorney from going into some parts of the district.

[1] Record, pp. 3616, 3627–3631.

[2] Journal, pp. 551, 552.

[3] Second session Forty-seventh Congress, House Report No. 1066; 2 Ellsworth, p. 172.

Therefore contestant, without prejudice to sitting Member, continued to take testimony after the expiration of the forty days. But sitting Member's counsel would not remain during the talking of this testimony, although contestant offered to give his opponent all the time he wanted for answering the testimony objected to. The majority report further says of sitting Member's attitude:

He knew of the other facts stated and of the illness of counsel which had delayed the taking of the evidence entirely within the first forty days. And the committee think that a fair-minded man would have been most likely to enter into an agreement allowing further time, and he must be presumed to know the previous practice of the Committee on Elections to exercise discretion in such matters.

It is also evident that most and probably all of the evidence to which he now objects did not admit of an answer, as his attempt to answer other evidence of the same kind to which he does not object proved ineffectual. That taken during the last ten days was such from its nature that it could not be contradicted or its force impaired by any counter evidence.

It is Manifest, therefore, that contestee did not suffer and was not prejudiced by any delay or the acts complained of.

No complaint is made or pretense set up that the evidence was not fairly taken and accurately reported. He had full opportunity to cross-examine if he desired to do it, and also to answer it after the same was taken. But he did not choose to do so and preferred to take the risk of its being considered. After the case was referred to the committee and printed he did not appear or make any motion to strike out the evidence objected to, so that it might be supplied if the motion was granted, but took the objection for the first time at the argument.

The committee are clearly of the opinion that the evidence taken after the expiration of the forty days should be received and considered, and they have considered it; that the evidence taken in rebuttal should also be considered. All of the evidence was taken within the ninety days allowed by statute, so that in that respect the statute was literally complied with, and the forty days allowed contestee was more than sufficient for his purposes, as he did not begin until about two weeks after contestant had finished, and then occupied but sixteen days, while he had the offer of all the more time which he desired.

It is manifest that contestee did not believe he could answer the evidence and, in the spirit manifested by his cross-examination, designed apparently to use up the time, so as to get beyond the forty days, and by leaving when the forty days were up, and when he knew contestant was going on to finish his list of witnesses, he was seeking some technical advantage if he could get it. The testimony in rebuttal, also taken within the ten days, appears to have been proper and competent, and should be, and has been, considered. The course of the committee seems fully justified by good precedents.

No statute can tie the House down to any rules of procedure.

Its provisions are directory, constituting only convenient rules of practice, and the House is at liberty, in its discretion, to determine that the ends of justice require a different course. (McCrary, pp. 353, 358, 359.)

In 1 Bartlett (Rep., 223, 224), a Democratic committee held that if either party desired further time to take testimony after the time had expired, it was his duty to give notice to his opponent and proceed and take it and present it to the committee, which would, on good reasons being shown, receive and consider it.

So, too, in regard to rebutting evidence; that rests in the discretion of a court always, even if not strictly in rebuttal. (Reed *v.* Kneeas, Brightley's Election Cases, 416; Richardson *v.* Stewart, 4 Birney, 197.)

The minority say:

The record shows that all the evidence taken in the counties mentioned below by contestant was taken as rebutting testimony, after the expiration of the time allowed by law for taking original testimony; that neither contestant nor contestee had taken any testimony in any of these counties during the forty days allowed to each, and that consequently there was nothing to rebut; that the contestant disregarded the act of Congress, which says that "the contestant shall take testimony during the first forty days, the returned member during the succeeding forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period" (of ninety days).

The following are the counties where contestant took such original testimony in the ten days allowed him for rebutting testimony only, and where contestee had taken no testimony; and where there could not therefore possibly have been anything to rebut, viz: Brevard, Bradford, Columbia, Hamilton, Putnam, Orange, St. Johns, Suwanee, and Volusia counties.

The record shows that no evidence in chief was taken in or concerning the election in any of these counties, and none whatever by the contestee during his forty days, and that all of contestant's testimony therein was taken after contestee's time had elapsed and after the contestant's time for rebuttal had commenced. See Vallandigham *v.* Campbell (1 Bartlett, p. 223); Brooks *v.* Davis (1 Bartlett, 244; McCrary on Elec., secs. 347, 348); Bromberg *v.* Haralson (first session Forty-fourth Congress, vol. 5, Index to Miscellaneous Documents Digest of Election Cases, p. 364).

It is claimed that all this testimony should be rejected.

Against all the evidence taken by the contestant in the above-mentioned counties the unanimous report of the Committee on Elections in case of Bromberg *v.* Haralson, first session Forty-fourth Congress, is cited. It appeared in that case that in Wilcox County the contestant, Bromberg, the Democratic candidate, undertook to violate the election law, just as the contestant in this case has done, and that his testimony so taken was rejected. (See Bromberg *v.* Haralson, supra.)

All the testimony in the above counties is ex parte in behalf of contestant. The notices served by contestant on contestee for taking this testimony in all those counties informed contestee that contestant would proceed to take testimony in rebuttal. The contestee, knowing that no original testimony had been taken in any of these counties, and that there could be nothing to rebut, declined to attend such examinations of witnesses. The contestant, instead of taking rebutting testimony, proceeded to take original testimony.

The minority quote McCrary, with comment:

The statute as it now stands (see sec. 108, Rev. Stat.) affords an opportunity for investigation, so ample and complete that it is believed that it will seldom happen that the House will find it necessary to depart from its provision in order to do the most complete and perfect justice, and it will no doubt be adhered to as furnishing the best possible guide for instituting and carrying forward inquiries of this character.

We have considered almost all the testimony thus irregularly and illegally taken, but we earnestly protest against the admission of such evidence unless great injustice would be done by rejecting it. We prefer to adhere to the law. The above-mentioned counties should stand as returned, however, both from the fact that all the testimony taken by contestant to assail them is unwarranted and because the testimony itself, as shown by the record, is insufficient to warrant the committee in rejecting the official returns and thereby disfranchising hundreds of legal voters.

978. The case of Bisbee, Jr., v. Finley, continued.

A vote offered by an elector and illegally rejected should be counted as if cast.

Electors having made affidavit of their qualifications and as to the ballots they intended to cast and the same being corroborated orally, the House counted the rejected votes.

As to the evidence which should be produced at the poll to justify rejection of a vote tendered by alleged convict.

As to the merits of the case, it appeared that sitting Member had a majority of 1,003 votes on the face of the official returns.

The examination of the objection raised by contestant involved a discussion of several questions of law:

(1) A question as to the counting of votes tendered but not received by the officers of election. The majority report holds:

The contestant avers and claims that many electors duly offered to vote for him, and their votes were illegally rejected, and insists that all such votes so tendered and refused shall be counted as if cast.

As a question of law we do not understand it to be controverted that a vote offered by an elector and illegally rejected should be counted as if cast. It was so held in the case of Niblack *v.* Walls (Smith's Reports, p. 104, reported by McCrary, who was then chairman of the Committee on Elections); again, in Bell *v.* Snyder (Smith's Reports, 251, 252, and in Martin *v.* Yates (Forty-sixth Congress). McCrary, in his work on contested elections, regards it as a settled principle (sec. 423), and your committee have so regarded it in this controversy.

In the appendix to this report, Exhibit A, will be found the name of every voter whose vote was tendered for contestant and rejected which we have allowed and counted for him, except a few votes in Madison County. This exhibit gives not only the name of the voter, but the page of the record where the testimony will be found establishing his right to vote and that his vote was tendered and rejected.

In the county of Marion, in which a large number of electors were deprived of the right to vote without any fault or neglect on their part, the electors in many instances, after being denied the right to vote, went before a United States commissioner and made an affidavit to the fact of their qualifications as electors and of their offering to vote, to which they attached the identical ballot which they tendered to the election officers. The figures in the column of Exhibit A headed "Affidavit" refer to the pages of the record containing such affidavits. In the case of Bell *v.* Snyder (Smith's Reports, pp. 251, 252) such affidavits were considered sufficient evidence of the voters' intention to vote for the officers whose names were on the ballot attached to the affidavit, and on such evidence their votes were counted.

But contestant has not only put in evidence the affidavit of the voters with their ballots attached, but has in most instances taken the testimony of the voter whose vote was refused, and where the voter is not called as a witness it is shown by the testimony of other witnesses, officers of the election and other persons at the polls, that his vote was tendered and refused.

Your committee find from the evidence that there should be added to contestant's vote 268 votes on the ground that they were tendered for him and illegally rejected, and should now be counted.

The minority views, presented by Mr. Frank E. Beltzhoover, of Pennsylvania, say on this question:

The contestee's counsel denies that these votes should be added to the contestant's majority in this county, and states the law on the subject to be as follows, viz:

"In order that a vote not cast shall be counted as if cast it must appear that a legal voter offered to vote a particular ballot, and that he was prevented from doing so by fraud, violence, or an erroneous ruling of the election officers."

The burden of proof of all these facts is upon the party who seeks to have the votes not cast counted for him. It devolves upon the contestant, therefore, to prove that each one of these voters was a legal voter, and that his vote was illegally rejected.

The ground upon which it is claimed and admitted that these 122 votes not cast were rejected was because they had not registered, or their names were not found on the registration list.

The election law of Florida requires registration at least ten days before the election. The law is as follows:

"No person shall be entitled to vote at any election unless he shall have been duly registered at least ten days previous to the day of said election, nor shall any one be permitted to vote at any other voting place or precinct than that of the election district stated opposite his name on the county registration list." (See act of legislature of Florida, 1877, pam., p. 69, sec. 3.)

Prima facie, all persons whose names are not found on the registration list are not legal voters, and in order to entitle them to vote, their names not being on the list of registration, it is incumbent on them to make every preliminary proof which the statute requires.

But whether these votes were rejected properly or improperly, it is very plain that, having been rejected, under the law they can not be counted unless each voter has adduced in the contest the same proof in every respect which would have entitled him to vote at the polls on the day of election. What, then, would have been required of each one of these voters whose names did not appear on the registry list? The law says that each one "shall, on offering to vote at the voting place or precinct in such election precinct, be required to state under oath: (1) That he is 21 years of age; (2) that he has resided in the State of Florida one year; (3) and in the county six months, (4) that he was duly registered at least ten days before the election; (5) and that he has not changed his place of residence to any district other than the one in which he was living when registered, (6) or if he has changed his place of residence

since such registration that he has notified the clerk of the circuit court of the fact of such change. These are six requirements which are necessary and indispensable to the legal qualification of any person whose name is not on the registration list. The testimony is not very clear what the rejected voters in this instance offered to do at the time they proposed to vote on the day of election. If they were ready and willing to swear to all these six matters, then they should have been allowed to vote. There is no doubt about this. But having been refused by the election board, although wrongfully, can they be counted now unless they have subsequently made the same proof during the contest and have it now before the committee? We think not. The proof which has been offered in all the various cases does not in any case, so far as we have been able to discover, come up to the requirements of the law. These votes, therefore, although it is possible they may have been and are now legal votes, must be rejected. We can not ignore any one of the muniments of the electoral privilege, which should be guarded as well to keep out illegal votes as to insure the right to those who are entitled to vote under the law.

(2) As to the proof required to refuse a vote where there is a disqualification because of conviction for crime, the majority report says:

It is urged by contestee that the votes of some of the persons named had been disfranchised by conviction of crime.

It appears to have been a rule with the election officers, not only in this but in other counties, to refuse to receive the vote of any person whose name was on a list—called by some of the witnesses a convicts' list—which had been prepared by the political associates of contestee and placed in the hands of the officer of election. It further appears that the votes of such persons on the said list were refused, without evidence of indentity, and without the production of any record of conviction, at the polls.

We have excluded from our count the votes of all persons where the evidence is satisfactory that the person alleged to have been convicted is the same person whose vote was offered and refused, though the record of conviction is not in evidence, and to designate them have placed the letter C opposite their names on said exhibit.

We do not mean to be understood, however, as holding that the record of conviction in such cases should not be produced as the proper evidence of disqualification. The question is an immaterial one in this case.

979. The case of Bisbee, jr., v. Finley, continued.

Where the law requires a citizen of foreign birth to produce his naturalization papers at the time of voting, a failure so to do destroys the vote even after it has been received.

A vote admitted without presentation of required evidence at the polls is not validated by production of the evidence during the investigation.

(3) The constitution of Florida provided:

At any election at which a citizen or subject of any foreign country shall offer to vote, under the provisions of this constitution, he shall present to the persons lawfully authorized to conduct and supervise such election a duly sealed and certified copy of his declaration of intention, otherwise he shall not be allowed to vote, and any naturalized citizen offering to vote shall produce before said persons, lawfully authorized to conduct and supervise the election, the certificate of naturalization or a duly sealed and certified copy thereof; otherwise he shall not be allowed to vote.

The majority report contends that the production of the evidence when the vote is offered is peremptorily enjoined, and cites the case of State *v.* Hilmontel (21 Wis. R., 574–578) and the Congressional cases of Myers *v.* Moffett, Weaver *v.* Given, and Covode *v.* Foster, etc., and continues:

Here the constitution of the State makes every voter of this class an agent to execute it, and places the burden upon him to furnish the prerequisite evidence of his right to vote. The constitution does not say that he shall be required to produce his naturalization papers only when his vote is challenged. By that instrument he is informed and challenged in advance of the election itself, and he must approach

the polls armed with such evidence as the supreme law commands him to produce as a condition precedent of his right to exercise the franchise of an elector. Our attention has not been directed to any judicial authority in conflict with the authorities cited. On the other hand, we find the principle to have been uniformly applied, and we are therefore of the opinion that it should be applied to this case.

The principle must likewise be maintained that the production of this evidence at the trial will not change the legal status of the voter and thus make these votes in question legal votes. Such a decision would be at variance with a well-established principle of law which forbids the making of an act valid at a subsequent period which at the time of its commission was void because prohibited by law.

Votes illegal when received can not be made legal by evidence offered at the trial which should have been produced before the vote was cast. (Shepperd *v.* Gibbons, 2 Brewster, p. 129; Myers *v.* Moffett, I id., p. 230.) The principle is again established in the following:

"If election officers receive a vote without preliminary proof which the law makes an essential prerequisite to its reception, such vote is as much an illegal one as if the voter had none of the qualifications required by law." (Brightly's Law Cases, 453–492, notes; also, 21st Wisconsin, 566; 23d Wisconsin, 630; 16th Michigan, 342.)

The principle is self-evident. Voting is a single act commanded to be performed within a particular time, on a particular day, and in conformity with law. There can not therefore be a valid performance of the requirements of the law at a period subsequent to the day on which alone the law commanded the act to be performed. The question at issue is not whether such evidence as required by law to establish their right to vote could have been furnished, but whether such evidence was furnished. If they did not produce it, the supreme law prohibited their voting, and an act prohibited by law can not be valid.

The committee being of the opinion that all votes cast by persons of foreign birth who failed to produce their naturalization papers or papers declaring their intention to become citizens, as required by the constitution of Florida, are illegal and void. We proceed to state the number of such votes which from the testimony should be deducted from the count.

The evidence introduced and to be relied upon is, first, the testimony of the voter himself that he did so vote without producing such evidence of his right to vote; secondly, his own admission, under oath, that he voted for contestee; and, thirdly, where the voter refuses to testify for whom he voted when called and sworn by the contestant, the testimony of other witnesses that he adhered to and supported the principles of the Democratic party and was a Democrat. This is a well-settled principle: "When a voter refuses to testify for whom he voted it is competent to resort to circumstantial evidence, such as that he was an active member of a particular political party." (McCrary, sec. 293.)

We find from the evidence that 74 votes should be deducted from contestee's vote on the ground that they were cast by persons of this class.

The minority oppose this contention, citing the case of Finley *v.* Bisbee, in the Forty-fifth Congress, and Curtin *v.* Yocum, in the Forty-sixth Congress, and a decision by Judge Briggs (Leg. Int., July 19, 1878), holding in the case of Gillin *v.* Armstrong:

That unregistered voters having voted without making the affidavits, the law presumes that they are legal, and it can not be permitted to show that they were not so legal.

980. The case of Bisbee, jr., v. Finley, continued.

An election held without proper registration., under laws requiring registration, was held to be illegal.

The honesty of election officers being impeached, the testimony of the voters as to their own votes was admitted to destroy the return and prove the vote aliunde.

The ballot box not having been kept inviolate, an unofficial recount is of little value to substantiate impeached returns.

As to the weight of testimony required to overturn the presumption that sworn agents of the law have acted rightly.

(4) The laws of Florida required a registration of the electors, and the constitution of the State commanded:

That no person not duly registered according to law shall be allowed to vote.

Because of disregard of this provision the majority of the committee rejected the returns of the entire county of Brevard:

The law requires one general registration book for each county, and also another registration book for each election district into which the county is divided; and these district books are the original books of registration, in which each voter must write his name, or have it written by the registrating officers, and take the oath of allegiance to the State and to the United States, which oath is to be printed or written at the commencement of the book. Opposite the voter's name must appear, in proper order, the number of the election district in which the voter resides, and the day, month, and year of his registration.

The law provides for copying by the clerk of the circuit court the names on the district books into the general registration book. This clerk is the registrating officer for the election district in which his office is located, and he appoints a registrating officer for each of the election districts of the county.

The registration must be closed ten days before the day of election, and a certified copy of the district book is to be delivered by the sheriff to the election officers, which copy is the legal evidence to the officers of the election of the fact of registration, and of the qualification of the electors whose names are on such copy.

The contestant asks that the entire election be set aside in this county, and that no votes shall be counted for either party, on the ground that the election was held without any registration in conforming to the law.

The evidence relied upon consists of the testimony of one James A. McCrory, the deputy clerk of court, who had charge of the clerk's office, and who performed, as it appears, such duties as were performed in this county preparatory to the election. (Record, pp. 403–405.)

This deputy clerk was a Democrat, and was examined as a witness on behalf of contestant. It is proven by his testimony that no registration books were provided or used in this county, and that the only semblance or pretense of registration of the electors consists of "loose sheets of paper" containing the names of citizens, which were brought into the clerk's office by the registrating officers from eight election districts.

The whole number of such districts was twelve, and from the other four this deputy clerk testifies that even such lists of names "on loose sheets of paper" were not made and brought to the clerk's office. McCrory can only name one district from which such irregular lists of names were returned that contained oaths required by the law to be taken and subscribed by the elector and registration officers. (Record, p. 405.)

It has been called to the attention of your committee that it was proven by the clerk of the court, and other witnesses, in the contested election ease of Bisbee *v.* Hull, that there were no registration books provided or used in this county at the election of 1878.

It also appears that by a statute of Florida, passed in 1879, a considerable portion of the territory of the adjoining county of Volusia was added to this county, Brevard, consequently it can not be claimed that any of the citizens residing within this portion of the county had the right to vote by reason of any prior registration. And this new part of the county is included in that containing the eight election districts in which these lists of names "on loose sheets of paper" were made and delivered.

The registration books, under the laws of Florida, are public records, and the clerk of the court is the legal custodian of them. This deputy, who had charge of the office, could not well be ignorant in regard to the subject-matter of his testimony, and he evidently testified with some reluctance, which may be accounted for from the fact that he was a political associate of contestee,

According to this testimony it is manifest that the entire foundation for a legal election in this county was wanting. As to the four districts in which not even the irregular lists of names "on loose sheets of paper" were made, there can be no pretense that there was any registration of any kind whatever. From these four districts 63 votes were returned for contestee and 12 for contestant.

As to the other eight election districts, it can hardly be claimed that "loose sheets of paper" are registration books such as the law requires. They could be manufactured, abstracted, and substituted at pleasure, with slight risk of detection.

To sustain this as a legal registration would do violence to the provision of the constitution and laws of Florida, would destroy all the safeguards against the frauds at elections which the registration laws are intended to prevent, and would, we think, furnish greater facilities for fraud than the absence of any registration at all.

Your committee therefore hold that the election in this county must be set aside as illegal and void.

The principle is so well settled that an election held without registration, under laws requiring registration, is illegal, that the citation of authorities is deemed unnecessary.

The returns from this county give the sitting Member 222 votes and the contestant 74 votes, which are excluded from the count.

The minority contend that the evidence does not establish the claim of the majority, and say:

It shows that there was a substantial compliance with the registry law, and that the voters should not, therefore, be disfranchised, because of the neglect of the officers who may have failed to furnish in all cases the proper registration lists. This is the law plainly laid down in Wheelock's case (1 Norris, 297), which was decided in Pennsylvania under a statute like the one in Florida. In Wheelock's case it appears that the general registration list had been made, and was on file in the commissioner's office, but there was no registration list at all at the polls. In that case the supreme court say:

"To disfranchise all the voters of a township, as we are asked to do in this petition, the facts on which we are required to act should show a case free from legal doubt. If we, by our decision, should permit the carelessness or even the fraud of officers whose duty it is to furnish a list of voters at the elections to defeat the election and deprive the people of the county of the officer who was elected by a majority of their votes, we would thus make the people suffer for an act in which they did not participate and which they did not sanction. In so doing, instead of punishing an officer for the violation of the election law we practically punish the voters of the county by defeating their choice of a county officer as declared at the election. A decision of this kind would be fraught with danger by inciting unprincipled or unscrupulous persons on the eve of an important election to recreate or destroy the list of voters or other important papers in a township in which the majority may determine the result in the county. Rules applicable to contested elections, like other legal rules, must be uniform, and the results and consequences of decisions therefore determine their correctness."

(5) Over Arredonda, poll, in Alachua County, a sharp division arose. The returns from this poll gave Finley 172 votes and Bisbee 69.

The majority report shows that in former years the vote of this precinct had shown a vastly different party division, and says:

The return is impeached and destroyed as evidence by the testimony of the electors themselves. Contestant has called and sworn as witnesses 259 voters, each of whom testifies unreservedly that he voted for contestant, and it is established by other evidence that another elector, deceased before the testimony was taken, voted for contestant, making 260 votes cast for him at this poll, instead of 69 given him by the returns.

The testimony of these electors will be found in the record, pages 68 to 218, inclusive. Their names are on the poll list made and returned by the election officers (all of whom were the partisan friends of the sitting Member but one, who was under the influence of liquor on election day), and it can not therefore be disputed that the 260 shown to have voted for contestant were legal electors, nor have your committee any doubt they voted for contestant.

As to the testimony of some of these voters, the criticism is made that they could not remember the names of all the candidates, State and national, for whom they voted.

We do not consider it remarkable that five months after the election an elector could not name all the candidates he voted for out of a dozen or more on his ballot, while he would be likely to remember the name of his candidate for Congress who had been his candidate for Congress for three elections in succession.

Any considerable number of voters proven for one candidate in excess of the number returned for him has always been regarded as evidence of fraud and a legitimate method of impeaching the return.

Here it is established that 191 more votes were actually cast for contestant than were returned for him. We think it is sufficient to exclude the return from the count, without further evidence.

One provision of the statute is that "the ballot box shall not be concealed from the public," and section 21 (of pamphlet compilation furnished the committee at the argument of the case) reads as follows: "As soon as the polls of an election shall be finally closed the inspectors shall proceed to canvass the votes cast at such election, and the canvass shall be public and continued without adjournment until completed."

Your committee find from the evidence that these provisions of the statute were violated, and without any reason being assigned for so doing.

Both the witnesses for contestant and contestee testify that after the polls were closed the officers of the election took the ballot box away from the polling room to a house in which they took supper, two or three hundred yards distant from the building in which the election was held, and the ballot box was carried inside of the supper house.

The report further holds that the ballot box was not kept with the security demanded by the law during this adjournment, and that it was surrounded by suspicious circumstances, impeaching the integrity of the election officers, and says:

Without any further statement of the evidence touching the action of the election officers on this branch of the case, your committee are of opinion that the disregard of the mandatory provisions of the election laws was willful and with a dishonest purpose of securing an opportunity to commit fraud, which such laws were intended to prevent, and that the conduct of these officers was such as to render their acts unworthy of credit and to entirely destroy the prima facie character of their return as evidence of the result of the election at this poll.

For this reason, as well as for the reason that the return is impeached and destroyed by the testimony of the electors, your committee have excluded this return from the count. The testimony with regard to this poll taken in behalf of the sitting Member will be found in the record, pages 378 to 394, inclusive, and the testimony in behalf of contestant other than that of the voters from pages 186 to 196.

The precedents for excluding a return in such a case as this are numerous, and the principles of law which we have followed are well settled. We refer, however, to McCrary on Elections, sections 302, 303; Brightly's Leading Cases, page 493; 1st Brewster's Reports, pages 66, 107; Washburn *v.* Voorhies (2d Bartlett, 54); Reed *v.* Julian (2d Bartlett, 822); Finley *v.* Walls (Smith).

The sitting Member took the testimony of the clerk of the circuit court of this county, to whom the ballot boxes were delivered after the election.

This clerk, nearly six months after the election, produces the box, opens it, examines the ballots in it, and testified that there were in the box 85 Republican ballots, counting no name for Member of Congress; that there were but 68 ballots for contestant, though the return gives him 69; 148 ballots for Republican Presidential electors, whereas the return gives them 150; and that there were but 140 ballots for Republican candidate for governor, though the return gives him 143. (Record, p. 399.)

It is claimed that these ballots in the box are better evidence of the result than the testimony of the voters.

As to the testimony of this clerk, it is sufficient to say that there is no law in Florida providing for the preservation of the ballots for the purpose of being used as evidence; the ballots are not evidence sufficient to overcome the testimony of the voters where the question of fraud and tampering with the ballot box is raised. (McCrary on Elections, sec. 276; id., 439; Washburn *v.* Voorhies, 2d Bartlett, 54.)

McCrary says in "such a case the ballots might sustain the fraud." (McCrary, sec. 439; also Reed *v.* Julian, 2 Balt., 822.)

These ballots can not be entitled to much weight as evidence of the result of the election, where it has been shown that the acts and conduct of the election officers are unworthy of credit and their returns set aside and regarded as unreliable. Having created for themselves, in violation of law and their official oaths, opportunities for tampering with the box, it is legitimate to infer that they would endeavor to put ballots in the box that would support the return.

Finally the majority conclude:

Your committee decide that the contestant is entitled to have 260 votes counted for him at this poll, or 191 in addition to his returned vote; and as contestee has not proven any votes for himself, none can be counted for him.

The minority analyze the evidence and conclude that, while the adjournment was irregular, yet no chance for fraud was shown, and cite evidence to show that there were divisions in contestant's party to explain the increase in the vote for sitting Member. As to the proof of the vote the minority say:

But there is a grave objection to the testimony of voters to show the true state of a poll in such a case as this, and surrounded by such circumstances. The voters were mostly illiterate and could not read their tickets, and the Dennis Republican ticket did not have Mr. Bisbee's name on it. How could they say any more than that they voted the Republican ticket? Besides, not only are political leaders liable to conceal their cutting a party ticket, but ignorant voters, who would incur the odium of their neighbors for admitting a deviation from the party paths, are also likely to deny the fact, and particularly when they have the additional shield for their consciences that they may not and perhaps can not know certainly how they voted.

The views also quote McCrary and other authorities to show that the rejection of a poll is a last resort:

The case of Biddle and Richard *v.* Wing, supra, is also cited as giving the correct doctrine, which holds: "Indeed nothing short of the impossibility of ascertaining for whom the majority of votes were given ought to vacate an election." (See also McCrary, pp. 436, 437, 438.) Under the law, as laid down in these citations, does the evidence justify the rejection of this poll? Have all the provisions of the election law been entirely disregarded by the election officers; and are the returns utterly unworthy of credit? Is it impossible to ascertain with reasonable certainty what the true vote is, and is it necessary to exercise the dangerous power of rejecting the poll, which the law says should only be done in extreme cases? We think not. But in addition to the provisions of the law, which declare what kind and amount of proof of fraud and illegality are required to reject a poll, the contestee very properly refers also to those presumptions which the law always throws around sworn officers, and those equally important presumptions of law, which are always in favor of innocence and right and against fraud and wrong. It is a well-settled and fundamental principle of law that in all cases and at all times all presumptions are against fraud and in favor of fairness. Fraud is never presumed, even from suspicious circumstances. When charged it must be proved. It is unnecessary to cite authorities in support of this. What is done by sworn officers in the pursuit and discharge of their duties is always presumed to be rightly done, and nothing but clear and convincing and unequivocal proof can destroy the credit and validity of their official acts. (See McCrary, sec. 87, etc.; see also Skerrett's case, Brightley's Leading Cases on Elections, p. 820 and p. 333, where the court holds this language: "What has been done by the sworn agents of the law is always to be presumed rightly done; and those who seek to impeach the acts of these functionaries must not expect to be entertained if, instead of bringing positive, tangible, and direct changes, they content themselves with general, argumentative, and theoretic imputations.")

981. The case of Bisbee, jr., v. Finley, continued.

Returns of a poll being rejected, the vote proven aliunde by one party is counted and nothing is credited to the other party unless he also prove aliunde.

The ballots in the box exceeding the names on the poll list, and the returns being impeached by the testimony of voters, the poll was rejected.

Instance wherein the House purged and did not reject a poll whereof the election officers had acted unfairly in drawing out of the box excess ballots.

Instance of the rejection of a poll for intimidation participated in by an election officer and general disorder.

The House deducted on account of an uncertified precinct return, although only the parol evidence of a single witness showed that it was included in the county canvass.

The House, on the testimony of one witness, assumed that county canvassers had improperly included an uncertified return.

(6) As to Newtonsville poll the majority report says:

The charge is made that fraud was committed at this poll by stuffing the ballot box with Democratic ballots. Two hundred and ninety-six votes were returned, 150 for Bisbee and 146 for Finley. (Record, p. 19.)

By the electors called and sworn as witnesses it is proven that 168 votes were cast for contestant; 18 in excess of the number returned. (Record, pp. 23–65 and pp. 296–313.)

It is also clearly proven that when the polls closed there were 29 more ballots in the box than names of electors on the poll list, which excess was drawn out and destroyed (Record, pp. 31, 182, 185); that Democratic ballots were found in the box folded together, which were counted; that before the ballots were counted a Democratic officer stirred or mixed the ballots up with his hand (Record, p. 183); and, after drawing out and destroying 21 ballots, on a second count 8 more in excess of the poll list was discovered, which were drawn out by the Republican inspector.

It is proven that 5 of the 8 so destroyed were Republican ballots, and that the greater portion of the other 21 were also Republican ballots. We conclude from the evidence that this excess was caused by the voting of two or more ballots by one voter, and that this was done by the supporters of contestee.

The report concludes:

On the part of contestant it is insisted that the return should be rejected, and only the votes otherwise proven counted. And our attention is called to the case of Washburn *v.* Voorhees (2d Bartlett's Reports, p. 54), where returns were rejected on proof of an excess of votes proven for one candidate over his returned votes of about 8 per cent, and at one poll of 4 per cent of the total vote returned.

McCrary says (sec. 371), "It is very clear that if the returns are set aside no votes not otherwise proven can be counted." The supreme court of New York, in 7 Lansing, 274, and other authorities, have declared and applied this as a settled principle, which we do not propose to overrule.

Another well-settled principle is that no poll shall be entirely set aside if the return can be corrected with reasonable certainty. The only correction of the return which, from the evidence, could possibly be made would be to count 174 votes for contestant and 121 votes for contestee. While we think this would approximate the probable true state of the vote at this poll we can not say from the evidence that such a result is reliably proven. The only other disposition that can be made of this poll is the rejection of the returns and count no votes save the 168 proven for the contestant, and from the views we have taken of the whole case it is not material to the final result which alternative is adopted.

The minority challenge the competency of the evidence and fall back on the presumption that the sworn officers have done their duty. It was also argued in the debate that, as the law provided for drawing out the excess of ballots, the proceedings were regular.

The majority also set aside the Parker's store poll:

There were but 306 votes returned for Representative in Congress, 151 for Bisbee and 155 for Finley. (Record, p. 262.) There are 336 names on the poll list. (Record, p. 374.)

It is satisfactorily proven by the electors sworn as witnesses for contestant that 179 votes were cast for him instead of 151 returned, an excess of 28 votes. (Record, pp. 323–371.) There were ballots in the box at the close of the election in excess of the poll list to the number of 6 or 7 (Record, p. 355), and 5 votes tendered by Republicans and rejected, which are included in Exhibit A of the appendix.

This excess of 28 votes proven for contestant over the number returned for him is not explained in any manner by the testimony. Whether it is the result of fraud in the officers of election or of gross carelessness in the count there is no proof to show, but upon the testimony adduced it must have been one or the other. In counting so small a number of votes it is wholly improbable that the election officers innocently made the mistake of suppressing 28 votes for contestant—nearly one-sixth of the total vote cast for him. Contestee has not taken any testimony with respect to this poll, and we are required to dispose of this question upon the evidence in the record.

There is no evidence by which the return can be corrected. The return is proven to be unreliable as evidence of the true vote, and the latter can not be ascertained by any other evidence.

"We think, therefore, that this return should be set aside and that no votes not otherwise proven should be counted.

It may be claimed that it would be proper to credit contestee with the difference between the returned total vote and the number proven for contestee, but this would be an assumption without evidence and an evasion of the rule that when a return is rejected each candidate must prove his vote by other evidence.

If legal votes were cast for contestee he had an opportunity to prove them, but he neglected to do so.

(7) In Madison County the majority report finds evidence of wholesale fraud, whereby excess of ballots over the poll lists were created, and then in the drawing out the ballots for contestant were deducted. But violence in this county prevented the contestant taking testimony fully. The report says:

To detail at length all the occurrences in this county as disclosed by the evidence would enlarge the report beyond proper limits, and therefore the statement will be condensed as much as possible.

It is in evidence that the Democratic ballots voted in this county were not more than half the size of and of finer quality of paper than the Republican ballots, and could be readily distinguished from the latter by even the sense of touch. This fact is established by the testimony of the witnesses of both contestant and contestee, and by specimens of ballots in evidence, and it is unnecessary to further allude to the evidence on this point. Likewise, upon the question of an excess of ballots, and of two or more having been folded so that one would be partially inclosed in another, and in such manner as when handled or shaken they would separate, there is no disagreement between the witnesses of the contestant and contestee.

The committee find that the sitting Member did not examine any witnesses with regard to any of the polls in this county except polls Nos. 1 and 2 in the town of Madison, and that his witnesses support the testimony adduced by contestant concerning difference in ballots, excess over poll lists, and the folding together of the same; that the contestee did not interrogate any of his witnesses as to the character of ballots drawn out and destroyed, whether they were Democratic or Republican; and as it was a very material thing to be established, the inference to be drawn is, that the contestee's attorney was aware of the fact that in the main they were Republican ballots, and that the testimony on behalf of contestant, taken before contestee examined his witnesses, establishes the fact that they were Republican ballots thus drawn out and destroyed. From this evidence the committee concludes that the following Republican ballots were drawn from the ballot boxes and destroyed, to wit: At the Greenville poll, 52; at the Madison poll No. 1, 52; at Madison poll No. 2, 14 votes, and that 20 more in excess on the second count were counted, which added that number illegally to contestee's vote; at Cherry Lake poll, 14 votes, and at Mosely Hall, No. 4 poll, not less than 10 votes.

The committee are therefore of the opinion that the fraud thus committed at the five polls last mentioned should be corrected by adding 142 votes to the contestant's vote and deducting 162 votes from contestee's vote. By thus correcting and purging the polls in question the contestant's majority at the five polls will be increased 304 votes.

The minority views say:

It is contended in behalf of contestant in regard to the Newnansville poll, in Alachua County, that the following language (quoted from McCrary) gives the true rule of law, viz:

"It is very clear that if the returns are set aside no votes not otherwise proven can be counted.'

This we admit is the true rule of law, and it is a gross inconsistency that would apply it to Alachua

County and would wholly depart from it in Madison County and attempt to set up an entirely new rule for which there is not an authority or precedent in the books.

The only way known to the law of disposing of such a case is either to accept the returns or to reject them in toto and put both parties upon the proof of their respective vote aliunde. But the contestant seeks to establish an entirely new rule, unknown to the law.

The law can not bend to suit the purposes of either party to the contest.

There is no principle of law more clearly established, says McCrary.

"And the safe rule probably is that when an election board are proved to have willfully and deliberately committed a fraud, even though it affect a number of votes too small to change the result, it is sufficient to destroy all confidence in their official acts and to put the party claiming anything under the election conducted by them to the proof of his votes by evidence other than the return." (See McCrary on Elec., p. 174.)

McCrary, on page 372, says:

"If the fraud be clearly shown to exist to such an extent as to satisfy the mind that the return does not show the truth, and no evidence is furnished by either party to a contest, and no investigation of the committee to enable them to deduce the truth therefrom, then no alternative is left but to reject such a return.

"To use it under such a state of facts is to use as true what is shown to be false." (See Washburn *v.* Voorhees, 2 Bartlett, 54.)

This statement of the law is peculiarly applicable to all the precincts attacked in Madison County.

There are but two ways known to the law of disposing of Madison County—either to let the returns stand as officially made or to discredit them altogether. For if they are false they can not be used for any purpose.

(8) Contestant impeached poll No. 3 in Hamilton County because of violence and disorder. The report finds:

Your committee find from the evidence that these charges are substantially sustained, and that the election at this poll was not, in any just sense, a free and fair election.

It is proven by a number of witnesses that the political supporters of contestee in several instances led colored men to the polls in a state of intoxication, which they had designedly, produced, and forced them to vote a Democratic ticket; and that from the efforts of Republicans to prevent such conduct and to secure the right of each elector to vote a free ballot violent quarrels ensued in front of the polling window, and that the immediate vicinity of the polls was a scene of disorder, lawlessness, and threats of personal violence, continuing a considerable portion of the day, and that by such means the result of the election at this poll was effected.

It was also proven that the officer of election who received the ballots sat in the window of the poll with a revolver exposed on his person, and that he rejected votes illegally. The deputy marshal was compelled to abandon efforts to maintain order, and several witnesses testified that in their opinion twenty or thirty votes were changed from contestant to sitting Member by the methods used. The committee conclude the poll should be set aside.

(9) The return from Fort Christmas was not signed by the election officers, and the report holds such return illegal and rejects it.

The minority say:

It is claimed that the whole vote of this poll should be rejected on the ground that the precinct return does not show that it was signed by the inspectors of this poll. There is no fraud alleged as to this omission.

The contestant makes the proof by the parol evidence of a single witness that the returns from this poll were included in the county canvass. This is not the best evidence, yet, if we take it as admissible evidence, the presumption of law is that the county canvassers properly and legally admitted the returns from this poll in the absence of proof to the contrary. The election laws of Florida require that the poll list, the oaths of the inspectors and clerk, and the registration list of the precinct be returned,

as well as the certificate of the vote, by the precinct officers. From some or all of these papers it might well appear to the board of county canvassers that the returns from any given precinct were authentic.

It would be against the well-established law to reject this poll on that ground. Nothing can be more familiar than the rule laid down by McCrary, sections 87 and 91:

"It is well settled that the acts of public officers within the sphere of their duties must be presumed to be correct until the contrary is shown."

It is presumed that the county canvassing board properly canvassed the vote of this poll, no evidence to the contrary being produced.

(10) Other irregularities were discussed and decision reached on questions of fact largely.

In conclusion, the report summarizes and concludes:

Which deducted from the last stated result gives for Finley 12,309; Bisbee, 12,954, and a majority for Bisbee of 645.

Now, concede to contestee at the two polls of Newnansville and Parker's Store, Alachua County, the difference between the total returned vote for Representative and the votes proven for contestant, and 255 votes would be deducted from Bisbee's majority, leaving him 390 majority. And even if the polls in Brevard County No. 3, Hamilton County, and Fort Christmas poll, Orange County, were not rejected, contestant would still have a majority of 147 votes.

In any view to the case founded upon the law and the evidence, the contestant has a majority of the legal votes cast.

Accordingly the majority reported resolutions declaring contestant elected and entitled to the seat. The minority found sitting Member elected.

The report was debated at length on June 1,[1] and on that day the resolutions of the majority were agreed to, yeas 141, nays 9, the minority refraining generally from voting for obstructive purposes.

Mr. Bisbee then appeared and took the oath.

982. The South Carolina election case of Lee v. Richardson, in the Forty-seventh Congress.

Discussion as to the degree of intimidation which will justify the rejection of an entire poll.

The House expressed the opinion that the storing of guns adjacent to the polls and the presence of disorderly persons who might naturally use them constituted effective intimidation.

Instance wherein the Committee on Elections purged and did not reject a poll whereof the election officers had withdrawn excess ballots unfairly.

On February 24, 1883,[2] Mr. William H. Calkins, of Indiana, from the Committee on Elections, presented the report of the majority of the committee in the South Carolina case of Lee *v.* Richardson. On the face of the returns sitting Member had a majority of 8,468 votes, but contestant alleged in substance that this was a dishonest majority, obtained by fraud and intimidation.

The committee examined the charges, precinct by precinct, and a minority of seven members of the committee, headed by Mr. A. H. Pettibone, of Tennessee, found enough changes justified, in their opinion, to create a majority of 284 votes for contestant. In reaching this conclusion the minority rejected the returns of

[1] Record, pp. 4421–4445; Journal, pp. 1388, 1389.

[2] Second session Forty-seventh Congress, House Report No. 1983; 2 Ellsworth, p. 520.

Darlington precinct, where 1,271 votes were returned for Richardson and 117 votes for Lee.

Mr. Calkins, in the report, states that in the main he agrees with the minority views, but differs as to Darlington, which is decisive, for unless it be rejected the contestant can not overcome sitting Member's majority:

The main difference of opinion is with reference to Darlington precinct. At that precinct Richardson received 1,271 votes and Lee received 117. I do not think the evidence is sufficient to reject this return; it is purely a question of evidence, and I can not bring myself to believe that the evidence is sufficient to justify its rejection. There is no evidence in the record tending to prove how the vote would stand on the theory of contestant, if the return was rejected. I think the evidence with reference to this precinct fairly establishes two propositions, viz: First, that the colored voters, on the morning of election, in large numbers, took possession of the market house where the elections were usually held. For some reason, not apparent, the poll was opened at the court-house, instead of the market house, and the white voters at the opening took possession of it. Attempts were made by the colored voters, early in the day, to force their way to the box to vote, which seems to have been prevented by the white voters crowding the stairs leading to the box. This led to crimination and recrimination and considerable confusion and excitement, and a rumor seems to have prevailed among the colored voters that several stands of arms had been brought to the town the night before the election by the white Democrats, and that they were concealed in the courthouse and in Early's store. Whether this was so or not is immaterial in the view which I have taken of the testimony. There was no physical display of the guns on the day of election, and I find as a matter of fact that probably as early as 10 o'clock, and certainly not later than 11 o'clock on the day of election, the colored voters, under the advice of one Smith, who was a leader and man of influence among them, dispersed and did not attempt again to vote on that day at that poll. The danger of bodily harm was not sufficiently imminent to warrant this course, and there was an entire lack of diligence on the part of these voters to maintain their right to vote. As a matter of law these voters had a right to vote at any precinct in the county; there was another voting precinct not many miles from Darlington, and there is no reason given why they might not have voted at that precinct if they were driven away from Darlington. For these and other reasons I am persuaded that Darlington should remain, and therefore submit the following resolutions, in which a majority of the committee concur:

Resolved, That Samuel Lee have leave to withdraw his papers, and this case is dismissed without prejudice.

The minority say:

But it is very evident from the testimony that intense excitement prevailed at Darlington on the day of the election. The polls were held at a different place from the usual one.

The witness McCall, a county commissioner of election (Record, p. 111), admits that the place was less convenient. It was up in the second story of the court-house, 15 feet above the ground, with two stairways leading up to the ballot box.

It appears from all the testimony that the Democrats, dressed in red shirts and caps, took possession of the polls from the outset.

J. A. Smith (Record, p. 106) states that from 700 to 800 Republican were prevented from casting their votes by reason of intimidation. He says:

"I made three attempts to reach the ballot box-myself and others; I found it impossible to do so without a collision with the Democrats and red-shirts, who had the steps packed from bottom to top."

Aimwell Western, Jr. (Record, p. 92), states that from 800 to 1,000 Republicans left the polls without voting. He also states that on the night before the election two wagons loaded with guns came on the back street and they were carried down the street next to the court-house. A portion was placed in a store of one Early and "some were put in the court-house where the ballot box was."

On Record, page 94, he gives the names of the men who unloaded those wagons: Moses Bishop, Sam Hinds, Rosser Hart, and Charlie Bishop. He states that Moses Bishop and Sam Hinds carried a portion of those guns upstairs where the ballot box was. It appears from his testimony that guns were

brought on the train about 12 o'clock at night, which train neither blew a whistle nor rung a bell. The guns were tied up in blankets in large bales.

None of the persons who handled the guns were called as witnesses to deny the statement. A great many witnesses were called by Mr. Richardson who did not see any guns and did not see any intimidation.

After quoting from testimony, the minority continue:

The depositions of 240 witnesses appear in the Record, who swear they were present at the Darlington poll and desired to vote for Mr. Lee, but were prevented from so doing by threats or intimidation. Convinced they could not vote without danger of riot and bloodshed, hundreds withdrew from the poll. There is counter testimony in the Record, but it is from the very parties complained of, and from comparatively few other witnesses.

Your committee are compelled to say, from all the evidence, that the case of Darlington poll falls within the principle laid down by McCrary, as follows:

"Sec. 416. The true rule is this: The violence or intimidation should be shown to have been sufficient either to change the result or that by reason of it the true result can not be ascertained with certainty from the returns. To vacate an election on this ground, if the election were not in fact arrested, it must clearly appear that there was such a display of force as ought to have intimidated men of ordinary firmness."

Here it is proper to remark that up to 1878 Darlington precinct always was largely Republican.

A few years ago the Republicans used to poll 1,200 to 1,300 votes at that poll. See testimony of John G. Gatlin (Record, p. 79), John Lunney (Record, p. 81), Jordan Lang (Record, p. 95).

At the election in 1880 Mr. Richardson is credited by the schedule, which purports to be certified to by the clerk, Garner, but which he testifies he did not certify, as having received 1,271 votes to 117 votes for Mr. Lee; and from the impossibility of ascertaining how the actual vote stood at Darlington poll, by the disregard on the part of the county commissioners to forward the returns and Poll list to the secretary of state, in violation of a plain provision of law, and from the fact that intimidation and violence prevented hundreds from voting, your committee reject Darlington poll from the count.

The only issue joined in the report or in the debate is as to Darlington precinct. As to the ruling in the minority views, relating to other precincts, whereby such reductions were made as to enable Darlington to be decisive, it is to be inferred, perhaps, that a majority of the committee might have approved them had it been necessary. They involve the treatment of fraud and irregularities, of which a few sample cases are:

(1) Santee, Sampit, and other polls, at some of which honest elections were held, and at all of which it was possible to reach a true result, and where contestant had large majorities, were thrown out by the county commissioners because the boxes were "sent without a written certificate authorizing the bearer to deliver it." The minority views held this reason flimsy and counted the polls.

(2) At Upper Waccamau the minority disposed of a question which is typical of a class in this contest:

This precinct was rejected by the Democratic county commissioners for the same reasons—purely technical. The managers who held the election were all Democrats (Record, p. 810). They were Mr. Richardson's political friends, and ought to have seen that no fraud was perpetrated, as against him at least. But Bently Weston and R. F. Johnson, the two supervisors, one a Democrat and one a Republican, reported (Record, p. 814) and Johnson swears that there were 432 names on the poll list; that an excess of 50 ballots were found in the box. This excess was drawn out and destroyed by a Democratic manager, but by a singular perversity of fate 48 of the ballots were Republican and only two Democratic. And, as a specimen, let the following testimony of R. F. Johnson show:

Question. How many, if any, Democratic ballots were found together in one at the counting of the ballots at the close of the poll?—Answer. Twelve in one."

After this manipulation the Democratic managers gave to Mr. Lee 341 votes and to Mr. Richardson 90, which gave Mr. Lee 251 majority, and this was rejected by the Democratic county commissioners and utterly cast away.

Reversing this process of gross and palpable fraud, even the Democratic managers, whose business it was to see justice done, admitted and certified to a majority for Mr. Lee of 251, and remembering that 48 honest votes given to Mr. Lee were drawn out and 48 votes not honestly given to Mr. Richardson were left in the box, thus taking from Lee 48 votes which belonged to him and adding to Mr. Richardson's vote 48 votes which did not belong to him, Mr. Lee's vote is swelled to 341 plus 48, which makes 389, and Mr. Richardson's is 90 less 48, which gives him 42 votes; and this clearly gives Mr. Lee at this poll a majority of 347 votes, instead of 251.

983. The case of Lee v. Richardson, continued.

The Elections Committee reversed the action of local canvassers who had rejected returns transmitted by an election officer of doubtful appointment.

The Elections Committee declined to ratify the rejection of a poll because it had been closed too early, no injury being shown.

The resolution before the House providing that a contestant have leave to withdraw, the mere adoption of an amendment to seat contestant does not thereby decide the case.

After an amendment in the nature of a substitute is agreed to, the question must then be taken on the original proposition as amended.

(3) As to Rafting Creek precinct the minority made this ruling:

Here, as usual, all the managers appointed by the county commissioners were Democrats. One of them, however, Mr. McLeod, did not serve by reason of a broken arm. (See Record, p. 34.) Prince A. James, a colored am, was chosen by the other two managers, both Democrats, to fill his place. (See Record, p. 15.) A fair election appears to have been held, by all the testimony given in evidence. The result was that for Lee were cast 313 votes, and for Richardson, 51 votes. This gave to Mr. Lee 9, majority of 262 votes. (See Record, pp. 33 and 249.)

The returns and ballot box were placed by the managers in the hands of Prince A. James to be delivered to the county commissioners. But on the pretext that James had not been appointed by them as one of the managers, these sternly righteous commissioners refused to count the vote at all, and threw out the entire poll. (See testimony of D. J. Winn, pp. 7 and 8, and E. P. Ricker, pp. 47 and 48.)

Your committee believe that an immense majority of all honest American would say at once, since no one questioned the integrity of the election at Rafting Creek poll, Mr. Lee's majority ought to be counted for him. Your committee feel that they are compelled so to count the vote; and Mr. Lee's majority of the honest votes, honestly cast, honestly counted, honestly returned, but rejected by the county commissioners, was 262 votes.

(4) As to the rejection of the poll of Midway precinct by the county commissioners, the minority ruled:

The only objection to this poll is that the managers, all politically opposed to Mr. Lee, closed the polls at too early an hour.

J. J. Morris, one of these managers, swears that this was done on the suggestion of Mr. Mouzon (Record, p. 717), while Mr. Mouzon swears (Record, p. 493) that it was done "at the suggestion of some of the managers." Your committee thinks that even if Mouzon gave bad advice the managers were not bound to take it, and since the contestee does not even pretend that anyone was deprived of voting at this poll by reason of its too early closing, your committee can not agree on such a technicality that the poll should be thrown out and Mr. Lee deprived of his majority of 83 votes. It is true that one witness, R. K. Hurst, swears (Record, p. 717) that Henry Williams, a colored man, told him he intended

to vote the Democratic ticket, but after Hurst voted and left he voted the other way. As Williams was not called, and the testimony is purely hearsay, your committee can not agree that this poll should be thrown out.

The minority, as the result of their conclusions, recommended the following:

I. Resolved, That John S. Richardson was not elected as a Representative to the Forty-seventh Congress of the United States from the First Congressional district of South Carolina, and is not entitled to occupy a seat in this House as such.

II. Resolved, That Samuel Lee was duly elected as a Representative from the First Congressional district of South Carolina to the Forty-seventh Congress of the United States, and is entitled to his seat as such.

The report was debated on March 3, 1883,[1] and on that date the question was taken[2] on a motion to substitute the minority resolutions for those of the majority; and there appeared, yeas 124, nays 111. So the motion was agreed to.

The question then recurred on agreeing to the resolution of the majority as amended by the minority substitute, and there appeared, yeas 128, nays 6—not a quorum voting.

Two other roll calls resulted the same way. Then a motion was made to reconsider the vote by which the previous question was ordered on the pending resolution as amended, and another motion to lay the first motion on the table. On the latter motion no quorum voted, although five roll calls were had.

And this was the state of the question when the House adjourned sine die.[3]

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[1] Record, pp. 3745–3752.

[2] Journal, pp. 621, 625, 632, 640, 642, 646.

[3] Mr. Lee in later years had before Congress a claim for salary on the ground that really, although not technically, the House decided in his favor.

Chapter XXXIV.

GENERAL ELECTION CASES, 1884 AND 1885.

1. Cases in the Forty-eighth Congress, section 984–999.[1]

984. The election case of Manzanares v. Luna, from the Territory of New Mexico, in the Forty-eighth Congress.

As to what constitutes a sufficient service of notice of contest when the returned Member is absent from home.

Instance wherein the census and returns of previous elections were referred to as creating a presumption against a return.

It being impossible to separate the good from the bad vote, the poll was rejected.

On March 5, 1884,[2] Mr. Thomas A. Robertson, of Kentucky, submitted the report of the Committee of Elections in the case of Manzanares *v.* Luna, from the Territory of New Mexico.

Sitting Delegate had been returned by an official majority of 1,419 votes.

At the outset of the case the committee thus dispose of a preliminary question:

That on the 29th day of November, 1882, the acting governor of the Territory of New Mexico issued his certificate of election in due form to the sitting Delegate; that on the 23d day of December, 1882, the contestant served a copy of his notice of contest on the wife of the contestee at his residence in the Territory of New Mexico, the contestee not being found at home; that on the 20th day of December, 1882, the contestant sent a copy of his said notice of contest by express to the Sergeant-at-Arms of the Senate of the United States to be served on contestee, and on the same day sent by mail, by a registered letter, another copy addressed to contestee, directed to the city of Washington, where contestee was then in attendance upon the session of Congress. That the contestee answered in full on the 29th day of January, 1883.

The contestee claimed that the notice was not served in time, but your committee are of opinion that the notice was ample, and served in time, and in accordance with the statute law of New Mexico; and for the further reasons that the sheriff who served the notice of contest upon contestee's wife testified contestee was absent from the Territory of New Mexico, and besides he mailed a registered letter containing notice of contest to contestee at the city of Washington, where contestee was, and that the letter reached the city within the time prescribed by law for the notice to be served.

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[1] Other cases in this Congress are classified in different chapters: Chalmers *v.* Manning, Mississippi, Volume I, section 44; Garrison *v.* Mayo, Virginia, Volume I, section 537.

[2] First session, Forty-eighth Congress, House Report No. 667; Mobley, p. 61.

As to the merits of the case, the committee investigated chiefly questions of fact. As to these frauds the report holds:

In the county of Valencia your committee think it is clearly proven that frauds were committed in several of the precincts, and were such as to compel your committee to throw out the whole vote of said precincts; the fraud being so great and the returns so entirely in disregard of law and fair conduct on the part of the election officers that it is impossible to separate the good from the bad vote.

Before going into any detail of the evidence, your committee will state that the census of 1880 shows the whole number of male adults capable of voting in that county to be 2,636, while the vote certified and counted for contestee is 4,193. Moreover, while the certificate from that county gave the contestee that remarkable vote, it did not give even one to the contestant, although the returns before them showed he had received 66 votes. Your committee deem it appropriate to refer the House to the vote for Delegate in Congress of the two political parties in this Territory from 1873 to 1882, inclusive.

The committee, after citing the returns, say:

These are very pregnant evidences of fraud, taken in connection with the evidence, which shows no increase of population from 1880 to 1882.

The report then examines the various precincts, and finds an actual majority of 938 for contestant. Therefore they recommended the following resolutions:

Resolved, That Tranquilino Luna was not elected a delegate to the Forty-eighth Congress from the Territory of New Mexico, and is not entitled to the seat he now holds.

Resolved, That Francisco A. Manzanares was duly elected a Delegate to the Forty-eighth Congress from the Territory of New Mexico, and is entitled to be sworn in as such.

The resolutions were agreed to, without debate or division.[1]

985. The Virginia election case of O'Ferrall v. Paul, in the Forty-eighth Congress.

Instance wherein a contest was maintained and contestant seated, although the returned Member had resigned before taking his seat.

Payment of a capitation tax being a prerequisite for voting, the votes of persons who had not paid were rejected.

Instance wherein the number of disqualified voters was fixed by testimony of a single witness as to his mere comparison of poll lists with delinquent tax lists.

Instance wherein the vote of a disqualified voter was proven by the fact of his color.

Instance wherein the House rejected votes as disqualified without ascertaining the names of the voters or the precincts wherein they voted.

A report of a committee is sometimes authorized by the affirmative votes of less than a majority of the whole committee, some Members being silent or absent.

On April 30,1884,[2] Mr. Robert Lowry, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Virginia contested case of O'Ferrall *v.* Mr. Paul had been credited with an official majority of 205 votes, and had received the certificate. But he never qualified and sent his resignation to the governor in August, 1883, on being appointed to the bench of the United

[1] Journal, p. 747.

[2] First session Forty-eighth Congress, House Report No. 1435; Mobley, p. 137.

States court. No special election having been ordered, the seat had been vacant from the first.

In Virginia the payment of a capitation tax was a prerequisite to the right to vote. The majority of the committee, finding as they claimed, that in one county of the district 557 persons who had not paid the capitation tax had voted for contestee, arrived at the conclusion that contestant was elected:

We base our conclusion that 676 votes were cast by persons delinquent in the payment of their capitation taxes in Albemarle for contestee, and that 557 of these were clearly illegal, upon the following facts:

By section 57, chapter 33, of the Code of Virginia, the commission of the revenue were required to state in their assessment lists the color of all male inhabitants over the age of twenty-one years. The treasurer, in making his return of delinquents to the auditor of public accounts, gave the color of all delinquents in accordance with the commissioners' books. So that the white delinquents were classified in one list and the colored in another list.

The contestant filed certified copies of the delinquent lists (white and colored) of Albemarle County. (Record, 75–91.)

These lists showed the names and color of all delinquents for the year 1881—the year for which the capitation tax was required to be paid before the day of the election in question.

There is contention between the parties as to whether the auditor of public accounts of Virginia could appoint certain collectors of delinquent taxes, and whether these collectors and their deputies could then legally collect these delinquent capitation taxes.

Assuming for the purposes of this case that the auditor of public accounts could appoint collectors of delinquent taxes, and that these collectors could appoint deputies (both of which questions are held in reserve), then, under the law, the clerks of the county and corporation courts of the Commonwealth and the special collectors appointed by the auditor and their deputies were the only parties by whom receipts could be issued for delinquent capitation taxes in the various counties and cities.

The principal question on which we rest this case is, whether certain tax receipts issued by these collectors (so-called) and their deputies were issued without being paid for.

The contestant, to show the number of receipts issued and to whom by both the clerk of Albemarle and special collector, filed a certified list of the names of delinquents for 1881, to whom receipts had been issued by the clerk of Albemarle County. (See Record, 73–75.)

After thus ascertaining the names of these parties who had clerk's receipts, it followed as a necessary consequence that all delinquents who voted whose names were not on the clerk's list, voted on the collector's receipts. Then to ascertain what delinquent voters cast their votes, and upon whose receipts, it was only necessary to compare the poll books of the county with the delinquent lists.

Contestant introduced a witness (Record, 71) who testified—and whose testimony remained uncontradicted—that he had compared the clerk's list with the poll books and had designated all the delinquents who voted on the clerk's receipts by the letters "H. B. B." opposite their names on the delinquent lists; that he then designated all the delinquents who voted and who did not have the clerk's receipts by the name of the precinct at which they voted opposite their names on the delinquent lists. It was thus found that 676 delinquents voted who did not have the clerk's receipt, and presuming that the judges of election did their duty and required the production of receipts, as required by law, these 676 voted on the collector's receipts. Of this number 655 were colored.

James T. Wayland, a strong and active partisan of the contestee, was appointed a special tax collector of delinquent taxes for Albemarle County by the auditor of public accounts, who belonged to the same party as the contestee, and was a State canvasser of that party. This special tax collector appointed persons whom he called deputies in said county; he issued unlimited numbers of blank receipts for delinquent capitation taxes to these so-called deputies, who were all partisans of the contestee, and these deputies filled these receipts without receiving any money, and delivered them to the voters. These deputies paid no money to the collector for the receipts at any time, either before or after the election; the collector only received, and that in bulk, without being applied to individual cases, for all the receipts issued by him, $125 before the day of election. Each receipt issued represented $1.05, so that,

even assuming that this $125 was a valid payment for so many receipts, the said sum of $125 only paid for 119 receipts. There were 676 votes cast upon the receipts issued by this special collector, so that after deducting said 119 receipts there were 557 votes cast upon collectors' receipts for which no money had been paid at the time the votes were cast or before the day of election, as required by the constitution of Virginia, and therefore these 557 votes were illegal.

The system of appointing these special collectors was inaugurated for political purposes by the auditor of public accounts of the State, who belonged to the party of which the contestee was the nominee; all of his appointees were active partisans of his party, and in many instances the chairman or secretary of the county committee, or a member of the State committee of that party, or an United States internal-revenue officer.

After quoting testimony, the majority report goes on:

This evidence shows as conclusively as circumstantial evidence could well show that the colored vote was cast with almost perfect unanimity for the contestee, and when it is taken in connection with the fact that 655 colored delinquents voted on collectors' receipts issued only to Readjuster voters, the conclusion naturally follows that these 655 colored delinquents voted for contestee.

What is proof? It is that degree of evidence which convinces the mind and produces belief.

Can any reasonable mind in the light of this evidence fail to believe that these votes were cast for contestee? Is not the weight of evidence on the side of the contestee? In fact, does it not exclude even a reasonable doubt?

There is no evidence nor any attempt to controvert this, and is not that another circumstance which goes to strengthen the belief? In the case of Smith *v.* Shelley the last House held that the testimony of two witnesses that 95 to 97½ per cent of the colored vote of a Congressional district was Republican was sufficient in the absence of controverting testimony. Here are 21 witnesses, of both political parties and both colors, who were present at the polls, working in the interest of the respective candidates, or observing as interested parties the movements, actions, and expressions of the voters, and with a knowledge of their political affiliations and associates, who testify that the colored vote of a county (not a Congressional district) was cast with approximate unanimity in a certain direction and for a particular candidate. It was not mere opinion, as in the case of Smith *v.* Shelley, but facts drawn from direct observation and participation at the polls, and from knowledge of political proclivities and associations.

Our conclusion is that these 557 persons had not complied with this constitutional provision, and were not therefore qualified to vote, and their votes must be deducted from the vote of the contestee. How, then, will the vote stand?

Returned vote for contestant, O'Ferrall	.....	11,941
Returned vote for contestee, Paul	12,146	.....
Deduct the illegal votes above	557	.....
		11,589
Majority for contestant, O'Ferrall	.....	352

But in this county Porter's precinct was thrown out by the board of county commissioners for mere irregularity. We think it ought to be counted. It gave contestee 104 majority. Deduct, then, 104 from 352, and it leaves a clear majority of 248 votes for contestant.

Therefore the majority reported resolutions declaring that Mr. Paul was not elected, and that Mr. O'Ferrall was elected and entitled to the seat.

Mr. Samuel H. Miller, of Pennsylvania, presented the views of the minority, assailing this conclusion. At the outset he stated the following:

The resolutions appended to the report of the Committee on Elections, submitted by Mr. Lowry, of said committee, received the approval, by a yea and nay vote, of 6 members out of 12 present at the time the vote was taken—2 members present declining to vote. Of the absent members, all 3 had expressed themselves opposed to the resolutions declaring Mr. O'Ferrall elected and entitled to the seat. We state this as showing that at the time said resolutions were adopted by the committee they only had the endorsement of 6 of the 15 members.

The minority then proceed to assail the method of proof adopted by the majority:

The utter unreliability of this testimony arises from the fact that the witness, Bennett T. Gordon, who testified on page 71 of record, did not pretend to know the parties whose names were on the poll books or on the clerk's list of delinquents. He simply performed a mechanical act, which any member of the committee or the House can do by taking up the two lists, and when he finds a name on the poll lists and a name on the delinquent lists which are the same check it off on the assumption that there could not be two men of the same name in the county.

OVER 6,000 NAMES ON THE DELINQUENT LISTS AND POLL BOOKS.

There are over 2,000 names of colored persons on the delinquent lists of Albemarle County and 4,133 names of white and colored on the poll books. There is no law in Virginia requiring the election officers to keep a record of the color of voters. Then, on the delinquent lists we find numerous instances where the same name is common to a number of persons. We find 3 Charles Burleys; 3 John Browns, Jack Brown, John A. Brown, and John W. Brown; 5 Nelson Browns; 4 James Johnsons and 1 Jim Johnson; 4 Wm. Johnsons; 5 Hy. Johnsons and 1 Henry Johnson; 3 Sam. Johnsons and 2 Saml. Johnsons, and an almost equal repetition is found throughout the alphabet. To assume that a stranger could take two lists, one containing over 4,000 names in twenty different books, and the over 2,000 names in two lists, neither of which have any distinguishing marks, and from these 6,000 names select the number of colored persons who voted on delinquent tax receipts and figure them out at 655 is to assume an impossibility. It is not pretended that the election officers kept a record of either the whites or blacks who voted on delinquent tax receipts. The proof is utterly unreliable. In short, it is no proof whatever, for, as heretofore stated, any member of the committee can take the lists and the twenty poll books and as correctly arrive at the same conclusion.

We contend that the only reliable and competent evidence would be the testimony of the alleged delinquents, or a sworn copy of the list of such as paid their tax made out by the collector to whom the tax was paid and by whom the receipts were issued. If the latter could not be obtained then the delinquent voters alone could testify correctly. Every man whose name was on the delinquent list and who voted is presumed to have had a tax receipt, and consequently his ballot can not be rejected except upon competent evidence.

It is on the evidence of Bennett T. Gordon, which will be found in the appendix, that the committee find that 655 colored delinquents voted in Albemarle County. The witness Gordon does not pretend that he has any personal acquaintance with any of these 655 men; does not pretend that he has any personal knowledge of whether they were delinquent or not; does not pretend that he has personal knowledge of whether they are colored or not; does not pretend that he has personal knowledge of whether they are the same men or not. All he testifies is that he finds the name of John Brown on the delinquent county list, and the name of John Brown on some poll list for the same county; therefore the two men are one and the same.

FOR WHOM WERE THESE 655 VOTES CAST?

Unless the House adopts the hypothesis of the majority report that Bennett T. Gordon could with absolute certainty pick out from over 6,000 names these 655 voters, then they are unnamed and unknown. But two of all are called, and three others only are identified. But if their identity is established, then there is not a single witness who testifies for whom they severally voted. Twenty-one witnesses, living in 16 of the 20 election precincts, testify as to whom the colored people as a class voted for. In 4 of the precincts, in which 66 of the alleged delinquents voted, there is not a line of testimony as for whom the colored people as a class voted.

But we contend that a still more important question is:

WHAT ARE THE NAMES OF THE 557 VOTERS

who cast the ballots which the majority report declares to be illegal, and which the committee deduct from contestee's vote, and which must be deducted from contestee's vote in order to seat the contestant?

The committee concede that of the 676 persons who it claims voted on collectors' receipts, 119 (of whom 21 were white and 98 colored) were entitled to vote. What are the names of these 119? It

is admitted by the majority report that Collector Wayland had at least $125 before the election, and that this would qualify 119 voters. Who are they? At what precinct did they vote? How many of them voted at Batesville? How many at each of the other 20 precincts? If it is impossible to say who the 119 voters are, how can the committee name the 557 voters whose ballots it deducts from contestee?

Did any court investigating an election case ever reject a ballot for the sole reason that the person casting it had not paid a tax required by law as a prerequisite for voting and deduct it from one of the candidates without naming the voter who cast the ballot? How is it possible to decide that the ballot is illegal unless the name of the person casting such ballot is known?

Can the majority of the committee name the 557 voters whose ballots it deducts from the contestee in order to seat the contestant? Can the contestant name them? Can anyone tell us the number rejected at each of the 20 precincts? If not, why not?

The minority also asserted, as a fact shown by the testimony, that the collector had a draft for the taxes alleged not to be paid, which was indorsed about three weeks after the election.

In the debate it was insisted that as the object of the law was revenue, and as the State had the revenue, the voters who had paid it should not be disfranchised.[1]

The report was debated on May 5,[2] and on that day a resolution proposed by the minority declaring Mr. O'Ferrall not elected was disagreed to, yeas 83, nays 139.

Then the resolutions of the majority were agreed to, ayes 128, noes 73.

Mr. O'Ferrall thereupon appeared and took the oath.

986. The Ohio election case of Wallace v. McKinley in the Forty-eighth Congress.

A report of a committee is sometimes authorized by the affirmative votes of less than a majority of the whole committee, some being absent.

A divided committee once held that canvassers, not having judicial authority, should count votes returned under variations of name in determining prima facie right.

It being determined that contestant had actually been entitled to the credentials, the burden of proof was shifted to the returned Member.

On May 14, 1884,[3] Mr. Henry G. Turner, of Georgia, from the Committee on Elections, presented the report of the majority of the committee in the Ohio case of Wallace *v.* McKinley.

The minority views, presented by Mr. A. A. Ranney, of Massachusetts, called attention to the division in the committee:

The learned chairman of the committee has prepared and shown to us the report which he proposes to make to the House, in behalf of the six members who constituted the majority, voting in favor of the resolutions appended thereto, as against five other members voting otherwise. It is to be regretted that this case proceeded to a vote in committee during the necessary and enforced absence of four of its members. The minority feel it to be their duty, not only to dissent from the majority report and its conclusions, but to assail it, as failing to present the case fully and properly for the determination of the House.

The sitting Member had received his certificate on an official plurality of 8 votes.

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[1] Record, p. 3812.

[2] Record, pp. 3800–3819; Journal, pp. 1178–1181.

[3] First session Forty-eighth Congress, House Report No. 1548; Mobley, p. 185.

As to the question of prima facie right and the burden of proof, the report says:

The State canvassing board, consisting of the governor and secretary of state, treated Jonathan H. Wallace, John H. Wallace, Major Wallace, Wallace, W. H. Wallace, W. W. Wallace, Jonathan Wallace, Maj. Wallace, and J. H. Wallace as distinct persons, and in that way awarded the certificate of election to the sitting Member. Under this treatment of the returns the sitting Member has a plurality over the contestant of 8 votes.

On the argument the concession was made that the votes certified for "Major Wallace," "Wallace," "Jonathan Wallace," "Major Wallace," and "J. H. Wallace," 16 in number, should be counted for contestant. Conforming the figures to this addition, the positions of the parties are reversed, and the contestant has a plurality over the sitting Member of 8 votes on the face of the returns. In this state of the case the burden is cast upon the sitting Member to contest the election of Mr. Wallace. Indeed, there can be no doubt that the certificate of election should have been issued to the contestant, and he should have been the occupant of the seat with its honors and emoluments. Logically, we assign him nunc pro tunc his true position in the controversy, and the onus is shifted to his adversary.

The proof shows that the contestant was the only candidate at the election bearing the name of Wallace, and under the weight of authority we think that the ballots certified to have borne the names John H. Wallace, W. H. Wallace, and W. W. Wallace, 7 in all, in the absence of any other evidence, should be also counted for the contestant.

The minority deny the principles above set forth.

The majority report goes so far as to say that the certificate of election ought to have been issued to the contestant on this account, and proceeds to treat him in advance as duly elected upon the final returns alone. Nothing, in our judgment, can be more clearly erroneous than this finding and statement. It is against every principle and rule of law, and all precedent. It can not be justly denied that, under the laws of Ohio, the State board are merely ministerial officers, invested with no power to meet the parties and hear evidence; and had they attempted to do it, it would have been a clear violation of duty. The precinct officers (the judges of election) had presumably counted the votes in question as cast for different persons, and they had been so returned to the county canvassers, and by them in turn to the State board. The State board had no right or authority to assume that votes for John H. Wallace, Major Wallace, Wallace, W. H. Wallace, W. W. Wallace, Maj. Wallace, and returned as if for different persons, were in fact intended for Jonathan H. Wallace. The State board had no legal authority whatever to hear evidence and determine that issue of fact. If they had, they should not have stopped there, but proceeded to hear other controverted issues of fact.

The board followed the rule uniformly laid down in the decided cases. (McCrary on Elections, secs. 211, 81, 82, 83; 27 Barb., 77; 25 Ill., 328; 4 Wis., 779; 10 Iowa, 212; 22 Mo., 224. Clark *v.* Board, etc., 126 Mass., 282; 64 Maine, 596; 71 Maine, 371; 59 Ind., 152.)

No authority to the contrary can be found, except in cases where the statutes gave the board greater authority than do the statutes of Ohio. The House can go behind the returns and hear evidence and get at the facts which the State board had no power to do.

In this investigation, therefore, we are to assume that contestee rightfully obtained his certificate, and that he has a prima facie title to the seat, with all of the usual presumptions that attach to the same. It is incumbent upon the contestant to overthrow that title and right. If, in attempting to do so, he shows, or it appears otherwise, that contestee got more votes than were counted and returned for him those must be overcome also. If the evidence nullifies any of the votes counted and returned for contestant, he can not have the benefit of them in maintaining his claim of a majority. It is erroneous to assume that the burden shifts from the contestant to the contestee, by proving one item of his claim, which alone considered might change the result.

There was also a question as to an error of 10 votes in the footings whereby sitting Member suffered; but this was denied by the minority, and sitting Member waived the claim.

987. The election case of Wallace *v.* McKinley, continued.

Ballots whereon the name of a candidate was spelled grotesquely, and rejected by the election judges, were counted on oral evidence sustained by a recount after the box had been in illegal custody.

Discussion as to admissibility of oral evidence to contradict a ballot.

Ballots with a different given name, and others with different initials, were counted without proof of intent of the voter.

A vote for "Kinley" was counted for "William McKinley" on proof of voter's intent.

A vote apparently for "Walce," and rejected by the judges as undecipherable, was counted for "Jonathan H. Wallace" on slender evidence.

The House declined to reverse the action of election officers who had returned for "Jonathan H. Wallace" votes cast for "J. Wales" and "Jonathan H. Walser."

Proceeding from the question of prima facie right, the report proceeds with the claims of contestant and of sitting Member. In brief, it may be said that recounts and reexaminations had so resulted as to enable contestant to claim a plurality of 30 votes, while sitting Member proposed to overcome this by showing the illegality of 55 votes alleged to have been cast for contestant. Individual votes being dealt with, a number of principles were involved in important relations to the decision of the case.

(1) The question as to the proper spelling of the name of the candidate.

Besides the variations discussed in the consideration of prima facie right, the majority proposed to count certain ballots found under conditions as follows:

In Fairfield Township, Columbiana County, a number of ballots bearing the surname of the contestant, or some approximation to that name, though improperly spelled, were omitted from the count and were not included in the return. An effort was made to ascertain the number and character of these ballots by a reexamination of the box. Although the persons charged with the custody of the box and the key of the box deny on oath that they had tampered with the box or its contents, it appears that for a short time the box and the key were in the possession of the same person, contrary to the law of the State. An opportunity was thus afforded for casting suspicion upon the integrity of the box. It also appears that on a recount of the ballots, which had been counted and strung and placed in this box, a different result was reached from the result certified by the judges of election.

But from the testimony of the judges of election and others there can be no doubt that at this precinct ballots of the character described were voted at the election and excluded from the count. Carpenter, Democratic judge of the election, in his evidence states the number of these uncounted ballots to have been from 7 to 15. Hum, a Republican judge of the election, in his evidence estimates the number at from 2 to 13, and his impression seems to have favored the latter number. Shields, another Republican judge, in his testimony places the number at 5. Augustine, Republican clerk of the election, states that there were 13 or 14 of these uncounted ballots. And others testify on the subject with more or less variant results. In the box at the recount just mentioned were found 11 ballots for "Major Wallace," "Ma. Wollac", Wolac," "Mag. Wolac," "Wollac," "Wallace," "Woloc," "Mage. Wolac," and "Wolloc." This species of ballots the judges say they rejected from the count. We adopt this number, and think they ought to be counted for contestant.

In Washington Township, Stark County, the judges of election cast out a ballot on which the sitting Member's printed name was erased, and the name "Walce" was written in pencil under the erased name. The reason given by one of the judges for the rejection of this vote was that "it lacked the Christian name or initials." We think it ought to be counted for contestant.

The minority views contend strongly that the custody of the box had not been in accordance with the law of Ohio, and that upon the person offering the box was cast the burden of proof of showing that it was intact. In this case four months had elapsed, and it appeared (and in debate was admitted by the majority) that there were 5 less votes in the box than at the time of the official count. The minority say:

The majority report virtually abandons the claim as based upon the recount, and appears to find that the evidence establishes, independently of the recount, that 11 more votes were cast for him than were counted. A careful examination shows that the evidence falls far short of proving this. The mixing up of the recount, when it is discredited, with what evidence is furnished by witnesses orally, is most remarkable. The oral evidence alone is not enough to prove distinctly the claim, either as to the number of the ballots not counted or to give an intelligible description of them.

As to the ballots for "Waiac," "Ma. Wllac" "Mag. Wolac," "Walor," "Mage Wolac," and "Waloe," and others (if proved), they neither indicate the proper name of contestant nor any name by which he was ever known.

The oral testimony describes no such ballots.

The judges of election made no return of such, as scattering or otherwise. Whereas if it was true that there were so many such irregular votes, as is now pretended, they would have been returned as was done at other places, in the county of Columbiana, and as the statute absolutely required. It is more probable that they are mistaken now than that they were guilty of any such misconduct.

To count them in any event for the contestant involves a contradiction of the ballots, they having been cast for names different from any by which the contestant has ever been known.

It seems perfectly well settled that no evidence can be received to contradict a ballot; it must be sufficiently certain upon its face, that when read in the light of the surrounding circumstances it appears to be manifestly for the candidate claiming it.

The minority then quote Cooley and Cushing in support of this doctrine.

The minority further discuss on their merits other questions as to ballots bearing variations in the names.

We now come to the 23 names returned from Columbiana County, which contestant claims and which the majority report finds. Upon the evidence that he was a candidate and was known and went by the name of Major Wallace and Jonathan Wallace, contestee very liberally concedes him 16 of the votes, and we need not discuss that matter.

As to 7 ballots, reading:

W. H. Wallace	2
John H. Wallace	4
W. W. Wallace	1
Total	7

There is no ambiguity, and the names designate other persons. There is no evidence to show the intention of the voter, as in case of the ballot for "Kinley." It is not safe to go into the region of guess, surmise, or conjecture. The intention can beagot only from the ballots themselves. There were other Wallaces in the district eligible to the office. There was a John Wallace. There was &good deal of scratching and independent voting, by Republicans especially. When this is done, third persons, not regular candidates, are often voted for. There were in fact some four different candidates at least, and numerous scattering votes, the names not being given.

We can not allow these ballots as proved to have been cast for contestant.

MOUNT UNION PRECINCT, STAR COUNTY.

The majority report allows contestant 1 vote not counted at Mount Union. The ballot is in evidence, marked Ex. A, A. L. Jones. An inspection of the same shows that it is impossible to read more than the first three letters, which are probably W-a-l. Beyond this it is impossible to decipher any letters. It is printed in the record "Walce." It is written in pencil under name of contestee erased in pencil. (Rec., p. 97.)

The judges, including Rakestraw, Democratic judge, were unanimously of the opinion at the time that the name could not be deciphered, and rejected the ballot at the time of the count. In his evidence he now pretends that it was because the initials were wanting. But the evidence of the other witnesses (entirely ignored by the chairman in his report) completely refutes this pretense now. We find that this should not be allowed for contestant with all the presumptions against it, and upon the evidence.

An opportunity to examine the same further, and call witnesses about this ballot, was denied contestee and his counsel, as already herein before stated. (Rec., p. 98.)

This would have been a good occasion for the chairman to have applied the principle, which he enunciates, as to the force which is to be given to the action of the election officers, and on this case "refuse to reverse their judgment."

There was also cast a ballot marked "Kinley," and it was conceded that this should be counted for sitting Member.

The minority also call attention to the following:

In Mount Union precinct, Washington Township, a ballot was cast for "J. Wales," which was counted and returned for Mr. Wallace. The name is not that of the contestant by any possible manner of spelling. It is a well-known name in Stark County, the proof showing that a gentleman of this surname was once a candidate for Congress in the district.

To count the vote for him contradicts the ballot.

In Osnaburgh precinct of Osnaburgh Township a ballot for Jonathan H. Walser was counted and returned for Mr. Wallace. The proof shows that there was a John Walser in Stark County, a prominent Democrat and candidate for office. In any event, the name Walser is not that of the contestant. If intended for him it was a mistake of the voter, which can not be corrected. (A. Smith, Rec., p. 361; M. Miller, p. 363; G. Holben, p. 364; B.F. Sullivan, p. 365.)

There is no evidence adduced from which the intention of the voter in the last two cases can be inferred, save the ballots themselves and the mere fact that contestant was one of the candidates.

The majority report declines to reverse the action of the judges and count the votes.

988. The election case of Wallace v. McKinley, continued.

The House counted a ballot rejected by election judges because of distinguishing marks, on testimony that the marks were made by inadvertence.

Evidence of declarations of voters after the election as to how they voted was rejected as hearsay.

Discussion as to whether or not the voters are parties to an election case in the sense that their declarations are admissible to prove their votes.

Discussion of an election case as a public inquiry, admitting a liberal rule of evidence.

Does the fact that an election case is instituted by a memorial instead of on pleading under the law justify a different rule of evidence?

Discussion as to the applicability of English decisions to American election cases.

(2) A question arose as to a marked ballot. The majority say:

In Lee Township, Carroll County, a ballot for contestant was not counted by the judges, because it had a name and some figures on the back of it. It is claimed by the sitting Member that this ballot is obnoxious to the statute of Ohio which forbids any mark or device by which one ticket may be distinguished from another. The evidence shows that this ticket was voted in the condition described by accident or inadvertence. We do not think that it is within the mischief intended to be prevented by the statute, and count it for this contestant.

The minority held:

The majority report allows a ballot which was rejected by the judges of election in Lee Township, Carroll County (Rec., p. 177). It was not counted, because on the back of it was written in ink, "H.—W. J. McCauseland," and then two columns of figures under the letters R. and D., respectively. The ballot was clearly in violation of the statute supplement to Revised Statutes, section 31. It provides:

"That all ballots voted at any election held in pursuance of law shall be written on plain white paper, or printed with black ink on plain white news-printing paper, without any device or mark of any description to distinguish one ticket from another, or by which one ticket may be known from another by its appearance, except the words at the head of the ticket, and that it shall be unlawful for any person to print for distribution at the polls, or distribute to any elector, or vote any ballot printed or written contrary to the provisions of this act: *Provided,* That nothing herein contained shall be construed to prohibit the erasure, correction, or insertion of any name, by pencil mark or otherwise, upon the face of the printed ballot."

The ballot had clearly on the back of it what made it a mark which served to distinguish it from other ballots. (McCrary, sec. 403; Hirk *v.* Rhoades, 46 Cal., 398.) 'We do not think the ballot should be allowed contestant.

The chairman, in his report, seems here to forget his purpose to allow all reasonable presumptions in favor of the action of the judges of elections, as availed of in the instances of J. Wales and J. H. Walser.

(3) An important question, lying at the foundation of much of the testimony by which sitting Member tried to prove illegal votes cast for contestant, related to testimony of persons to whom voters had made declarations. The majority say:

The sitting Member insists that declarations of voters made long after the election, not under oath, are admissible to prove how they voted. Even if this evidence were competent, we could not under the rule just cited add more than 10 to the votes involved in doubt; in any view, therefore, the contestant's plurality can not be overcome. But we believe that these unsworn declarations of voters made after the election are hearsay and inadmissible for any purpose. It has been attempted to justify the admission of this species of evidence upon the pretext that the voters are parties to the case. They are not served with notice; they have no right to appear in the contest in their own right, either in person or by counsel; they can not of their own motion even present themselves as witnesses. They are as much strangers to the case as the men of the district who did not vote or the women and children of the district or the other people of the United States.

It is also urged that this is a public inquiry, and therefore a more liberal rule of evidence ought to prevail. But we fail to discover in this suggestion any good reason why a controversy involving the right to represent 150,000 people and to make laws for the entire Union should be adjudicated upon evidence which the courts have always rejected in other causes.

In the early cases of contested elections they originated in the House, and the witnesses were examined in the presence of the Committee on Elections or of a subcommittee detailed for that purpose. Under this practice there was possibly more significance in this suggestion of "a public inquiry," many of the cases arising upon memorials of private citizens. It was during the prevalence of this practice that the celebrated New Jersey case arose. Cases in the English House of Commons were originated and conducted in a similar manner. But since Congress passed the act governing contested elections they are instituted upon regular pleadings like any other suit, the proofs taken by the parties before designated officers, and all the proceedings are conformed to judicial precedents. We respectfully submit that it is greatly to be desired that these cases should be adjudicated upon the principles as well as the forms which prevail in the courts.

The vicious tendency of hearsay evidence in election cases needs no demonstration. An unlawful vote may be cast for one party, and then upon the unsworn statement of the voter it may be deducted from the other party.

And we deny that the weight of authority is in favor of the admission of this class of testimony. On the contrary, we affirm that the overwhelming weight of authority supports the view which we have taken.

In the debate this point was much controverted, and Mr. Turner [1] insisted that the House should not follow the English precedents, which were originally established when voting was viva voce and when the voter's declaration, being as to qualification, and therefore being against his own competency, was received. But the American cases were the other way, and he referred to Letcher *v.* Moore, and especially to Farlee *v.* Runk, where such testimony as "He told me he voted for Mr. Runk" was not approved. The case of Cessna *v.* Myers was also cited as a main authority. Bell *v.* Snyder and Newland *v.* Graham were also referred to, while it was denied that the case of Vallandigham *v.* Campbell was as cited by the minority.[2]

The minority views contend:

The case of Cessna *v.* Myers (Contest. Elect., 1871–1876, p. 60) has been supposed to be authority opposed to the admission of this class of testimony. While the report discusses the question, and it is stated that some of the committee think that such declarations are only admissible when part of the res gestse, and all agree that such evidence should be received with caution, only to be acted on when declarations are clearly proved and in themselves satisfactory (p. 65), the committee and the House did consider the testimony and act upon it in deciding the case. So, notwithstanding the discussion of the subject and the expression of the opinion of the member of the committee who framed the report, the case is an authority in favor of the admissibility of such testimony, holding "evidence of hearsay declarations of the voter can only be acted upon when the fact that he voted has been shown by evidence aliunde, and the declarations clearly proved and are themselves clear and satisfactory" (p. 67).

Cook *v.* Cutts, Forty-seventh Congress, ought to be mentioned perhaps. What is said on the subject in the report of that case, as the writer of this report knows, was not the result of a decision by the committee. The question was not essential to the determination of the case, but that turned upon other grounds.

This subject was most elaborately discussed in the case of Vallandigham *v.* Campbell, and the conclusion reached sanctioned by the House, was that such declarations are admissible.

The report has distinguished names attached to it, such as Mr. Lams, (now Senator), from Mississippi, and Ex-Governor J. W. Stevenson, of Kentucky.

This case is cited and approved in People *v.* Pease (27 N. Y., 51).

The doctrine contended for is upheld in State *v.* Oliver (23 Wis., 319, 327).

The person assailing the right of the voter and charging against him moral turpitude and crime in the unlawful exercise of the franchise should not be compelled to make this alleged dishonest adversary his own witness, thus giving validity to his testimony. The doctrine is well settled that it is not necessary in such cases to first call the voter:

"It was not done in any of the cases decided in the British Parliament. It is not necessary in settlement cases, where the declarations of the parishioner may be given in evidence, and the Supreme Court of the United States has expressly decided that where a witness can not be compelled to answer he need not be called. (1 Greenleaf on Ev., 175; 6 Peters, 352–367. Vallandigham. *v.* Campbell, supra.)"

Wigginton *v.* Pacheco (Cases 1876, p. 10).

The common-law rule as to hearsay evidence can not be made to apply. If so, it would apply and exclude the evidence just as much after the voter had been called and refused to testify as before.

The suggestion of the chairman of the committee that the rule of admitting the declaration of voters as to how they voted originated in the House in the early cases of contest, when witnesses were summoned and testified personally before the Committee on Elections, in no sense destroys the force or reason for the rule. If competent in one case it must be dearly competent in the other. He fails to state, what is the fact, that the rule has been followed since Congress passed the act governing contested elections. Notably in the case of Vallandigham *v.* Campbell in 1858, and in the very recent case of Wigginton *v.* Pacheco in 1877, and in other cases. The fact that election cases are tried upon pleadings now instead of upon a memorial can not be justly held to change the rule in question. This does not make the contest any more a proceeding, inter partes than it was before. The public has the same interest and rights in the contest as they ever had.

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[1] Record, p. 4592.

[2] See also Record, pp. 4578, 4579, 4582, and 4583, for speeches of Messrs. Cook and Hurd reviewing precedents, especially the English.

989. The election case of Wallace v. McKinley, continued.

To reject votes cast by persons alleged not to have lived within the precinct, the best evidence regarding precinct lines should be produced.

Discussion as to the qualifications of paupers residing in an alms house.

Where returned Member's name was written on an opposition ballot under contestant's, with the latter not scratched, the vote was counted for returned Member.

The fact that a voter was registered in a county infirmary as an idiot, did not avail to cause rejection of his vote as illegal under the law.

The vote of a person under guardianship for lunacy was sustained on testimony that he was employed in a position of some responsibility.

(4) As to votes alleged to have been cast by persons not living within the precinct, the majority say:

In this list there are 5 votes alleged to have been cast for contestant in wards of the city of Canton in which the voters did not reside, and 2 votes said to have been cast for contestant in townships in which it is claimed the voters did not reside. In these cases a dispute arose as to the boundaries of these voting subdivisions, and if the highest evidence should be required on this question, the municipal ordinances or official action of the local authority having jurisdiction and establishing these boundaries should have been produced. In the city of Canton it is alleged, and not denied, that a very recent change of ward limits had been made.

The minority say:

John Rigler, Frank Walters, M. Zilch, Daniel Winkleman, Celestin Jourdain, are proved to have voted in the wrong wards in Canton. They each admnt this, and say upon oath that they voted for Mr. Wallace.

It is expressly provided by the constitution of the State of Ohio, article 5, section 1, that to be an elector requires residence in the State for one year, and of the "county, township, or ward, in which he resides such time as may be provided by law."

Section 2945 Revised Statutes of Ohio, 1880, provides that—

"No person shall be permitted to vote at any election unless he shall have been a resident of the State for one year, resident of the county for thirty days, and resident of the township, village, or ward of a city or village for twenty days next preceding the election at which he offers to vote, except where he is the head of a family and has resided in the State and in the county in which such township, village, or ward of a city or village is situate the length of time required to entitle a person to vote under the provisions of this title, and shall bona fide remove with his family from one ward to any other ward in such city or village, or from a ward of such city or village to a township or village in the same county, or from a township or village to a ward of a city or village in the same county, or from one township to another in the same county, in which cases such person shall have the right to vote in such township, village, or ward of a city or village without having resided therein the length of time above described to entitle a person to vote."

Moreover, it is made a crime by the laws of Ohio to vote in a ward or election precinct in which the voter has not actually resided for more than twenty days preceding the election. (Rev. Stats. of Ohio, 1880, § 7047.)

This precise question was passed upon in the case of Vallandigham v. Campbell (Contested Election Cases, 1834–865, p. 232):

"Of nonresidents of the ward or township, two votes are disputed by the returned Member and none by the contestant. It is not denied that both of these voters were legal electors of the county; but having voted (though not fraudulently, but by mistake) out of their proper wards, the undersigned find the votes illegal and deduct them from the poll of the contestant. (Report Vallandigham *v.* Campbell, supra. See also Cushing's Law and Pr. Leg. Assemb., 9th ed., § 24. Cook *v.* Cutts, 47th Congress. Wigginton *v.* Pacheco, Contested Elections, 1876.)"

The same is true of John Moriarty, who voted in the wrong precinct in Alliance, Stark County. (Rec., p. 400; J. W. Coulter, p. 401.)

Jos. Bittaker.— He voted in Sugar Creek Township for Mr. Wallace. The testimony shows that he resided with his father in Franklin Township, Tuscarawas County. He recognized the fact that he had no right to vote in Sugar Creek Township, and said he would offer to vote, and, if challenged, would go away.

The evidence is that he was a Democrat in politics. It is not denied by contestant in his brief that he was a Democrat, and no question is made apparently about his having voted the Democratic ticket.

In the debate [1] it was not denied that the votes should be deducted if they were shown to have been cast by persons proved legally to have lived out of the precinct; but it was objected that the testimony was not conclusive, since no competent evidence was produced that the ward lines were changed, and the testimony of a voter that he finds by a map (not adequately proven as official) that he lived out of the precinct was not admissible.

(5) The minority laid stress on certain votes of paupers:

It appeared in evidence that Charles Ducatry, M. Stimler, B. Waldecker, and Joseph Frickert were inmates of the Stark County Infirmary, situate in Plain Township. Ducatry voted at Louisville, Nimishillen Township; Stimler voted in Washington Township; Waldecker and Frickert in Canton Township, and all voted for Mr. Wallace.

An inmate of a county infirmary, who has adopted the township in which the infirmary is situated as his place of residence, is a resident and voter in the township in which the infirmary is situated. (Sturgeon *v.* Korte, 34 Ohio St., 525.)

Each of these persons states, unequivocally, that he regarded the poorhouse as his home, had no other home, and never expected to leave the infirmary. They said they voted in the townships to which they were taken to vote because they were told to do so. Frickert said he voted in Canton because he got his papers there. None of them, owing to poverty, great age, and infirmity, had any expectation of living elsewhere. They had a right to vote in Plain Township, and nowhere else.

The majority report does not consider this question specifically; but in the debate [2] it was shown that these four voted at this election in their old homes as they had done before, and it was claimed that the decision of the supreme court of Ohio did not go to the extent of compelling them to vote in the precinct where the institution was located. They had a right to elect, on the theory put forth on behalf of the majority.

(6) The majority concluded that votes should be counted under these circumstances:

Again, a recount was also had in Austintown Township, Mahoning County, at the instance of the sitting Member, and 2 ballots were found in the box which had not been counted by the judges of election. On one of these ballots the name of the contestant was written under the printed name of the sitting Member, and on the other the name of the sitting Member was written under the printed name of the contestant, and the printed name on each had not been erased. These ballots should, we think, have been counted according to the written names appearing on them.

The minority say:

The ballot shown to have been voted in Selem Township, Washingtonville precinct, and not counted, was a regular Democratic ticket, with Mr. McKinley's name written in full under the name of Mr. Wallace as a candidate for Congress, the name of Mr. Wallace not, however, being scratched. The writing should prevail, and the ticket not having been counted should be added to Mr. McKinley's Poll.

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[1] Speech of Mr. Adams, of New York, Record, p. 4537.

[2] Speech of Mr. Adams, Record, pp. 4536, 4537.

(7) As to certain alleged incompetent voters the minority views say:

Samuel Thompson was a Democrat, and always voted that ticket; he voted at the election in this township, and unquestionably voted for Mr. Wallace. He is an inmate of the county infirmary, and registered there as an idiot, and if the proof shows that he is an idiot, under the constitution of the State he is not a legal elector. (Constitution of Ohio, art. 5, sec. 6.)

(Thos. H. White, Rec., p. 163; Craig D. Filson, Rec., p. 165; Wm. Davidson, Rec., p. 168; Horace P. Hessin, Rec., p. 170; A. J. Cowan, Rec., p. 443; Jas. Brubeck, Rec., p. 446.)

Michael Higgins voted at the election in Leetonia precinct. He was an insane person, under guardianship as such, and, his own declarations show, was not of sufficient intelligence to know how he voted; although there is some conflict in the testimony, we do not think there is sufficient evidence to overcome the presumption arising from the inquisition of lunacy and the appointment of the guardian, which is shown.

The only proof of the person for whom he voted is the testimony showing that he came to vote with his fellow railroad-track hands, who were Democrats, was living with his brother, who was a Democrat, and was understood to be a Democrat; but we think the evidence is sufficient on the authority of the case of Vallandigham, *v.* Campbell, supra, and the authorities there cited. (See pp. 233, 234.)

In the debate [1] it was claimed on behalf of the majority that these two votes were competent, Higgins being employed as a railroad hand to act as watchman at a crossing. His employers testified that he was competent for that responsible service.

(8) The minority set forth in their views this rule, which they conceived should prevail:

The House will please observe that the evidence adduced by contestee, and the substance of which has been given or referred to in his report in support of his claim as to the said list of 55 alleged illegal voters for contestant, stands substantially without contradiction or conflict. Evidence in rebuttal was introduced by contestant only in a very few instances, and none at all as to the votes in Liverpool Township. In the few cases where evidence in rebuttal was taken it served only to confirm the evidence in chief. If the evidence was not true contestant had the means and an ample opportunity to refute it and show how the facts were. When the legality of votes is assailed, upon notice and answer, and the issue is formed, that issue is to be fairly heard and tried upon evidence. When one party adduces apparently credible evidence, sufficient of itself to maintain the issue, the opposite party is called upon to meet it; and if he does not do it, with the means at hand, there can be but one reasonable conclusion, and that is that there was no answer to it. The committee adopted such a rule in the case of Manzanares *v.* Luna, decided at the present session.

The majority report does not discuss this subject.

(9) The remaining questions involved in the report were largely as to facts and the credibility of testimony.

The majority of the committee, in accordance with their reasoning, concluded that contestant was elected, and proposed these resolutions:

Resolved, That William McKinley, jr., was not elected a Member of the Forty-eighth Congress and is not entitled to a seat in this House.

Resolved, That Jonathan H. Wallace was elected a Member of the Forty-eighth Congress and is entitled to a seat in this House.

The minority contended that sitting Member was elected by 67 majority.

The report was debated at length on May 26 and 27,[2] and on the latter day a

[1] Speech of Mr. Turner, Record, p. 4591.

[2] Record, pp. 4523, 4568–4594; Journal, pp. 1325–1327. Appendix, pp. 257, 415.

motion to substitute a proposition of the minority declaring sitting Member entitled to the seat was disagreed to, yeas 108, nays 158.

The resolutions of the majority were then agreed to without division.

Mr. Wallace thereupon appeared and took the oath.

990. The Indiana election case of English v. Peelle, in the Forty-eighth Congress.

The House reluctantly sustained a report holding that the use, with fraudulent intent, of very thick paper for ballots, constituted a distinguishing mark.

The House reluctantly sustained an unauthorized recount made incidentally during a legal recount for a State office.

The House rejected votes cast by prisoners brought from the jail to the polls and voting under duress.

The House rejected the votes of paupers who were carried to the polls by officers and compelled to vote contrary to their party affiliations.

On May 14, 1884,[1] Mr. George L. Converse, of Ohio, from the Committee on Elections, submitted the report of the majority of the committee in the Indiana contested case of English *v.* Peelle. Sitting Member had been returned elected by an official majority of 87 over the contestant.

The entire controversy was confined to the single county of Marion, and principally to the city of Indianapolis.

The majority report at the outset charged that all but two election precincts in the city were under control of sitting Member's party, and that the other party had but one out of 56 election inspectors. But in the minority views and the debate[2] it was pointed out that at each and every precinct contestant's party was represented by a judge, a clerk, and a watcher. The law of Indiana required this representation, and the law was complied with.

The majority report charged, and it does not appear to have been denied, that the police force was controlled by sitting Member's party.

The examination of this case involved the discussion of several points.

(1) The alleged destruction of the secrecy of the ballot.

The report says:

> The work of the police and other Republican officials in intimidating and unduly influencing voters was no doubt facilitated by tickets that were used by the Republicans in Marion County at this election, commonly called "springback tickets," because printed on a material that would spring open when lightly folded, thus facilitating double voting. These tickets were printed on a material called "plate," such as is generally used by lithographers. It was bought and billed to the party who printed the tickets as "plate." This material is not plain paper such as is ordinarily used for printing, and especially for printing election ballots. The witnesses say they never knew such material to be used for election tickets before. It is a thick, heavy material, of such finish, bulk, and texture as to be easily distinguishable from tickets printed on ordinary paper, and for that reason contestant claims that it is in violation of the Indiana statute, which reads as follows:
>
> "All ballots which may be cast at any election hereafter holden in this State shall be written or printed on plain white paper of a uniform width of 3 inches, without any distinguishing marks or other embellishments thereon except the names of the candidates and the offices for which they were voted." (Sec. 4701, Revised Statutes of 1881.)

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[1] First session Forty-eighth Congress, House Report 1547; Mobley, p. 167.

[2] Record, p. 1343.

And also that it is in violation of the spirit of the constitution of Indiana, which provides that all elections by the people shall be by ballot. (Art. 2, sec. 13.)

In William *v.* Stein, 38 Indiana, page 89, the supreme court construed the provisions of the constitution above referred to. It was there decided that the word "ballot," as used in the constitution, "beyond doubt * * * implies absolute and inviolable secrecy, and that the principle is founded in the highest consideration of public policy." (P. 95.)

The court quotes from Cooley's Con. Lim., 604, as follows:

"These statutes are simply declaratory of the constitutional principle that inheres in the system of voting by ballot, and which ought to be inviolable, whether declared or not. In the absence of such a statute, all devices by which party managers are enabled to distinguish ballots in the hands of the voter, and thus determine whether he is voting for or against them, are opposed to the spirit of the constitution, inasmuch as they tend to defeat the design for which voting by ballot is established."

The evidence is conclusive that these tickets could be, and were, distinguished in the hands of the voters from 15 to 30 feet distant, and the secrecy of the ballot guaranteed by the constitution and laws of a sovereign State was thus destroyed in Marion County. One of the Republican managers, who was instrumental in getting up the tickets, stated that they were gotten up as "a scheme to beat the Democrats." Another prominent Republican admitted on the day of election that the tickets were fraudulent and gotten up for fraudulent purposes. (Rec., pp. 103–121.) The fraudulent intent is apparent. There were 12,551 of these fraudulent tickets voted at that election in Marion County, and it is shown that the Democrats formally protested against receiving and counting these tickets. (Rec., pp. 67, 124, 126, 121.)

Your committee hold that the object of the ballot system is secrecy; that when the constitution of Indiana said her citizens should vote by ballot it meant a secret ballot; that when the legislature said that the ballots should have no embellishments or other distinguishing marks it meant that the ticket should be such that it could not be known for whom the voter was casting his ballot; that any ticket printed on material, plain white in color though it be, yet so thick as to be readily distinguished from ordinary paper in use for such purposes, is as much a distinguishing mark and as much in violation of law as if it had the photograph of the candidate printed on it. The evidence discloses in this case a deep-laid and cunningly devised scheme to avoid the statute and to compel the poor and humble voter to "show his hand" to his party and his employer. The fact appears that some voters came to the polls to vote, and on discovering the character of the ticket refused to vote and went away. Others undoubtedly were constrained to vote by these mean and the circumstances surrounding them against their will. The fraud on the part of the friends of contestee is glaring and so well established that if there were no other facts in the case than those connected with the "spring-back tickets" your committee would find no difficulty in setting aside the election and but little in recommending the seating of the contestant.

The minority views, presented by Mr. Alphonso Hart, of Ohio, dissented from the above view.

There is nothing in the statute of Indiana declaring either a penalty for the violation of this law or declaring that ballots on any other kind of paper are invalid.

There is no doubt, indeed it is admitted, that the ticket used by the Republicans at that election and upon which the name of Mr. Peelle appeared conforms strictly to the letter of the foregoing statute. It was a ticket printed upon plain white paper; it was of the length and width required by the statute; it had no mark or device upon it such as is prohibited by the statute, and the only claim that is made against the ticket at all is that, although it was of plain white paper and of the proper length and width, it was of greater thickness than that which is ordinarily used, and that by reason of this thickness the ticket could be detected in the hands of the voter and distinguished from the other tickets that were cast. It seems to us that it as clearly complies with the requirements of the statute as the two other tickets that were in the field. They were all of plain white paper and of the proper length and width. The Republican ticket is printed on No. 2 book paper, the Democratic ticket is printed on No. 3 book paper or a high grade of newspaper, and the National ticket on common newspaper. But no two of the tickets, either the National or the Democratic or the Republican, were exactly alike in thickness, and in weight of paper. Which of these should be the standard? If they had all three been of the same kind, whether of the thickest or the thinnest, they would have complied with the statute and no objec-

tion could possibly have been made; it is only upon the ground that one is thicker than the other, or that one is thinner than the other, that exception is taken. If it be contended that the Republican ticket could be identified because it was thicker than the Democratic ticket, it can with equal force be charged that the latter can be detected because it was thinner than the Republican.

From the testimony which appears in the record there certainly can be nothing said against the validity or the legality of the ticket in question. It as clearly complied with the provisions of the statute as the others, and it would be an extraordinary position to take after a ticket had been cast by as many thousand voters as is found to be the case in this instance with the character of the ticket well known, to say that all of these voters should be disfranchised in consequence of the single fact that the ticket, although complying strictly with the provisions of the law, was a little thicker than in the judgment of the friends of Mr. English it ought to have been.

It is claimed by the majority report that the purpose of the Republicans in using this kind of paper was to enable persons to identify the ticket in the hands of the holder. This is wholly unwarranted. The proof shows that the only object was to prevent the ticket from being counterfeited, and also to prevent the tickets, when in bunches, from sticking together, and all intention to violate or evade the law is expressly denied.

The law was not violated. It not only complies with the statute, but is fully sustained by the judicial authority of Indiana, not only in this particular instance, but in other cases where the principle is involved.

It appears from the record that after the November election a contest arose in the courts of Indian as to the matter of sheriff in Marion County. J. W. Hess was the Republican candidate and D. A. Lemon the Democratic candidate. Hess was shown by the returns to be elected by 12 votes. Lemon contested the election. A recount of votes was had, resulting in increasing the majority of Hess over 40. The tickets upon which Mr. Hess was elected were the same as that upon which the name of Mr. Peelle appeared.

One of the points made was the legality of the ticket.

If the ticket was illegal as to Peelle—that is, if it was on the wrong kind of paper—then it was equally so as to Hess, and yet in the election contest for the sheriffalty the court sustained the validity of the ballot upon which the name of Hess appeared, and thereby gave its sanction to the one upon which the name of Peelle appeared, they being the same. It follows from this that in the judgment of the court of competent jurisdiction no objection can be made or was made to the character of the ballot that was used.

This is, to a certain extent, an adjudication of the matter. But, beyond this, a still more important consideration arises. What was the character of the law of Indiana designating the kind of ballot which was to be used, and the paper upon which the ticket was to be printed? Was it directory or mandatory; was it a penal statute or otherwise? If it was merely directory, or even if it was intended to be a penal statute, then the penalty as well as the wrong must attach only to those parties who printed the tickets. It can not attach to the voter, and it would be a matter of very great injustice to deprive the citizens of the State of Indiana who voted this ticket of the right to be heard through the ballot box, simply because the paper upon which the ticket voted by them was printed is alleged not to be strictly of such a character as is required by statute. The whole theory of a Government which is to be managed and controlled by the people exercising the elective franchise is that their will, when fairly and honestly expressed, shall be the law and shall be respected by all the authorities. There can be no doubt but that the voters of the seventh district, in the use of the ticket to which attention has been called, honestly intended to express their judgment as to who should be chosen for the respective offices named. We think, therefore, for this reason, as well as for the other reasons already given, that this vote should stand as the expression of the will of the people of the seventh district and of the State of Indiana.

In the debate the question of the illegality of the tickets was treated as of importance, and it was argued that they were illegal, although no attempt was apparently made to ascertain their number, and no specific reduction or rejection of the poll was proposed.

(2) The value of an unofficial count in determining the true state of the vote, the official return being alleged to be impeached.

The majority report declares that the credit due to the returns of the several precinct officers is greatly impaired by the fact "that 54 of the 56 voting places in the city were controlled by partisan officers who were more or less parties to the general fraudulent intent which pervaded the Republican managers." "And it is further impaired," says the report, "by the fact that it has been officially determined by a Republican board, who, under the law of the State and by the appointment and approval of a Republican judge, made a recount of the votes for sheriff at the same election, that the official returns were false and unreliable as to sheriff." The report then continues:

When once the taint of fraud or unreliability is attached to the official count its value is gone, and we must look to other sources for better information. The law of Indiana in regard to the preservation of the ballots is as follows:

"As soon as the votes are counted, and before the certificate of the judges, prescribed in the foregoing section, is made out, the ballots, with one of the lists of voters and one of the tally papers, shall in the presence of the judges and clerks be carefully and securely placed by the inspector, in the presence of the judges, in a strong and stout paper envelope or bag, which shall then be tightly closed and well sealed with wax by the inspector, and shall be delivered by such inspector to the county clerk at the very earliest possible period before or on the Thursday next succeeding such election, and the inspector shall securely keep said envelope containing the ballots and papers therein, and permit no one to open said envelope, or touch or tamper with the said ballots or papers therein; and upon the delivery of such envelope to the clerk, said inspector shall take and subscribe an oath, before said clerk, that he has securely kept said envelope and the ballots and papers therein; and that after said envelope had been closed and sealed by him in the presence of the judges and clerks, he had not suffered or permitted any person to break the seal, or open said envelope, or touch or tamper with said ballots or papers, and that no person has broken such seal or opened said envelope, to his knowledge, which oath shall be filed in said clerk's office with the other election papers. The clerk shall securely keep said envelope so sealed, with the ballots and papers therein, in the same condition as it was received by him from the inspector." (Rev. Stat., 1881, secs. 4713, 4714.)

It will be seen the law required the ballots to be carefully sealed up and delivered to the clerk. In this case the clerk, D. M. Ramsdall, is the same person who was chairman of the Republican county committee, and who selected the "plate "for and aided in getting up the illegal "spring-back "ticket. (See his deposition, Rec., pp. 365–367.) On the same day of the election for Congress a sheriff was to be elected for the county. There was a contest, and the circuit court, presided over by a Republican judge, under the laws of Indiana appointed a commission to recount the ballots cast for sheriff. This commission consisted of two Republicans and one Democrat. These commissioners executed the order of the court and reported thereto unanimously that the ballots showed that the returns made by the election officers and board of canvassers were not correct; on the contrary were full of errors, amounting in the aggregate to 49 votes. (See Rec., pp. 86, 403, 410.)

Hon. Austin H. Brown, one of these commissioners, an experienced and able expert, and a gentleman of the very highest character and standing, testified that at the same time he carefully examined and counted every vote for English and Peelle for Congress; that the returns were full of errors as to the vote for Congress, as well as sheriff; that the errors amounted in the aggregate to 99 votes in favor of English, and that English was certainly elected.

After calling attention to Mr. Brown's testimony, the report continues:

This testimony of Mr. Brown, one of the commissioners appointed by the court to count the ballots for sheriff, also shows he counted the ballots at the same time for Congress. He conclusively proves that the errors amounted in the aggregate to 99 votes in favor of contestant.

The value of the recount made by him must turn upon the capacity of Mr. Brown to make the count and his veracity in testifying in regard to it. If these are both established, as much weight should be given his count as if he had been directed by the court to make it. That they are fully established let the following testimony, both as to his integrity and capacity, bear witness.

The report also cites testimony to show the reliability of the witness and his capacity as a man of affairs, able and skilled to make a recount.

The minority views assail this recount, saying of the commissioners:

They were not instructed to make the count as to any other candidate. They were sworn to make the count upon the matter of sheriff honestly and truly, and this was the extent of their authority and duty. A short time, perhaps a clay or two, before the count began by these three commissioners, William H. English, the father of the contestant, approached Mr. Brown and employed him to make also a count as to the votes received by the respective candidates for Congress. This was a private arrangement, the service to be rendered by Brown for a consideration to be paid by English. No other member of the commission was spoken to upon the subject. Nine wards were counted during the first and second days. Brown claims that while counting the vote upon sheriff he also counted the vote upon Congress for those nine wards. It is an admitted fact that he did not communicate to anyone what he was doing. On the second day Mr. Byram, one of the other commissioners, became aware of the fact that Brown was making the count upon Congress, and from that time afterwards, during the remainder of the count of Marion County, they together kept count as to the Member of Congress. At the end of the count, according to the testimony of Mr. Byram, Peelle had gained so that his majority in Marion County would have been 767 instead of 640, a gain of 127. But Mr. Byram. did not claim that this count was absolutely correct, but that it was as nearly correct as could be made under the circumstances, he doing the best he could.

The minority call attention to the fact that Mr. Brown testified that in his opinion the ballots had been tampered with, since the ticket which he himself voted in a certain precinct he had marked, but could not find it when the recount was made.

Say the minority:

If it is to be granted as a fact that the ballots in Marion County, after the election and before the count made for sheriff by these commissioners, had been tampered with, then according to all the authorities upon the subject, without an exception, the subsequent count made by Brown, or by anybody else, is wholly unreliable and never can be considered or treated as overcoming the original official count. The contestant, by making this claim, entirely admits away his case. Outside of the statement of Mr. Brown there is no evidence, so far as we know, that any improper action had been taken in regard to these ballots. They had been from the time of the November election up to the time of the count in the custody of the proper sworn officers. But he claims, and his counsel insist, that the ballots had been tampered with, and we answer, if this be so, then it furnishes a reason why the count made by Brown can not be relied upon to overcome the official returns.

But there are other reasons still stronger why no reliance whatever can be placed upon his action in this matter.

First. He was the hired agent and employee of William H. English, a party interested in disturbing the count and making a ground of contest. He would naturally, almost inevitably, be inclined to take such action and make such a report of his proceedings as would favor the purpose had in view by Mr. English, his employer.

Second. The count made by him in the beginning was secretly made, and made with the evident purpose of accomplishing something which it was not intended anybody else should have knowledge of.

Third. Mr. Brown, upon his examination on the witness stand, is unable to give any intelligent statement of the condition of the vote in a single precinct in Marion County. He claims that, as he made the count of the first nine wards, he took a memorandum of the vote that was cast for each of the candidates for Congress, and that at the end of his count, from the data thus gathered, he made an estimate, and that the estimate which he made decreased the majority of Peelle 99. It is a very singular circumstance that when he is placed upon the stand all of these memoranda which he swears were taken at the time, and which if taken would indicate the character of the vote in the respective precincts, are missing. He is not able to produce a single scrap of paper showing the condition of the count in the

precincts. He does, however, produce a paper in which he claims to have summed up the result of his investigation and which is put in the form of a declaration showing that there is a gain for Mr. English and a corresponding loss for Mr. Peelle of 99 in that county. He claims that the other memoranda which he took are lost.

Under the circumstances the disappearance of these papers, which every man of ordinary intelligence must have known would be very important, is a strange and a suspicious circumstance, affecting the integrity of Brown's deposition. In his examination he is unable to swear to anything save the final result as he claims he figured it out. He can not even tell the number of votes that were received by Peelle, or the number of votes that were received by English. He can not tell the number of votes given for either of these candidates in any ward or precinct. He can not give an intelligent statement of the condition of the vote either in the county as a whole or in any portion of the county.

Fourth. There is another circumstance which is of very great significance in the consideration of Brown's testimony. After his associate commissioners, who were helping him count the vote upon sheriff , had discovered what Brown was at there is no further increase of the vote of English, but, on the contrary, an increase of the vote of Peelle from that time forward.

Fifth. When the commissioners appointed, as we have stated, to count the vote upon sheriff in Marion County had concluded their work, the subject of the vote upon Member of Congress was talked over between them. In that conversation the remark was made by Byram and Adams that a recount of the vote upon Members of Congress would result in increasing the majority of Mr. Peelle, and the testimony is that all three of the commissioners, including Brown, concurred in this statement. The testimony further is that Mr. Brown at that time made the declaration that "there was nothing in a recount for Mr. English," and that he should so report to Mr. William H. English, his employer. These facts are testified to by Byram, Adam, and Hawkins.

In view of these facts, what possible weight can be given to the testimony of Mr. Brown? The count which he made was an unsworn and unauthorized count; it was a count made not under oath; it was made under circumstances wherein if he did the best he could it would be very difficult to be accurate, for the reason that his work as commissioner to count the vote upon sheriff would necessarily require his attention, and the matter of count upon Member of Congress would be only incidental.

Then again, as already appears, his inability to give an intelligent statement of the condition of the vote, and his admission that there was nothing in the count which would benefit Mr. English, will surely destroy his testimony. Now, the question comes, shall we permit the testimony of Brown, given under these circumstances and so thoroughly impeached by circumstances and by contradictory statements made by himself, to overcome the sworn official statement and returns of the inspectors and judges of election, made under oath and in the performance of their duty? To this inquiry there can be but one answer. It seems to us that no just-minded person will permit an election to be overturned upon so flimsy a pretense.

(3) The majority report also charges that about 34 or more prisoners from the county jail were taken to the polls and compelled to vote for contestee. But it appears from the minority view that "there were seven inmates of the jail who voted. They were shown to be legal voters in that precinct. Two others offered to vote, and their votes were challenged and rejected."

The majority report also asserts that 51 paupers from the county poorhouse were carried to the polls by the officers of the institution and compelled to vote for Peelle, and that two-thirds of them were proven to be Democrats. The minority say it was admitted that these persons were entitled to vote, and that there was no evidence that they were prevented from voting for the person of their choice. Not one of them was called as a witness.

(4) It was also claimed on behalf of contestant that 100 votes were lost to him because the police officers intimidated voters who approached the polls, and deterred them from voting.

The minority report says on this point:

In this connection it may not be improper to refer to the position taken in the report of the majority upon this point. It is claimed that about 100 persons were kept from the polls. There is not a particle of testimony in the whole record justifying any such conclusion. There are less than 350 voters in the precinct in question, and the returns show that 309 persons voted. The witnesses for contestant were able to give the name of but one man whom they claimed was rejected, while the inspector of election swears that not a single person who made the proper affidavit was denied his vote.

In the debate [1] much stress was laid on the fact that the names of these 100 men were not given; that none of them had been called to testify. Six witnesses who were called estimated that a hundred men who would have voted for contestant were kept from voting. Mr. Hart in debate asserted that it would be a most remarkable thing to count 100 votes for contestant by putting these 100 unknown names on the poll.

The majority thus recapitulated their conclusions:

To recapitulate:

(1) The correction of the error in counting the vote in Marion County gives contestant 99 additional votes.

(2) The fraud and coercion practiced upon the 51 paupers, 34 of whom were Democrats and compelled to vote for contestee, would, if corrected, add to contestant's vote 68 additional votes.

(3) The fraudulent jail vote counted for contestee makes in the result a difference of 34 additional votes.

(4) The 12 counterfeit tickets which were counted for contestee, and should have been counted for contestant, make in the result 24 additional votes.

(5) Votes of naturalized citizens, and others fraudulently rejected, 100 additional votes. Total, 325 votes.

(6) The destruction of the secrecy of the ballot by contestee's friends in the use of the springback tickets undoubtedly made a difference in his favor of several hundred more votes in the final result to which he is not entitled.

Your committee are therefore clearly of the opinion that the contestant, William E. English, was duly elected and is entitled to the seat in the House of Representatives in the Forty-eighth Congress from the Seventh Congressional district of Indiana, and recommend the adoption of the following resolutions:

Resolved, That Stanton J. Peelle was not elected a Member of the Forty-eighth Congress of the United States from the Seventh Congressional district of Indiana, and is not entitled to the seat he now holds.

Resolved, That William E. English was duly elected a Member of the Forty-eighth Congress of the United States from the Seventh Congressional district of Indiana, and is entitled to his seat.

The minority reported a resolution declaring Mr. Peelle entitled to retain the seat.

The report was debated on May 20 and 21,[2] the most important questions in the view of the House being the thick ballots and the authority of the recount.

On May 21 [3] the vote was taken on substituting the minority proposition for that of the majority, and there appeared yeas 121, nays 117. Then, by a vote of 119 to 118 the House adjourned, after a motion to reconsider had been made.

On May 22 a motion to lay on the table the motion to reconsider was disagreed to, yeas 132, nays 132. Then the motion to reconsider was agreed to yeas 133, nays 130.

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[1] Record, p. 4345.

[2] Record, pp. 4339, 4358–4377.

[3] Journal, pp. 1283, 1285–1288, 1299, 1300.

Thereupon Mr. Thomas M. Browne, of Indiana, moved to recommit the subject to the Committee on Elections "with instructions to make a recount of the ballots cast for the contestant and contestee * * * at the several precincts in the county of Marion."

This motion was disagreed to, yeas 124, nays 134.

Then the question recurring on the substitute proposed by the minority, it was disagreed to, yeas 128, nays 129.

The resolutions of the majority were then agreed to, yeas 130, nays 127.

Mr. English thereupon appeared and took the oath.

991. The Ohio election case of Campbell v. Morey, in the Forty-eighth Congress.

Full discussion of the status of college students as having or lacking the residence qualifications of voters.

Persons within a precinct as students, for a transitory or temporary purpose, without the interests or burdens of citizens, and going elsewhere for vacations, were held not to have voting residence.

Discussion as to what constitutes lunacy and idiocy justifying rejection of a vote.

Discussion as to the residence of paupers living in a public institution.

As to the principle of deducting unsegregated illegal votes by a system of computation.

Journeyman mechanics were recognized as having residence within the precinct where they lived for the statutory time.

A person may not vote in a precinct wherein he does not live, although required to preside therein as an election officer.

On June 16, 1884,[1] Mr. Robert Lowry, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Ohio contested election case of Campbell *v.* Morey.

The sitting Member had been returned by an official plurality of 41 votes.

Various questions were involved, but the essential point, dwelt on in the report and the debate, was as to the rights of certain students as electors.

The majority thus state the case of the students:

Ninety-six undergraduate college students voted in the precincts where the colleges are located. Twelve voted for contestant and 84 for contestee. With few exceptions they were not lawful voters. The statute of Ohio reads as follows:

"A person shall not be considered to have gained a residence in any county of this State, into which he comes for temporary purposes merely, without the intention of making such county his home."

This statute, and all other Ohio laws bearing on the subject of residence, are fully discussed in a case decided in the Ohio senate as recently as April 12, 1884, which seem to us to be a well-considered case upon the status of college students as electors in Ohio. It is the case of Mickey *v.* Loomis, to be found in the appendix to the journal of the Ohio senate for the session just ended. The following is the agreed statement of facts:

"It is agreed by the whole committee that, under the testimony, the decision of this contest shall depend upon the question as to whether certain students at Oberlin College, coming under the class described in the following agreed statement of facts, had or had not the right to vote at the October

[1] First session Forty-eighth Congress, House Report No. 1845; Mobley, p. 215.

election in 1883. The following is the agreed statement of facts above referred to, viz: The following is a substantial statement of the evidence concerning the right of students at Oberlin College to vote, and who, it is claimed, voted for Timothy G. Loomis:

"(1) Said voters were students at Oberlin College, in Russia Township, Lorain County, Ohio.

"(2) They voted there at the October election in 1883.

"(3) They claimed that Oberlin was their residence at that time.

"(4) They went to Oberlin for the purpose of acquiring an education, and at the time of voting were at Oberlin for that, purpose alone. They came there from other counties and States, and had been there long enough to acquire a residence.

"(5) They left the home of their parents, and never intended to return and make it their home.

"(6) They claim that they have no other place of residence than Oberlin.

"(7) They claim they have no place in view as a place of residence after their education is completed.

"(8) These student voters had never been married.

"(9) They were not assessed for tax purposes, and paid no tax in Oberlin.

"(10) It is admitted as true that Harrison J. Mickey, contestant, is entitled to his seat in the senate of the sixty-sixth general assembly, if, upon the facts hereinbefore stated, a student at college is not entitled to vote at the place where the college is located."

This statement is decidedly more favorable to the Oberlin students than the facts developed in the present case are to most of the students who voted in the seventh district of Ohio, yet under it the senate held that these students were disqualified, and rejected their votes.

The subjoined portion of the report is so clear that we quote it:

"In this connection let us look to section 2940 of the Revised Statutes of Ohio, which prescribes how judges of election shall proceed when a person offering to vote is challenged as unqualified, on the ground that he is not a resident of the county or precinct where he offers to vote. One of the questions required to be put to the person offering is this: 'When you came into this county did you come for a temporary purpose merely, or for the purpose of making it your home?' And here it may be remarked, in passing, that in this question, in the words 'or for the purpose of making it your home' is to be found the legislative definition of the word 'residence.' For the wording of questions 1 and 2 required to be put by the judges, when the person is challenged on the ground that he is not a resident, is as follows:

"'(1) Have you resided in this county for thirty days last past?'

"'(2) Have you resided in this precinct for twenty days last past?'

"But when they come to ascertain the purpose of the voter in coming into the county the question is, 'Was it for a temporary purpose' or 'for the purpose of making it your home?'

"There they use the word that has but one meaning; that word—the only one—which is understood by all men alike—a word which is as dear to the savage as to the civilized man—home.

"In quoting to the senate these rules for the guidance of judges of elections in Ohio—rules that are a part of the statutes of the State—we might well close our report with our recommendation alone, but we prefer to support it by authorities, which are conclusive against the 'student vote' as agreed upon in the statement."

We find much the same idea carried out in all the more recent decisions in other States. Dale *v.* Irwin (78 Ill., 170) is a very fine case; the language of the court is:

"These students were undergraduates of Shurtleff College, subject to its rules and regulations, and, so far as testimony shows, taking no part in town affairs, and paying no taxess, and not assessed on their personal property for taxation to aid in defraying expenses of the town. Some of them paid a road tax on labor, the street commissioners demanding this on a residence of ten days.

"As a general fact, however, undergraduates of colleges are no more identified with residents of the town in which they are pursuing their studies than the merest stranger, and should all the seats of learning in the United States be polled, not more than one student in twenty would be found to possess the proper qualifications of a resident of the town."

In Vanderpoel *v.* Jones (53 Iowa, 246), the court held that "one who becomes a resident of the county for the purpose of attending college, and who has formed no intention of remaining after the completion of his college course, is not entitled to vote in said county."

In Fry's election case (71 Pa. St., 302), known as the "Allentown case" (see Brightly's Leading Cases on Election, pp. 468–479), it is held that "students at a college living at the place in which it is located, whether supported by themselves and emancipated from their fathers' families, with no intention to return to their homes, or supported by their parents, who visit their home in vacation, and may or may not return after graduating, have not such residence as will entitle them to vote in the district where the college is."

Yet these students were assessed and paid taxes at the college town, and had lived from one to three years there, all claiming it to be their home. It is also held in the same case that "very few, if any, students, while residing at the college, acquire a new home or change of domicile, and they are, therefore, not entitled to vote. In the early history of our colleges, while the true meaning of the State constitution was fresh in the minds of the framers of that instrument, it was never pretended that the student acquired a residence at the college so as to become a qualified elector, to be liable to taxation, and to the performance of municipal duties. In those days, when the purity and freedom of elections prevailed, the parental home, or the locality from whence the student came, was universally accepted as the district in which he was entitled to vote."

It was also held that, in the opinion of the court, a "careful examination of the testimony leads to the conclusion that none of these students, whose votes are contested, were qualified electors at the last October election."

The court in this case draws the true distinction between students and laborers, and uses this language:

"Students being here for the sole purpose of being educated, and not coming animo manendi, but intending to go elsewhere as soon as graduation takes place, do not fall within the same category with unmarried men who seek employment from point to point, as opportunity offers. The student is in a preparatory condition, in a state of tutelage, and nonproductive, not yet able or willing to enter the world to engage in business or in the productive pursuits of life nor fully prepared to assume civil and political rights and duties. The unmarried man who has severed the parental relation becomes a laborer, producing for himself, and thus adds to the productive wealth of the community in which he resides, being willing not only to enjoy the political privileges, but also to assume and to discharge political and civil duties."

In Massachusetts there have been four cases, but none recently. The only one in any degree favorable to students is the very early case of Putnam *v.* Johnson (10 Mass., 488), where counsel for plaintiff especially based his claim upon the plea that his client was not an ordinary college student. His language (pp. 493 and 494) is:

"This case has been compared to that of students at college, but it more resembles the case of resident graduates or instructors, who have always voted in the town where the college is situated in which they reside."

All the later decisions, however, refuse to go so far, and are uniformly against the claim that undergraduate students are entitled to vote. Another case is Granby *v.* Amherst (7 Mass., 1, A. D. 1810), wherein Chief Justice Parsons says of a college student that he "was abroad merely for his education; during the vacations he was at home in Belchertown, and on receiving his degree he continued his residence in the same place. His absence was occasional and for a particular purpose, and we are satisfied that within the intent of the statute there was no change of his domicile. His home was at Belchertown; it was his place of residence, although from home for the purpose of instruction."

Another is the case in 5 Metcalfe, 587, where the court say:

"But in such case [i.e., residing at a university town] his right to vote at that place would depend upon all the circumstances connected with such residence. If he has a father living; if he still remains a member of his father's family; if he returns to pass his vacations; if he is maintained and supported by his father; these are strong circumstances repelling the presumption of a change of domicile. So, if he have no father living; if he have a dwelling-house of his own, or real estate of which he retains the occupation; if he have a mother or other connections with whom he has before been accustomed to reside, and to whose family he returns in vacation; if he describe himself of such place and otherwise manifest his intent to continue the domicile there, these are all circumstances tending to prove that his domicile is not changed."

The last Massachusetts case is in Cushing's Contested Election Cases (p. 346), in which the legislative committee uses this language:

"The requirements of the constitution and laws are not satisfied by merely abiding or remaining within the Commonwealth and town where the individual claims to vote. He must go there with the intent, bona fide, to make it his home—to obtain a domicile. If his home is in another State, or in another town in this State, and he is a sojourner for temporary purposes merely, intending when those purposes are accomplished, sooner or later, to leave the State or town and return home, he is not liable to the duties nor entitled to the privileges of a citizen of the town he sojourns in. This is a question of fact in each case, and the party who avers that he has abandoned his domicile of origin and taken up a new one is bound to prove it."

The latest and best known case in Congress, where this question has arisen, is Cessna *v.* Meyers (McCrary on Elections, p. 496), in the Forty-second Congress, which follows the Massachusetts decisions, and which is strengthened and extended in its scope by the foregoing Ohio, Illinois, and Iowa cases. There were also two very early Congressional cases which are clearly distinguishable from these later ones, in which it was held that certain students, under peculiar circumstances, were legal voters. One was the case of Letcher *v.* Moore (1 Bartlett, 750, A. D. 1833), in which especial stress is laid upon the fact that a student who had voted was a practical printer, working at his trade in the college town, and belonged to the local militia. The other case was Farlee *v.* Runk (1 Bartlett, 87, A. D. 1846), where the students paid taxes at the college town and in many other ways assumed the liabilities of citizens. We cite these cases to show the advance continuously made toward the rule that but few college students acquire a domicile and a right to vote in the college precinct. The estimate of lawful voters amongst them, as made by the court in Dale *v.* Irwin, above quoted—that of one in twenty—seems to us to be a very close approximation to accuracy. In the present case, however, we adopt no general rule, but predicate our conclusions upon the testimony. In weighing such testimony we have regarded as especially applicable in such cases the doctrine of Keith *v.* Stetler (25 Kans., 100), where it is held that "A man's acts and conduct are more to be considered in determining the question of a change of residence than any mere declaration of intent."

We have carefully examined the testimony in the case now before us, and, in our judgment, but 7 of the 96 students who voted were lawfully entitled to do so. They are S.I. Lindsay, J.G. Stewart, I.M. Burgan, S.J. Stahl, G.W. Branch, Tony Perry, J.A. Greene, J. Tillman, G.M. Tillman, D. Turner, F.D. Scott, E.A. Palmer, and G.W. Fairchild (who voted for contestee), and J.W. Scott (who voted for contestant). We have some doubts as to several of these, but give them the benefit of the doubt.

The following is a list of 71 students whom we find to have voted illegally for contestee: W. C. Houser, E. C. Hoover, W. A. Galloway, A. L. Glendenning, C. S. Spangler, J. U. Moore, K. C. Kunkle, Evan Griffiths, J. W. Smallwood, John Wardlow, E. G. Zimmer, G. F. Osler, W. R. Butcher, J. A. Beery, G. M. Brown, W. E. Bowman, P. E. Cromer, L. G. Cromer, J. B. Fairchild, J. L. Plummer, H. W. Gibson, Richard Foote, D. J. McMullen, E. S. Keeney, J. W. Freas, Simon Barr, S. N. Bousman, H. E. Miller, S. H. Darbyshire, H. C. Gibbs, W. S. Whitacre, U. H. Williams, M. J. Sanford, John Zell, W. F. Hague, L. Huston, J. H. Lansinger, W. T. Anderson, G. W. Prioleau, N. A. Banks, J. R. Scott, J. J. Bass, B. F. Morris, G. W. Nicholson, W. T. Young, W. H. Coston, C. N. Crosby, J. A. Kirke, Z. Roberts, S. C. Stewart, C. N. Williams, L. M. Beckett, P. M. Alexander, E. L. Bell, Aaron Brown, G. W. Hamilton, G. S. McElroy, C. A. Buck, W. I. Brooks, W. C. Lawther, W. J. Graham, W. J. Golden, J. S. Colvin, J. McNaugher, J. C. Gibney, H. T. Jackson, A. Gordon, L. W. Williamson, W. G. Martin, J. H. Bailey, and T. O. Baker.

Those students who voted illegally for contestant, 11 in number, are G. A. Crisman, A. E. McLaughlin, T. M. Smith, T. M. Lombard, J. A. Wiley, William Weber, G. E. Krout, A. M. White, S. E. Kirkpatrick, M. Benn, and J. R. Flowers.

Want of adequate time and space prevents comment on, or quoting in detail from, the depositions of the foregoing students. We call especial attention to what may be termed the general testimony bearing on each of the four colleges in the district. A careful perusal of that will greatly aid a just and intelligent judgment of the case. The general testimony bearing on the National Normal University will be found in the record, part 1, pages 493 to 495, 583, 584, 641, and 642. Reading this, in connection with the individual depositions of the students, it will be found that the university has an enormous annual attendance, and scarcely one student in a thousand settles or remains in the village where it is located; that these students, unlike the ordinary collegians, do not attend for a course of four years, but for merely for one or more sessions of eight or ten weeks each; that many are schoolteachers, living elsewhere, who come just long enough to attain proficiency in such branches of study as they may be teaching, and are soon off to their homes and employment; that, in a word, they are

there for a transitory and temporary purpose only. At this school many are young, the average age of those voting being only 23 years, although a few are quite matured. All have matriculated from distant places. None showed any act to indicate an intention to make Lebanon their home. They describe themselves from other places; went elsewhere in vacation, etc. None worked the roads nor paid taxes. None took such interest in public affairs as citizens ordinarily do. Out of the 35 who voted there illegally for contestee 10 had left the school during the short interval which elapsed between the election and the beginning of this contest. It is also shown that many of the Republican students at this university had been preparing themselves for examination as witnesses in this case by a systematic course of study, and had requested the faculty to especially instruct them upon their rights as witnesses in a contested election case, and that on the Saturday prior to the October election in 1882 they held a meeting in University Hall, at which outside parties addressed them and advised them to vote at the approaching election, regardless of the fact that they had not paid taxes, worked the roads, etc.

The general testimony relating to Wilberforce University would be found in the record, part 1, pages 280 to 283, 292 to 300, 357 to 359, 443, and 444. This institution is situated in the country, away from any village or city. It is attended only by colored people, the male students preparing to be ministers and teachers. They come mainly from distant States, only 6 out of the 20 illegal voters at that school having matriculated from the State of Ohio. There is but little difference between them and the normal students above referred to, except that their average age is higher, being 25 years, owing to the fact that their race, previous condition, and lack of early advantages had retarded their education. They never paid any taxes nor discharged any other civil obligations; they never worked the roads (with very trifling exceptions) until after the election in controversy; they have no means of getting employment in the country at Wilberforce, either in teaching, preaching, or other professional occupation; they are very transitory, coming and going as their exceedingly limited means admit. Five of those voting illegally had left the school before this contest began, two of them leaving the State. They were not called together by the faculty and other political leaders and instructed how to testify, but just one day before their examination Mr. A. G. Wilson, attorney for contestee, and chairman of the Republican county committee, published an article of his own writing in a Republican newspaper upon the topic "Rights of students—where should they vote?" He procured 500 copies of the paper, and every colored student in Greene County admitted receiving or seeing marked copies of the newspaper containing this article. Attention was also called to the article by a professor at public prayers in the presence of these witnesses.

The students at the Xenia Theological Seminary also read the foregoing marked copy of this newspaper, and, although studying theology, do not in any respect differ from the Wilberforce and Normal students, except that they generally remain a stated term of two or three years. They matriculated from distant places—see the following extract from the matriculation book, which is just as they signed it, and is, substantially, similar to the matriculation books of the other. colleges:

Names.	Post-offices addresses.	Presbytery.
W. I. Brooks	Northwood, Ohio	Sidney.
C. A. Buck	College Corner, Ohio	First Ohio.
W. J. Golden	Scroggsfield, Ohio	Steubenville.
J. C. Gibney	Odell Guernsey County, Ohio	Muskingum.
W. J. Graham	Scroggsfield, Ohio	Steubenville.
R. T. Jackson	New Concord, Ohio	Muskingum.
Albert Gordon	Hanover, Ind	Indiana.
W. C. Lawther	Wattsville, Ohio	Steubenville.
John McNaugher	Allegheny, Pa	Allegheny.
L. W. Williamson	Xenia, Ohio	Xenia.
Jesse S. Colvin	Chicago, Ill	Chicago.
W. G. Martin	Irondale, Jefferson County, Ohio	Steubenville.

They were all credited to distant presbyteries, where they retained their membership and church connection, and by which many of them were partially supported. They neither paid taxes nor worked the roads. Some of them took so little interest in local and municipal affairs that they could not tell which ward of Xenia they had voted in.

The majority say that in their opinion the student vote is decisive of the case:

To overcome contestee's majority contestant claims that 80 persons who were students unlawfully voted for contestee, and that 11 persons who were students unlawfully voted for contestant, making a net gain of 69 votes for contestant on the so-called student vote. The wholesale setting aside of this large number of votes, without reference to the merits of each individual case, is not justified by any known authority or precedent, and is inadmissible upon any view of the case. The desperate character of this case is demonstrated by this extravagant claim.

There have been four cases before Congress in which the legality of votes cast by persons who were at the time following the occupation of students were assailed, and in neither case were these votes held to be illegal. They are the cases of Letcher *v.* Moore, from Kentucky; Farlee *v.* Runk, from New Jersey; Koonts *v.* Coffroth, from Pennsylvania; Cessna *v.* Myers, from Pennsylvania.

McCrary, in his work on Contested Elections, reviewing the leading authorities, uses the following language, paragraph 41:

"It will be found from an examination of these authorities, and from a full consideration of the subject, that the question whether or not a student at college is a bona fide resident of the place where the college is located, must in each case depend upon the facts. He may be a resident and he may not be. Whether he is or not depends upon the answer which may be given to a variety of questions, such as the following: Is he of age? Is he fully emancipated from his parents' control? Does he regard the place where the college is situated as his home, or has he a home elsewhere, to which he expects to go and at which he expects to reside?"

Putnam *v.* Johnson (10 Mass., 488–502); Vanderpool *v.* O'Hanlon (53 Iowa, 246); Fry's Election Case (71 Pa. State, 302); Dale *v.* Irwin (78 Ill., 170); opinion of the judges (5 Metcalf, 587); Cushing's Election Cases (437), all support the view that each case must be determined on its facts.

The Ohio statute is as follows:

"Sec. 2946. All judges of election, in determining the residence of a person offering to vote, shall be governed by the following rules, so far as the same may be applicable:

"(1) That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.

"(2) A person shall not be considered to have lost his residence who leaves his home and goes into another State or county of this State, for temporary purposes merely, with the intention of returning.

"(3) A person shall not be considered to have gained a residence in any county of this State, into which he comes for temporary purposes merely, without the intention of making such county his home."

In the statute the words "residence" and "home" are used as convertible terms; both are defined in the statute itself as "that place in which his habitation is fixed." Habitation is "a place of abode;" fixed means "established."

"RULE 1. The residence or home, then, of a person is 'where his place of abode is established,' not forever, but for the time being, and to which, whenever he is absent, he has the intention of returning.'

"RULE 2. A residence is lost by leaving the home or "place of abode" and going into another State or county in this State, even for a temporary purpose, without the intention of returning.

"RULE 3. A person may gain a residence in any county in this State into which he comes for temporary purposes merely, if he does so with 'the intention of making such county his home,' his place of abode, not forever, but for the time being." (McCrary, par. 39; Sturgeon *v.* Korte, 34 Ohio St., 525–537; Miller *v.* Thompson, 118; and Pigotte Cases, 463, 2 Cong. Election Cases.)

The question of intention is of the highest importance, and is held by all authorities to be decisive whenever there is doubt as to which of two places is the residence of the voter.

In his testimony the contestant has set forth the portions of the student's register or matriculation book of each of the educational institutions, showing the names, address, etc., of each student as recorded on first entering college. With exception of a few names he repeats these lists in his brief, for the purpose of proving such students to be nonresidents. This whole question of matriculation books, as evidence in regard to residence of students, was very fully discussed and effectually settled in the contest of Letcher *v.* Moore, of Kentucky, in the Twenty-third Congress (1 Bartlett, 750). The contest involved, among other things, the right of students of Danville, then a part of Mercer County, to vote there. The Committee on Elections divided, the majority reporting adversely to the right and the minority favorably. The college register at Danville showed the names of students entered after this

manner: (1) David McKee, Harrison County, Kentucky. (2) Robert McKeown, Jefferson County, Kentucky.

The minority committee, in its report, says:

"Under the last resolution, the names of D. D. McKee (and other students mentioned), were stricken from the poll book by a majority of the committee. We think the committee erred in this decision. In order that our opinions may be the better understood, we will give the substance of the testimony laid before the committee in regard to each of the persons above named."

The students and the officers all say that the address does not indicate residence, but simply where the student came from.

After recounting the testimony, which in its general features does not differ materially from that in the present case, the committee goes on to say:

"The persons whose names we have mentioned as being stricken from the poll books were students at Centre College. Their votes were received by the officers of the election; this would be prima facie evidence of their being legal votes. He who denies their right must prove satisfactorily that they did not possess it. The register proves nothing but the place from which they originally came and the time of their entrance into college. It does not prove, nor purport to prove, even the time they came into the State or county. They performed all the duties of citizens, and could not be denied the rights of citizens. By the constitution of Kentucky there are three requisites to entitle a man to vote: He must be a free male citizen; he must have attained the age of 21, and he must have resided in the State two years and in the county one year next preceding the election. This age and residence give a position and vested constitutional right; of this right he can not be deprived without a palpable violation of the constitution. * * * His employment forms no part of his qualifications, nor is it material how long he intends to reside in the county after the election. The right is founded in prior residence, and his intended future residence neither gives nor tends to defeat it. Those persons were all 21 years of age. They had been in the State or county the length of time prescribed by the constitution, and actually resided in the county at the time of election. This is all the constitution requires, and it is not for us to require more. We think the majority of the committee erred in rejecting their votes."

The House sustained the minority report, and refused to seat the contestant.

The case of Farlee *v.* Runk, in the Twenty-ninth Congress (1 Bartlett, 87), is directly in point upon this question. The whole contest was based upon the denial of the right of students at Princeton, N.J., to vote in the college town. The constitutional qualification for voting in New Jersey was almost identical with the Ohio statute. The voter must be a male citizen of the United States, 21 years of age, a resident of the State for one year and of the county five months next preceding the election.

Mr. Farlee, in his memorial, represented that Mr. Runk's nominal and apparent majority of the votes of said district was obtained by his receiving the votes of thirty-six individuals specified in his memorial who were, at the time of his election, students of the Theological Seminary at Princeton, N.J., and of five who were students in the College of New Jersey, at Princeton, and all in the Third Congressional district, which were unlawful votes, and ought to be rejected, because, although the above-named students were living at Princeton for the time being merely for the purpose of obtaining their education, they were not residents of the district, and could not legally vote at said election.

The committee reported in favor of the legality of the votes of these students, and stated the reasons on which they based their report as follows:

"But it is contended by Mr. Farlee, the contestant, that they were not residents, as contemplated by the Constitution, but students, merely living at Princeton for the purpose of obtaining an education. The depositions of nineteen persons, students of the college and theological seminary, appended to this report and marked 'D,' taken at the instance of Mr. Farlee, the contestant, have been examined, and your committee are of the opinion that they were legal voters. They swear that they were more than 21 years of age; nearly every one swears that he came to Princeton without any intention of returning to the place he came from, and with the intention of remaining there until he accomplished the purpose for which he came either to the college or the theological seminary, and then of going wherever he could find occupation, if he did not find it in Princeton, or wherever he felt it his duty to go.

"It will be observed on reading the depositions that these individuals had all been in Princeton more than one year, and most of them had been there several years before the election; and that although they were in pursuit of an education, either in the college or theological seminary, they had, many of them, been of age and enjoying the privileges of freemen many years."

Here follows, in a report, a synopsis of the depositions of the students, the main features of which disclose a state of facts very similar to the student branch of the present contest.

The House adopted the report of the committee and refused to seat the contestant.

In the case of Putnam *v.* Johnson (10 Mass., 488–502) the court decided the vote to be legal, and in so doing used the following language (p. 500):

"A residence at the college or other seminary for the purpose of instruction would not confer a right to vote in the town where such an institution exists, if the student had not severed himself from his father's control, but resorted to his house as a home and continued under his direction and management. But such residence will give a right to vote to a citizen not under pupilage, notwithstanding it may not be his expectation to remain there forever."

In Fry's election case (71 Pa. Stat., 302), relied on by contestant, it is conclusively admitted as a matter of fact that these students always had a fixed intention to leave the college town. In the very language of the court, they "may or may not return" to their fathers' homes, excluding the idea of abandonment of the old homes and the adoption of new ones.

Contestant quotes copiously from the Allentown election case (Brightly's Digest, 468–479), and says: "It is probably the most complete, exhaustive, and decisive case reported," oblivious of the fact that it is the same case as Fry's election case (71 Pa. Stat.), described by him on the same page (18) of his brief, as "another and very strong case." His quotation shows that the students in that case "are under the pupilage of their parents, receiving all their support from them, and in no sense whatever are they emancipated from the parental domicile."

In Dale *v.* Irwin (78 Ill., 170) the court says:

"The permanent abode prescribed by the Revised Statutes of 1874, as the criterion of residence required to constitute a legal voter does not mean an abode which the party does not intend to abandon at any future time. In the sense of the statute, a permanent abode means nothing more than a domicile, a home which the party is at liberty to leave as interest or whim may dictate, but without any present intention to change it.

"The undergraduates of a college, who are free from parental control, and regard the place where the college is situated as their homes, having no other to which to return in case of sickness or domestic affliction, are as much entitled to vote as any other resident of the town pursuing his usual avocation. It is pro hac vice the home of such students, the permanent abode in the sense of the statute."

After a full consideration of the merits of each particular vote in question the court admitted a part of the student votes as legal and rejected a part as illegal on the principle announced in the case that the legality of each vote must be determined by the facts relating to it alone.

In the case of Cessna *v.* Myers (McCrary on Elections, 496, Forty-second Congress), involving student votes, the committee, speaking of evidence, says:

"It is often a question of intention. If a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of present domicile, it becomes his place of domicile, notwithstanding he may have a floating intention to go back at some future period. A fortiori would then be true if his floating intention were to go elsewhere in future, and not to go back, as in such case the abandonment of his former home would be complete.

"The fact that the citizen came into the place where he claimed a residence for the sole purpose of pursuing his studies at a school or college situate there, and has no design of remaining there after his studies terminate, is not necessarily inconsistent with a legal residence in such place. This is to be determined by all the circumstances of each case."

In the opinion of the judges (5 Metcalfe, 587) the following language is used:

"But if, having a father and mother, they should remove to the town where the college is situated, and he should remain a member of the family of the parent, or if having no parent, or being separated from his father's family, not being maintained or supported by him, or if he has a family of his own and removes with them to such town, or by purchase or lease takes up his permanent abode there, without intending to return to his former domicile, if he depends on his own property, income, or industry for his support; these are circumstances, more or less conclusive, to show a changed domicile, and the acquisition of a domicile in the town where the college is situated. We do not consider this circumstance (i.e., 'having means of support from some place elsewhere') of much importance in determining the domicile. If, indeed, a young man, over 21 years of age, is still supported by his father or mother, it is a circumstance concurring with other proofs to show that he is still a member of the family of such parent,

and so may bear on the question of domicile. But if he is emancipated from his father's family and independent in his means of support, it is immaterial from what place his means of support are derived."

In Cushing's Election Case (p. 437) the committee on the judiciary of the legislature says that a right of a student, or of other persons, to vote is a constitutional right qualified only by the constitutional requirement of age and residence. "He has the same right to employ himself in obtaining a literary education as in learning or exercising a trade, an art, a profession, or agricultural pursuits."

The minority views, presented by Mr. S. H. Miller, of Pennsylvania, took issue with the position of the majority:

It is claimed "that a student must prove his domicile of origin to have been abandoned." This is not the law." The vote having been received by the election officers, the burden is on the other side to show that they erred." (Cessna *v.* Myers, McCrary, p. 501; Letcher *v.* Moore, Election Cases, p. 829; Botts *v.* Jones, Election Cases, p. 74; Contested Election Cases, vol. 5, p. 79; Contested Election Cases, vol. 3, p. 407.)

It is claimed that the students in Xenia and Lebanon did not work the roads nor pay poll tax. Neither did any other citizen, the care of the streets in both of these corporations being provided for out of the corporation funds. At Wilberforce the colored students worked the roads with quite as much regularity as other people, as many as twelve ministers offering to work, but being excused, under the impression of the supervisor that they were exempt. But whatever the fact be, there is no such prerequisite to voting in Ohio.

It is clear from the authorities cited that persons whose occupation is that of student, teacher, or preacher have the name right to change their residence as people pursuing other occupations and that their place of residence must be determined by the same rules which are prescribed by the legislature of Ohio for all the people of the State.

The case of Mickey *v.* Loomis, recently decided in the Ohio senate, is much relied on to show the illegality of student votes in Ohio. The agreed state of facts in that case is much less favorable to the students than the facts in this case. They were not self-supporting, as in this case. They came to college directly from their parents' homes and had not been out in the world for years, as in this case. They were not teachers, preachers, etc., and of the average age of 27 years, as in this case, and yet even they were clearly legal voters. The elections committee in that case consisted of five Democrats to two Republicans. The vote against the students was five to two in the committee, and in the senate it divided exactly on party lines. It can hardly be accepted to overthrow four cases (and the only cases) in this House in favor of the legality of such votes.

THE COLORED VOTERS OF WILBERFORCE; XENIA TOWNSHIP.

It is claimed that 28 students of Wilberforce voted for contestant.

The town of Wilberforce and Wilberforce College and Academic and Theological School for colored people are situated in Xenia Township. It is a settlement of colored people, and is surrounded by colored settlements on every hand. In Greene County alone there are several thousand colored inhabitants, while in Greene and in the adjoining counties of Clarke and Clinton is one-fourth part of the entire colored population of the State. The men who voted at Xenia Township who were students at Wilberforce were but 28 in number of all the students in that great university. They were men advanced in years, far beyond the age of majority. Their average age when they voted was 29 years—running all the way from 23 to 35 years. They had lived at Wilberforce, respectively, from one to five years. They were all self-supporting, and had been engaged in useful, productive occupations, such as laboring, teaching, preaching, etc. At the time of the election, October 10, 1882, twelve of these men were licensed preachers, with settled charges at Wilberforce and at the neighboring colored settlements. Most of their parents were dead. All of them had for years been away from the early family hearthstone and from under the parental roof. One of them, a type of them all in most of the facts which distinguish him, was born a slave. He left his home in North Carolina in 1869, without education and poor in purse. He labored on the railroads in Tennessee and Kentucky; lived at Evansville and Terre Haute; voting at both places, and in 1876 settled in the town of Wilberforce, where he has ever since lived and where he has voted at every election for five years prior to October 10, 1882, except at one election, when he had charge of a church in another county in Ohio. Eighteen of these voters had voted at previous elections in Xenia

Township; five of them at eight previous elections at least; eight of them at three or four previous elections; five of them at two previous elections.

A brief statement of each case and the testimony supporting the same will be found in Appendix H to minority report. The object of the law is not to disfranchise, but to enfranchise. There was no place in the world where these men could lawfully vote on October 10, 1982, except at Xenia Township, where they did vote and where many of them had been voting for years. Their abandonment of all former houses was complete and their adoption of Xenia Township manifest.

THE THEOLOGICAL STUDENTS.

Of all the students at the theological seminary, Xenia, twelve only voted for contestee. They, too, were men advanced in years far beyond the age of majority, their average at the time of election being over 26 years. They had all completed their academic education, had been attached to presbyteries, and had become in fact a part of the clergy of their church. They were in nearly every instance poor men, who had been compelled since their majority to become teachers or engage in other industrial pursuits for their own sustenance and support. Of those who were interrogated on that point two had voted there at five previous elections; five had voted there at three previous elections; one had voted there at one previous election. Their uncontradicted testimony is that they had abandoned their former homes and had adopted Xenia as their residence, without any present intention of removing therefrom. They, like all preachers, were subject to go where the exigencies of their profession might call them. It has always been held in Ohio that a minister of the Gospel is entitled to vote where he has resided for the statutory period, notwithstanding he may move the next year to take another charge. Much stress is laid upon the fact that these students signed a college register, giving their addresses and the presbyteries to which they were credited. All the witnesses testify that the address merely indicates where the student came from, and in no sense indicates residence, and that the giving the name of the presbytery is merely for the information of the officers of the college, that they may know what body has jurisdiction over his spiritual walk and conduct. Rev. J. G. Corson, the secretary of the board of managers, explains the whole matter. He says:

"The name of the presbytery under the care of which the student is does not indicate anything in regard to his residence, as it is in a great measure a matter of convenience, as, for example, a number of the students coming from distant parts of the country put themselves under the care of Xenia presbytery, in whose bounds the seminary is located, because more convenient for being examined by and delivering discourses before such presbytery."

Much stress is also laid on the fact that several of these men had completed their course at the time they were examined as witnesses. Some of them had appointments to be examined and to deliver their trial discourses before their presbyteries. The law required that they should have five days' previous notice of their examination. They simply asked, in order to avoid delay, that they might be examined at once and go to their presbyteries for that purpose alone. Where they would thereafter make their homes or whether they would ever abandon their homes in Xenia were matters for the future, to be determined by the exigencies of their lives, just as the place of residence is determined in the case of every other voter.

A brief statement of the facts in each case will be found in Appendix H to this report.

THE NORMAL UNIVERSITY.

Contestant claims that 36 students at the National Normal University at Lebanon voted illegally for contestee. These men were mechanics and farmers and teachers; principally the latter. Their ages are from 21 to 31 years. Most of them were advanced far beyond the age of majority; all had been severed from their parental homes and had been out in the world fighting their own battles for years.

At the time of the election the witnesses put the number of students at from 450 to 1,300. The best informed persons say that there were about 300 adult males there at that time. Out of these 300, 36 only voted for contestee—about 1 in 10.

These students did not, as has been claimed, vote in a body, nor as a class. Only such as were qualified by age, residence, and intention to reside there presumed to vote, and this after careful discussion of the requirements for voting. A large number of them had been voting for a number of elections

previous to October 10, 1882. Seven had voted at three previous elections; 8 had voted at one or more previous elections.

The university is not a preparatory school for youth, but it is a school for teachers. It is the headquarters of teachers in Ohio. Many teachers make Lebanon their home because the university is there. From there they go out to teach or follow other occupations as they have opportunity.

Certain other questions as to the qualifications of voters were disposed of:

(1) As to the votes of certain idiots, the majority say:

We find that three hopeless idiots, from the infirmary in Greene County, voted for contestee. They are Berry Valentine, Samuel Scott, and William Morris, and we deduct these votes from contestee's poll. He attacks a number of persons as idiots, lunatics, and imbeciles and claims that they voted for contestant. We find the mental condition of A. M. Apple to be far above the average of voters. We find the following persons to be of fair intellect, to wit: George Robb, Charles Beebe, Warren Lytle, John Killeen, Harlan Duke, Aaron Cosad, William Dill, and William Hawkins. We find the following to be persons of small intelligence, but not idiots, to wit: Noah Potts, David Norris, and Dennis Morris. We might add that there is no testimony to show how some of them voted, nor any to show how the following persons voted, they being very weak-minded, to wit: John H. Nichols, John Kitchel, John Fleck, and Thomas Reiley. The case of Dennis Morris, a man over 80 years of age, merits special notice. He was not a weak-minded person in his prime. His right to vote in his old age is preserved to him by the supreme court of Ohio, which held, in the case of Sinks *v.* Reese (19 Ohio Statutes, 307), that "the vote of a man otherwise qualified, who is neither a lunatic nor an idiot, but whose faculties are simply greatly enfeebled by age, ought not to be rejected."

The minority say:

Idiots and insane persons are excluded from the elective franchise in Ohio by the constitution. By the statute an imbecile is defined to be an idiot, so that the disqualification extends to imbeciles. There are 6 persons of this class who voted for contestant. Two of them have been adjudged by the courts of competent jurisdiction to be idiots; 4 to be insane, and 2 to be imbeciles, and each and all of these 6 were under guardianship, both of their persons and estates, and, by the law of Ohio, their guardians are ex officio guardians of their minor children. They are not competent to exercise any civil or political right.

Upon a careful examination of the testimony in these cases and of the records of the courts, wherein 6 of them have been adjudged insane, idiots, and imbeciles, it clearly appears that the following persons come within the provisions of the constitution and are disqualified to vote; that they voted for contestant; that their 6 votes ought to be deducted from contestant's poll and that number added to contestee', majority: Thomas Reiley, John Fleck, John Killeen, Noah Potts, William Hawkins, Charles Beebe, Warren Lytle, John H. Nichols. A brief statement of the facts in these cases, with testimony bearing on the same, will be found in "Appendix B" to this report.

(2) As to the votes of certain paupers, the majority say:

Certain inmates of the Butler County Infirmary voted. They had a right to do so, as there is no pretense that they voted through any intimidation. There is no testimony to show how any of them voted. None were called as witnesses. Their rights are guaranteed by the supreme court of Ohio, which held, in Sturgeon *v.* Korte (34 Ohio Statutes, 525), that—

"(1) An inmate of a county infirmary who has adopted the township in which the infirmary is situated as his place of residence, having no family elsewhere, and who possesses the other qualifications required by law, is entitled to vote in the township in which said infirmary is situated.

"(2) Such inmate is not under such legal restraint as to incapacitate him from adopting the township in which the infirmary is situated as his place of residence."

We can see no grounds for the claim that 17 votes should be deducted from contestant on this account.

The minority say:

Thirty-one inmates voted, Nos. 9, 13, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 70, 71, 93, 126, 215, in the poll book; they were, with a few exceptions, taken to the polls in the infirmary wagon; all but five were admitted from other townships than Fairfield, wherein the infirmary is situated. One, George Leonard, came from Lemon Township, October 4, 1882, only six days prior to the election. His vote was illegal for that reason alone. The legal residence of a pauper is the place from which he entered the almshouse. (McCrary on Elections, 42; Paine *v.* Town of Durham, 29 Ill., 125; Freeport *v.* Supervisors, 41 Ill., 41.) The same rule is adhered to in Sturgeon *v.* Korte (34 Ohio, 525–537).

The court found, however, "that while such inmates they severally did adopt said Falls Township (where the infirmary was situated) as their permanent residence, and by such act of adoption and selection and not otherwise did change their residence." It was claimed that an inmate was under such restraint as to be incapacitated "from forming a purpose or intent to change his residence."

The court was in doubt even on this question, and said: "While the question is not free from doubt, we incline to think he is not" [incapacitated].

Contestant did not attempt to show that either of these inmates from other townships did even "select or adopt" Fairfield Township (where the infirmary is situated) as their residence.

The law conclusively fixes their residence at the places from which they were received into the infirmary. Here, then, are 26 illegal votes.

(3) The minority, claiming that the votes of the paupers should be deducted, propose that it be done on evidence as follows:

Mr. Ross, the Democratic superintendent, swears to giving them tickets—20 Democratic and 3 Republican. Taking the view most favorable to contestant, we will suppose that he gave 5 Democratic tickets to the five inmates who lived in Fairfield Township; that would leave 15 Democratic and 3 Republican tickets voted by nonresident inmates, leaving it in doubt as to how the eight other nonresident inmates voted; charge the 15 Democratic ballots to contestant, and the 3 Republican ballots to contestee, and divide the eight remaining votes between contestant and contestee according to the vote received by each in the precinct, and we find contestant's net loss on the infirmary vote to be 17 votes. Upon every principle of law these 17 votes must be deducted from contestant's poll, and that number be added to contestee's majority in the admitted case.

The majority in the debate [1] vigorously combated the proposition that the distribution of the tickets under the conditions stated was evidence sufficient to determine how the persons voted.

(4) The majority report thus decides a question of domicile:

John Estel was attacked because he voted in a precinct where he lived apart from his wife. The testimony is that he had been separated from her for many years.

The rule of law, that a man whose wife has abandoned him can and does acquire a domicile other than hers, is too well known to be elaborately cited. In addition to this, nobody pretends to say that Estel voted for contestant.

(5) Another question of domicile is thus disposed of by the majority:

Michael O'Gara and P. J. Cook were journeymen mechanics; they belong to that class of laborers who are always recognized as having a home in the precinct where they have lived the statutory time. As far back as 1833, in the case of Letcher *v.* Moore, the House decided to admit "the votes of journeymen mechanics, and all other laborers having no fixed and settled residence, but remaining for the time where they could get employment."

(6) A question relating to voting out of the precinct was determined:

Newton Long and G. W. Turner were also attacked by contestee, and their cases are peculiar. The townships of Madison, in Butler County, and Stonelick, in Clermont County, are each divided into two

[1] Record, pp. 5406, 5407.

voting precincts. The law requires the three trustees of the township to act as judges of the election, but provides for dividing them between the precincts when there is more than one. The statute reads:

"In every township containing more than one election precinct each trustee shall act as judge in the precinct in which he resides unless they all reside in the same precinct, when two only can so act therein, and the other trustee shall act as judge in any other precinct."

In Stonelick Township, G. W. Turner, being a judge at the precinct at which he did not live, went over into his own precinct and voted. In Madison Township, however, Newton Long was obliged to sit all day as a judge in the precinct in which he did not live, and voted there. We think there is no provision authorizing him to vote outside of the precinct in which he lived, and that this vote should be deducted from contestant. It is clear, however, that Turner's vote was cast at the right place.

992. The election case of Campbell v. Morey, continued.

As to what constitutes the determination of result on which the serving of a notice of contest is predicated.

The admission to naturalization being the function of a judge, a performance of this function by a clerk is void.

The exact size of the ballot is immaterial.

As to ballots in language other than the English.

The House deducted an excess of ballots proportionately, although the State law did not justify bringing them into the count.

A ruling that the law prohibiting a distinguishing mark on a ballot did not apply to pencilings; by the voter himself.

Ballots spelled wrong or lacking the initials were counted.

The writing of the name of a candidate for a State office beneath the name of the candidate for Congress was held not to render uncertain the intent of the voter.

The House corrected the ballot of a voter shown to have been deceived into voting otherwise than he intended.

Certain other questions were discussed, as follows:

(*a*) As to notice of contest, the majority held:

Contestant served notice of contest on the 11th of January, 1883. The law is that—

"Within thirty days after the result of the election in a district has been determined by the proper authority the contestant must serve the returned Member with notice of contest. * * * It is no doubt true that for the purpose of fixing the time when the thirty days begins to run there must be not only a decision but a promulgation of the result."

The decision and promulgation of the result were, in our opinion, both made December 14, 1882, which is less than thirty days before notice was served. Such is the date of the official record of that decision. Contestee having disputed the date of the finding, signing, and promulgating of the foregoing decision, contestant called witnesses to sustain the accuracy of the record, but no witness was called to impeach it. George K. Nash, then attorney-general, and now a judge in Ohio, was a member of that canvassing board, and testified as follows:

"Upon the afternoon of the 14th the court adjourned until the 2d of January, 1883, without passing upon the motion in the mandamus proceeding. When the action of the court was made known to the board it signed the abstract and certificate now on file in the office of the secretary of state. This signing, as I have before indicated, took place on the 14th of December, 1882."

Alexis Cope, chief clerk to the secretary of state, was called, and testified as follows:

"Q. Third. State who made out or prepared the abstract and finding made by the State canvassing board of Ohio in December, 1882, of the election held October 10, 1882, and when the same was so made out and prepared.—A. I made out the abstract and findings and certificate attached thereto under the direction of the board. The abstract, I think, was completed on the 7th; the certificate

of the findings, according to my recollection, in the form in which it now appears, was not completed until the 14th, the day on which I recollect it was signed."

There is nothing whatever in law or fact to justify contestee's allegation that notice of contest was not served within the required time.

(*b*) Contestant denied the sufficiency of certain naturalization papers on the ground that they were not issued by the judge of the probate court, but by the deputy clerk thereof. The majority say:

The function of deciding whether an alien has proven his claim to be admitted to citizenship must be exercised by the judge only, and if exercised by any other officer of the court the judgment rendered is void; but the judicial function extends no further. The execution of the certificate, the swearing of witnesses, and even the examination of witnesses, if in the presence of the judge who is hearing and deciding the cause, may all be done by the clerk, and are merely ministerial duties. The leading case is Re Cristern et al. (43 Superior Court, New York, 523), in which it is held that when the judge delivers the examination papers to the clerk the judicial function is completed, and the subsequent acts, such as issuing and filing papers, are ministerial only, the allowance is the judgment itself; and that no journal record need be made nor entry in a book.

The minority agree as to the law, but disagree as to facts:

In Ohio the probate court only is provided with records for the admission of aliens to citizenship. The probate judge is ex officio his own clerk and is entitled to a deputy clerk. It is further admitted by contestant in his brief that the admitting of an alien to citizenship is a judicial function, which can only be performed by the judge, and that papers granted on a hearing by the deputy clerk are void.

(*c*) As to the sufficiency of a certain ballot the majority rules:

In the Fifth Ward of Hamilton a written ballot, in the Spanish language, of the uniform width of 2⅞ inches, was voted for contestee. The law of Ohio is that a ballot shall be "not more than two and one-half nor less than two and three-eighths inches wide." The exact size of a ballot has been held to be immaterial. The law is laid down thus in McCrary on Elections (p. 347):

"The supreme court of California has very recently had occasion to consider the force and effect of a statute regulating the size and form of ballots, the kind of paper to be used, the kind of type to be used in printing them, etc. The court held, and we think upon the soundest reason, that as to those things over which the voter has control the law is mandatory, and that as to such things as are not under his control it should be held to be directory only."

We consider this ballot to have been properly counted.

The minority say:

Contestant claims that there was a ballot in the Spanish language, which was a little more than 2⅕ inches wide, was cast for contestee in the Third Ward, and that it is illegal. We submit that this is a substantial compliance with the law of Ohio, and as such the ballot is legal. If it is not, then a large number of German ballots for contestant in the same ward of unlawful width are in the record and must be deducted from his poll.

(*d*) The majority rules against the contestant on a question of the width of certain ballots:

Contestant claims that 49 ballots which were voted for contestee in Sugar Creek precinct (and which are attached to the manuscript testimony in this case) are unlawful under the laws of Ohio. They were cut off close to the name of a candidate on said ticket, and no space was left to scratch or alter the ticket, as provided in the following section of the statute:

"SEC. 2948. All ballots shall be written on plain white paper, or printed with black ink with a space of not less than one-fifth of an inch between each name, * * * and it shall be unlawful for any person to print, for distribution at the polls, or distribute to any elector, or vote any ballot printed or written contrary to the provisions hereof; but this section shall not be considered to prohibit the erasure, correction, or insertion of any name, by pencil mark, or with ink, upon the face of the printed ballot."

The object of leaving a blank space of the fifth part of an inch was to provide for changing the ballot,

as named in the latter part of the section, and it is claimed that any printed ballot without such space can not be lawfully voted or counted. Such is the claim made by contestant in his brief, but as a mere legal proposition only. In his oral argument he disclaimed any desire to have these ballots deducted from contestee's poll. He puts this disclaimer on the ground that, while in his judgment the ballots are unlawful, yet he does not desire to disfranchise any voter on account of a technicality over which the voter himself had no control, We agree with him that, whatever may be the effect of this on other candidates on said ballots, the question involved does not properly arise here.

(*e*) A question arose as to an excess of ballots, the majority saying:

The law of Ohio provides for tallying only as many ballots as there are names on the poll books, leaving the residue, if any, to be preserved but not counted. The Revised Statutes, section 2957, reads thus:

"SEC. 2957. Any ballots in the box in excess of the number of names on the poll books, together with the ballots strung as aforesaid, shall be deposited in the box."

The design is to preserve but not to string or tally the excessive ballots. However, the judges did string and count them in several precincts, as follows:

Precinct.	Number.
Oxford, Butler County	2
North Madison, Butler County	1
Fourth Ward, Xenia, Greene County	4
Fifth Ward, Xenia, Greene County	1
Franklin Warren County	3
Total	11

Desiring to dispose of this excess equitably, the following table is prepared in conformity to the rule laid down in the People *against* Cicott (16 Mich., 283), where the court held that "the adoption of the principle of allotment is the most sensible and practical measure which could be devised," and in the syllabus they lay down the rule of allotment as follows:

"When ballots are found in any ward or township in excess of the names on the poll book, and the inspectors fail to draw them out, as required by section 62, Comp. L, they should, on the trial of the cause, be so apportioned that each candidate shall have deducted a share of them, proportioned according to the whole number of votes in his favor, the probability being that the legal and illegal votes have been cast ratably for the several candidates."

The majority therefore found a net loss of 3 votes for contestee.

The minority contend that the Michigan authority was predicated on an entirely different statute. In Michigan it was the duty of the election officers before proceeding to canvass the votes, if the number of ballots exceeded the number of names on the poll lists, to draw out and destroy unopened a number of ballots equal to the excess. But if the election officers failed to destroy, such excessive ballots, and counted and returned them, their loss on a contest must be determined by allotment, because the ballots which would have been drawn out and destroyed could not be identified. There was no such difficulty about the Ohio law. The ballots last found in the box in excess of the names on the poll lists were by law deemed fraudulent, and they could always be identified whether they were counted and strung or not.

(*f*) As to certain marked ballots: The law of Ohio provided that ballots should be "without any mark or device by which one ticket may be distinguished from another, except the words at the head of each."

The majority say:

The object of this statute was to guard against frauds upon the voter.

And therefore the majority hold that ballots pencil marked by the voters themselves, who voted them, after being printed and distributed according to statutory requirement, did not fall within the requirements of the statute.

The minority contended that the object of this statute was to preserve the secrecy of the ballot, and that the ballots in question should be rejected because it was shown that the voters marked them to let their employers or party friends know how they voted.

(*g*) One ballot was found with sitting Member's name written "W. R. Moorey" and another simply "Morey." Also, there were other ballots where the candidates' names were spelled wrong. All these were counted.

On several ballots a name similar to the name of a candidate for sheriff was written beneath the name of the candidate for Representative to Congress. The majority say:

> We think these ballots ought not to be disturbed for the reason that William McLain was a candidate for sheriff at said election, and the voters, when writing the names on said ballots, merely erred in putting some in the wrong place thereon. There is no doubt as to the intention of the voters to be gathered by inspection of the ballots. We follow the rule laid down by contestee himself in these words:
>
> "The intention of the voter ought to prevail whenever it can be ascertained by an inspection of the ballot, and if the ballot is ambiguous the intention of the voter may be shown.

(*h*) As to a deceived voter the majority hold:

> Robert Wilson voted for contestee in Ross precinct under the supposition that he was voting for contestant, having been deceived by a Republican who gave him the ballot. His vote should be deducted from the poll of contestee and added to that of contestant.

In accordance with their conclusions of law, and also certain conclusions as to questions of fact, the majority of the committee found for contestant a majority of 44 votes, and reported resolutions declaring him entitled to the seat.

The report was debated at length on June 19 and 20,[1] and on the latter day the proposition of the minority, confirming the title of sitting Member was disagreed to, yeas 62, nays 139.

Then the resolutions reported by the majority were agreed to without division.

Mr. Campbell then appeared and took the oath.

993. The Virginia election case of Massey v. Wise, in the Forty-eighth Congress.

Where a capitation tax is a prerequisite to the right to vote, the collection of such tax by unauthorized agents should not invalidate the vote.

A Member who was appointed to assist a United States attorney in certain cases was held not to be disqualified as a Member of the House.

Discussion as to what constitutes "a person holding office under the United States," within the meaning of the Constitution.

On June 30, 1884,[2] Mr. Mortimer F. Elliott, of Pennsylvania, from the Committee on Elections, submitted the report of the majority of the committee in the Virginia case of Massey *v.* Wise.

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[1] Record, pp. 5371, 5404–5426; Journal, pp. 1486, 1497, 1499.

[2] First session Forty-eighth Congress, House Report No. 2024; Mobley, p. 365.

The sitting Member had been returned by a majority of 5,808 votes; but contestant claimed that sitting Member received many illegal votes, and also that he was disqualified.

(1) As to the illegal votes:

The law of Virginia provided for the payment of a capitation tax of $1 prior to the day of election as a prerequisite to the right of the citizen otherwise qualified to vote. Many thousands of citizens failed to pay the capitation tax to the officers first intrusted with the collection of the same.

A short time prior to the election of 1882 the auditor of public accounts appointed special collectors, who issued capitation-tax receipts to the number of 15,000 or 16,000.

The majority report thus concludes as to this branch of the question:

It is impossible for the committee to state who or how many persons voted on the tax receipts, as the evidence utterly fails to show these facts. We are satisfied, however, that several thousand votes were cast upon these receipts, and probably a greater number than contestee's returned majority.

We are of opinion that the votes cast on receipts issued by the tax collectors appointed by the auditor of public accounts, which were paid for by the voters or other persons for them prior to the day of election, were legal votes, and were properly received and counted by the election officers.

It may be doubted whether the auditor of public accounts had authority to appoint these collectors under section 29 of the revenue laws of Virginia. It was his duty, however, to supervise the collection of the delinquent personal and capitation taxes certified to him by the respective county clerks, and under the law to place them in the hands of one or more sheriffs, sergeants, constables, or collectors for such purpose; and if, as it is contended by the contestant, he was not authorized to select private persons as collectors, still we think such persons so appointed to receive the delinquent taxes were acting under color of office, and the taxpayers were not bound, at the peril of losing their votes, to know whether the auditor had exceeded his powers in appointing them. The purpose of the law was to compel the payment of the tax, and that was accomplished and the money reached the treasury through these collectors, the accredited agents of the auditor, and to hold that the citizens who endeavored to qualify themselves to vote by paying the taxes assessed against them to the persons who were held out to them as proper and lawful collectors by the head of the revenue department of the State would be establishing a rule manifestly unjust.

The minority views, presented by Mr. Henry G. Turner, of Georgia, say on this point:

We do not believe that the section of the State statute (sec. 29) under which these appointments were made (and cited in the report of the majority) created such officers or authorized their appointment. If collectors of arrears of taxes had been appointed under section 34 of the same statute, with the approval of the governor, there would have been good reason to think that the auditor could have placed the lists of delinquent capitation taxes in their hands for collection.

But we concede that the tax system of Virginia, taken as a whole, is somewhat obscure, and we will not under the circumstances reverse the decision of that department of the State government which is charged with its administration. The practice of making these special appointments seems to have been inaugurated by the contestant while auditor of public accounts of the State; and while we do not think that the principle of estoppel applies, we admit that this circumstance would greatly embarrass a decision on this point in favor of contestant.

There can be no doubt that many capitation tax receipts were issued in blank, that many were issued on the day of election, and that many were issued in gross and then distributed. And it is claimed, with much force, that any payment of taxes for delinquent voters without their authority previously given, especially when made by political agencies, approximates bribery. But we can not say that the evidence is clear that a sufficient number of votes, illegal for any cause, were cast for the sitting Member to justify the rejection of his majority. We therefore forbear to pursue these painful details.

(2) As to alleged disqualification, the majority report says:

It is claimed by the counsel for the contestant that if the contestee was duly elected that he has since disqualified himself from holding the office of Representative in Congress.

Article I, section 6, last clause, Constitution of the United States, is as follows:

"And no person holding an office under the United States shall be a Member of either House during his continuance in office."

It is claimed by contestant that the contestee, after his term of office commenced, we appointed by the Attorney-General to an office under the United States, which he continued to hold until after he was sworn as a Member of the House.

There is nothing in the record to show the facts alleged, and all the committee had before them was the admissions made by the contestee during the argument of the case. He stated that on the 5th day of March, 1883, he was employed by the Hon. Benjamin Harris Brewster, Attorney-General of the United States, to assist the United States district attorney of Virginia in the trial of certain enumerated cases then pending in the United States district court of Virginia; that the cases had not all been disposed of at the time this case was argued before the committee, and that he expected to assist in the trial of the case then undisposed of when they should come on to be heard. The contestee, by his agreement with the Attorney-General, was to receive for his services as special counsel in said cases not less than $500 nor more than $1,000, as the Attorney-General should afterwards determine.

Under these facts, admitted by the contestee, was the contestee appointed to an office under the United States, and did he hold such office at the time he took his seat as a Member of this House?

The contestee was employed by the Attorney-General under section 363 of the Revised Statutes, which is as follows:

"The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain in the name of the United States such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorney and counselor the amounts of compensation, and shall have supervision of their conduct and proceedings."

What authority is given the Attorney-General by the section quoted? We think the section so plain that it construes itself. He is authorized, "Whenever in his opinion the public interests require it, to employ and retain," attorneys and counselors at law on behalf of the United States to assist the regular law officers of the Government in the trial of particular cases. The duties of an attorney so employed depend upon the contract made between the Attorney-General and himself, and are not defined by law. He is retained to try a particular cause, and when that service is performed his contract is at an end.

He has no right to perform the general duties of a district attorney, but is confined to such services as the Attorney-General has stipulated for in the contract of hiring. If it had been the purpose of Congress to authorize the Attorney-General to appoint the attorney to an office under the United States, would the words "retain" and "employ" I have been used? Would not the word "appoint" have been used instead? If an attorney employed by the Attorney-General to assist the district attorney in the trial of a single case is an officer of the Government, what is his official name? Is he to be known during the trial of that cause as assistant district attorney and as ex-assistant as soon as the verdict is rendered? Does the office as well as the officer die with the cause the attorney was retained and employed to try? Must it not be a singular office when the compensation to be received by the appointee depends upon a bargain to be made between the Attorney-General and the officer?

The report refers to the Pennsylvania case of Bache *v.* Bums (17 S. and Rawle, 234) and to the decisions of the United States courts in the cases of United States *v.* Hartwell (6 Wallace, 385) and United States *v.* Germaine (99 U. S. Reports, 508).

The last-quoted case was that wherein a United States pension examining surgeon, paid by fees, was held not to be an officer of the United States, because "the duties are not continuing and permanent, and they are occasional and intermittent."

Therefore the majority concluded that sitting Member was not disqualified, and recommended a resolution confirming his title to the seat.

The minority views took issue on this point:

But we feel it to be our duty to inform the House that the sitting Member holds another position which, in our opinion, forfeits his right to a seat. The last clause of the sixth section of the first article of the Constitution is as follows:

"And no person holding any office under the United States shall be a member of either House during his continuance in office."

The precise position of the sitting Member is defined in the two sections of the Revised Statutes of the United States following:

"SEC. 363. The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain in the name of the United States such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorney and counselor the amount of compensation, and shall have supervision of their conduct and proceedings.

"SEC. 366. Every attorney or counselor who is specially retained under the authority of the Department of Justice to assist in the trial of any cause in which the Government is interested shall receive a commission from the head of such Department as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require, and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law."

Some strew is laid on the words "employ and retain" in the first section cited; but it is respectfully submitted that those words mean no more than the word "appoint" would imply in the same connection. At any rate, they are to be construed in pari materia with the subsequent section. Attorneys or counselors at law occupying the position of Mr. Wise are designated "special assistants to the district attorneys;" they receive a commission (the position is called an "appointment" in the statute); they are required to take the oath prescribed for the district attorneys, which is an oath of office, strictly so called; they are subject to the supervision of the Attorney-General in their conduct and proceeding; they are to assist the district attorneys in the discharge of their duties; they are subject to all the liabilities imposed upon the district attorneys by law, and they are paid out of the Treasury of the United States. This enumeration seems to exhaust the highest badges of office known to us. The power of the Attorney-General to fix the compensation of these special assistants to the district attorneys can not affect the question, except to indicate the possibility of greater subserviency on that account.

The constitutional provision before cited was manifestly intended to exclude from Congress all persons under the official influence of the Executive. It is public policy, solemnly declared in the fundamental law. It is our duty firmly to execute the Constitution according to its plain intent and spirit if we would preserve the independence of Congress.

The cases decided by the courts, while not based on the precise question here raised, confirm by clear analogy, the view we have presented.

We therefore submit the following resolution:

Resolved, That John S. Wise, one of the Members of this House, having continued to hold the office of special assistant to the district attorney of the United States for the eastern district of Virginia after he was qualified as a Member, has thereby forfeited his right to his seat, and that said seat be declared vacant.

The report in this case does not seem to have ever been acted on by the House. Mr. Wise retained his seat, of course.

994. The election case of Botkin v. Maginnis, from Montana Territory, in the Forty-eighth Congress.

No wrong or injury being shown, polling places established without entire adherence to the law were approved.

Instance wherein a law providing method of establishing polling places was construed as directory rather than mandatory.

The mere fact that a voter is a soldier does not necessarily imply disqualification.

On July 5, 1884,[1] Mr. A. A. Ranney, of Massachusetts, from the Committee on Elections, submitted the report of the committee in the case of Botkin *v.* Maginnis, from Montana Territory.

Mr. Maginnis had been returned by an official majority of 1,484 votes. Contestant assailed this majority on several grounds, some involving issues of fact and others of law. The committee, in settling the question, passed on the following:

(1) As to the legality of certain polling places:

The committee concludes that the polling places established in the counties of Custer, Dawson, and Missoula were without authority of law. We regard the statute prescribing that precincts shall be established at the regular meeting immediately preceding the general election to be directory rather than mandatory in its character. And following the familiar rule in such cases, we do not hesitate to say that their designation at another time, in the interest of a free and convenient ballot, was such an exercise of power as the commissioners might well indulge in. However this may be, the committee do not find that there was any wrong or injury done, or that there was any fraud in the matter.

The statute referred to is as follows:

SEC. 5. It shall be the duty of the commissioners of the several counties, at their regular session immediately preceding said general election, to appoint three discreet and capable persons possessing the qualifications of electors to act as judges of election in each township or precinct; and said board shall designate one or more of said judges, whose duty it shall be to post up or cause to be posted up in each precinct or township, notices of election in the manner hereinafter provided. Said board of commissioners shall also set off and establish at said meeting townships or precincts when the same my be necessary. And the clerk of said board shall make out and forward by mail, immediately after the appointment of said judges, a notice thereof in writing directed to each of said judges so appointed. In case there shall be no post-office in any one or more of the townships or precincts in any county, then in that event the clerk shall forward notices of such appointment by mail to the post-office nearest to such precinct or township, directed to the judges as aforesaid. If in any of the townships or precincts any of said judges refuse or neglect to serve, the voters of such township or precinct may elect a judge or judges to fill vacancies on the morning of the election to serve at such election.

* * * * * * *

SEC. 14. It shall be lawful for any elector to vote for Delegate to Congress at any place of holding elections in this Territory; and for members of the legislative assembly and all other officers at any place for holding elections within the particular limits for which such member of the legislative assembly and such other officers are to be elected: *Provided,* That an elector qualified to vote for part and not all of the officers to be chosen at any election shall vote an open ballot, and the judges may determine the legality of such vote."

(2) As to the legality of the votes of certain soldiers:

There is some proof tending to show that "soldiers" voted at this election. In the opinion of witnesses these "soldiers" were from 40 to 150 in number. We do not feel that we are justified in presuming that because the contestant and his witnesses have seen fit to designate these persons as soldiers that they are therefore necessarily incompetent as electors.

In his description of them, and of their qualifications as electors, contestant has contented himself with saying they were soldiers. There is no evidence that they were not residents of the Territory; that they had not been residents of the Territory long prior to any enlistment in the United States service, if it is claimed that they were in the United States service—a proposition by no means clear in the light of the proofs. But if it is admitted that they were enlisted men of the United States Army, and are therefore incompetent as electors, the committee are still left in doubt as to how and for whom these incompetent electors cast their ballots.

[1] First session Forty-eighth Congress, House Report No. 2138; Mobley, p. 377.

In conclusion the committee reported this resolution:

Resolved, That Martin Maginnis was duly elected as a Delegate from the Territory of Montana in the Forty-eighth Congress, and is entitled to his seat as such Delegate.

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

995. The Alabama election case of Craig v. Shelley, in the Forty-eighth Congress.

Being satisfied by extrinsic evidence that returns rejected by State canvassers for informalities were correct as to the result, the House counted them.

Instance wherein the House unseated a member of the majority party.

On July 5, 1884,[2] Mr. L. H. Davis, of Missouri, from the Committee on Elections, submitted the report of that committee in the Alabama case of Craig *v.* Shelley.

The sitting Member had been returned by an official majority of 2,724 votes over contestant; but this result had been reached by the action of the returning boards in throwing out townships in the district which had returned a total of votes sufficient to change the result. The committee, after reviewing the law of Alabama in regard to elections, say:

The supreme court of Alabama has decided that it is the election that entitles the party to office and if one is legally elected by receiving a majority of legal votes his right is not impaired by any omission or negligence of the managers subsequent to the election. (State, ex rel. Spence, *v.* The Judge of the Ninth Judicial Circuit, 13 Ala. Rep., 805.)

It has further been held that a mistake by the managers of the election in counting the votes and declaring the result will not vitiate the election. Such a mistake may and should be corrected. The person receiving the highest number of votes becomes entitled to the office. (State, ex rel. Thomas, *v.* The Judge of the Circuit Court, 9 Ala. Rep., 338.)

The precincts rejected by the county boards of supervisors were rejected for sundry reasons. The rejection of the precincts in Dallas County, according to the evidence of James S. Diggs, an attorney at law, of Selma, was for the following reasons:

"The voting precincts in Dallas County are numbered from 1 to 36, but by consolidation of some of the beats there are really, I think, but 30. I was present at the count of votes of Dallas County made by the board of supervisors, which board is composed of the probate judge, the clerk of the circuit court, and the sheriff of said county. The board was all present at said count. I think there were either ballot boxes or returns for 23 or 24 of said precincts before said board. I think they only counted the votes from the following precincts, viz: Woodlawn, Valley Creek, Cahaba City, Marion Junction, one of the Lexington boxes, one of the Summerfield boxes, Burnsville. I do not now recollect of any other boxes that were counted. There were 14 or 15 boxes that were rejected or that they refused to count. These boxes are as follows: Plantersville, because the poll list was not signed and there was no statement of the vote in the box; Harrals Crossroads, because there was nothing in the box but a lot of loose ballots; Martins, because it was said that the polls were not opened until after 9 o'clock a.m.; Orrville, because there was no statement of the vote in the box; River, because the names of the inspectors signed to the returns appeared to be in the handwriting of one person; Pine Flat, because the poll list was not signed; Union, because the returns were in an envelope, directed to J.W. Dimmick, and they said they had no authority to open it; Chelatchie, because the poll list was not signed; Browers, because the statement of the vote was not signed by the inspectors; Smyleys, because there was an irregularity in the poll list, and also because the box, which was nailed up and sealed, did not have a lock on it; the box was so securely nailed that it had to be pried open; Elm Bluff, because the statement of the vote was not signed by the inspectors; Bykens, because the poll list was not signed, and

[1] Journal, p. 1701.

[2] First session Forty-eighth Congress, House Report No. 2137; Mobley, p. 373.

because the box, though securely fastened and sealed, had no lock upon it; Mitchells, because the election was not held in the place in which they had been accustomed to hold the election, and because there was some evidence the tickets were numbered before the board."

The precincts rejected in the other counties were for reasons very similar to those in Dallas.

The committee has counted no rejected precinct, except where the evidence of contestant clearly shows that the election was honestly and fairly held. It does not criticise the action of the board of supervisors in the several counties in rejecting these precincts. They were rejected for technical reasons in the main. The committee, holding that mistakes and errors of the election officers in declaring the result and making the returns will not vitiate the election, have corrected or rather overlooked these errors and mistakes when satisfied by extrinsic evidence that the return made, although possibly informal, was correct as to the result. In doing this it has not only followed the precedents established by the House of Representatives, but the decisions of the supreme court of Alabama.

So the committee reported a resolution declaring Mr. Shelley not elected and Mr. Craig entitled to the seat.

After brief debate and without division the resolutions were agreed to on January 8, 1885,[1] and Mr. Craig appeared and took the oath.

Mr. Shelley was a member of the majority party in the House.

996. The Missouri election case of McLean *v.* Broadhead, in the Forty-eighth Congress.

May a registry law establish a qualification as to residence within a ward which the State constitution does not establish?

Should the House defer to a decision of a State court applicable to the case in issue as to its reasoning, but only analagous as to facts?

On February 18, 1885,[2] Mr. Mortimer F. Elliott, of Pennsylvania, from the Committee on Elections, presented the report of the majority of the committee in the Missouri case of McLean *v.* **Broadhead. The sitting, Member had been returned by a majority of 102 votes.**

The investigation of the contest involved the settlement of several questions of fact, and the following question of law:

The only other claim made by the contestant which can possibly affect the result in this case is that 50 legal voters who offered their ballots at their proper polling places, which ballots contained contestant's name for Congress, were denied the privilege of voting because their names were not found on the lists furnished the judges and clerks in the respective precincts; their names having been illegally and improperly stricken off the registration list.

We have stated the position of the contestant upon this question in almost the exact language of his brief.

The constitution of Missouri, adopted in 1875, article 8, section 5, provides as follows:

"The general assembly shall provide by law for the registration of all voters in cities and counties having over 100,000 inhabitants, and may provide for such registration in cities having a population exceeding 25,000 and not exceeding 100,000, but not otherwise."

The city of St. Louis, in which the Ninth Congressional district is located, had, at the time of the adoption of the constitution of 1875, a population of more than 100,000.

In 1881 the general assembly of Missouri passed a registry law, the first two sections of which are as follows:

"SECTION 1. There shall be a registration of all the qualified voters in cities having a population of 100,000 inhabitants or more, which registration shall be had under the provisions of this act, and not otherwise.

"SEC. 2. Every male citizen of the United States, and every person of foreign birth who may have declared his intention to become a citizen of the United States, according to law, not less than one year

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[1] Second session Forty-eighth Congress, Journal, p. 206; Record, pp. 555, 556.

[2] Second session Forty-eighth Congress, House Report No. 2613; Mobley, p. 383.

nor more than five years before he offers to vote, who is over the age of 21 years, who has resided in this State one year next preceeding the election at which he offers to vote, and during the last sixty days of that time shall have resided in the city, and during the last ten days of that time in the ward at which he offers to vote, who has not been convicted of bribery, perjury, or other infamous crime, nor directly interested in any bet or wager depending upon the result of the election, nor serving at the time in the regular Army or Navy of the United States, shall be entitled to vote at such election for all officers, State or municipal, made elective by the people, or at any other election held in pursuance of the laws of this State; but he shall not vote elsewhere than in the election precinct where his name is registered and whereof he is registered as a resident."

The constitution required the general assembly to pass a registry law. The legislature obeyed the command of the constitution, and to enforce its provisions provided that the citizen should "not vote elsewhere than in the election precinct where his name is registered, and whereof he is registered as a resident."

There is no misunderstanding this provision of the law. No citizen, although otherwise qualified, has the right to vote unless at the time he offers his ballot he is properly registered at the precinct where he resides. It may be said that the general assembly exceeded its power when it imposed the penalty of temporary disfranchisement upon the citizen for omitting to be registered in the manner and within the time limited by the provisions of said law.

The constitution commands the general assembly to enact a registry law, and in order to compel obedience to the law the legislature clearly had the right to say that the failure to register should be conclusive evidence that such person was not a legal voter.

Registration is not a qualification, but is made the necessary evidence that the person offering to vote possesses the qualifications prescribed by the constitution of Missouri.

The legislature, we think, had the right to go that far under the mandatory provisions of the constitution of Missouri requiring the passage of a registry law.

Without such a provision the registry law would be a nullity. If a person offering to vote is allowed to make proof at the polls that he possesses all the qualifications of an elector, then the registry law affords no protection against fraud and false swearing. Even if the board received the ballots of persons who were not registered, and such persons possessed all the qualifications of electors prescribed by the constitution, such votes should not be counted.

The majority call attention to the Pennsylvania case of Martin McDonough (Legal Intelligencer, vol. 41, p. 234), and then say:

It is not necessary in this report to go into the details of the registration law. It is sufficient to state that the registration is not completed until five days prior to the election, the board of revision being required to sit until that time for the purpose of striking off and also restoring names improperly stricken off by said board.

The recorder of votes is required on the day prior to the election to deliver to the judges of election two copies of the corrected registration lists of their respective precincts alphabetically arranged, together with a copy of the law regulating elections.

These lists were furnished the judges at the election out of which this contest arises.

Of the 50 persons who it is alleged offered to vote, and, if they had been permitted to do so, would have voted for the contestant, not more than 6 were on the lists furnished the judges of election, and there is no evidence that they were on the original registry list after the board of revision had concluded its labors. These lists were required to be furnished for the guidance of the election officers, and they are presumed to be correct until the contrary is shown by competent testimony. The only competent evidence to prove the incorrectness of these lists is the original registration from which they were taken. There has been no effort to put in evidence the registration as it stood five days prior to the election, the time when the power of the board of revision over it ceased.

The evidence before the committee thus shows that only 6 of those 50 persons were registered, and as they were not registered their votes were properly rejected, and can not now be counted for the contestant.

After a somewhat careful consideration of the case, we have reached the conclusion that James O. Broadhead, the sitting Member, was duly elected.

The minority views, presented by Mr. Alphonso Hart, of Ohio, took issue with the position of the majority:

The constitution of Missouri has the following provision upon the subject of the election franchise:

"ARTICLE VIII.

SEC. 2. Every male citizen of the United States, and every male person of foreign birth, who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of 21 years, possessing the following qualifications, shall be entitled to vote at all elections by the people:

"First. He shall have resided in the State one year immediately preceding the election at which he offers to vote.

"Second. He shall have resided in the county, city, or town where he shall offer to vote at least sixty days immediately preceding the election.

"SEC. 3. All elections by the people shall be by ballot; every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the voter who presents the ballot. The election officers shall be sworn or affirmed not to disclose how any voter shall have voted, unless required to do so as witnesses in a judicial proceeding: *Provided.* That in all cases of contested election the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law.

"SEC. 5. The general assembly shall provide by law for the registration of all voters in cities and counties having over 100,000 inhabitants, and may provide for such registration in cities having a population exceeding 25,000 inhabitants and not exceeding 100,000, but not otherwise."

The provision is explicit and easily understood. The qualifications of a voter are four in number:

(1) He must be a male citizen of the United States. or, if of foreign birth, must have declared his intention to become a citizen of the United States not less than one nor more than five years before he offers to vote.

(2) He must be over the age of 21 years.

(3) He must have resided in the State one year immediately preceding the election.

(4) He must reside in the county, city, or town at least sixty days preceding the election.

The foregoing are all the qualifications named as requisite to the exercise of the elective franchise. The constitution has, however, in sections 8 and 11, denied the right to vote to occupants of poorhouses and persons confined in public prisons, and to all officers, soldiers, and marines in the Regular Army or Navy of the United States. By section 10 it has also provided that the general assembly may enact laws excluding from the right of voting all persons convicted of felony or other infamous crimes or misdemeanors connected with the right of suffrage. The provision in regard to the registry law does not in any manner change these qualifications or prohibitions named in the Constitution.

Suppose the legislature should neglect or refuse to pass any registration act, would that operate to disfranchise all the inhabitants of Missouri? Could no election be held; or, if held, would it be a nullity? Certainly not. It is not in the power of the legislature to deprive any man of the right to vote, provided he possesses the above-named constitutional qualifications and is not included in any of the above named prohibitions. Any law passed by the legislature which in terms or in effect makes any additional requirements, whether it be done under the name of a registry law or not, is to that extent unconstitutional and void. The general assembly can neither add to nor subtract from the constitutional requisites.

After quoting from the registration law, the minority contend that it attempts to add to the qualification of voters, and hold:

The whole registration act is in violation of the constitution, and any registration made under it is an absolute nullity. There is another feature of the statute deserving attention: The law provides that each year, a certain time before the election, a board of revision shall be appointed to examine the registry lists and make corrections of the same. They shall strike from the list, by a majority vote, the names of all persons who have removed or have died, or who, for any reason, are not entitled to registration under the provisions of this act. This revisory board are to execute the unconstitutional

provisions of section 2, and hence their action is based upon and infected with the same infirmity as that of the recorder. Since the hearing of this case before the subcommittee our attention has been called to an opinion delivered by the St. Louis court of appeals on the 13th of May, 1884, upon an appeal from the St. Louis circuit court, in the case of Ewing *v.* Hoblitzell, in which certain portions of the registry law are declared unconstitutional. The particular points which we have discussed were not involved in that case and the judgment of the court was not invoked upon them. The inquiry arose upon another branch of the statute. We are justified, however, in saying that the reasoning of the court in the case referred to, if applied to the statute, would have the effect to invalidate the entire action of the recorder of voters, and also the action of the revisory board. By the charter of St. Louis the power of appointing the recorder of voters, the board of revision, and also the judges and clerks of election is lodged with the mayor. The registration act to which we have referred and the amendments made to it require the appointment of the recorder of voters to be made by the governor, and the judges and clerks of election and board of revision are appointed by the recorder. The court in the case referred to holds that the recorder of voters had no authority to appoint judges and clerks of election, and that the law giving him that right was invalid, as an invasion of the chartered rights of the city of St. Louis and its mayor. The same doctrine would hold good as to the appointment of the recorder of voters. The court also, in the above case, holds that the registry law is invalid for the further reason that it is such special legislation as is prohibited by the constitution of Missouri.

We thereupon submit that the registration law of Missouri is invalid and void.

If, however, we assume that the registration law is a constitutional and valid act, there still remains another important question for consideration: Is the action of the board of revision which is provided for in the law final, or have the judges of election the right to review their proceedings and pass upon the qualifications of voters after the revisory board have acted?

The sitting Member contends that the board of revision is a judicial body, and from its decision there is no appeal, and that there is no redress-from any wrong it may commit. This view is expressly contradicted by the statute itself, for in section 6 it is provided that even though the name of a person offering to vote is upon the registry list, "he may be challenged, and it shall be the duty of the judges of election to try and determine in a summary manner the qualifications of every person challenged; and if they find he is not a voter, then his vote is to be rejected." If the action of the revisory board is not final in the case of men whose names are on the list, why should it be as to men who are not on the list?

After commenting on the manner in which the registry lists were revised and the alleged lack of care and fairness, the minority conclude:

We are of opinion that these votes should have been received by the judges of election, it having been clearly shown that they were legal voters on the 7th of November, 1882, that their names had been upon the registry list, and that they were stricken off or left off by mistake. But one conclusion can be arrived at. All election laws should be construed liberally and in favor of the largest privilege to the voter. Our conclusion upon this branch of the subject is, first, that the entire registration was invalid, being in conflict with the constitution of Missouri; and further, that even admitting its validity, the registration and revision of the registry lists was characterized by fraud and mistake as to the names of at least 35 of the persons whose votes were rejected for want of registration.

Therefore the minority concluded that contestant was elected.

The report was not acted on by the House.

997. The Iowa election case of Frederick v. Wilson, in the Forty-eighth Congress.

The State law providing for preservation of the votes as a record but not for a recount, the House corrected the returns by an unofficial recount which it deemed correct.

As to the sufficiency of a recount which justifies a disregard of the returns of the sworn election officers.

On February 19, 1885,[1] Mr. Risden T. Bennett, of North Carolina, from the Committee on Elections, submitted the report of the majority of the committee in the Iowa case of Frederick *v.* Wilson.

The sitting Member had been declared elected by the State canvassing board by a majority of 23 votes.

The principal issue in the case was as to the validity of certain recounts of votes. The recount in Tama Township, which was one of several, is thus discussed by the majority report:

Contestee criticizes this recount as not having been made pursuant to law. The laws of Iowa in no manner provide for a recounting of the ballots. It simply provides that the clerk shall preserve them until after the time for contesting the election has expired. He is not required to keep them in any box or in any particular way. They are a record with the township clerk. Under the statutes of Iowa and the laws of the United States there is no technical rule surrounding them. The only question before the committee is, Are they the same ballots as cast and what is the correct count? The manner of the recount and the time of the recount are immaterial. These ballots were strung by the judges and left with the township clerk. While contestant's testimony was being taken the township clerk opened the box in the presence of three men and counted the ballots for Representative. All testify, and it is not questioned, that the clerk alone handled the ballots and they were in no manner changed or mutilated. Afterwards the ballots were also brought before the commissioner and publicly counted. Both these recounts agree and give the result before stated.

The clerk who thus examined the ballots was a partisan friend of Wilson and Frederick was not connected with it. The clerk violated no law, as the ballots are not required to be kept secret; manifestly it would be wrong to deprive contestant of this evidence, and the objection to the recount is without weight when it appears that not only were the ballots kept as required by law, but it is conclusively shown that the ballots were not tampered with nor could they have been changed. The election officers of this precinct were all partisan friends of Wilson. A request to have a Democrat appointed on the board was refused.

In this township we attach much importance to the fact that the return upon its face impeaches itself; the 4 votes returned in excess of the ballots actually cast, added to the discrepancy of 5 between the tallies of the two clerks, makes precisely the number changed by the recount. Not only this, but the evidence shows that the count on the night of the election was made under circumstances rendering it highly probable that mistakes occurred. Here again we base our conclusion upon the general evidence, accepting the recount as confirmatory proof. If there was nothing suspicious on the face of the return, and no proof showing the original count incorrect, and fairly showing the recount as giving the actual vote, we should not feel justified in disturbing the official count and return; but, in the light of all the testimony, we have no hesitation in concluding that 9 votes too many were certified up for Wilson, and we on this account deduct 9 votes from him.

The minority views, presented by Mr. S. H. Miller, of Pennsylvania, object to the validity of the recounts:

In Iowa the ballot boxes are left by law with the township clerk, who by law is ex officio a clerk at the election, and they are directed to be placed in some convenient condition for preservation and deposited with the township clerk, who is to keep them until the time is passed for contesting the election of any officer voted for. The law is as follows:

"SEC. 629. One of the poll books containing such returns with the register of election attached thereto, in cases where such register is required by law, shall be delivered to the township clerk and by him filed in his office. The other poll book, with its returns, shall be inclosed, sealed, and superscribed, and delivered by one of the judges of the election within two days to the county auditor, who shall file the same in his office.

[1] Second session Forty-eighth Congress, House Report No. 2623; Mobley, p. 401.

"SEC. 630. When the result of the election is ascertained, the judges shall cause all the ballots, including those rejected, with the tally list, to be placed in some convenient condition for preservation and deposited with the township clerk, who is to keep them until the time is passed which is allowed for contesting the election of any officer voted for."

As contestant can not, under any claim or view, be seated unless by the benefit accruing to him under the alleged recount, we desire to call the attention of the committee to the law governing recounts of ballots, published herewith.

A brief history of these recounts need but be given to stamp them as worthless. What is that history? After the returns of the district were all in and contestee was elected by a small majority, contestant hired agents to secretly go round the district to hunt up the ballot boxes and examine the ballots to see what they showed. One witness, C.W. Stone, in behalf of contestant, admits he was a hired agent, by the day, of contestant. That in two counties alone he opened the boxes of about thirty precincts, without authority of law or color of right, and examined, inspected, and professed to have assisted in counting the ballots. He was twenty-one days engaged in this work without the knowledge of contestee or notice to any friend of his, laying the foundation for this contest. His testimony is found on pages 77 and 78 of the record. This witness is brought in to prove he did not change the ballots, but only touched them with the rubber end of his pencil.

Thomas Stapleton is another hired agent (p. 338). The extent of his area "was Iowa County and some others." He admits freely he handled the ballots.

William A. Palmer (p. 218) was engaged by a Democratic editor to visit Cedar Township, Johnson County. He got the poll book from the ballot box and took it to Iowa City and kept it two weeks. At Highland Township, Tama County, "Mr. Frederick and a man from Gilman came over, "and Cunningham—all friends of contestant—and "Mr. Frederick strung the ballots." (See p. 141.)

There is not a ballot box which, on a recount before the notary who took the testimony, gave an increased majority to contestant or a decreased majority to contestee but what had been previously, opened by unauthorized persons between the official count on the night of election and the recount before the notary. Some of the boxes had been opened as often as three times.

The minority also quote the cases of Kline *v.* Myers, Cook *v.* Cutts, and the textbook of McCrary; and finally concludes:

The issue in this case, as presented by the majority report, is: Will an official count, made by sworn officers immediately upon the closing of the polls, be set aside upon proof that an alleged recount, made by unauthorized persons, including the paid agents of the contestant, and made without the knowledge of contestee, showed a different result from the official count?

To seat the contestant in this case imperils every Member's seat in the future where majority does not exceed 25 votes.

Once establish the precedent that a defeated candidate can hire an agent to open the ballot boxes in the district and tamper with the ballots before a recount is had before the legal authorities in pursuance of law, and no man's election will be safe.

In the language of Judge Cook (quoted from McCrary on Elections, p. 209), a Member of this House, and a member of the Committee on Elections, when he himself was a contestant in the Forty-seventh Congress.

"Before the ballots should be allowed in evidence to overturn the official count and return, it should appear affirmatively that they have been safely kept by the proper custodian; that they have not been exposed to the public or handled by unauthorized persons, and that no opportunity has been given for tampering with them."

Also the minority say:

The majority report gives the seat to contestant wholly and solely upon the grounds of pretended recounts of ballots in ten precincts, and in every instance but two the ballot boxes containing the alleged ballots had been opened by a hired agent of the contestant, hired by the contestant for the express purpose of traveling over the district and having the boxes opened and recounted without the knowledge of the contestee or pretended authority of law.

998. The case of Frederick v. Wilson, continued.

Naturalization by a court whose authority was unquestioned for years was sustained by the House.

As to what is meant by a common-law jurisdiction justifying a court to naturalize aliens under the act of Congress.

A paster which did not cover the name of the rival candidate was yet held to make certain the intent of the voter.

The election officers having received a made-up ballot of which voter had neglected to paste the two parts together, the House declined to overrule the action.

Various other questions were also considered in the determination of the case:

(1) *As* to naturalization:

Contestee attacks votes cast for contestant by men whom contestee claims were not naturalized. The fact is they were for the greater part naturalized in due form by the county court of Iowa. It is claimed that this court did not have jurisdiction to induct aliens to citizenship. It seems this court assumed jurisdiction and did grant naturalization papers in various counties, and these people have voted unquestioned for many years. After patient examination of the laws of Iowa and the decision of courts we are convinced that this court had the jurisdiction, and its action was valid. The authorities concur in this, that the State courts mentioned in the act of Congress as having common-law jurisdiction are such as exercise their powers according to the course of the common law. It was not meant they should have all common-law jurisdiction over every class of subjects, including all civil and criminal matters.

The minority concur in this:

Whether it had jurisdiction or not is a question we do not here pass on. As stated by the majority report:

"It assumed jurisdiction and did grant (some years ago) naturalization papers in various counties, and the persons thus naturalized have voted unquestioned for many years."

We count all these votes for the contestant, Mr. Frederick, amounting to nearly 60 in all.

(2) *As* to a defective ballot the majority hold:

In Marietta Township, Marshall County, a Republican ballot was cast having Frederick's name on a "paster," placed under the words designating the office of Representative, but not so as to cover the name of Wilson; this ballot was not counted for either. We think it should have been counted for Frederick. The same rule must apply here as where the name of one candidate is written and the name of the other is not erased. It is well settled that the name written must be counted and the printed name rejected, because the writing is the last act, and shows the intent of the voter to cast his ballot for the name written.

The minority say:

Here is a claim of one vote by reason of a paster. The paster was above Wilson's name, and of same size print. The judges, not knowing for whom the voter intended to vote, threw out this ballot and counted it for neither. (See Randall's testimony, Rec., p. 116.)

(3) As to another defective ballot the majority report says:

A voter handed in an open ballot consisting of the Democratic State, Congressional, and county ticket, the township being blank; on this he placed a township ticket filled out. The judges received this ticket openly, folded it up, and deposited it in the box without objection; afterwards it was not counted, on the ground that it was a double ballot. This was erroneous. It was not a double ballot; it was one full ballot in two pieces. Had it been pasted together no question would have been raised, but as it was openly received and folded together it was equally clear, and one vote must here be added to contestant.

999. The case of Frederick v. Wilson, continued.

Voters being deceived in casting a ballot not intended by them, the House corrected the error.

A return was corrected on the evidence of the tally list supplemented by oral testimony of an election officer and a recount of ballots.

Instance of obstruction on an election case which forced a compromise as to another matter of legislation.

(4) In Homer Township certain men were induced to vote a ticket containing sitting Member's name by reason of deceptive representations made by supporters of sitting Member. The majority of the committee favor a correction of the result on account of this deception.

The minority deny that the voters were deceived.

(5) The majority report thus discusses certain irregularities:

The State canvassing board, on the 11th day of December, 1882, declared James Wilson elected by a majority of 23 votes, and he was duly commissioned. The county canvassers of Marshall County refused to count the votes from Taylor Township; but it was afterwards irregularly certified to the State board, and by them counted in their canvass, contrary to and in total disregard of an injunction issued by a court of competent jurisdiction at the State capital.

The contestant assails the vote of said township for fraud, and he sets out as badges of the fraud that the ballots were handled and counted by the judges of the election during the progress of the voting some hours before the time for closing the polls; that the secrecy of the ballot was invaded and violated by the judges; and that more votes were cast for him than were counted or returned.

In the count by the State canvassers the contestant was given 8 votes and the contestee 48 from that precinct.

We find that the judges of election at this precinct were guilty of gross and flagrant irregularities. They began to count the votes before the polls were closed. They counted the votes before the hour prescribed by law for counting them was reached, and after they had thus counted, voters to the number of 10 or more voted and in effect were wholly deprived of that secrecy and shield which the law provides for and puts around the ballot. We, however, allow the canvass as made by State board to stand.

(6) As to the relative value of returns and the tally sheet:

In Buckingham Township, Tama County, the returns or certificate gave Mr. Frederick 43 votes in both the books, and in the book retained by the township clerk the tally sheet gave him 43 votes; but in the one sent to the county auditor the tally sheet gave him only 38 votes. The county canvassers disregarded the return before them (which gave him 43 votes) and based their return to the State canvassers on the tally list. This was of itself an error, because, under the laws of Iowa, the return is of higher evidence than the tally sheet. The clerk who kept the tally list which was 5 short testified that he made the mistake of 5 against the contestant, and swears that Frederick received 43 votes.

A recount of the votes by the township officers shows that the contestant received 43 votes. A mere examination of the two returns and the two tally sheets leaves no doubt that he received 43 votes; but when to this we add the testimony of the clerk and the recount the proof is simply overwhelming. We here add 5 votes to those for Frederick.

The majority concluded:

The leading question in the case is this: Will the House, by its constituted agents, go behind all certificates and returns to inquire into and correct all mistakes in elections brought to its notice by a contest legally made?

We submit to the House for adoption the following resolutions:

Resolved, That James Wilson was not elected as a Representative in Congress from the Fifth district of Iowa, and is not entitled to a seat on the floor of this House.

Resolved, That Benjamin T. Frederick was duly elected as a Representative in Congress from the Fifth district of Iowa, and is entitled to be sworn in as a Member of this House.

The minority proposed a resolution confirming the title of sitting Member to the seat.

The report in this case was called up on March 2 and 3, 1885,[1] in the closing hours of the Congress, and consideration was for a time obstructed by the minority. Finally, evidently by a compromise affecting the fate of another question, the report was considered and the resolutions proposed by the majority were agreed to without division or debate.

Mr. Frederick thereupon appeared and took the oath.

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[1] Journal, pp. 745, 746, 807; Record, pp. 2325, 2412, 2565

Chapter XXXV.

GENERAL ELECTION CASES, 1886 TO 1888.

1000. The Ohio election case of Hurd v. Romeis in the Forty-ninth Congress.

The House declined to reject a vote on charges of general bribery sustained by hearsay testimony.

The House declined to reject a return because of irregularities on the part of election officers and the settlement of discrepancies between the ballots and the poll list by additions.

Proof of efforts to intimidate, unsustained by proof that it was effective, does not justify rejection of a return.

On March 31, 1886,[3] Mr. Henry G. Turner, of Georgia, submitted the report of the majority of the Committee on Elections in the Ohio case of Hurd *v.* Romeis.

The sitting Member had been returned by an official majority of 295 votes, which contestant assailed on several grounds.

(1) Contestant claimed that the return of Precinct B of ward 8 of Toledo, which gave a majority of 220 for Mr. Romeis, should be entirely rejected, because of alleged bribery, fraud, and irregularities, claimed to be sufficient to taint the entire result.

(*a)* As to bribery.

The charges of contestant are thus set forth in the minority views: [4]

The testimony satisfies us that there was a conspiracy to corrupt the precinct by money in the interest of contestee, and that it was successfully carried out. The evidence of Gerstmann (pp. 115 and 128 of the record) shows the plan to defeat the contestant and the methods by which it was executed.

He testifies that he was agent of the Republican national committee, sent to Toledo for the purpose of finding the sentiment of people in certain districts before the October election of 1884. He, being able to speak the Polish and German languages, was assigned to this precinct, which was almost entirely

[1] See also case of California Members. (Vol. I, sec. 645.)

[2] See cases of—

Lowry *v.* White, Indiana. (Vol. I, see. 424.)

Chase, Cimarron territory. (Vol. I, sec. 412.)

[3] First session Forty-ninth Congress, House Report No. 1449.

[4] Submitted by Mr. Thomas A. Robertson, of Kentucky.

inhabited by Germans and Poles. He was deputed to work in this precinct by Captain Brown, who was the chairman of the Republican committee in the city of Toledo, and also the attorney of contestee in the contest.

He visited the precinct in pursuance of his instructions and went through it to find the sentiment of the people. He found them all for Hurd.

After some consultation he learned from them that the sentiment might be changed by the use of money. They informed him that from $2,000 to $10,000 would be required to change the precinct.

After having obtained this information he reported to the local committee and then went to New York to report to the national committee. There he had an interview with S. B. Elkins, in which he reported the condition and the necessity of money for this precinct.

Mr. Elkins said that the election of Mr. Hurd was a nationally important question; that he was a free trader; and that it was necessary he should be defeated. He said also that the money needed would be sent through the regular channels. He was directed to go to Toledo and tell them to do all they could to defeat Hurd.

In the work of his agency Gerstmann returned to Toledo a few days before the election.

He visited the same persons and places he had visited before. He found the sentiment all changed. It was then against Hurd and for the contestee.

He learned from the voters there that the change had occurred through the use of money; that their wants had been satisfied; and he left Toledo before the election, as there was nothing more for him to do.

We call attention to the testimony of Gerstmann on page 128:

"4. Q. What was said, at your last visit to Toledo before the election, by Warnke and other voters in precinct B, in ward 8, as to money or other considerations having been satisfactorily furnished to the voters of that precinct to carry it for Romeis?—A. From the general conversations with Warnke and others living in that neighborhood there was no doubt in my mind that money and other materials were furnished to defeat Mr. Hurd in that precinct. There was no further use for me, and I left Toledo. My reasons for leaving, no doubt, are from the conversations which I had on that subject with Warnke and other voters of that precinct. I was satisfied in my own mind that Romeis would carry that precinct, notwithstanding at my first visit everything was for Hurd there. Had it not been for the use of money and other considerations used in the political machinery, Hurd would certainly have carried the precinct."

To corroborate Gerstmann the testimony of Louis Johns is offered, who swears that shortly after the election of Henry Gates, the vice-president of the Republican organization in that precinct, boasted that he had paid on the night of election at a saloon in that precinct 19 persons from $3 to $10 apiece for services as ticket peddlers.

Jones also heard others say that the money had been so paid.

We think that if the statements of these witnesses are to be accepted as true there can be no doubt that this precinct should be rejected.

If there were a conspiracy to send from $2,000 to $3,000 to a little precinct of less than 450 votes; if the voters were changed in sentiment, by their own confession, within two or three weeks by the use of this money; if the officers of the Republican organization, from the national down to the local committee, interested themselves to carry out this conspiracy, and if the corruption were so open and public that the local Republican manager in that precinct boasted shortly after the election that he had paid unusually large sums for a day's work, to many more men than the legitimate expense of an election could possibly have required, it would be an outrage upon justice and fair dealing to permit the returns from this precinct to be counted.

The only answer made to this evidence by the contestee is that (1) the witness Gerstmann is not credible, and (2) that the testimony is not competent, as it is hearsay.

As to the first part, we reply that Gerstmann declared himself to be the agent of the Republican committee to do the work to which he was assigned, and stated that he was deputed to the special work in this precinct by Mr. Brown, the chairman of the Republican committee, the very man who was cross-examining him. He mentioned the name of Mr. Elkins and Mr. Schenck, two Republican managers, who had engaged him and to whom he reported. How easy it would have been for one of them to have gone onto the stand and testify that he was not their agent. They knew his testimony and realized its importance, and yet not one man undertook to contradict him.

Neither was there any effort to impeach him.

His testimony remains uncontradicted and unimpeached. There is nothing to affect his credibility, unless it shall be found in his cross-examination, and after the more thorough examination of that we are satisfied that there is nothing in it to weaken the force of the statement he makes as to the great points of his testimony.

The only question remaining is, Is the evidence competent?

It is said it is not, because it is hearsay. We are not of this opinion. The rule as to evidence in contested election cases is stated in Cushing's Parliamentary Law, section 210:

"The same general rules by which courts of law are governed in regard to evidence in proceedings before them prevail also in the investigation of cases of contested elections; but inasmuch as a legislative assembly touching things appertaining to its cognizance is 'as well a council of state and court of equity and discretion as a court of law and justice,' the legal rules of evidence are generally applied by election committees more by analogy and according to their spirit than with the technical strictness of the ordinary Judicial tribunals."

"The testimony in this case" continues the minority, "is not offered to prove the bribery of individual voters, but to show the prevalence of corrupt methods in an election precinct. It is sought to throw out an election district because of general bribery. If individual acts were to be proved the poll could be easily purged by the elimination of the bribed votes, which would disappoint the object in view. It is as though one were attempting to show the general reputation to be bad. You can not do this by proof of individual acts of bad conduct. It must be done by proof of what people generally say. When you would impeach a precinct for general bribery you must prove by analogy to the rule of courts of justice the fact in the same way. The general sentiment of a community, the changing it, and the common reports of the method by which it is done, are all facts to be established as any other fact of common reputation."

The minority then cite several English cases in support of their contention, and consider a conspiracy to bribe proven.

The majority dismisses these claims as to bribery

He alleges "general bribery" against the election in precinct B, Ward 8, in the city of Toledo. To support this charge he relies on the evidence of S. Gerstmann. This witness does not attract confidence either by his antecedents or by the character of his testimony. But waiving these tests of his credibility, his testimony on the matter in issue is hearsay only, and even by that method of establishing this charge he proves nothing; in no way does he disclose either the bribers or the bribed.

It is also alleged that in this precinct on the night after the election one Gates, a Republican, paid 19 ticket peddlers from $3 to $10 each. However reprehensible this transaction may appear, the witness (Louis Johns) admits that he knows nothing of it "except from what Gates and others told him."

In the debate this question was discussed at length. In the first place the majority showed from Gerstmann's cross-examination that he refused to answer pertinent questions as to his past life, one of these questions being as to whether he had ever been in prison. Aside from attacking the credibility of the witness, the majority attacked also the nature of his testimony, as indefinite and belonging to the realm of opinion and hearsay rather than of fact.

(*b*) The minority assailed the return as inaccurate and invalid:

The falseness consisted in this, that there were five tickets short at the end of the count, and the judges ordered two votes to be added to every candidate, with no tickets in the box to correspond to the votes so added.

This of itself is enough to bring discredit upon this return, as no confidence is to be reposed in the acts of officers who are willing to certify under oath, in a solemn matter of that kind, that to be true which they know to be false. But with this standing alone, while we might hesitate to exclude this

whole poll, we have no doubt on the subject when we consider the conduct of these officers in other particulars.

(2) Their irregularities were such as to leave the result in an uncertainty in which it is impossible to ascertain the true result. The following are the statutes of Ohio relating to the counting of the vote:

Page 2956: "At the close of the polls the poll book shall be signed by the judges and attested by clerks, and the names therein contained shall be counted and the numbers set down at the foot of the poll books in the manner hereinafter provided in the form of the poll books."

Page 2957: "Alter the poll books are signed, in the manner hereinafter provided for, the ballot boxes shall be opened, and the ballots therein contained shall be taken out, one at a time, by one of the judges, who shall read aloud distinctly, while the ticket remains in the hand, the name or names thereon contained, and then deliver it to the second judge, who shall examine the same and pass it to the third judge, who shall string it on a thread and carefully preserve it, and the same method shall be observed in respect to each of the tickets taken out of the ballot box until the number taken out of the ballot box is equal to the number of names in the poll books; and any ballots in the box in excess of the number of names on the poll books, together with the ballots strung as aforesaid, shall be deposited in the box and locked, and the box and contents delivered to the officer authorized to receive and keep the key or keys, and the box shall remain locked until the expiration of the time within which any legal notice of contest can be given, and if such notice be given shall remain locked until the trial of such contest."

The testimony shows that the poll books were not signed until after votes had been counted (p. 73 of the record). This made it impossible to do the counting as the statute prescribed. It was the intention of the law that the number of the vote should be ascertained before the counting began, in order that the judges might know the number of tickets to be taken out of the box. But in this case the number of votes was not attempted to be ascertained until the count had been finished.

The ballots were required to remain in the ballot box until the poll books had been signed and the total vote ascertained. Instead of that, immediately after the polls were closed the ballots were emptied onto the table in the room where the election had been held, and where there were 25 to 30 people present. That the ballots for several hours were away from the place in which, under the law, they ought to have been, out of the legal custody of the election officers, and exposed to the possibility of being tampered with, is clear. (See pp. 28, 29 and 68, 69 of the record.)

The statute required that the judges should take the tickets from the box one by one and read the name on each. Instead of this the tickets were arranged into four piles upon the table, from which the judges counted them by fives. The board also was illegally organized. Two of the judges were Republicans, while the third Democratic judge was a nonresident of the precinct. We think that a fair construction of the Ohio statute requires the judge to be a resident of the district in which the election is held. Both clerks were Republicans, while the law expressly provides that they should belong to different political parties.

From this it will appear that every important provision of the statute of Ohio as to conducting the election and counting the vote was violated.

It would have been singular if this misconduct had not brought confusion and uncertainty.

The majority report thus disposes of this contention:

It is also claimed that the returns from this precinct ought to be excluded because there was a discrepancy between the number of names on the poll book and the number of ballots in the box. There was one, and, perhaps two, informal counts of the votes by the judges of election, which were not satisfactory because the number of names on the poll book and the number of ballots were not equal. No two witnesses give the same estimate of this discrepancy, one putting it at 7 votes on the first count, and 3 votes on the second count; and another witness putting the difference at 4 votes. But when the votes were officially counted and tallied, it appeared that there were 4 or 5 votes short of the poll list. The judges then added 2 votes to each canditate. In this course they erred, as the committee think, but it was an immaterial error which did not affect the result.

It is also said that one of the judges did not reside in the precinct; but the statute of Ohio governing elections in the city of Toledo does not require the judges of election to reside in the precinct. It is also averred that the clerks at this precinct were not of opposite politics, but under some circumstances the two clerks may belong to the same party. The proof does not exclude this hypothesis.

It is further objected that the judges spread the tickets on the table and assorted and counted them by fives, instead of counting them one by one from the box as the statute of the State directs. But this was a mere irregularity, and could not void the election, in the absence of any evidence of fraud or corruption. We fbin that the majority of 220 returned for Mi. Romeis from this precinct ought to stand.

In the debate it was further urged on behalf of the majority that the statute as to counting the votes was mandatory rather than directory; that the officers of election were not skilled men at counting votes, and that the final discrepancy of 2 votes was not such as to demand the rejection of the entire poll of the precinct.

(2) As to alleged intimidation the majority report says:

Contestant seeks to have rejected the return from Kelleys Island, which certified a majority for his opponent of 60 votes. The ground on which this rejection is invoked is intimidation alleged to have been attempted by one Kelly towards his employees. We think the burden was on the contestant to prove that this attempt was effectual. To justify the disfranchisement of an entire precinct on this ground there ought to be some evidence to show its influence on the election. We fail to find such evidence.

The minority views say:

Section 7065 of the Revised Statutes of Ohio declares it to be a felony for an employer to threaten to withhold or reduce wages of or to dismiss from service any laborer in his employ with a view of influencing his vote.

The effect of intimidation upon the result of an election is stated in the report made by ex-Speaker Keifer in the case of Donnelly *v.* Washburn, already quoted.

"The rule undoubtedly is in this country that when bribery, fraud, or intimidation is so interwoven with the vote of any voting precinct that it can not be eliminated from the aggregate vote cast with certainty, the whole vote of the precinct may, and perhaps should, be rejected."

To show how the nature and extent of the intimidation practiced in this precinct, we call attention to the testimony of Norman-Kelly and the other witnesses.

Mr. Norman Kelly (p. 308):

"Q. Did you have any conversation with any of your men upon the subject of the contestant's (Mr. Hurd's) candidacy for Congress?—A. I did.

"Q. Did you have any conversation with your employees as to the subject of free trade and the effect which its adoption in this country would have upon their employment?-A. I (did, so far as my opinion on that question is concerned.

"Q. Did you say to your employees, or any of them, that the effect of the adoption of free trade would be, in your opinion, to embarrass the business in which you were engaged and they were employed?-A. I think I did.

"Q. Did you say to your employees, or any of them, that in the event of embarrassment coming to your business by the adoption of free trade and the consequent necessary reduction of the force you employed, the persons to be first discharged would be those voting for the advocates of free trade?—A. No, sir; I have never told anyone in my employ so, unconditionally.

"Q. Did you conditionally; and, if so, with what conditions?—A. I said to two or three of my employees that in case Mr. Hurd was elected to Congress and Mr. Cleveland was elected President, and if free trade was adopted in this country, the effect would to be materially injure our business, and in that event, in my opinion, we would undoubtedly require over or to exceed one-half and probably not over one-third of our present force of men, and that we thought the interest of our men was the same as our own.

"Q. What, if anything, did you say to these employees with whom you talked as to the discharge of employees in the event of a reduction being made necessary by the election of Hurd and Cleveland and the adoption of free trade?—A. I have not a distinct recollection of what I said.

"Q. Can you give it generally and in substance?—A. I said in the event of the adoption of free trade that our employees knowing that their interest was identical with our own, we would naturally expect to retain those who voted for our interest and their own."

The minority quote other testimony to show that Kelly was bitter against Hurd and that he electioneered among his men at the polls that day, and conclude:

We think this testimony clearly shows that Mr. Kelly intended to intimidate his employees, that he made the men acquainted with his purpose, and that he carried it out by his presence and conduct at the polls on election day.

It is urged by counsel for contestee that the proof does not show that the intimidation is not shown to have made the result different from what it otherwise might have been. It was claimed that contestant was bound to prove that the intimidation compelled the employees to vote for contestee.

We do not think this is the law. 'We axe of the opinion that where intimidation is practiced over men sufficient in number to affect the result the burden of proof is devolved upon him in whose interest the intimidation was done, to show that the intimidation did not affect the result. If this proof be not made, the intimidation is so interwoven with the vote that it is impossible to separate with reasonable certainty the good from the bad vote, and the whole precinct must be rejected.

The minority quote Cunningham on Elections and the Drogheda case (10 M. Hard., p. 255), The County of North Durham (20 Hard., p. 156), and the cases of Ford *v.* Abbott and Goode *v.* Platt in the House, saying of these two cases:

In these cases the poll of the precincts where the navy-yard vote was cast was thrown out on account of intimidation practiced by the officers in the yard. The burden of proof was held to be upon the contestee to show that the violation of the law had not affected the result.

The contestee has failed to show that the intimidation practiced in his interest did not affect the result, and as that intimidation was great enough to affect the majority in the precinct we are of the opinion that the return from this precinct should be excluded.

In debate it was urged in behalf of the majority report that there was no proof that the men of Kelly's force were naturally partisans of contestant or that any one of them intended to vote for him, no proof that they all did not vote for him, and no proof that a single man was influenced by Kelly's interference to vote otherwise than he would have done without it.[1]

1001. The case of Hurd v. Romeis, continued.

Handling of the ballots by an unauthorized person during the count, no fraud being shown, does not vitiate the return.

In a city precinct testimony that certain names on the poll lists are unknown to the witnesses., does not justify an assumption that the voters are disqualified.

Discussion as to the proper method of deducting from the returns unsegregated illegal votes.

The House declined to declare a seat vacant on hearsay evidence as to general bribery and irregularities.

Instance wherein the House declined to seat a contestant belonging to the political party in a majority in the House.

(3) As to contestant's claim that the poll of another precinct should be rejected the majority report says;

Precinct C, Ward 3, in the city of Toledo, returned a majority of 166 for Mr. Romeis. Mr. Hurd asks that this return be excluded because he complains that one Bell, a Republican, took some of the ballots from the box and handed them to the judges while they were engaged in counting the vote. This complaint is supported by the evidence of one of the clerks of the election. It is negatived by the judges and flatly denied by BeIl. Bell had been one of the judges of election for that precinct for many previous years, and had been appointed to that office for the year of this election and had acted

[1] Speech of Mr. Boyle, p. 3444; also Mr. Payne, Record, p. 3449.

in that capacity at an election in the spring, but having moved out of the precinct he did not serve as judge at this election. His character seems to have been good, and he had the confidence of the judges of election. No evidence of the contestant impeaches his integrity. It is scarcely probable that he could have changed the tickets in the presence of the judges, the clerks, and of the public. It was a wrongful act or irregularity if it occurred, but under the circumstances we can not recommend the exclusion of this return.

The minority hold:

The only explanation of the conduct of Bell, as already stated, attempted was to show that the tampering with the box occurred in November. We are of opinion that contestee has failed in the explanation. The act of Bell is therefore without anything to extenuate or justify it.

In all elections the most important thing to be shown is that the votes counted were those cast. There can be no assurance of this fact, except that the ballots have been preserved in the exclusive custody of the officers charged with the duty of keeping them. Any interference with them by an unauthorized person, any handling or taking them into possession by others than the proper officers, whereby an opportunity to tamper with them and alter them has been given, will be fatal to the count unless the clearest and most satisfactory explanation has been made of the conduct of such persons. The burden is shifted to the contestee to show that what was done did not interfere with the ascertainment of the true result. This doctrine is declared in Duffy's case, supra, where it is said:

"Besides where the officers of an election board, as shown by the evidence in this case, have either, through design or ignorance, neglected to comply with some of the essential requirements of the law * * * presumption in favor of the legality, fairness, and regularity of the election predicated upon a return and tally sheet ought not to weigh heavily with a tribunal seeking to vindicate and administer the law. The burden of proof must be shifted to the other side. Those who are advantaged by such an election must show affirmatively its general fairness, otherwise it will become the duty of the court to throw it out altogether."

Here no proof was offered upon this point by contestee, except to attempt to show that the interference with the ballots by Mr. Bell occurred at the November election. This attempt having failed, the conduct of Mr. Bell remains without extenuation, indeed fuller of suspicion, because of the effort to set up a false explanation of it.

The rule of the law in disposing of a return made where the ballots have been taken from the custody of the proper officers is laid down in a case decided in the New York senate, hereafter cited.

The penalty for interference with ballots in Ohio before counting is very severe.

Section 7059 of the revised statutes provides:

"Whoever at any election, unlawfully, either by force, fraud, or other improper means, obtains or attempts to obtain possession of any ballot box, or any ballots therein deposited, while the voting at such election is going on, or before the ballots are duly taken out of such ballot box and enumerated by the judges of the election, according to law, shall be imprisoned in the penitentiary not more than three years nor less than one year."

The act here prohibited is not merely the fraudulent taking possession of ballots, but the illegal taking of them by any improper means. This shows the view in which the Ohio statute holds the giving of any opportunity to unauthorized persons to tamper with the votes.

The New York case above referred to is the case of Cary *v.* Twombly (New York Contested Election Cases, p. 474).

(4) The final objection of contestant is disposed of by the majority as follows:

The contestant insists that very many illegal votes were cast in the various precincts of the city of Toledo. Comparing the poll books of the October election, out of which this contest arose, with the poll books of the Presidential election in November (which were in the possession of the city clerk), he seems to have found the names of several hundred persons who voted in October but did not vote in November. With this information used as a basis of inquiry, he undertook to prove by certain witnesses that these persons were not known to the witnesses, or were not resident in the wards in which they seem to have voted. This mode of impeaching votes may be useful in country precincts, in small towns and villages, where each resident is known to almost every other resident, but in a busy and crowded city it can not be safe, however great the opportunities of the witnesses.

In the city of Toledo a large part of the population consists of foreigners. The officers of election, who in a given case may be native citizens, have to take the strange names of naturalized citizens, and in another case, naturalized citizens, acting as officers of election, have to take the names, equally strange to them, of native citizens.

The majority then go on to give illustrations of names misspelled on the poll books in such ways that the name of one man by the various spellings seemed to be the names of different men. And the majority conclude:

The poll books, it is obvious, under these conditions would be very misleading.

Much of the evidence on this branch of the case consists of statements and declarations of other persons, proven by the witnesses, and of conclusions drawn by the witnesses from these statements and declarations. The contestant contends that declarations of this character are competent to show the disqualification of voters, but not competent to establish their right to vote. Without commenting on this apparent inconsistency, we regard this evidence as hearsay and inadmissible for any purpose.

The contestant claims, as the result of this proof, that he has shown that 291 illegal voters cast their ballots in the city of Toledo, but admits that he has not shown for whom these unlawful ballots were cast. He insists, nevertheless, that these votes should be deducted from the majorities of the sitting Member and of the contestant in the various precincts, and by this arbitrary method he would take from Mr. Romeis 135 and from himself 56. By this process he reaches a result which makes a difference of 79 votes in his favor and against his competitor. We can not sanction this treatment of illegal votes. In the absence of any proof as to how they were cast, we think that they should not be deducted from either candidate, or, if deducted at all, should be taken from all the candidates, including the Prohibition candidate, in the several precincts where they were cast, in the proportion of the actual votes counted for each of the candidates in each precinct. This latter mode of elimination would not affect the result.

The minority say:

Lists were prepared of the names of these voters and put into the hands of people living in the precinct. These persons were placed upon the stand to testify as to whether those whose names had been given them were electors or not in the precincts where they had voted. The witnesses called upon from each precinct were persons who were residents, had in some cases lived many years there, and in many cases had been born there; were acquainted with the people; had been doing business with them, and had held offices, such as assessors and councilmen, among them. Besides, they had taken the lists and called in from the neighborhood a number of prominent persons from every part of it to consider the names. They made comparison with the directory, and in most cases went personally from house to house to learn whether the parties were voters.

With this information, possessed as to each precinct, the witnesses went upon the stand and testified that the 347 persons were not residents of the precinct at the time of October election and were not legal voters there at that time. This testimony will be found on pages 18, 20, 22, 24, 26, 31, 40, 47, 50, 53, 56, 60, 62, 64, 82, 84, 89, 93, 102, 106, 108, 111, and 113.

This testimony is entirely competent and always makes out a prima facie case against the votes claimed to be illegal. This doctrine is well settled.

After quoting from the case of Blair *v.* Barrett and McCrary, especially the latter, to show that proof of the above kind shifted the burden to the parties desiring the challenged votes to be counted, the minority continue by saying that sitting Member recognized the force of this rule and undertook to show that the votes were legal. The minority then say as to the votes alleged to be illegal:

It is admitted that there is no evidence to prove for whom these votes were given.

The question thus directly presented is, What disposition shall be made in a contested election of illegal votes where there is no proof as to how they were cast.

McCrary says that there are three methods of disposing of such votes. These are—

(1) To declare the election void; i. e., the election at the precinct where the illegal votes were cast; (2) to subtract the votes from each proportionally, and (3) to deduct them from the majority.

In disposing of these ballots we think that each precinct should take care of its own illegal vote. Where an election is declared void, it should be that held in the precinct where the illegal votes are cast. This is the rule laid down in the case of Goode *v.* Platt (p. 679):

"When illegal or fraudulent votes have been proven, and the poll can not be purged with reasonable certainty, the whole vote must be rejected."

When the illegal votes are not numerous enough to change the result in the precinct, they must either be subtracted from the candidates proportionally or deducted from the majority.

The first method is unsatisfactory. It is practically dividing the illegal votes between the candidates, upon the principle that the illegal voters have voted as the lawful voters did. This not a fair presumption, as from the fact that large numbers of illegal votes are cast in a precinct, it may well be inferred that it was intended by those who cast them to prevent the natural division of the votes from being effectual. Besides, when the majority in a precinct for a candidate is small, it would require a very large illegal vote to affect the result; i. e., under this rule large numbers of illegal votes could be cast with impunity, providing they left only a small majority for the successful candidate.

We think that the rule of deducting the votes from the majority candidate in each precinct is the correct one. It is on this theory only that the election can be avoided where there are enough illegal votes to affect the result.

It will make each candidate take care of his own precinct. It will make it for the interest of judges to prevent illegal votes which may injure their friends. It will cause that candidate to lose the votes who through his friends might have prevented their being cast.

This rule is approved in the case of Le Moine *v.* Farwell (Digest of 1871, p. 442), and Goode *v.* Platt (Digest of 1871, p. 686).

In Commonwealth *v.* McCloskey (Brightley's Cases, p. 211); in Marblehead case, reported in Cushing's Man. Election Cases, and in In *v.* Duffy (4 Brewster, p. 173).

The doctrine is also approved in Massachusetts Report of Contested Election, pages 52, 63.

In the recent case of In *v.* Barker (10 Phil., 596), the syllabus is as follows:

"When legal and illegal votes have been counted indiscriminately and a majority have resulted in various districts, embraced in the general return, whether for one candidate or the other, the only means whereby even approximate justice may be reached is to require him for whose advantages such majority inure to lift the curse which the law has imposed upon the illegal ballots; otherwise they will be deducted from his count."

Applying this rule, we find that contestee will lose 135 votes and contestant 56, making a total of 79 votes, after the polls are purged, to be deducted from the vote of the sitting Member.

In debate it was claimed on behalf of the majority contention that the presumption from all the facts was that the voters unaccounted for were actually legal voters, and because they could not be found five months afterwards in a large city was not conclusive evidence that they had not been there.[1]

In accordance with their conclusions, the majority of the committee reported resolutions declaring sitting Member entitled to retain the seat. The minority of four Members headed by Mr. Robertson proposed the following:

Resolved, That Jacob Romeis was not elected a Member of the House of Representatives of the Forty-ninth Congress from the Tenth Congressional district of Ohio.

Resolved, That Frank H. Hurd was elected a Member of the House of Representatives of the Forty-ninth Congress from the Tenth Congressional district of Ohio.

Another minority of two Members, Messrs. Robert S. Green, of New Jersey, and Benton J. Hall, of Iowa, came to this conclusion:

Resolved, That neither Frank H. Hurd nor Jacob Romeis was lawfully elected to the Forty-ninth Congress from the Tenth Congressional district of Ohio, nor is either of them entitled to a seat in said Congress.

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[1] Speech of Mr. Payne, Record, p. 3450.

The report was debated at length on April 13 and 14,[1] and on the latter day the question was taken on a motion to substitute the first resolution of those presented by Mr. Robertson for the majority proposition, and this motion was disagreed to—yeas 105, nays 168. The second proposition of Mr. Robertson was then rejected without division.

Then the resolutions of the majority, confirming the title of sitting Member, were agreed to without division.

The contestant, Mr. Hurd, was a prominent member of the majority party in the House.

1002. The Iowa election case of Campbell v. Weaver, in the Forty-ninth Congress.

Discussion of a registration law as mandatory or directory.

Discussion as to the nature of a judicial construction of a State law as bearing on the duty of the House to accept it in an election case.

Unregistered voters having voted on the production of affidavits prescribed by law for such cases, the affidavits should be kept inviolate as in the case of ballots for a recount.

An elector having in good faith presented an affidavit in lieu of registration, and the vote having been accepted, the House declined to reject the vote because the affidavit did not meet the legal requirement.

A vote deposited in good faith by the elector, supposing himself to be registered, should not be rejected upon subsequent discovery that he was not registered.

On April 12, 1886,[2] Mr. B. J. Hall, of Iowa, from the Committee on Elections submitted the report of the majority in the Iowa case of Campbell *v.* Weaver.

The sitting Member had been returned by an official majority of 67 votes. Contestant alleged various objections to the legality of this majority, and several questions of fact were decided by the majority report; but the report and the debate in the House shows that the decision of the case turned entirely upon a single question of law. The minority views, presented by Mr. Sereno E. Payne, of New York, state fairly the conditions under which the question arose:

> The following are in substance the sections of the Iowa code which prescribe the manner in which the registry shall be made for each election:
>
> "The township trustees and clerk shall constitute the board of registry, and shall meet annually, * * * and shall make a list of all qualified electors in their township, which shall be known as the register of elections." (Code, sec. 595.)
>
> "The register of elections shall contain the names of the voters at full length, alphabetically arranged, with residence set opposite. It shall be made from the assessor list and the poll books of the previous election, and shall be kept by the township clerk, and shall at all times be open to inspection at his office without charge. He shall, also, within two days after the adjournment of the board, post up a certified copy thereof in a conspicuous place in his office, or in such other place as the board may direct." (Code, sec. 596.)
>
> The board shall meet on Tuesday preceding general election to complete registry. Must give previous notice by publication; at time of meeting "they shall revise, correct, and complete the register of election, and shall hear any evidence that shall be brought before them in reference to

[1] Record, pp. 3442, 3483–3501; Journal, pp. 1242, 1246, 1247.

[2] First session Forty-ninth Congress, House Report No. 1622; Mobly, p. 455.

such correction." It further provides that names may be added or stricken from the register at this meeting. (Code, sec. 597.)

These sections seem to contemplate what would appear to be a most natural result from such a method of making up the lists in the first instamce—an incomplete list of the voters in a large precinct—unless the board were aided in their duties by the appearance before them of the voters themselves, who had neglected to vote at the last election, and who were not taxpayers in the district. But this registry law does not even require the presence of the voter at the place of registry, but his name may be placed on the register if any person shall make it appear to the registry board that he is a legal voter in that precinct.

But if the name of a legally qualified voter is left off the list he still is not deprived of his vote. The following section of the statute affords him an ample and a simple remedy:

"SEC. 618. The judges in election precincts where the registry law is in force shall designate one of their number to check on the register the name of every person voting; and no vote shall be received from any person whose name does not appear there, unless he shall furnish the judges his affidavit showing that he is a qualified elector, and a sufficient reason for not appearing before the board on the day for correcting the register, and shall also prove by the affidavit of one freeholder or householder, whose name is on the register, that such affiant knows him to be a resident of that election precinct, giving his residence by street and number, if in a city or incorporated town, as the same is in such cases required to appear on the register. Said affidavits shall be kept by the judges and by them filed in the office of the township clerk, and all such affidavits may be administered by either of the judges or clerks of election."

In Oskaloosa Township it seems that the Republican committee were diligent on the days for correcting the registry and saw that the voters belonging to their party were all registered. On the other hand, it appears that the committees for the Democratic and Greenback parties made no attempt to correct the registry or to see that the names of the voters of their party were put upon the lists before the election. The result was that about 200 of the members of those parties were not registered.

These unregistered voters presented affidavits, and it was not objected that these affidavits failed to show that each of those presenting them was "a qualified elector." But it was objected that the "sufficient reason for not appearing" did not appear in them.

These affidavits alleged to be defective were of two principal classes:

First, 31 affidavits, each of which gave no reason whatever for failing to appear before the board. The majority say as to these that they were not, when produced as evidence in the case, identified by the voters, the notary public, or the judges. They were simply produced by the township clerk, into whose hands they were placed after the election. The safe custody of them was not proven, and the majority reports imply that they should have been kept and identified with the same care as ballots for a recount. But the majority say that these 31 ballots are not decisive of the case.

Second, the following cases described in the majority report:

Thirteen cases where "neglect" is assigned, and 103 where "left off the register" is assigned for not appearing before the registry board. With one or two exceptions these affidavits were presented and used in the two Oskaloosa precincts in Mahaska County. The evidence shows very conclusively that the registry list in that township was not an honest one. In its preparation it was found in unauthorized hands and at unauthorized places. Out of a voting population of about 800, about 200 names, nearly all Democrats, were omitted. Old citizens who were property holders, and had voted there for many years, found themselves unregistered, although their names must have been upon the poll lists and assessment lists. On election day the fact that 25 per cent of voters' names was omitted, and nearly all of one political party, must have created a profound impression of neglect or fraud on the part of the registry board. The evidence shows that some of the electors were so indignant and humiliated that they refused to furnish the necessary affidavit and declined to vote. In such a state of affairs the words

"neglect" and "left off the register" are pregnant with meaning, and furnish "sufficient reason" to any unbiased mind. Those terms, as thus used, do not imply "neglect" on the part of the elector, but on the part of sworn officers in whose honesty and efficiency the electors were authorized by law to depend.

The minority views deny as a matter of fact that there was anything about the registry list that was dishonest.

Discussing the single question of law, the majority report says:

The question then presents itself whether the provisions of section 618 are directory or mandatory, or partly both. It is not a case in which the vote of a nonregistered elector was received without any affidavit or proof whatever, as directed in the statute. There is no claim or pretense that the elector was not in all other respects qualified. There is no claim or pretense that any of the alleged defects or imperfections in the affidavit were the result of design or of any intent to evade or defeat the statute.

But the case is where the elector, finding himself omitted from the registration list, resorts in good faith to the second method of qualifying himself as to the method of voting; attempts to prepare, subscribe, and swear to an affidavit in compliance with the statute; presents it to the judges for inspection and examination to satisfy them of the existence of the requisite qualifications and a satisfactory reason for not appearing before the registration board; the examination is made bona fide; the judges are satisfied and the vote received. Are all of these provisions mandatory; and can such a ballot be rejected because the reason for not being registered is omitted, or may not afterwards be satisfactory to some court or person who was not a judge of election, or because of some technical mistake, or clerical omission, which, if noticed at the time, could at once have been corrected, and all question as to the legality and regularity of the vote obviated?

Little aid is derived from decisions in Iowa or elsewhere. In the case of Edmunds *v.* Banbury (28 Iowa, 267), the plaintiff, insisting that the registry law was unconstitutional and void and being unregistered, tendered his vote without any attempt to make the required affidavit, which being refused, he sued the judges of the election. The court held the law constitutional and that the judges were justified in refusing his vote. This was correct whether the provisions of section 618 are directory or mandatory.

In a later case, Nefzger *v.* R. R. (36 Id., 642), at a special township election to determine whether property should be taxed to aid in building a railroad, held without any pretense of registration, the court held that the law requiring all elections to be conducted under the registry system was mandatory and that the election was void. But this does not reach the question, for there can be no doubt that a general statute which declares that all elections shall be held under a registry system is mandatory in its general sense.

The question has arisen as to the character of the statute, wherein it provides that no vote shall be received from any person whose name does not appear on the list, unless he shall furnish an affidavit, or proof, etc. In the cases of Doerflinger *v.* Helmantel (21 Wis., 566); in reelection of McDonough (105 P., 490), and cases in one or two courts of interior jurisdiction, provisions of this character have been held mandatory. It has been held directly otherwise in Illinois. (See Dall *v.* Irwin, 78 Ill., 170; Clark *v.* Robinson, 88 Id., 504.)

This identical question arose in the contested election case of Curtin *v.* Yokum in the Forty-sixth Congress.

The report also quotes the constitution of Iowa to show that the reasoning of the majority in the case of Curtin *v.* Yokum would apply here:

ART. 2. SEC. 1. Every male citizen of the United States of the age of 21 who shall have been a resident of this State six months next preceding the election and of the county in which he claims his vote sixty days shall be entitled to vote at all elections which are now or hereafter may be authorized by law.

The report also cites Wheelock's case (1 Norris, 297) and the case of Lowe *v.* Wheeler. Citing Wheelock's case, the report says:

The highest court of judicature in Pennsylvania has declared as follows:

"The State constitution gives to every citizen possessing the qualifications prescribed the right to vote; and section 7 of the same article provides that no elector shall be deprived of the privilege of vot-

ing by reason of his name not being registered. To disfranchise all the voters of a township, as we are asked to do in his petition, the facts on which we are asked to act should show a case free from legal doubt. If we by our decision should permit the carelessness or even the fraud of officers, whose duty it is to furnish a list of voters at the elections, to defeat the election and deprive the people of the county of the officer who was elected by a majority of their votes, we would thus make the people suffer for an act in which they did not participate and which they did not sanction. In so doing, instead of punishing an officer for the violation of the election law, we practically punish the voters of the county by defeating their choice of a county officer as declared at an election. A decision of this kind would be fraught with danger by inviting unscrupulous and unprincipled persons on the eve of an important election to secrete or destroy the list of voters or other important papers in a township in which the majority may determine the result in the county."

It can not be seriously contended that the right of a single individual citizen to vote is not as securely guarded by the constitutional guaranty as that of the electors of an entire township. And it must be held that if the fraud, mistake, or omissions of a board of registry or of the judges of election could not deprive the electors of a whole precinct of their right to vote, so it could not that of a single elector. Accordingly, after much consideration in the Curtin-Yokum case, the House, whose decisions in matters of such high privilege and affecting the constitution of the House itself ought to be the highest authority in the world, decided in favor of the sitting Member, and in effect held the registry law to be directory.

The same action was had by the House in the later cue of Lowe *v.* Wheeler, in the Forty-seventh Congress, where it was held that when electors who are not registered are permitted to vote without challenge, their votes can not afterwards be rejected, became to do so would perpetrate a fraud upon the elector and deprive him of his vote. Thus it will be seen that the question is not a settled one, and it may be very doubtful as to the weight of authority one way or the other. But may not this conflict be reconciled in a manner entirely satisfactory and in recognition of a just rule of interpretation?

It is difficult to escape the conclusion that where a registry law requires the production of an affidavit by an unregistered elector as the condition for his voting, it is many to a certain degree and for a certain purpose. It is mandatory so far as to require good faith in its observance and to prevent its willful evasion. But the whole scope and purpose of such a law is to defeat fraud, subterfuge, and evasion, and to enable every lawful and qualified voter to vote and have his vote counted in a canvass purged of all illegal votes. The moment the operation of the registration defeats itself, operates to defraud the legal elector and defraud him of his vote, it not only ceases to be mandatory, but is quoad hoc void.

To illustrate this more fully: The law requires the registry board to enter the names of all the electors on the list. The elector, when he approaches the polls to vote, has the right to presume omnia recte acta, and that his name is properly on the list. He can not know that it is or is not there. Even though he may have appeared before the board of registry and seen his name registered, it may have been subsequently erased upon showing or fraudulently. Hence, when he comes to vote, his offer to vote is itself an inquiry whether he is registered.

The list is in the possession of the judges, and an inspection of it alone can give answer to the inquiry. The elector can not inspect it, and the law makes it the duty of the judges to answer whether the elector is registered. They may answer "yes" verbally, or silently by signs and acts, in receiving the vote. It matters not whether the elector makes the inquiry aloud, or simply by tendering the ballot; or whether the answer is aloud or by silently receiving the ballot; the effect is the same. The judges may have been mistaken in the name, or may have made the answer in fraud, intending to cause the subsequent rejection of the ballot for want of registry. There can be no question that the elector in such an instance, if correctly informed that he was not registered, could still rectify that omission and secure his vote by presenting the requisite affidavit. And the failure to give him the true information, as above supposed, would not only be a direct violation of law and a fraud on him, but deprive him of that right, and, consequently, of his vote; and the result would be the direct and immediate consequence of the conduct of the judges.

It would be a gross fraud upon the elector and deprive him of the very right which it is the whole purpose of the law to protect and subserve. The law should not bear a construction which would permit such consequences. Indeed, to that extent the law would be unconstitutional. For it may be safely asserted that where the Constitution affirmatively confers the right to vote upon the citizen, the legislature has no power to prescribe regulations that would thus entrap him and deprive him of that right.

Not any of the cases cited go to this extent. The Wisconsin case—Doerflinger *v.* Hilmartel—and the Pennsylvania case, in reelection of McDonough, simply hold the general doctrine that in its general sense the statute is mandatory. They simply assert that where the elector is not registered and votes as a nonregistered voter without the additional affidavit or proof, his vote must be rejected. If they are to be deemed as going farther than this they are obiter dicta and of no authority.

The elector can not be deprived of his vote except by conviction of felony. A registry law is only reasonable when it puts the elector who does not comply with it in the attitude of remaining away from the polls or refusing to vote. To register or furnish an affidavit is a reasonable regulation accompanying the act of voting. If this act is omitted or refused it is equivalent to remaining away and refusing to vote. But when this same statute deprives of his vote an elector who comes in good faith and is advised by the authorities, and believes he is registered, and whose vote is received in such manner as to deprive him of his right to rectify the omission by affidavit, it violates directly the constitutional clause conferring the right, and is to that extent void.

Hence we insist that a vote deposited in good faith by the elector, supposing himself to be registered, can not be rejected upon subsequent discovery that he was not. But where the elector is advised or knows that he is not registered, no such consequences will follow. No such fraud can be perpetrated upon him. He is not deprived of any locus penitentiae in procuring an affidavit. He knowingly violates the law, and his vote is a fmudulent one.

This your committee believe to be the true rule, and announce it as a principle. Where the elector, acting in good faith and honestly supposing himself to be registered, deposits his vote, and the same is received by the judges, it is a valid vote. But where the elector does not act in good faith and knows he is not registered his vote should be rejected.

It is worthy of consideration that the statute in question is only so far mandatory as to control the action of the judges of election. While it is a negative statute it applies to and affects the judge only. "No vote shall be received" by the judges unless the elector is registered. But suppose they do receive it. The judges might be punished. But there is no provision affecting the elector. He is not to be punished or his vote cast out.

Under the rule or principle announced above, it may sometimes be a matter of some difficulty to establish the want of good faith on the part of the nonregistered elector whose vote has been received by the judges. But most unquestionably, in the absence of other evidence, the presumption of innocence and omnia recte acta prevails in such case. The burden of the showing want of good faith must necessarily rest upon the one challenging the vote and asking its rejection.

It is quite well settled that when the elector offers his vote he must establish all legal qualifications to justify its reception. But the act of the judges in receiving it is judicial. When it has been received every presumption is in favor of its regularity and legality. Whoever seeks to cause its rejection must assume the burden of establishing the disqualifications, even to proving a negative.

"Evidence which might have been sufficient to put the voter to his explanation if challenged at the polls is not deemed sufficient to prove a vote illegal after it has been admitted." (Gooding *v.* Wilson, Forty-second Congress.)

"Of course some weight is to be given to the decision of the judges of election, whose province it is in the first instance to admit or exclude votes. Their action is to be presumed correct until it is shown to have been erroneous." (McCrary on Elections, sec. 372; see also Id., sec. 294; New Jersey Cases, 1 Bartlett, 24; People *v.* Peare, 13 N. Y., 74.)

There can be no doubt that if the foregoing views are maintained they are conclusive of the question involved in the present case. For if a ballot received from an elector who in good faith believed himself registered as required by law would be voted, still more so would it be the case where he in good faith presented an affidavit in supposed compliance with the law and the judges accepted it as sufficient.

The distinction between the essential qualifications of the elector and the mere methods or machinery of election must not be confounded. The judges of election can not by receiving a ballot give qualifications to one who is not a qualified elector. The elector, when challenged, may take the required oath as to his qualifications, and the judges then admit his vote. This will not prevent his vote from being subsequently thrown out when it is shown he was not qualified. But suppose in administering the oath by mistake some important line or sentence of the oath was omitted by the judge, would that alone cause a rejection when it appeared the oath was taken in good faith?

So, too, if regularly registered, acceptance of his ballot does not establish his real qualification. Neither does it when he votes upon affidavit. All these things are mere preliminary proofs to enable him to deposit the ballot. They are not part of his real qualifications. Hence an error or mistake in the preliminaries, when the ballot is received, will not cause its rejection.

But the statute, in so far as it provides what declarations shall be set forth in the affidavits, is directory only. And in this particular the assumption, hereinbefore rebutted, that a vote received without registration is illegal, would not control the actual question in this case. It may well be held that an affidavit is necessary, and also that a failure to comply in respect of all the statements required would not render the affidavit void. There is no prescribed formula for the affidavit. It shall show that the elector is qualified and a sufficient reason for not appearing before the registry. He shall also prove by one freeholder who is on the register that he knows him to be qualified, giving residence, etc.

Suppose there are errors or omissions in the statement, but the vote is received by the judges. What shall the proof be that will subsequently reject the vote? That the elector was not in fact a qualified elector or that he failed to "say in his affidavit" that he was a qualified elector? Shall the substance give way to the shadow? There is no doubt that the affidavit is to be submitted to the judges. They are to pass upon its compliance with the statute. Here again we find the same method of perpetrating a fraud upon the elector. The judges are to aid the elector by carefully inspecting the affidavit in the discharge of their duty, and if it does not contain the necessary allegations to so decide and by pointing out the imperfections enable the elector to rectify and perfect his proof. The law providing for affidavits was intended as a means of securing the vote, not defeating it.

In other words, the judges of election have no power to pass upon the legal and essential qualifications of the elector. They have no right or power to hear evidence or pass upon that question; but as to whether the affidavits comply with the statute, whether they show a satisfactory reason for not appearing at the registry board and contain the necessary statements, is a matter addressed to their judgment and examination; and when that judgment has allowed and received the vote it is final. The proof has been sufficient to justify the reception of the ballot, and thenceforward the only question that can be raised must relate to the essential qualifications of the voter. Of course it is not necessary to add that this proposition may be modified by the proviso that the paper offered as an affidavit is intended as such in good faith, and is not palpably an evasion or subterfuge.

The minority contended that the courts of Iowa had passed on the registration law and declared it mandatory, and say:

Congress has never reversed the decision of a State court as to the constitutionality and force of its own enactment.

But in debate it was denied that this was so, a Member arguing for the majority report saying: [1]

The State of Iowa in dicta has so decided; but the direct question involved in this case was not presented for decision, otherwise I should feel bound to follow the judgment of that case.

The minority discuss the cases of Edmunds *v.* Barnburry (28 Iowa, 267); Nefzgar *v.* R. R. Co. (36 Iowa, 642); in re Election of McDonnough (105 Pa., 490); Doerflinger *v.* Helmantel (21 Wis., 566), and two Illinois cases (78 Ill., 170, and 88 Ill., 504); and conclude:

After a review of all the cases we find it impossible, as it seems to be "difficult" for the majority (p. 7, majority report), to escape the conclusion that this registry law, requiring the "furnishing of an affidavit "by an unregistered voter as a condition for his voting, is mandatory. And we believe that it is mandatory upon all. It is the condition precedent—"no vote shall be received," etc. There is no middle ground.

It is not denied that this rule may sometimes work hardships and even deprive the honest elector of his right of suffrage. What law is there which is not obnoxious to the same charge? Ignorance will

[1] Speech of Mr. Rowell, Record, p. 4146.

pervert and set at naught the most perfect laws. If the plea of ignorance were allowed as an excuse many salutary laws would be practically annulled.

In Oskaloosa Township 31 voters presented affidavits, in which there were no reasons given for not appearing before the board on the day for correcting the registry. These affidavits are all in the same form, and the following is a sample of the whole:

STATE OF IOWA, *Mahaska County, ss:*

I, Walter Mitchell, on oath do say that I am a resident of West Oskaloosa Township, county of Mahaska and State of Iowa; that I am a citizen of the United States; that I am twenty-one years of age; that I have resided in the State of Iowa six months, and county of Mahaska sixty days last preceding this election; that I have not voted in this election, and the reason my name does not appear on the register list is Walter C. Mitchell.

C. BLATTNER.

Subcribed and sworn to before me by said affiant this 4th day of November, A. D. 1884.

[SEAL.]

J. B. BOLTON,
Notary Public.

In the same township 103 gave as a reason "left off the register." This is a sample of these affidavits:

STATE OF IOWA, *Mahaska County, ss:*

I, Walter Hunter, on oath do say that I am a resident of West Oskaloosa Township, county of Mahaska and State of Iowa; that I am a citizen of the United States; that I am twenty-one years of age; that I have resided in the State of Iowa six months, and county of Mahaska sixty days last preceding this election; that I have not voted in this election, and the reason my name does not appear on the register list is left off registry.

WALTER HUNTER.

Subcribed and sworn to before me by said affiant this 4th day of November, A. D. 1884.

[SEAL.]

J. B. BOLTON,
Notary Public.

It is conceded that all these affidavits were presented by Democrats, and upon them the affiants were permitted to vote. We maintain that all these votes should be deducted from the count of votes for the sitting Member. If we are right in our conclusions that this statute is mandatory, there cam be no doubt as to the rejection of the 31 votes where no excuse is given. But is it not equally true of the 103 voters who say that the reason they did not appear is "left off the register?" Can this, by any process of construction, be made to furnish an excuse? We will not go into the question as to who is to judge of the sufficiency of the excuse, or whether it is competent for the House to reverse a decision of the judges where any excuse is furnished; but in this instance we maintain that the words "left off the register" furnish no excuse for the nonappearance, and that there is nothing for the judges of election to act upon. It appears to us impossible to spell out an excuse from these words.

The majority of the committee, in their report, after a labored argument, at page 8 say:

"This your committee believe to be the true rule, and announce it as a principle: Where the elector, acting in good faith and honestly supposing himself to be registered, deposits his vote, and the same is received by the judges, it is a valid vote. But where the elector does not act in good faith and knows he is not registered his vote should be rejected."

But that principle, if correct, does not affect this contest. In this case the voter knew that he was not registered; hence his affidavit. He knew the law and that it was necessary to furnish the affidavit, presenting all the facts essential for the judges of election to act upon. He was not deceived by the judges as to any fact peculiarly within their knowledge; he knew that he was not registered as well as they; he knew that he must present a reason as well as they, for he was bound to know the law. And hence the reasoning in the majority report, as in the Illinois cases, is inapplicable to this case. It is impossible to work out any deception or fraud in this case from the evidence.

It is true that the unbiased mind must come reluctantly to a conclusion that would disfranchise a voter for the single reason that he had failed to comply with the registry law. And yet it is our duty to uphold the laws. Even were we convinced that the law was a bad one, our duty would be the same. But there are no more commendable laws upon the statute book than these same registry laws. No laws

have done more to guard the purity of the ballot box than these same laws. In every State where they are in force they have thrown up a bulwark against fraud and dishonest voting that human ingenuity has seldom been able to compass. Any construction that weakens their force or construes away their mandatory character is a step backward and should not be adopted, unless plainly required by the well-settled rules of construction. It should be our aim to enforce these salutary measures to their full intent and meaning. If we enforce them in this case we can reach no other conclusion than that the contestant is entitled to the seat now held by the contestee.

In accordance with their conclusions the majority offered these resolutions:

Resolved, That Frank T. Campbell was not elected to a seat in the Forty-ninth Congress as a Member from the Sixth Congressional district of the State of Iowa.

Resolved, That James B. Weaver was elected and is entitled to retain his seat in the Forty-ninth Congress as a Member from the Sixth Congressional district of the State of Iowa.

The minority presented resolutions declaring contestant elected.

On May 4[1] the report was debated at length, and then without division the minority resolutions were disagreed to, and the resolutions offered by the majority were agreed to.

1003. The Rhode Island election case of Page v. Pirce, in the Forty-ninth Congress.

Although a contestant had accepted and held a State office in violation of the State constitution if he were really elected a Congressman, the House did not treat his contest as abated.

Testimony being taken after the legal time against returned Member's protest, but under color of a disputed oral agreement of counsel, the House declined to dismiss the contest.

Where contestant had taken testimony irregularly, the House gave returned Member additional time to cross-examine witnesses who had already testified and to take rebuttal evidence.

On April 14, 1886,[2] Mr. R. S. Green, of New Jersey, presented the report of the majority of the committee in the Rhode Island case of Page *v.* Pirce. The law of Rhode Island required for election a majority over all other candidates.

The facts as to the phase of the contest involved in this examination were thus set forth in the minority views presented by Mr. Frederick D. Ely, of Massachusetts:

This contest concerns the Second Congressional district of Rhode Island. The election returns legally made show that Pirce received 7,746 votes; that Page received 5,995 votes; that Alfred B. Chadsey received 1,500 votes; and that other persons received 235 votes. Pirce received 1,751 votes over Page and 16 votes over all. Page does not appear in this case as a citizen claiming that the election was void, but as a contestant, claiming that he was duly elected in Congress from said district. At the date of the November election, 1884, Page was a member of the senate of Rhode Island, and continued to hold his seat in said senate and act and vote as a member of said senate after the 4th day of March, 1885, and after that date, in April, 1885, became a candidate for reelection, was elected a member of said senate, accepted the office, and has been since his said election, and during this session of Congress, acting and voting as a member of said senate, all in contravention and violation of the constitution of the State of Rhode Island, if he is and has been, since the 4th day of March, 1985, as he now claim and asks this House to declare, a Representative in Congress from his State.

It appears that Page served his notice of contest on Pirce within the time required by law, to wit, on the 5th day of February, 1885, and Pirce answered on the 5th day of March, 1885, and on that day

[1] Record, pp. 4138–4147; Journal, pp. 1488, 1489.

[2] First Session Forty-ninth Congress, House Report No. 1623; Mobly, p. 475.

served his answer on Page. Page took no testimony within the time required by law, but on the 12th day of June, 1885, did notify Pirce that he should begin to take testimony on the 25th day of June, 1885, and did between said date and the 20th day of July, 1885, in the absence of Pirce and against his written protest, examine certain persons, and the questions asked and answers given have been printed in this case, with the understanding and agreement that it should not affect, impair, or prejudice Pirce's rights. Said 25th day of June was seventy-two days after Page's time for taking testimony under the statute had expired, being one hundred and twelve days from the day on which the answer of Pirce, the returned Member, was served upon Page, the contestant.

The law limiting the time for taking testimony in contested election cases in the House of Representatives is found in section 107 of the Revised Statutes, and section 2 of chapter 119 of the Statutes of 1875.

Section 107 of the Revised Statutes is as follows, viz:

"In all contested election cases the time allowed for taking testimony shall be ninety days, and the testimony shall be taken in the following order: The contestant shall take testimony during the first forty days, the returned Member during the succeeding forty days, and the contestant may take testimony in rebuttal during the remaining ten days of said period."

Section 2 of chapter 119 of the Statutes of 1875 is as follows:

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

Page alleges and makes oath that he made in oral agreement with Stephen A. Cooke, Jr., the attorney of Pirce, on the 9th day of March, 1885, to the effect that the testimony might be taken at any time before the meeting of Congress in December, 1885. Said Cooke, under oath, denies that he made said agreement. Page supports his affidavit by the affidavit of Frederick C. Hull, and Pirce in reply to Hull's affidavit files the affidavit of Charles C. Gray, to the effect that Hull had for some years made his headquarters at Page's office, had been employed by Page in various capacities, and derived therefrom most of his support, and that prior to the election for Congress, 1884, Hull presented at the printing office of which Gray is superintendent a written copy of a spurious Republican ticket to be used at said election; that said ticket was set up at Hull's request, and the form taken away by Hull, the name of the candidate on said spurious ticket being William H. Pirce. These affidavits are attached to the printed record in this case. It also appears that in a correspondence between Page and Cooke, Cooke informed Page on the 28th day of April, 1885, that he never made the agreement now claimed by Page, and yet Page allowed fifty-three days thereafter to elapse before he attempted to take any testimony.

After Page served his notice to take testimony on Pirce, Pirce served, on the 23d day of June, 1885, his protest against and objection to taking such testimony on Page, and notified him that he should not appear during the taking thereof in person or by attorney. Pirce seasonably appeared before the Committee on Elections and moved that this contest be dismissed, because the testimony was not taken in time.

The majority of the committee, by an inspection of the returns, concluded that the actual majority of returned Member was only 3 instead of 16.

This being the state of facts, the majority of the committee concluded:

While the committee would be inclined in ordinary cases to require that parties should strictly observe the directions of the statute, the testimony presented in this case by the contestant discloses such wholesale and open bribery, implicating even the contestee personally, that the House, in justice to its own dignity, must, in the opinion of the committee, take notice of the me. As the contestee, relying on his understanding of the agreement, abstained from cross-examination of the witnesses and from the production of evidence to contradict the case made by contestant, we recommend that time be given, as provided in the accompanying resolution:

"Resolved, That William A. Pirce, sitting Member from the Second Congressional district of Rhode Island, be allowed thirty days from the passage of this resolution within which to resubpoena and cross-examine witnesses heretofore examined by Charles H. Page, the contestant, and to take any testimony he may desire, and that ten days thereafter be allowed to said Page to take evidence in rebuttal."

The minority favor the motion of Mr. Pirce that the contest be dismissed:

In our opinion this motion should be granted. Even if the agreement were made, as claimed by Page, he has no standing before this House. Whether we regard the statutes concerning contested elections as absolutely binding on the House or as rules of procedure, neither Page nor Pirce nor both could waive or abrogate them. The House alone can do that. If Page desires the time for taking testimony to be extended, or that testimony already taken be received and considered as if taken in time, it is his duty to apply to the House, and this he has not done or attempted to do. He should also allege and prove a sufficient reason for such indulgence to him on the part of the House. This he has failed to do. If any agreement, founded on mere convenience of counsel, be sufficient, which we deny, certainly an oral agreement is not. This was decided in O'Hara *v.* Kitchin, in the Fortysixth Congress, five years ago, and has never been overruled or even questioned. We make one or two brief quotations from the able report of the Committee on Elections in that case and earnestly approve them as wise and just. Democrats and Republicans all join in saying:

"The evils resulting from permitting the parties, at their own convenience, to regulate the time of taking testimony, without regard to the statutes or public interest, are too serious and obvious to require comment. In any case, if such agreements axe to be regarded, they should be in writing and signed by the parties or their attorneys."

And again—

"The misunderstandings that often honestly arise from oral agreements axe alone sufficient to justify courts in insisting that none but written agreements will, if questioned, be recognized. We think it of great importance in election cases that parties should understand absolutely that all agreements in contravention of the statutes of the United States in regard to the taking of testimony, to be considered at all, should be in writing, properly signed, and made a part of the record itself."

The minority cite the decision of the committee in the case of O'Hara *v.* Kitchin and declare that the convenience of counsel or parties is not a sufficient reason for postponing the time for taking testimony beyond the statute limit. Therefore the minority recommended a resolution declaring Mr. Page not entitled to a seat, and a further resolution providing for an investigation into the intimidation and bribery alleged by contestant.

The report was debated at length on May 4[1] and the minority modified their proposition so as to provide for allowing the sitting Member forty days from May 12, 1886, within which to cross-examine witnesses heretofore examined by Mr. Page, and that ten days be allowed contestant to take evidence in rebuttal.

This proposition was offered as a substitute and was disagreed to, yeas 99, nays 127.

The resolution proposed by the majority was then agreed to, yeas 117, nays 78.

On January 15, 1887,[2] Mr. Henry G. Turner, of Georgia, submitted the report of the majority of the committee on the merits of the contest.

The majority report claimed that the actual majority of sitting Member was not 16 but 3. The minority denied this and presented during the debate a certificate of the secretary of State of Rhode Island giving the majority as 16. Thereupon Mr. Turner said that he would concede that the majority should be considered 16.

1004. Case of Page v. Pirce, continued.

Affidavits of persons who did not appear at cross-examination because of failure of returned Member to pay witness fees were not rejected as ex parte.

There being direct testimony of voters that they were bribed to vote

[1] Record, p. 4148–4161; Journal, pp. 1489–1493.

[2] Second session Forty-ninth Congress, Report No. 3617; Mobley, p. 489.

against their convictions for returned Member, this fact contributed to overcome the returned majority.

A tinted ballot was not rejected as having a distinguishing mark when voters were not supplied with envelopes as required by law.

Influence of a highway superintendent over his employees at the polls was held to be intimidation.

In Rhode Island, in 1886, a majority vote was required for election of a Representative in Congress.

The majority report discusses the only two issues in the case, the alleged bribery and intimidation practiced in behalf of sitting Member.

(1) As to bribery.

Ten witnesses swore that they received money for their votes, but afterwards they qualified this by saying that they received payment for their time. The testimony of Charles C. Gardiner is the most direct:

Charles C. Gardiner, having been sworn, testifies as follows:

1. Q. What is your name, age, residence, and occupation?—A. My name is Charles C. Gardiner; age, 48; Natick, R. I., is my residence; occupation, weaver.

2. Q. Were you a voter in the town of Warwick in the year 1884; if so, in which voting district?—A. I was; in district No. 1.

3. Q. Were you present at the election on November 4, 1884, and did you vote for Representative to Congress at that election?—A. Yes, Sir, I was present and voted for Representative to Congress.

4. Q. For whom did you vote?—A. For Pirce.

5. Q. Did you at that election receive any money for voting the Pirce ticket?—A. I did.

6. Q. How much money did you receive?—A. Two dollars.

7. Q. Did you receive this money from a person working for the election of Pirce for Congress?—A. I did.

8. Q. Was this person who paid you this money distributing Pirce tickets at that election?—A. He gave me one of the Pirce tickets, then saw me vote, and then gave me the money. I did not see this person distribute ballots to anyone else.

CHARLES C. GARDINER.

Cross-examination of CHARLES C. GARDNER, a witness called in behalf of Charles H. Page, contestant.

BY MR. COOKE:

1. Q. When you voted for Wm. A. Pirce, as you have stated in your direct examination, did you vote according to, or contrary to, your political convictions, in the election held November 4, 1884?—A. I voted the Republican ticket. I always have voted the Republican ticket ever since I have been a voter.

2. Q. Would you have voted for Mr. Pirce at that election for Representative in Congress if you had received no money?—A. I should have voted for Chas. Page if I had received no money.

3. Q. Why would you have voted for the Democratic candidate for Congress at that election, if you had always before that time voted the Republican ticket?—A. Because it was my choice in the man.

4. Q. Do you know for whom you voted for Representative in Congress at that election?—A. Voted for Pirce.

5. Q. Did you have a very decided choice in your candidate for Congress at that election?—A. I did at first. Some of the men around there told me to vote the straight Republican ticket, and I "done" so.

6. Q. Was your choice on account of personal or political considerations?—A. It was on the question: I liked Page better than Pirce, although I had never seen either one to know who he was.

7. Q. What did you know about either of them to cause you to wish to vote contrary to your party?—A. I did not know nothing about either of them. All it was they said that Page was the best man for Congress.

8. Q. So you voted for $2 against Page notwithstanding, did you?—A. Yes, Sir.

9. Q. Why so?—A. 'Cause I needed the money.

CHARLES C. GARDINER.

The testimony of William Wilcox was presented as showing not only how he had voted for money, but how others had been paid:

6. Q. Will you please state whether you received any money as an inducement to or as pay or reward for having so voted?—A. After I voted I received $3 for voting the ticket for Mr. Pirce.

7. Q. At the time you voted did you expect to receive money for voting the Pirce ticket which you would not have expected to receive had you voted for Mr. Page?—A. No, sir.

8. Q. State how and by whom the money was paid to you. Give the particulars.—A. I don't wish to give the name of the gentleman who paid me the money at present. It was paid in Atwood's Hotel, in Warwick, Kent County, R.I.; there were probably 100 voters there waiting for money. This gentleman whom I have spoken of, and whose name I do not wish to give, paid the money in greenbacks right out of his own pocket.

9. Q. Do you know if there were any voters paid at Atwood's Hotel who had voted for Mr. Page?—A. No, sir; there was no money paid there for Mr. Page; I don't know a man who got a dollar there for voting for Mr. Page.

10. Q. In whose interest and for whose election as Representative was the person who paid the money as you have stated working?—A. In the interest of Mr. Pirce; John H. Collingwood was the managing man for Pirce at that election in Warwick.

11. Q. How came you to go down to Atwood's Hotel and join the crowd of voters, as you have stated?—A. I was called there to get my pay for voting.

12. Q. When did you first understand that you would receive some money if you voted the Pirce ticket?—A. Soon after the polls were open-probably twenty minutes.

13. Q. From your knowledge and observation, about how many voters were paid for voting for William A. Pirce at that election in the town of Warwick?—A. In our district, which is the first voting district in the town of Warwick, there were probably from 100 to 125.

WILLIAM WILLCOX.

Jinks also testified:

5. Q. How much did you receive, and where, when, and from whom? State the particulars.—A. I got $3; I received it at the office in the barn of Atwood's Hotel that night after the polls closed. I am unwilling to state the name of the person who paid it. A number of voters went up there with me. All these voters that went with me voted for Pirce. I probably saw 100 people paid the same amount that I got. This person I have spoken of had a list of our names, called them off, and we answered them, and as we went up he paid us the money out of his pocket.

6. Q. When did you first know or when were you first given to understand that you would be paid if you voted the Pirce ticket at that election?—A. This man that I have mentioned came to me two days before the election, and told me to see him before I voted and he would give me as much as there was going. He said he knew there would be money going on the Pirce ticket, and he also said a man had been to him and hired him to buy voters to vote the Pirce ticket. I saw him on election day and he took my name as I went up and voted.

7. Q. To what political party do you belong, Republican or Democratic, and for whom would you have voted at that election if there had been "no money going," as you expressed it?—A. I am a Democratic man and I voted the Republican ticket that day because I got money for doing it; otherwise I should have voted for Mr. Page.

JESSE JINKS.

On testimony like the above the majority of the committee based their conclusions as to this portion of the case.

The minority [1] contended that only 8, or at most 10, could be found who testified to anything that could be construed as an admission of bribery. The testimony of Wilcox and Jinks as to the men paid at the barn at Atwood's stable was condemned as hearsay. The minority also criticise the evidence:

Instead of considering these ex parte affidavits as in the nature of information which might justify the House in entering upon an investigation, and requiring the evidence to be taken de novo,

[1] The minority views were presented by Mr. J. H. Rowell, of Illinois.

so that it might be entitled to the credit due to evidence lawfully taken, the House upon the recommendation of the majority of the Elections Committee, simply authorized contestee to cross-examine the witnesses whose ex parte depositions were on file, and to take testimony in his own behalf, giving him thirty days in which to do so, and to contestant ten days in which to offer testimony in rebuttal.

When it is known that a large part of the so-called testimony was in the nature of hearsay, or opinions in cases where opinions are not allowable as evidence, and that the method of examinin the witnesses, the way of putting questions so as to shape the answer, would not be tolerated in a court of justice, the necessity of applying strict rules in considering the evidence is made apparent.

Under permission of the House, given as above recited, contestee proceeded to cross-examine such of contestant's witnesses as answered to his subpoena, and to examine witnesses in his own behalf.

Several of contestant's witnesses did not appear for cross-examination at all, although duly subpoenaed, and it is upon the testimony of some of these that the decision of the case is made to turn by the majority of the committee.

In debate it was stated on behalf of the majority that the failure of witnesses to appear for cross-examination was due to the fact that sitting Member declined to pay the witness fees.

The minority also assailed the character of the witnesses and denounced them as men whose word was not to be relied on.

(2) As to intimidation, two questions arose:

(*a*) As to the color of the ballots the majority report says:

The contestant has also alleged in his notice of contest, and proven incontestibly, that the party managers of Mr. Pirce's candidacy used ballots printed on tinted paper easily distinguishable at the polls, and contends with much force that this device violated the secrecy of the ballot, and operated greatly to his prejudice in a district in which there are many manufacturers belonging to Mr. Pirce's party.

The statutes of Rhode Island prescribe that voting shall be by ballot, but there is no express direction as to size or color of the ballot. But the law also requires that voters shall be supplied at the voting places with envelopes in which to inclose their ballots, and uniformity of the envelopes is prescribed. For this reason, largely, we decline to recommend that these ballots for Mr. Pirce should be rejected on account of their color, it not having been shown that the envelopes were not supplied, or their use discouraged or denounced.

(*b*) As to alleged intimidation by employers of labor.

majority rely on the following testimony principally:

JOHN GARLAND, having been duly sworn, testifies as follows:

1. Q. What is your name, age, residence, and occupation?—A. John Garland; age, 39 years; residence, Pawtucket; occupation, teamster and contractor.

2. Q. Were you, on November 4, 1884, a qualified voter in Pawtucket, R.I.; and, if yea, how long had you been such?—A. I was, and had been ten or twelve years.

3. Q. Were you present at the polling place in said Pawtucket on that day; and, if yea, how long did you remain there?—A. I was, and I remained all day.

4. Q. What was your business at that time?—A. Foreman on the highways.

5. Q. As such foreman, did you at that time have under your superintendence and control any considerable number of employees who were voters in said Pawtucket; and, if yea, about how many?—A. I did. I can't say how many; it might be 30; it might be 50; that or more, I can't remember.

6. Q. Did you at the election held at said Pawtucket, on said 4th day of November, 1884, work to secure the election of William A. Pirce to Congress; and, if yea, at whose request did you so work?—A. I did; at the request of the town committee.

7. Q. What was the color of the ballots used on that day at said Pawtucket in voting for William A. Pirce?

(Objected to as immaterial under the laws of this State by Mr. Cooke.)

A. I couldn't remember; there was two or three colors of tickets there.

8. Q. Did the use of such colored ballots then and there in anywise intimidate voters or prevent them from voting according to their political views?

(Same objections to this question as were made by Mr. Cooke to question 4 of Harley Howard's testimony.)

A. I think they might.

9. Q. Did you as such foreman exercise or attempt to exercise any influence upon the employees whom you superintended in said highway department in reference to their voting at said election, and if yea, in what manner did you exercise or attempt to exercise such influence, and with what effect?—A. No more influence than request them to vote, and I stayed at the polls all day to see that they did vote, as I voted, for Major Pirce.

10. Q. Were the majority of such employees, your subordinates, Democrats, and would they, to your knowledge or belief, vote the Democratic ticket if not influenced to the contrary?

(Same objection made by Mr. Cooke to this question as he made to question 8.)

A. They were most of them Democrats. I believe they would have voted the Democratic ticket.

11. Q. How, as a matter of fact, did said employees vote on that day?

(Same objection made by Mr. Cooke as above.)

A. They voted as I wanted them to at any election. They voted the Republican ticket on that day

12. Q. Did any person or persons furnish you with money to be used at said election in treating voters or otherwise improperly influencing them to vote the Republican ticket, and did you treat any such voters with the money so furnished?

(Same objection as to the previous question made by Mr. Cooke.)

A. No, sir.

13. Q. Did you treat any voters on that day?

(Same objection as above and as immaterial if not done for the purpose of influencing their votes.)

A. I did.

14. Q. For what purpose did you treat them?—A. I suppose for friendship.

15. Q. Was it to influence their votes or because they had voted as you desired, and was it for the purpose of retaining your influence over them?

(Objected to by Mr. Cooke for the same reasons included in objection to question 13, and also because witness has already stated the purpose of treating them without assistance of counsel.)

A. It was because they had voted as I requested and to have the influence with them again.

16. Q. Who was the chairman of the Republican town committee of the town of Pawtucket at the time?—A. Almon K. Goodwin.

17. Q. Were you not on said day, and on all election days while you were foreman of the highway department, employed by said Goodwin to work at the polls and to remain there for the purpose of seeing that laborers on the highways voted as the Republicans wanted them to vote?

(Objected to for reasons included in objection to question 13, and also as to all matters relating to any other day than November 4, 1884. Mr. Baker insists upon the answer for the purpose of showing that such laborers knew from past experience the purpose for which the witness was stationed at the polling place.)

A. Yes.

Witness also continued with testimony indicating that men who did not vote as he wished would be liable to lose their positions.

The minority do not consider this testimony as establishing actual intimidation.

The claim that a number of voters at Pawtucket were intimidated by their employer, the overseer of highways, amounts only to a complaint that the voters allowed themselves to be influenced by the wishes, of the overseer, expressed only by a simple request that the men should vote as he did.

This claim would overthrow, if allowed, all labor to secure votes for one party or another.

If one may not ask a voter to vote his ticket, he may not make a political speech, publish a political newspaper, or dare to express an opinion in the presence of voters.

As a result of their conclusions the majority proposed the following:

Resolved, That William A. Pirce was not elected a member of the House of Representatives of the Forty-ninth Congress from the Second Congressional district of Rhode Island, and that the seat be declared vacant.

The minority proposed as a substitute:

Resolved, That William A. Pirce was elected a Representative to Congress for the Second Congressional district of Rhode Island at the election held November 4, 1884, and is entitled to retain his seat.

The report was debated at length on January 25,[1] and on that day the question on agreeing to the substitute was decided in the negative—yeas 108, nays 130.

Then the resolution of the majority declaring the seat vacant was agreed to—yeas, 130, nays 33.

1005. The Indiana election case of Kidd v. Steele, in the Forty-ninth Congress.

The fact that an election officer before he became such had made a bet from which he withdrew before acting did not vitiate the return.

The House requires very plain evidence to presume such an interweaving of bribery in the votes as to justify rejection of the poll.

On February 21, 1887,[2] Mr. John S. Henderson, of North Carolina, from the Committee on Elections, submitted the report in the Indiana case of Kidd *v.* Steele.

The sitting Member had been returned by a plurality of 54 votes.

Two questions were raised by contestant's objections:

(1) The report describes the first thus:

The contestant insists, however, that the returns from precinct No. 2, Liberty Township, Wabash County, must be rejected for the reason that George E. Vandergrift, inspector of election at that precinct, was disqualified to act because he had an interest to the extent of $50 in a bet of $100, which George T. Rowan is alleged to have made with Ben Sweetzer to the effect that the contestee, George W. Steele, a candidate for Congress against the contestant, would be elected. It is assumed that the statutes of Indiana prescribe that no person shall be eligible as a member of the board of elections if he has anything of value bet or wagered on the result of the election.

Mr. Rowan, a witness for the contestant, testified that he received $50 from Vandegrift about two weeks before the Ohio October election, and that this money was bet for Vandegrift." That was the intention at the time." On cross-examination he stated that about a week after the bet Vandegrift came to him and wanted to be let out of the bet, as he was going to be inspector of elections, and wanted him to assume it, and that he did so, and gave him his note for $50, which was afterwards paid. It is not proven, nor even alleged, that Vandegrift had any interest in the bet at the time of the election. The vote of this precinct was 182 for Steele and 66 for Kidd. The election appears to have been fair and free from fraud or corruption of any kind. The committee agreed that the returns of this precinct ought not to be rejected.

(2) A question as to bribery.

The report says:

The contestant also insists that the returns from the first, second, and third precincts of Center Township, Grant County, should be excluded because "the proof of bribery, of the almost open and shameless purchase of votes for money by Steele and his agents is full and conclusive." The contestee

[1] Record, pp. 1008–1028; Journal, pp. 372–375.

[2] Second session Forty-ninth Congress, House Report No. 4142; Mobly, p. 513.

resides in Center Township. This allegation requires a careful and patient investigation. The returns of these precincts show the following votes:

	Kidd.	Steele.
First precinct	103	212
Second precinct	121	307
Third precinct	199	380

As to the testimony:

Andrew Sheron testifies that Amos Six, whom he supposed lived on sitting Member's farm, offered him $3 to vote the Republican ticket. Sheron testified that he declined the offer.

Robert H. Home testified that he saw Amos Six, with whom he was acquainted, pay James Havens $5 to vote for Steele, and that he marked Havens's ticket for him, knowing that he was to receive money for it. Havens was a Democrat.

William Odom testified in reference to a conversation with sitting Member just before the election:

He then called me out to one side and said, "Here, Bill, I know you are a Democrat anyhow;" and said, "If you will support me, here is a $5 note to get the drinks on." I said, "You just give it to me and I will get the drinks anyhow, and you can tell after the election whether I supported you or not." He then gave me the $5 note. He pulled it out of his pocket and handed it to me behind him. The next time I had any conversation with him was over here on the court-house steps, at the south end. Me and Mr. Pilcher were together, and I stepped up to him (Mr. George Steele) and asked him if he had a dollar to spare. He said, "It is owing to what it is for.' I said, "That don't make any difference to you, does it, George, so we get it?" He asked me who we was. I told him it was me and Mr. Pilcher; and he said that wouldn't do me no good, would it? I said, "I don't know." He said, "If you will not forget me to-morrow I will give it to you." He then just reached down in his pocket and pulled out a roll of bills and pulled a $1 bill off of it and handed it to me. This was the night before the election. The other time was a month or six weeks before the election.

Cross-examination:

Q. Then he did not give you the $5 because of any assurance of support by you?—A. I had promised him a few minutes before that to support him, but not right at the time he gave me the $5.

Q. What act or word on the part of Steele caused you to say to him that you would give him your support?—A. I don't know as I can say just what words were used there at that time when I told him that.

Q. Then whatever was said about the $5 and whatever was done with it was said and done after your promise of support?-A. Yes; he gave it to me after I promised him my support.

Q. Then all that was said about the $5 by Steele was said after you promised him your support?—A. No, sir; I asked him for the $5 before, and he wouldn't give it to me till I did promise him my support.

William Pilcher made affidavit:

That he is a resident of Grant County and State of Indiana; that on the 4th day of November he was in the town of Marion, in said county, and that he did on said day, between the hours of opening and closing the poll, see one Charles Parker, of Marion, pay James Maxwell money and one-half pint of whisky to vote the Republican ticket at said election. And he further says that he heard Charles Brown say on said day that he had $200 of Steele's money, but he had paid it all out, but would see him (Steele) and get more; and afterwards heard Brown say that he had $30, and heard him offer the same for 7 votes, if they would vote for Steele; and he further says that on said day and between the hours above stated, he heard George Steele say to William Hubbard, in reply to said Hubbard's proposition to vote for him (Steele) if he would pay him money, that he did not dare to handle any money himself, but see Chs. Brown, Steve Smith, or Chs. Parker, and they would fix it for him.

Later when cross-examined Pilcher affirmed that he saw Charles Parker pay James Maxwell money and whisky to vote the Republican ticket; declined to answer when questioned as to the alleged remark of Brown about Steele; declined to identify his signature to the affidavit, and declared that to the best of his knowledge he did not swear to the affidavit.

An affidavit similar to that of Pilcher was also presented as from George R. Cresswell, but on examination Cresswell repudiated the affidavit.

James F. McDowell testified to conversations with Cresswell about Pilcher, which tended to give the impression that either of them might repudiate an affidavit for money. McDowell's testimony tended, but not conclusively, to show that both had made the affidavits.

Both McDowell and David Overman gave testimony tending to show that Jacob Malott had acknowledged after election that he had been induced by money from Steele to change his support from Kidd to Steele. They did not know personally whether he had done so or not.

John L. Parker, otherwise known as Charles Parker, the individual referred to in Pilcher's testimony, swore that he did not pay any money to anyone to induce him to vote the Republican ticket; but declined to testify as to his use of money at election time.

The report says of this evidence:

> This evidence, if uncontradicted, would be sufficient to authorize the rejection of the returns of these three precincts. The witnesses Pilcher and Cresswell have not testified in a plain, straightforward way. Their statements are contradictory, and can not serve one side any better than the other. (See pp. 118, 123, 916, 921.) William Pilcher (979) swears that William Odom, since he testified before Samuel Babb, the notary, made a statement to John A. Kersey that the testimony he had given before Babb was false in every particular, and that he had been hired by Mr. Overman to make the statement. George R. Cresswell (980) also testified to the same effect. It is impossible for the committee to conclude, from an impartial examination of the testimony, that "bribery had been so interwoven with the vote of these precincts that the whole return thereof should be rejected." Bribery is a heinous crime, and those who practice it should be denounced and punished. But there is not sufficient evidence in this case to warrant the rejection of the returns from the first, second, and third precincts, of Centre Township, Grant County.

After examining certain questions of fact the committee say that the contestant has failed to satisfy the committee that he received a plurality of the legal votes duly cast, and therefore they report resolutions confirming the title of sitting Member to the seat.

February 24[1] the House agreed to the resolutions without division.

1006. The Kentucky election case of Thobe v. Carlisle, the Speaker, in the Fiftieth Congress.

Contestant not having used due diligence in taking testimony, the House declined to extend the time therefor.

House was disinclined to extend the time of taking testimony in order to procure testimony on points not referred to in the original notice of contest.

Contestant having presented ex parte affidavits in support of his

[1] Journal, p. 716.

motion for further time to take testimony, returned Member was permitted to rebut with ex parte affidavits also.

As to what contestant must show to cause the House to reopen an election case for further testimony.

The mere fact that election officers are not divided as to party is not of itself proof that the law requiring such division has been violated.

Election officers belonging to one political party only, in violation of the requirements of law, are nevertheless de facto officers.

On January 17, 1888,[1] Mr. Charles F. Crisp, of Georgia, from the Committee on Elections, presented the report of the majority of that committee in the Kentucky case of Thobe *v.* Carlisle.

The sitting Member had received an official majority of 825 votes.

The notice of contest and answer, also an amended notice and an answer to that, were duly filed in this case. Thus the issues were joined between the parties.

The majority report thus gives the history of the contest:

On the 15th day of February, 1887, contestant took the testimony of three witnesses; on the 16th, of one witness; on the 17th, of three witnesses; on the 25th, of one witness; on the 26th, of one witness; on the 2d March, of one witness; and on the 3d, of one witness. Contestee, through his counsel, cross-examined the witnesses of contestant, but took no testimony himself.

On the 6th day of January, 1888, the cause came on for a hearing before the committee, when counsel for contestant argued the case upon the record, and also moved that the committee recommend to the House the appointment of a special committee to proceed to the sixth district of Kentucky and investigate the case further, or that the case be opened so that testimony might be again taken under such rules as should be prescribed by the committee. In support of this motion contestant presented and filed certain affidavits, letters, etc., copies of which accompany this report as an appendix, marked "A."

Contestee addressed a letter to the committee asking time to file affidavits in answer to those presented by contestant, whereupon the further hearing was adjourned until the 14th day of January, 1888. On that day contestee appeared by counsel and submitted affidavits, letters, etc., copies of which accompany this report as an appendix, marked "B."

Your committee first considered the motions submitted.

To excuse his failure to take testimony sustaining his notice of contest, contestant charges his attorney, L. A. Wood, esq., with being unfaithful to him; says he misled and deceived him, and intimates, if he does not charge, that said Wood, for a money consideration, "sold out" to the friends of contestee. In support of this allegation he presents the affidavits of himself and one John J. Pearce. Contestee in reply submits affidavits of L. A. Wood, esq., of Charles A. Tinley, the notary before whom the testimony was taken in Kenton County, of L. E. Wood and of John A. Goodson, an examination of which will show that contestant signally fails to establish the charge made against Wood.

Contestant avers that the case should be opened to allow him to establish the following facts:

(1) That on the evening of the day after the election contestee admitted to Horace Cambron, esq., that he, contestee, was defeated, and that said admission was published in the Evening Telegram, a newspaper published in Cincinnati, Ohio.

(2) That John A. Goodson, brother-in-law of contestee, two days after said election, admitted to Charles Easton that contestee was defeated, and the next day, on meeting said Easton again, said that "things were shaping up right, and that Carlisle would get in."

(3) That on the second day after the election there was held in the Federal Building, in the city of Covington, a conference of the friends of contestee for the purpose of determining arrangements to override and disregard the result of said election of contestant, and to the end that contestee might be declared elected.

(4) That in most of the counties of the district no tickets bearing the name of contestee were distributed before the election.

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[1] First session Fiftieth Congress, House Report No 48; Mobly, p. 523.

(5) That at midnight of the day after the election a hack drove from the direction of Covington toward the residence of A. S. Berry, esq., and in a few moments returned to the comer of York and Madison streets, and three men got out of said hack and went into the office of the Kentucky State Journal, and one of these men was contestee, and another was William Hanes.

(6) That on the poll books of seven of the eight precincts in Carroll County the register of names of voters are in the same handwriting, and that the signatures of the same election officers in many of the precincts are different upon the oath and to the certificate of election.

(7) That in certain other precincts and counties there were irregularities on the part of election officers.

It might be answered to all this, that the notice of contest fails to specify as grounds of contest the acts and omissions contestant now asks leave to prove, and therefore the evidence would not be competent, even if the case were reopened. Such is the well-established rule.

"Whenever any person intends to contest an election of any member of the House he shall, within thirty days, * * * give notice in writing, to the Member whose seat he designs to contest, of his intention to contest the same; and in such notice shall specify particularly the grounds upon which he relies in the contest." (U.S. Rev. Stat., sec. 105.)

"The language of the statute is specific and admits of but one construction. The grounds of the contest which are to be insisted upon must be stated in the notice. This, of course, is to the end that the contestee may be fully advised of the nature of the case which he has to meet. The notice is the only pleading required of contestant; it is the foundation upon which the whole proceeding rests, and if the contestant could introduce one new cause of contest not mentioned therein, he could introduce any number, and the contestee could never know in advance of the taking of the testimony what issues are to be tried." (Barnes *v.* Adams , Forty-first Congress.)

Again, to induce the House to order a new hearing of his case, contestant must show diligence in the use of the time allowed him by statute. (Giddings *v.* Clark, Forty-second Congress; Howard *v.* Cooper, Thirty-sixth Congress; Mabson *v.* Oates, Forty-seventh Congress, and authorities there cited.)

Contestant took testimony on only seven of the fifty days allowed him by statute; he made no efforts to procure evidence; he avowed that he never wanted to enter into the contest, and would like now to get out of it; that he did not want to pay out money in the matter; that the labor clubs had forced him into it; that he had only lost one day's work on account of the business, and he would not pay out any money but for the imputation that had been cast upon him by his own party that he and Wood had been bought up (see evidence, Tinley). In contestant's brief, beginning on page 17, will be found this statement:

"Contestant could, had he deemed it necessary, have proven every allegation in his notice and amended notice of contest; but when contestee in his answer admitted that 1,643 votes for himself and only 210 for contestant were improperly returned and counted by the returning officers of the State of Kentucky, contestant deemed any other action upon his part would be a work of supererogation, as the taking of these votes, thus admitted to be illegally counted, from the returns, would elect contestant."

In the opinion of your committee the laches of the contestant and his counsel have been such as to preclude him from asking further indulgence of the House.

Again, the case should not be reopened, unless it appear to the House that on a new hearing the contestant would probably be able to produce evidence which would entitle him to his seat. To do this he must produce the affidavits of some of the witnesses upon whom he relies, stating what facts are within witnesses' own knowledge (Giddings *v.* Clark, Forty-second Congress), and it must appear that such witnesses are credible, and have opportunity of knowing whereof they speak. Let us examine this case in the light of these rules.

The majority then analyze the showing made by the affidavits and conclude:

Very careful consideration of the papers of file satisfy your committee beyond all reasonable doubt that not one of the substantial averments of contestant could be established by satisfactory proof. The committee concede the right of the House to investigate the title of the contestee to a seat even if contestant has been guilty of such negligence as to preclude him as a party, but fail to see anything in the case before us calling on the House to institute an inquiry and investigation for its own vindication or to purge itself of a Member unelected, in fact.

Mr. J. H. Rowell, Of Illinois, who filed individual views supporting the conclusion of the majority, said:

I do not think it good practice to try disputed questions of fact upon ex parte testimony. In concurring with the recommendation of the committee, that the case ought not to be reopened, I do not give my assent to the proposition that all of the affidavits presented on behalf of contestee were legitimate matters for the consideration of the committee.

The serious charge made by contestant, and supported by affidavit as furnishing conclusive reason for reopening the case, was that the returns from seven out of eight election precincts in one county were in one and the same handwriting; or, in other words, that the returns were forgeries. Standing alone and uncontradicted this charge so supported would furnish ample ground for granting the motion of contestant.

In answer to this charge the original returns were brought before the committee and completely refuted it. No amount of testimony can change the appearance of these returns. In regard to them there can be no cross-examination to test the knowledge and truthfulness of witnesses. Regarding the attack upon these returns as the vital and material point raised in the motion to reopen the case for further testimony, and considering the presentation of the original returns as legitimate and not of the same character as a counter affidavit upon disputed questions of fact, I can not see any good reason to reopen the case in order that witnesses may be examined with reference to them.

The minority views, presented by Mr. Joseph Lyman, of Iowa, and concurred in by three other members of the committee, cite in full the motion:

Motion to investigate the conduct of the election held November, 1886, for Representative in Congress from the Sixth Congressional district of Kentucky.

(1) By select committee, as was done in the case of the First and Second Congressional districts of Ohio by the Forty-sixth Congress, first session.

(2) By resolution to reopen the case and take testimony, as was done in the Forty-third Congress in cases of Lawrence *v.* Sypher and Davidson *v.* Smith.

(3) By summoning witnesses before this committee.

And then say:

The minority then felt and now feel that a case involving such grave charges of fraud should not be settled in this hasty and off-hand manner, on the mere presentation of ex parte affidavits. They therefore felt obliged to urge a fitting investigation of the case, and failing in this, three of them felt unable to vote, as they would on every personal ground have been glad to do, in favor of the sitting Member's title to his seat and for the resolutions reported by the majority of your committee.

The single point is, whether when a prima facie case is made for reopening an election case, that prima facie case be rebutted by affidavits as was done, and for the purposes of this question, we may say completely done in this instance. The minority think that in a case of such gravity as this it is highly improper to try and decide the question on ex parte showings alone. But they believe that a reasonable showing having been made by contestant, he should, in all justice and fair dealing, be allowed to establish by legal and competent evidence, if he can, these allegations, by him made, of fraud and illegality in said election.

The minority cite the cases of Sypher and Butterworth and Young as sustaining their view; but in the debate these cases were analyzed to show their difference.

The question of reopening the case was the only one on which an issue was joined, either in the committee or on the floor of the House.

A question on which the committee were united was as to a certain allegation made by contestant in his notice of contest, and admitted by sitting Member in his answer.

The report says as to this:

Without expressing an opinion as to how far as a general rule the House should be bound by or act upon any admission of a contestant or contestee in a contested election case, your committee have accepted the admission of contestee, relied upon by contestant, as if the facts thus admitted were duly proven, and considered the case accordingly.

The fourth specification of contestant is in the following words:

"(4) And for the further cause that all the officers of the said election, at all the precincts or voting places of said Trimble County, and at each and every one of them, were selected and appointed from the Democratic party and belonged to one only of the political parties in this Commonwealth, to wit, the Democratic party; that said officers of election were not so selected and appointed as that one of the judges at each place of voting was of one political party and the other judge of the other political party, and that the like difference at each place of voting between the sheriffs and clerks of election at said precincts, and this, too, notwithstanding the fact that there were sufficient numbers of persons, discreet voters, to fill said offices, residing within said several precincts, of Republicans, from which said officers of election might have been selected and appointed, as the law provides and requires.

"Whereof said election so held in said Trimble County as aforesaid was and is illegal, invalid, and null and void, and the returns thereof are likewise illegal, invalid, and void, and I therefore object and protest against the counting of same in this contest."

The answer of contestee to this specification is as follows:

"(5) For the response to the fifth specification in said notice (numbered 4), it is true that all the officers of election in said county of Trimble belonged to one political party, to wit, the Democratic party, except the clerk and one judge at Barrows precinct, in said county; but I aver that the said election was legally and fairly held and that every vote cast for you in the said county of Trimble was counted for you. There were no qualified Republican resident in any of the other precincts of said county who were willing to accept the said offices or to serve therein."

This is the admission relied upon by contestant. The statutes of Kentucky provide:

"That hereafter, so long as there are two distinctive political parties in this Commonwealth, the sheriffs, judges, and clerks of elections in all cases of elections by the people under the Constitution and laws of the United States and under the constitution and laws of Kentucky shall be so selected and appointed as that one of the judges at each place shall be of one political party and the other judge of the other or opposing political party, and that a like difference shall exist at each place of voting between the sheriff and clerk of elections: *Provided,* That there be a sufficient number of the members of each political party resident in the several precincts, as aforesaid, to fill said offices.

"Should the court fail to appoint such judges or clerks, or either fail to attend for thirty minutes after the time for commencing the election, or refuse to act, the sheriff shall appoint a suitable person or persons to act in his or their stead for that election."

Under these statutes, the fourth specification of the notice of contestant, and the answer of contestee two questions arise:

(1) Whether it follows from the answer of contestee that the law of Kentucky as to selection of officers of election has been violated.

(2) Whether, if the law of Kentucky has been violated in the selection of officers of election, as claimed by contestant, the election is invalid.

As to the first question:

In certain contingencies the officers of election may, without violation of law, all belong to the same political party—i.e., "if there is not a sufficient number of each political party resident in the several precincts;" if the officers appointed do not arrive upon the ground and open the polls within thirty minutes of prescribed time. The legal presumption is that the appointing officers did their duty. (McCrary on Elections, sec. 87 and case cited.) That presumption remains until overcome by proof, and before the House will find against that presumption it must appear affirmatively that there were a sufficient number of each political party resident in the several precincts to act as election officers. Contestee denies this as to some of the precincts, is silent as to others, admits it as to none. In this state of the case it is incumbent on the contestant to make proof that the appointing officer might have complied with the law and did not.

Your committee are of the opinion that it does not follow from the admission of contestee that the law of Kentucky was violated in the selection of the officers of the election.

Should the House agree with the committee in their finding on this question it would not be necessary to proceed further, but inasmuch as the other question presented has been fully considered by the House heretofore, and determined after careful investigation, your committee feel that attention should be called thereto. In the case of Barnes *v.* Adams, from the Eighth district of Kentucky, Forty-first Congress, one of the questions was—

"Whether an election was valid under the first act named (the act now relied on by contestant), if the officers thereof were not equally divided between the two political parties in a precinct where there were a sufficient number of persons belonging to each party to fill said offices."

The report in the case was presented by Mr. McCrary, of Iowa, and is a very able one. The committee say:

"We inquire, in the next place, what was the effect of a failure to divide election officers equally between the two political parties? We are altogether unable, consistently with our views of the law, to hold that such failure of itself avoids the election. What we have said, and what we shall hereafter say, about the validity of the official acts of officers de facto applies here, for such officers are clearly of that class. Besides the statute which we have quoted, requiring an equal division of election officers between the two political parties, itself provides the penalty which shall be incurred by the persons appointing these officers if the statute is disregarded. It declares that the penalty shall be a fine of $100 for each offense of the kind. It does not declare that the election shall be set aside in such cases."

The report then proceeds to review the decisions of the courts of the various States as to the validity of the acts of an election officer who is in by color of authority, an officer de facto, and not a mere usurper. A long list of cases is cited sustaining the acts of such officers, and the report says:

"After a careful examination of the authorities the committee is satisfied that no principle of law is better settled by judicial decisions, and that no authority can be found emanating from a respectable court in conflict with those cited."

After referring to the conflicting decisions on this question by the House of Representatives, the summing up is as follows:

"The question, therefore, regarded in the light of precedent or authority alone, would stand about as follows: The judicial decisions are all to the effect that the acts of officers de facto, so far as they affect third parties or the public, in the absence of fraud, are as valid as those of an officer de jure. The decisions of the House are to some extent conflicting. The question is, therefore, a settled question in the courts of the country, and is, so fax as this House is concerned, to say the least, an open one.

"Your committee feels constrained to adhere to the law as it exists and is administered in all parts of the country, not only because of the very great authority by which it is supported, but for the further reason, as stated in the outset, that we believe the rule to be most wise and salutary. The officers of election are chosen of necessity from among all classes of the people; they are numbered in every State by thousands; they are often men unaccustomed to the formalities of legal proceedings. Omissions and mistakes in the discharge of their ministerial duties are almost inevitable. If this House shall establish the doctrine that an election is void because an officer thereof is not in all respects duly qualified, or because the same is not conducted strictly according to law, notwithstanding it may have been a fair and free election, the result will be very many contests, and, what is worse, injustice will be done in many cases. It will enable those who are so disposed to seize upon mere technicalities in order to defeat the will of the majority."

House adopted the report in Barnes *v.* Adams without dissent, and since that time the rule therein stated has been almost universally accepted and acted on. Your committee approve and adhere to it.

Inasmuch, therefore, as there appears nothing to impeach the fairness of the election of contestee, your committee present and recommend the adoption of the following resolutions:

Resolved, That George H. Thobe was not elected a Representative to the Fiftieth Congress of the United States from the Sixth district of Kentucky.

Resolved, That John G. Carlisle was duly elected a Representative to the Fiftieth Congress of the United States from the Sixth district of Kentucky, and is entitled to his seat.

The report was considered in the House on January 20,[1] and at the conclusion of the debate the question was taken on a proposition offered as a substitute by Mr. Lyman, that all the papers in the case be referred to a select committee, or a subcommittee of the Committee on Elections, with instructions to investigate the case carefully.

[1] Record, pp. 590–606, 610, 629; Journal, pp. 481, 489, 504.

This substitute was disagreed to—yeas 125, nay 132.

The question recurring on the resolutions reported by the majority of the committee, there appeared yeas 139, nays 3—no quorum voting. Thereupon the House adjourned.

On January 23 a quorum was obtained, and the resolutions were agreed to—yeas 164, nays 7.

1007. The Alabama election case of McDuffie v. Davidson, in the Fiftieth Congress.

The House declined to impeach a return on the testimony of a witness who distributed tickets and testified that he saw them voted in numbers greater than the returns credited.

The House declined to seat a contestant on the claim that, after rejecting the greater part of a district, he had a majority of the remainder.

As to what constitutes a general conspiracy justifying a rejection of the returns of a large part of a district.

On February 24, 1888,[1] Mr. Levi Maish, of Pennsylvania, presented from the Committee on Elections the report of the majority of that committee in the Alabama case of McDuffie *v.* Davidson. The vote in the district had been returned as follows: For Davidson, 14,913 votes; for McDuffie, 3,526; for Turner (colored), 2,519. The report states:

> The notice of the contestant contains seventy specifications of grounds of contest, each applying to a different precinct or polling place. No evidence was taken as to twenty-six of these precincts. Of the remaining specifications, thirty-three allege the same grounds of contest, and therefore they can be advantageously considered together.
>
> The grounds upon which the contestant relies in this group of precincts is that the votes were cast for the contestant but were fraudulently counted for the contestee. The several specifications vary slightly in language, but the gist of them all is that the inspectors did not count the ballots as they were cast by the voters.

The majority at the outset discuss a legal question which they hold to involve, if strictly construed, the decision of the case:

> It will be observed that in none of the specifications now under consideration is it alleged that the law has been violated in the manner of receiving the ballots, numbering them, depositing them in the boxes, sealing, or preserving them, nor that the poll lists were not properly made out and returned.
>
> It is virtually admitted that the election was fairly conducted until the officers proceeded to ascertain the result. Then it was, as is alleged, that the fraud was perpetrated.
>
> It is not pretended that the ballots were changed during the progress of the election, or afterwards, when they were counted, or that they were destroyed when falsely counted. The allegation simply is that they were so counted as to make it appear that they were cast for the contestee when they were, in point of fact, cast for the contestant.
>
> These statutes have been cited to show what provisions of law have been made in Alabama to protect the ballot box against frauds and the means of discovering them when perpetrated. It must be admitted that they are admirably designed to promote the purity of elections, and afford the best methods yet discovered for detecting frauds upon the ballot box.
>
> As will be seen, the names of the voters are written down and numbered as they vote, forming what is called the "poll list," and the ballots cast are correspondingly numbered with the number of each of the electors, so that it can easily be ascertained, when necessary, for whom the voter cast his ballot, or whether the officers of the election fraudulently substituted ballots for those cast by the voters.
>
> The statutes also provide that a statement of the number of votes received for each person, and

[1] First session Fiftieth Congress, House Report No. 707 Mobley, p. 577.

for what office, must be made in writing and signed by the officers, and they must also accompany this statement with a certified poll list of the election and seal the same in the box furnished by the sheriff for such purpose. The ballots, also, after being counted out must be rolled up and securely sealed and labeled, and securely fastened up in the ballot box, which must also be sealed and labeled so as to show the nature of its contents and kept by one of the inspectors for the space of sixty days for the express purpose of being available as evidence in cases of contest.

All this elaborate machinery is prescribed for the express purpose of ascertaining the true result of the election and providing certain and effectual methods for discovering frauds upon the ballot box. It is, in other words, the preservation of the best evidence that the case admits of, they being the records made by the sworn officers of the election and the very facts in controversy. Yet it is a singular fact that the contestant failed to offer in evidence to establish the allegations of his notice the ballots thus preserved, and offers no reason or excuse for not doing so.

Cases of contest of election are governed by the ordinary rules of evidence. The burden of proof is upon the contestant. He can not introduce secondary evidence when primary evidence is within his reach. Especially is this so when the law expressly preserves the best evidence the case admits of for that purpose, and places it within the reach of the parties.

The majority then cite the New Jersey case, and People *v.* Holden (28 Cal., 123), in support of this contention, and conclude:

In regard to the precincts in question, as has already been stated, no charge was made that the ballots or poll lists were tampered with and, therefore, no evidence to impeach their integrity could lawfully be introduced under the authorities just cited. This would fairly and legally dispose of the contestant's case against him, if the errors alleged in the remaining precincts did not affect a sufficient number of votes to change the result of the election, and in a court of justice it would be so decided; but as this House, in the exercise of its constitutional power, does not always rigidly follow precedents, it was deemed proper to examine the case as if the evidence offered were admissible.

The minority views, presented by Mr. Henry Cabot Lodge, of Massachusetts, say:

It would also seem from the character of the objections made by contestee to the examination of witnesses and from statements of counsel that it was intended to argue further that the official returns being the best evidence of the vote at an election all other testimony as to such vote is merely secondary and ought to be excluded as of no weight. The plenary power of Congress already alluded to is really a sufficient answer to this argument, which it seems hard to believe could be seriously advanced, but it may be added as entirely conclusive on this point that the precinct returns are merely prima facie evidence of the vote, and may of course be attacked, rebutted, or impeached by evidence from any source. There is, however, no need to resort to the plenary power of Congress in this case. The testimony is all regular and legal and would be admitted anywhere to rebut and impeach the official documents, for which purpose it is entirely competent.

In the debate this point was further examined. In the first place it was shown [1] that the majority report was in error in stating that the names of the voters and their ballots were numbered. This law had in fact been repealed, and therefore the minority pointed out that an important premise was removed from the argument of the majority that the ballots should have been produced. Furthermore, the minority argued that the honesty of the election officers was impeached, and that their count could not be verified by the production of ballots kept in their tainted custody.[2]

Proceeding next to the testimony which the majority consented to examine, although they had denied that it was the best evidence, and held it not to be strictly

[1] Remarks of Mr. Lodge and admission of Mr. Crisp, Record, p. 1750.

[2] This point is stated forcibly by Mr. J. H. Rowell, of Illinois, Record, p. 1758.

competent, it appears that the testimony on which contestant assailed the returns of the election officers was as follows:

At Liberty Hill the official returns gave Davidson 132 votes, McDuffie 31, and Turner 37. A witness, Tony Talbert, testified:

I now live in Perry County; at the time of the election I lived in Liberty Hill precinct, Dallas County. I had been living in Liberty Hill beat ten years. There was an election held in that beat on the 2d day of November, 1886, and A. C. Davidson was the Democratic candidate for Member of Congress and John V. McDuffie was the Republican candidate. I do not know who the inspectors were, or the clerks either. I reckon there was about 100 votes cast there that day. About 60 or 70 colored electors voted; the white electors were about 15 or 20.

Interrogatory. Who issued the tickets for the Republicans on that day at that beat? If you say that you issued them state how many of those tickets you issued, and state also whether or not you stationed yourself so that you could see the voter from the time that he took the ticket from you until he placed it in the hands of the inspector whose duty it was to receive it. And state how many of the identical tickets that you say you issued that you saw handed to the inspectors by the elector when he voted.

Answer. Martin Williams issued the tickets for the Republicans. I saw about 65 or 70 of those tickets issued; I did station myself so that I could see the electors from the time they received their tickets from Martin Williams until they placed them in the hands of the inspectors. I saw about 65 or 70 of the tickets issued by Martin Williams placed by the electors into the hands of the inspectors.

Interrogatory. Look at the paper handed you and say whether or not it is an exact copy of the tickets which you saw Martin Williams issue to the electors and which the electors voted. Read the paper handed you.

Answer. This is an exact copy of the ticket that Martin Williams issued, and so voted by the elector: "For Representative in the Fiftieth Congress United States, from the Fourth district of Alabama, John V. McDuffie."

Interrogatory. Do you mean to be understood as saying that, in your judgment, you saw 65 or 70 of the electors of Liberty Hill beat vote tickets the exact copy of the one that is shown to you?

Answer. Yes, sir.

Interrogatory. At what time did you go to the election on that day; and how long did you remain there during the day; and during the time that you said you were there, did you not see and converse with nearly every colored elector who voted there on that day? If yea, did you see or converse with any colored electors that day who expressed an intention to vote for any other person other than John V. McDuffie? If so, how many?

Answer. I went to the polls about 10 o'clock, and stayed there until night. I conversed with a good many of the colored electors—the most of them. I did not see or talk to any person who expressed a determination of voting for any other person than John V. McDuffie.

A witness testifying to a similar condition at Union precinct said that he was 40 or 50 yards away from the polls when he issued the tickets, but that he could and did see that they were voted.

The majority contended that such evidence was totally inadequate to overturn the presumption that the sworn officers did their duty. On the other hand, the minority showed testimony like the following:

The official returns of Valley Creek precinct gave Davidson 501, Turner 149, and McDuffie 35. W. H. Haynes testified as follows:

Q. What time did the polls open that day and what time did they close?—A. They opened between 8 and 9 and closed between 5 and 6.

Q. What were you doing there that day?—A. I was issuing Judge McDuffie tickets.

Q. How many tickets did you issue there that day, and did you see the parties to whom you issued tickets vote them?—A. I issued 100 McDuffie tickets and Alf Boyd issued 4; 1 saw 95 of the persons to whom I issued McDuffie tickets vote them, and I saw the 4 men to whom Alf Boyd issued tickets vote them.

Q. How far were you from the polling place when you gave the voters the McDuffie tickets and you saw them vote them?—A. I would meet the voters from 10 to 20 feet from the polls; ask them what ticket they wanted to vote; they would tell me they wanted McDuffie tickets. I gave them a McDuffie ticket, walked up to the polls with them, and saw them vote it, and when they voted I was not over 3 or 4 feet from the inspectors who took the tickets.

Q. Did anyone notice you watching the voters vote, and, if so, whom, and what did they say to you, if anything?—A. Mr. Ben Harrison noticed me and said to me, "Can you swear to all to whom you gave tickets voted them?"

Q. What did you say to him?—A. Very nearly all.

The supporters of the majority report, in the debate, insisted that the testimony was not sufficient, and urged that the contestant should have summoned the voters themselves to testify how they voted.[1]

The minority contended that the evidence showed a conspiracy to defraud the contestant of election, and attempted to show this by testimony to the effect that the nomination of Turner was brought about by corrupt connivance on the part of sitting Member's supporters, and that another prominent supporter of contestant had declared that they should carry the election, peaceably if they could, but by force if necessary, "and that arrangements had been made to do it."

The majority minimized the force of this testimony, and also held that it was not competent, having been introduced in rebuttal; also that no conspiracy was alleged in the notice of contest.

The minority also presented testimony to show that in some precincts more votes were cast than there were voters present or living; also that persons had voted on the names of dead men.

In conclusion the minority say:

This review of the testimony seems to the minority to show conclusively and overwhelmingly that a conspiracy to carry the election of November 2, 1886, in the Fourth Congressional district of Alabama existed and was carried out successfully in four of the five counties of the district. They have no doubt that if the vote had been honestly counted Judge McDuffie would have been returned by a large majority. Inasmuch, however, as it is impossible to tell what the exact vote was in the precincts where the returns are contested and obviously vitiated throughout by fraud, they believe that the vote from all such precincts should be thrown out and only the uncontested precincts of Lowndes County counted. Judge McDuffie lived in that county, and the conspiracy broke down among the neighbors of a man generally respected by all, without distinction of party. The uncontested precincts of Lowndes County give Judge McDuffie 2,014 votes and Davidson 362.

The minority is therefore of opinion that Judge McDuffie is entitled to his seat in the Fiftieth Congress.

The majority in the debate pointed out that the Lowndes County precincts were not the only ones unassailed, but that there were nine in Wilcox County, nine in Dallas, six in Hale, which were not assailed, and that these gave Davidson 3,385 votes, and McDuffie 208; and adding these votes to the unassailed Lowndes County vote, the sitting Member would have a majority of 1,425.[2]

It was also maintained on behalf of the majority[3] that the proposition of the minority to seat contestant on the unassailed Lowndes County vote, i.e., on a total of 2,376 votes in a district containing 20,000 voters, was an extraordinary proposition.

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[1] Speech of Mr. Outhwaite, Record, pp. 1755, 1756; also Mr. O'Ferrall, Record, p. 1792.

[2] Speech of Mr. O'Ferrall, Record, p. 1792.

[3] Speech of Mr. Maish, Record, p. 1748.

1008. The case of McDuffie v. Davidson, continued.

An election officer having committed a fraudulent act in counting ballots, the return was rejected and only votes proven aliunde were allowed.

The return being destroyed by a tampering with the ballots after the count, contestant was permitted to prove his vote aliunde by testimony of persons who saw the votes cast and tallied or estimated it.

Contestant was required to sustain charges against the correctness of the count by the ballots.

The ballots are higher and better evidence of the result than the poll lists.

Returns not signed or certified by the election officers are not admissible.

The majority of the committee made certain rulings in specific cases:

(*a*) As to Lowndesboro precinct:

In this precinct the evidence shows that one of the inspectors, whilst counting the ballots, put some of them in his pocket, saying as he did so that they were McDuffie tickets, and that "he was not going to let them pass." Although this allegation is not specifically set forth in the notice, the committee is of the opinion that it is substantially averred, and should have been met by the contestee, affecting, as it does, the integrity of the ballots. The official return, therefore, is set aside.

No evidence of a satisfactory character was produced to show what number of votes were cast for the contestant, excepting the few who testified for him, and stated that they were Republicans, qualified voters, and attended the election. And these, being 7 in number, are accordingly counted for him.

The contestee failed to establish his right to any votes in this precinct.

(*b*) As to uncontradicted evidence impeaching a return, and proof aliunde of the vote:

It is charged that at the Uniontown precinct, after the ballots were counted they were put in a bag and taken charge of by Alek Pitts, a nephew of the contestee and an officer of the election.

Pitts was not called to deny this charge, and no effort was made to controvert this evidence of tampering with the ballots. It is sufficient, in the opinion of the committee, to destroy the prima facie character of the returns. This being so, the parties were required to prove aliunde the number of votes they respectively received. The contestant called witnesses to prove certain facts, from which the committee was asked to infer the number of votes cast for him. George A. Clark testified that he issued 836 McDuffie tickets, took down the name of each voter as he delivered the ticket to him, and with the ticket held open in his hand the voter proceeded in the direction of the polling place. Other witnesses corroborated this testimony. The polls were more than 300 feet from the place where the tickets were issued by Clark, in a room on the second story of the city hall, and the inspector could not be seen receiving the ballots from outside the building. Fountain Hudson, an inspector at the election, testified that he saw about 400 of these tickets in the box. Eight colored witnesses were called who testified that they voted for the contestee. Though the evidence is very slender, yet it is the best that was produced. The committee finds, under the circumstances, that the contestant is entitled to 400 votes in this precinct and the contestee 8.4

(*c*) As to the comparative value of the ballots and poll list as evidence:

It was charged and established to the satisfaction of the committee that in the Walthall precinct there was a discrepancy between the poll list and the certificate of the inspectors of 21 votes. It is also charged that votes cast for the contestant were counted for the contestee. It has always been held that the ballots were higher and better evidence than the poll list [People *v.* Holden, supral]; and it was incumbent upon the contestant to sustain both charges in this specification by the production of the ballots. Under the evidence no additional votes can be given to the contestant in this precinct.

(*d*) As to St. Clair precinct:

In the St. Clair precinct the regularly appointed officers failed to open the polls, and after the hour of 9 o'clock the polls were opened by five qualified electors, one of whom was the regular inspector. The county canvassers refused to receive the returns of this poll, because the officers omitted to sign them. The action of the canvassers was in accordance with law. In the cases of Chrisman *v.* Anderson (1 Bart., 328) and Barns *v.* Adam (2 Bart., 760) it was held that returns not signed nor certified by the officers of the election were not admissible.

The evidence on which the above action was predicated was questioned by the minority in the debate.

In accordance with their conclusions of fact and law, the majority found that sitting Member had a majority of 8,890 votes over contestant, and, reported resolutions confirming his title to the seat.

The minority, apparently basing their conclusion on the uncontested precincts of Lowndes County, reported resolutions giving the seat to contestant.

The report was debated at length on March 5 and 6,[1] and on the latter day the question was taken on substituting the majority resolutions, and decided in the negative—yeas 122, nays 144.

Then the resolutions proposed by the majority were agreed to without division.

1009. The Illinois election case of Worthington v. Post in the Fiftieth Congress.

A mandatory State law providing in effect that the writing of the name of one candidate under the unscratched name of another should make the ballot void, the House did not count the vote.

The intention of the voter being clear, the House counted the ballot, although irregular in form.

A judgment of the court was held sufficient evidence that a person was disqualified as a voter by being a convict.

In determining qualifications of voter as to length of residence, either the first or last day is excluded from the reckoning.

On March 14, 1888,[2] Mr. Charles T. O'Ferrall, of Virginia, from the Committee on Elections, submitted the report of the committee in the Illinois case of Worthington *v.* Post.

Sitting Member had been returned by a majority of 29 votes.

The objections of contestant involved the consideration of several questions of law and many questions of fact. As to the principles involved:

(1) As to irregular ballots:

The contestant claimed that there were 24 ballots which were not counted for him, either in the original count or recount to which he was entitled.

The statutes of Illinois provide that—

"If more persons are designated for any office than there are candidates to be elected * * * such part of the ballot shall not be counted for either of the candidates." (Ill. R. S., 1885, chap. 46, sec. 57.)

The committee construing this provision of the statutes of Illinois as mandatory, which construction is sustained by the decisions of the supreme court of that State, proceeded to examine the ballots referred to, 24 in number.

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[1] Record, pp. 1747, 1782–1806; Journal, pp. 1052, 1059, 1060.

[2] First session Fiftieth Congress, House Report No. 1140; Mobley, p. 647.

On some of these ballots, under the words "For Representative in Congress, Tenth district," there were two names, the name of the contestee printed and the name of the contestant written with pencil. On others the name of the contestant was written under the words "For State superintendent of public instruction" and no name under the words "For Representative in Congress, Tenth district."

After a careful examination of all of these 24 ballots the committee found only 2 which, in its opinion, were legal.

One will be found on page 100 of the record, and is in the following form:

DISTRICT.

NICHOLOS E. WORTHINGTON.

The other will be found on page 104 of the record, and is in the following form:

[In pencil] NICHOLAS E.
For Representative in Congress, Tenth Congressional district.
[In pencil] WORTHINGTON.

The committee thought that the intention of the voters was clearly indicated by these ballots, and counted the same for the contestant.

(2) As to a convict's vote:

William A. Wright. He was a convict and had not been restored to citizenship. The contestant insisted in his brief that the entire record from the finding of the indictment down to the sentence must be produced. The contestee produced the judgment of the court and the committee thought that was sufficient.

(3) As to the time of residence of two men:

These men had not been in the election district thirty days before election. They did not move into the district until the 4th clay of October, 1886. The contestant says that both the 4th day of October and the 2d day of November ought to be counted. Your committee differ with the contestant, and exclude one day, which will give only twenty-nine days in district before election.

1010. The case of Worthington v. Post, continued.

Students who have left their parental homes and are relying on their own resources, with no fixed determination as to future abode, are legal voters in the college precinct.

A contestant having conceded certain votes on a construction of law at variance with the committee's, the votes were left to his credit.

An unregistered voter being required to produce an affidavit and an oral witness as to qualifications, the House, because of a defective affidavit, rejected a vote received by the election officers.

(4) As to the vote of certain students:

There were 18 votes cast by students of Knox College and Lombard University, which were claimed by contestant to be illegal; 14 of these votes were cast for contestee and 4 for contestant.

The committee, in passing upon the legality of these votes, was of the opinion that where young men had entirely severed their connection with the home of their parents, and were relying upon their own resources, efforts, and means, and had no fixed determination as to their future place of abode, they were legal voters at the point where these colleges were located; that to hold differently would be to deprive many worthy young men of the right to vote, and disfranchise them during the years they might be engaged in their laudable efforts to secure an education. With this principle in view the committee made a careful examination of each individual vote, and found that the votes of three persons, whose names are included in the above list of conceded illegal votes for contestee, did not come within the principle laid down.

(5) As to the effect of concessions by one of the parties in his brief:

The contestant in his brief conceded that 4 votes cast for him by students were illegal, but he made this concession upon a construction of the law which is not in accordance with the views entertained by the committee, and the committee has, therefore, left them to his credit.

(6) As to the technical competency of certain affidavits required of unregistered voters:

The qualifications of electors in Illinois are as follows:

"*Who may vote.*—Every person having resided in this State one year, in the county ninety days, and in the election district thirty days next preceding any election therein, who was an elector in this State on the 1st day of April, in the year of our Lord 1848, or obtained a certificate of naturalization before any court of record in this State prior to the 1st day of January, in the year of our Lord 1870, or who shall be a male citizen of the United States above the age of 21 years, shall be entitled to vote at such election." (Ill. Rev. Stat., ch. 46, sec. 65.)

There is a registration provision, and where a voter presents himself and his name is not on the registry list, and his vote is challenged, the statute provides that he may make and subscribe an affidavit in the following form, which shall be retained by the judges of election and returned by them with the poll books:

"STATE OF ILLINOIS, *County of* ———.

"I, ——— ———, do solemnly swear (or affirm) that I am a citizen of the United States (or that I was an elector on the 1st day of April, A. D. 1848, or that I obtained a certificate of naturalization before a court of record in this State prior to the 1st day of January, A. D. 1870, as the case may be); that I have resided in this State one year, in the county ninety days, and in this election district thirty days next preceding this election; that I now reside at (here give the particular house or place of residence, and if in a town or city, the street and number), in this election district; that I am 21 years of age and have not voted at this election; so help me God (or this I do solemnly and sincerely affirm, as the case (may be).

"Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

"_____ _____."

(Sec. 69, chap. 46.)

It is also provided that—

"In addition to such an affidavit the person so challenged shall produce a witness personally known to the judges of election and resident in the precinct (or district), or who shall be proved by some legal voter of such precinct or district, known to the judges to be such, who shall take the oath following, viz:

'I do solemnly swear (or affirm) that I am a resident of this election precinct (or district) and entitled to vote at this election, and that I have been a resident of this State for one year last passed and am well acquainted with this person whose vote is now offered; that he is an actual and bona fide resident of this election precinct (or district) and has resided herein for thirty days, as I verily believe, in this county ninety days, and in this State one year, next preceding this election.'" (Starr & Curtis's Statutes of Illinois, sec. 70, chap. 46.)

Again:

"No vote shall be received at any State election in this State if the name of the person offering to vote be not in the said register, unless the person offering to vote shall furnish to the judges of the election his affidavit, in writing, stating therein that he is an inhabitant of said district and entitled to vote therein at such election, and prove by the oath of a householder and registered voter of the district in which he offers to vote that he knows such person to be an inhabitant of the district, and if in any city, giving the residence of such person when in said district." (Part of sec. 145, chap. 46.)

There were 27 votes attacked by the contestant, cast by parties who were not registered and who were sworn in, upon the ground that the affidavits were defective. Twenty of these votes were cast for the contestee and 7 for the contestant.

The committee, after a careful consideration of these affidavits, was of the opinion that all but 5 of them were substantially within the requirements of the law. It has deducted from the vote of the contestee the 5 votes cast upon the five defective affidavits—in fact, five blank affidavits.

In accordance with their decisions the committee found a majority of 47 votes for sitting Member and reported these resolutions:

Resolved, That Nicholas E. Worthington was not elected a Representative to the Fiftieth Congress of the United States from the Tenth Congressional district of Illinois.

Resolved, That Philip Sidney Post was duly elected a Representative to the Fiftieth Congress of the United States from the Tenth Congressional district of Illinois and is entitled to a seat in the same.

On March 27 [1] these resolutions were agreed to by the House without debate or division.

1011. The Missouri election case of Frank v. Glover, in the Fiftieth Congress.

The House in determining its election cases passes on the validity of State laws under State constitutions.

On April 24, 1888,[2] Mr. John T. Heard, of Missouri, submitted the report of the Committee on Elections in the Missouri case of Frank *v.* Glover.

The sitting Member had a certified plurality of 100 votes.

The only question in the case was as to 249 ballots tendered for contestant, but rejected because the names of those tendering them were not on the registration lists. The report says:

The constitution of Missouri, which went into effect November 30, 1875, provides:

"The general assembly shall provide by law for the registration of all voters in cities and counties having over 100,000 inhabitants, and may provide for such registration for cities having a population exceeding 25,000 inhabitants and not exceeding 100,000, but not otherwise."

Article 9, section 7, constitution of 1875, provides:

"The general assembly shall provide, by general laws, for the organization and classification of cities and towns. * * *"

Pursuant to the above, by acts approved April 21, 1877, and May 23, 1877, the general assembly carried into effect the foregoing provision of the constitution of 1875.

"SEC. 1. All cities and towns of this State containing 100,000 inhabitants or more shall be cities of the first class."

Section 5 provides for any town becoming a city of the class to which its population would entitle it.

Session Acts, 1877, page 49, provides for registration in cities of the first class.

By Session Acts, 1877, page 250, the following law was enacted:

"SECTION 1. In all State, county, and municipal elections hereafter held in any city of this State having a population of 100,000 inhabitants or more no person shall be deprived of the right of voting at such election by reason of having failed to register: *Provided,* That in all cities where registration is required by law, the party offering to vote shall be, on the day of such election, registered by a special registrar of election, appointed by the judges of election for that purpose at each precinct, as a qualified voter, in a book to be kept for that purpose, and the ballot of such voter shall be received and counted at such election; and such registrar shall return to the registrar of voters of such city the list of such voters so registered within ten days after such election: *Provided,* The said registrars shall be sworn as provided for the recorder of voters, and the books shall contain the written or printed oath as required in the regular registration books.

"Approved March 30, 1877."

By an act "approved March 26, 1881," the general assembly provides, Session Acts, 1881, page 47:

"SECTION 1. That the act entitled 'An act to provide for the exercise of the right of voting by persons who have failed to register,' approved March 30, 1877, be, and the same is hereby, repealed.

"SEC. 2. By reason of the frauds believed to have been perpetrated under the law this act seeks to repeal, and the near approach of an election in the city of St. Louis, an emergency is deemed to exist; therefore, this act shall take effect and be in force from and after its passage."

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[1] Journal, p. 1333.

[2] First session Fiftieth Congress, House Report No. 1887; Mobley, p. 655.

The legislature of Missouri at the same session, to wit, Session Acts 1981, page 48, adopted a general registration law for the city of St. Louis.

The question really at issue is whether the registration law of 1881 is valid; the contestant's counsel claiming in the argument before the committee and in his brief that the law is unconstitutional and invalid.

Says McCrary on Elections, second edition:

"SEC. 6. While the legislature cannot add to, abridge, or alter the constitutional qualifications of voters, it may and should prescribe proper and necessary rules for the orderly exercise of the right resulting from these qualifications. * * *

"SEC. 7. The power to provide for the orderly exercise of the right of suffrage, which we have seen belongs to the State legislature, includes the power to enact registry laws and prohibit from voting persons not registered. It is now generally admitted that these laws do not add to the constitutional qualifications of voters, and are therefore not invalid. (Capon *v.* Foster, 12 Pick., 485; Brightley's Election Cases, 51; Hawkins *v.* Carroll Co., 50 Miss., 735; State *v.* Baker, 38 Wis., 71.)"

The committee being united in the opinion that the law is constitutional, do not consider it necessary to go further into the legal argument.

Therefore the committee reported:

Resolved, That Nathan Frank was not elected and is not entitled to a seat in this House as a Representative in the Fiftieth Congress from the Ninth Congressional district of Missouri.

That John M. Glover was duly elected and is entitled to the seat he now holds in this House as a Representative in the Fiftieth Congress from the Ninth Congressional district of Missouri.

On June 12[1] the House agreed to the resolutions without division or debate.

1012. The California election case of Lynch v. Vandever, in the Fiftieth Congress.

In an election case the House disregards evidence in chief introduced during time for rebuttal testimony.

May 4, 1888,[2] Mr. James T. Johnston, of Indiana, submitted the report of the Committee on Elections in the California case of Lynch *v.* Vandever.

The sitting Member had been returned by a majority of 55 votes.

The committee passed on only one question of principle:

As to the third charge, that is, the use of money by the friends of the contestee to improperly influence voters to vote for the contestee, the committee find that the evidence wholly fills to sustain the charge. The only proof offered by the contestant tending in that direction was offered in rebuttal when the contestee had no opportunity to contradict the same, and such evidence, besides being insufficient to sustain the charge, was offered in open violation of every known principle of the laws of evidence, and we hereby enter our protest against such practice before this committee in the future.

The committee recommended resolutions confirming the title of sitting Member to the seat, and on June 12[1] the House agreed to them without debate or division.

1013. The South Carolina election case of Smalls v. Elliott, in the Fiftieth Congress.

Contestant producing no legal evidence as to the return, and nothing to show that such return might not have been produced, parol evidence as to the vote was not considered.

On December 7, 1888,[3] Mr. Charles F. Crisp, of Georgia, presented the report

[1] Journal, p. 2122.

[2] First session Fiftieth Congress, House Report No. 2035; Mobley, p. 659.

[3] Second session Fiftieth Congress, House Report No. 3536; Mobley, p. 663.

of a majority of the Committee on Elections in the South Carolina case of Smalls *v.* Elliott.

The sitting Member had been returned by an official majority of 532 votes, which contestant assailed on the ground of frauds and irregularities. There were also countercharges of bribery and intimidation.

The examination of the case involved, besides the exploration of many questions of fact, a discussion of the following legal questions:

(1) As to the sufficiency of the proof of fraud at Pocotaligo and certain other precincts. As to Pocotaligo the report says:

> Contestant claims that there was an excess of ballots in the box when the count began of 105 or 148 votes; that only 143 votes were cast at the precinct; that the managers, after drawing out the excess in accordance with the law, returned to the commissioners of election, who are the county canvassers, the vote of this precinct as follows: Elliott, 87 votes; Smalls, 56 votes; and that the county board of canvassers in canvassing the vote of Beaufort County so counted it. Contestant then examined 118 witnesses, each swearing that he voted for Smalls, and claims from this that there was fraud on the part of the managers; that the return is impeached and should be disregarded, and that he should have counted for him the 118 votes of those sworn, and Elliott should have the remainder of 143, which, he says, was the total vote cast.
>
> Devaux, the Republican supervisor, and Bampfield, the son-in-law of contestant, swear they were present at the count by the managers, and that there was an excess of boots; that is, more ballots in the box than on the poll list. Bampfield says that he suggested to the managers that the proper way to do was to ascertain the number of ballots in the box, then mix them up and draw out enough to reduce the number in the box to the number on the poll list. This was done. Bampfield says the excess was 148. Devaux says the excess was 105. Devaux says that of the 105 drawn out 47 were Small's ballots. That would leave 58 Elliott ballots drawn out. There is no evidence as to who put the surplus ballots in the box. The managers were not examined. The law of South Carolina provides, "If more ballots shall be found on opening the box than there are names on the poll list, all the ballots shall be returned to the box and thoroughly mixed together, and one of the managers or the clerks shall, without seeing the ballots, draw therefrom and immediately destroy as many ballots as there are in excess of the number of names on the poll list." The drawing out of the excess of ballots seems to have been done in accordance with the law, in the presence of the Federal supervisors of election and the son-in-law of contestant, and at the suggestion of the latter.
>
> Contestee denies that there is any evidence as to what vote was counted by the county canvassers from this precinct.
>
> The law of South Carolina requires one of the managers of election, within three days after the election, to deliver to the commissioners of elections the poll list, the boxes containing the ballots, and a written statement of the result of the election in his precinct. The commissioners of elections, who are the county board of canvassers, on the Tuesday next following the election, after being duly sworn, shall proceed to canvass the votes of the county, shall make such statement thereof as the nature of the election requires, and shall transmit to the board of State canvassers any protest and all papers relating to the election, and, finally, after adjournment, shall by messenger transmit to the governor and secretary of state the returns, poll lists, and all papers appertaining to the election. These papers remain in the office of the secretary of state, who is the custodian thereof.
>
> It appears in the record that contestant offered in evidence a paper claiming it to be a copy of the poll list and return kept by the managers of election at Pocotaligo, precinct. Contestee objected to its introduction because it was not certified to be a copy of the poll list and return by any official and not proven by anyone to be such. We have this paper before us; it is clearly not the original, and is not certified by anyone as a true copy. There is no evidence in the record tending to prove that it is a correct copy. Under the circumstances your committee do not think this paper should be considered.
>
> The only evidence in the record as to the vote cast, counted, and returned at this precinct is that of Devaux and Bampfield. The highest and best evidence of the return, which is presumed to be on file in the office of the secretary of state, is a certified copy thereof, which was easily accessible. Your Committee are of the opinion that, in the absence of any evidence of the loss, destruction, or inaccessibility of the returns, parol evidence as to what the vote was should not be considered. This is the established rule of

law, and the propriety of the rule is well illustrated in this case by the conflict in the testimony of the two witnesses by whom the number of votes cast is sought to be proven. In the absence of any legal evidence as to how the vote was counted from this precinct by the county canvassers in canvassing the vote of the county, the evidence of the voters as to how they voted is immaterial.

In the foregoing and one other precinct an excess of ballots was found. In South Carolina the voter deposits his own ballot in the box. The law says the opening in the box shall only be large enough to admit of the entry of one ballot at a time; but it is difficult to see how it could be so arranged as to prevent the voter from depositing two or more ballots at the same time if he desired to do so. The presumption is that the managers complied with the law in seeing that no ballots were in the boxes at the beginning of the election. There is nothing in the evidence that throws any light on the matter.

The minority views, signed by Mr. J. H. Rowell, of Illinois, and five others, take this position as to this precinct:

When the process of purging the box of the excess of votes was finished, the manager counted the 143 votes left and found 87 votes for Elliott (contestee) and 56 votes for Small (contestant). Now the curious part of the story comes. An examination of the record from pages 215 to 260 discloses the names and oaths of 118 men, each of whom swears he voted for Smalls. The poll list (Rec., p. 262) discloses the names of these identical 118 voters as having voted at Pocotaligo box. If 118 men whose names are on the poll list voted for Smalls, how is it that he received only 56 votes, or, in other words, how was it that 62 of his votes were stolen from him?

That the ballot box was stuffed is clear. One or two, or even a dozen surplus votes, out of a total poll of 143 votes, might by accident or carelessness get into the box, but here over a hundred extra votes were in the box. The box was stuffed. No one denies it. How was it done? Who had charge of it? Three Democratic managers, a Democratic clerk, two Democratic State constables. It was stuffed in order that the purging process might be resorted to. The fact that nearly double the proper number of ballots got into the box while in charge of the managers solely is proof so overwhelming of their deliberate fraud that their every act is tainted, and the presumption that the law ordinarily attaches to official acts, omnia proesumuntur rite acta esse, is destroyed and every act of these managers attainted with suspicion and fraud.

Why did not contestee put these Democratic officials upon the stand? Did he fear to do so? They were all within the jurisdiction. Contestee administered testimony within a stone's throw of them. Contestant charged them with fraud and crime and proved it; yet not one of them is put upon the stand to contradict or to defend. And if the sanctity attaching ordinarily to the acts of managers of an election is destroyed as to these officials, it is competent for contestant to establish the true return as best he may.

He proves 118 votes out of 143. The canvassing board gave him but 56. To his vote should be added 62 votes, and from Elliott's vote of 87 should be deducted 62 votes, leaving him 25 votes at Pocotaligo box.

1014. The case of Smalls v. Elliott, continued.

The regular returns being lost or invalidated, and not canvassed, the House took into account a statement of the United States supervisors as to the state of the vote.

As to votes received by election officers but rejected by canvassers because of mere informalities as to registration.

Although only one of the three election officers was sworn, the House overruled the State canvassers and counted the vote as cast.

Although irregularly chosen, an election officer was regarded as a de facto officer, whose acts were valid.

(2) As to proof aliunde in a case where the purity of the returns was impeached. This occurred at the Fort Motte and Adams Run precincts. The report of the majority says:

At these two precincts the election appears to have been properly held, the returns made out regularly and signed, the boxes locked and sealed, and in each case delivered to one of the managers to

be carried to the county board. The Fort Motte box was carried to the office of Doctor Hydrick, a Democratic county politician, who was not one of the county canvassers, and in his absence left with a young medical student therein. Doctor Hydrick, upon his return, refused to take charge of the box. The young gentleman who had received it in his absence then carried the box to the president of the county board of canvassers, who refused to receive it because it was not delivered to them by one of the managers. The box was then deposited in the office of the probate judge of the county, where it now remains. The Adams Run box was taken by one of the managers to Waterboro, and left in the store or office of one Gruber, a man who had nothing to do with the election officially, and since that time the box: has been lost sight of. The county canvassers in making up the returns counted no votes from either of these precincts. It appears from the evidence that the supervisors at each of these precincts, at the time of the counting of the vote, made and mutually signed a paper showing the vote cast thereat.

After reproducing these papers the report says:

Your committee are of the opinion that under the circumstances of this case these returns should be received and counted.

The minority take the same view:

Of course, having no box, the canvassers made no return.

The question for the House is, Whether the fault or neglect or crime of one manager can deprive the citizens of their election and contestant of his rights under it? If so, the power of the people is gone and their right to rule through the honest ballot is lodged, in South Carolina at least, in the hands of a few men called managers. The law as laid down gives to the contestant the right to show by secondary testimony what the vote really was. (McCrary, Jaw of Elections, pp. 97, 131; 11 Mich., 362; 9 Kansas, 569.)

At this stolen box there were two Federal supervisors; one was a Republican (Bailey) and the other (Simmons) was a Democrat. These men each kept a poll list and made a return, and each signed the other's list and return.

This return is not denied. It is found at pages 531, 532, and is as follows:

"Return of the election held at Adams Run precinct, Colleton County, November 2, 1886.

"The whole number of votes given for Member of Congress was 214—of which Smalls received 177; of which Elliott received 37.

"We, the undersigned supervisors, certify that the above is a correct return of the votes cast at the election held at Adams Run precinct, of Colleton County, on the 2d day of November, 1886.

"M. W. SIMMONS,
"C. R. BAILEY,
"Supervisors."

These returns, official in their character, and attested by the Federal supervisors of each party, should be counted, and to contestant's vote must be added 177 and to contestee's vote 37.

To reject and refuse to count this return is to permit contestee to be benefited by the fault or crime of his own partisans. Nay, more, it is to permit the triumph of criminal neglect, designedly perpetrated in the interest of contestee, by which American citizens are cheated of their election. Who can afford to do this? Who can afford to be parties to it?

(3) The county and State canvassers rejected the poll at Brick Episcopal Church, under the terms of this law:

All electors of the State shall be registered as hereinafter provided; and no person shall be allowed to vote at any election hereafter to be held unless registered as herein required.

Each elector registered as aforesaid shall thereupon be furnished by the supervisor with a certificate which shall contain a statement of his age, occupation, and place of residence, as entered in the said registration book, and which certificate shall be signed by the said supervisor; and no person shall be allowed to vote at any other precinct than the one for which he is registered, nor unless he produces and exhibits to the managers of election such certificate: *Provided,* In case there shall be no election precinct within any township or parish, the supervisor shall designate in the certificate at which of the

neighboring precincts the elector shall vote; and in case there be more than one precinct in any township or parish, the supervisor shall likewise designate in the certificate at which of the said precincts the elector shall vote. The certificate of registration shall be of the following form.

The majority quote the testimony of the supervisor of registration for the county to show that he held his books open and never refused a certificate of registration for Brick Episcopal Church, and never issued one, for there were no applications. Then the majority say:

This was a new polling precinct.

Section 5 of the act of the general assembly, No. 719, approved July 5, 1882 (17 Statutes of South Carolina, p. 1172), provides as follows:

"Whenever a new polling precinct is established by law, it shall be the duty of the supervisor of registration to transfer from the books of registration the names of such qualified voters registered at other precincts as should, under this act, register and vote at the new precincts so established, and who may request such transfer, and to make such changes as may be necessary in the certificate of registration issued to such voters, and such voters shall thereafter vote only at such precincts to which they have been thus transferred."

The chairman of the board of county canvassers says in his testimony that he refused to count the vote of this precinct "on the ground that the voters voting at that precinct were not registered there." This poll we think was properly rejected.

The minority find a state of fact which in their opinion modifies conditions:

In order to arrive at a correct understanding of the election at this box it is necessary to state that "Brick Episcopal Church" and the town of Mount Pleasant are both in Berkeley County, but 6 miles apart. The former is in the Seventh Congressional district; the latter is in the First. They are both in the same registration precinct. But voters in the town of Mount Pleasant voted there both for State and county officers, as well as for Congressman for the First district. But voters outside of the town had to vote for State and county officers at Mount Pleasant, and then go 6 miles to Brick Episcopal Church, where the polling place for Congressman from the Seventh district was held. The laws of South Carolina require separate boxes for State and county officers, and for Congressmen and Presidential electors. Sometimes these boxes axe placed conveniently near each other. In other cases, as in the one under review, the boxes were placed miles apart. Mount Pleasant and Brick Episcopal Church are in the same voting precinct, but the polling place for State officers for voters residing outside of Mount Pleasant is in Mount Pleasant, while they must travel 6 miles to vote for Congressman or President. The voter residing in Mount Pleasant is entitled to vote for State and county officers as well as Congressman at Mount Pleasant. But different registration certificates are not required. No voter is obliged under the law to have one registration certificate for Congressmen and another for State officers. He votes for all upon one certificate, though at separate boxes, often placed miles from each other.

The minority continue:

It is folly to contend that the mere establishment of a separate poll for the Federal election within the same precinct necessitated a change of registration certificate. The officer of registration should have made duplicate books containing the names of the registered voters of Mount Pleasant precinct, and one book should have been sent to Mount Pleasant for the State poll and one to Brick Episcopal Church for the Federal poll. He did not do so. He failed in his duty, and he was the partisan of contestee. He made one book, but it was retained at Mount Pleasant, where only 60 votes were cast, and denied it to Brick Episcopal Church, where 270 votes were cast. This was done by Mr. Kirk, the Democratic chairman of Federal elections. (Rec., pp. 94, 95.)

But the question for the House of Representatives to determine is whether the people shall be disfranchised for the fraud or neglect of officials. The testimony (Rec., pp. 96 to 99), shows that the managers were all Democrats; that they compelled every voter to show his certificate of registration; that no one was permitted to vote who did not produce his certificate, and that the election was fair and peaceable. We see no reason why the vote should not be counted. The certificate and not the book is the requisite. Mr. Kirk says they rejected the box "on the ground that the voters voting at that

precinct were not registered for that precinct (Rec., p. 95), and in the very next breath almost admits that the "books for Mount Pleasant contained the names of those who should vote for Member of Congress at Brick Episcopal Church in the Seventh Congressional district;" and he could have taken that list in the book and compared it with the poll list from Brick Episcopal Church and verified and counted the vote as was his duty to do. Why he failed to do so we can only infer.

The vote should be counted, and to Smalls' vote should be added 267 votes, and to Elliott 3 votes.

(4) At Cedar Creek the county board rejected the box because only one of the managers was sworn. The vote was, Smalls 18, Elliott 0. The other managers were present and acting, and sitting Member admitted that the return should have been counted.

The minority views represent that only one manager failed to take the oath. The election is represented as fair and regular in all other respects. The minority consider the failure to take the oath immaterial and hold that the poll should be counted.

(5) At Griers, say the majority—

the poll was opened by Jenkins, one of the managers, and two other persons appointed by the Federal supervisors. Grier was a regularly appointed manager, and reached the poll at 7 o'clock a.m. The poll was then opened; he took the place of one of the managers appointed by the Federal supervisor, and the election was thus managed to the close. The county canvassers rejected the poll because of this irregularity. It is not perfectly clear that this was wrong, but your committee are inclined to think that this poll should have been counted.

The vote was William Elliott, 4; Robert Smalls, 65.

The minority say:

The next rejected box is Griers precinct. The voting was fair, election regular; no complaint of it from any source. There were three managers, two regularly appointed and Alston, a third manager, sworn in and served in place of one who would not qualify. (See testimony of all the managers—Jenkins, p. 70–71; Grier, 666–668; Alston, 73–74; Johnson, 72–73.)

The minority further say that the third officer was a de facto officer, with color of authority.

1015. The election case of Smalls v. Elliott continued.

The House will not examine testimony as to a precinct not included in the notice of contest.

An informal poll, held by one election officer instead of three, and irregularly conducted, was rejected.

Only one legally appointed election officer presiding, and the voting being interrupted by disorder, the poll was rejected.

The House declined to order a new election because of a failure to open polls at a few places in a district, neither party being shown to be responsible therefor.

Because of a general condition of intimidation practiced by the dominant faction in a precinct, the return was rejected.

(6) As to Sandy Island, the majority say:

This precinct was not included in notice of contest, and hence the evidence referring to it should not be considered. It is well settled that a contestant can not make any points in his contest which are not in his notice of contest. (McCrary on Elections.)

(7) As to the box at Santee the majority say:

This box was rejected because only one manager held the election. The law was entirely disregarded. Poll was in open air under a tree, no space railed off, and everyone allowed to vote whether a legal voter or not. The evidence shows that the one manager allowed 25 men not registered and 34 who had changed their residence to vote. This box was properly rejected.

The minority say that not a syllable impeaches the fairness and regularity of the election, except the fact that two Democratic managers would not qualify, although they visited the polls during the day. The election was held by one regular manager, a clerk, and a Federal supervisor. The minority hold that the poll should be counted.

Discussing in full the four polls of Sandy Island, Cedar Creek, Griers, and Santee, the minority say:

But we contend that all of these votes should be counted. Let it be remembered that there is not an iota of testimony going to impeach the fairness and regular conduct of the election at these polls, the legal count, and proper return of the boxes. They stand rejected because of the failure of the full number of managers to qualify. In every instance the managers failing to qualify were the partisan friends of contestee. Now, the question is whether the voters at these boxes and the contestant shall be deprived of the result of the election because of the neglect or failure of some of the officers to do their duty. The law of South Carolina provides for three managers at each box. But it does not void the election because of the failure of three managers to serve. Hence it is only directory in so far as it provides for three managers. McCrary says:

"Irregularities are generally to be disregarded unless the statute expressly declares that they shall be fatal to an election, or unless they are such in themselves as to change or render doubtful the result." (McCrary, 2d ed., p. 186.)

The laws in relation to boxes, locks, the number of managers, clerks, etc., and the ordinary facilities of an election are mainly directory, unless the statute makes them otherwise, and an infraction of these directory provisions, in the absence of fraud, will not vitiate the election.

The minority then quote Judge Cooley, the cases of Arnold *v.* Lea, Cox v. Strait, and other authorities, and continue:

If South Carolina had intended that an election held by less than three managers should on that account be void, she would have said so in her statute. She did not say so; hence the law fixing the number of managers is simply directory. The State board of canvassers of South Carolina so held, because the record in this very case shows that both State and county boards canvassed and counted boxes at which there were not three managers. At Indiantown precinct, Williamsburg County there were two boxes (one for the sixth and one for the seventh district) and but two managers, or one manager for each box, yet the box was counted by both the State and county boards.

At Kingston, in the same county, there were also two boxes (one for the sixth, Dargan's district, and one for the seventh) and only three managers to the two boxes. Still it was counted by both State and county boards. At Cades precinct, the same county, was a similar state of affairs, and yet the box was counted. So much for construction by the State and county boards.

There is no proof of fraud at the four boxes under discussion—not even an allegation—nor is there a whisper of complaint that the result was affected by the fact that less than the prescribed number of managers were present.

Another fact is, that the manners who failed to serve were the partisan friends of the contestee. He now seeks to take advantage of the neglect of duty of his own friends, and that, too, without a single allegation or word of proof against the perfect integrity of the election at these boxes. He relies upon a bare technicality, occasioned by the willful neglect of duty by his own friends, and asks that hundreds of voters be disfranchised and deprived of the results of an election against the integrity of which he utters not a syllable of complaint.

Judge Cooley lays down the rule, quoted before, which he emphasizes, saying:

"This rule is an eminently proper one, and it furnishes a very satisfactory test as to what is essential and what not essential in election laws. And when a party contests an election on the ground of these or any similar irregularities, he ought to be able to show that the result was affected by them."

Now, what is the rule so recommended by this great lawyer?

"Any irregularity in conducting an election which does not deprive a legal voter of his vote or admit a disqualified voter to vote, or cast uncertainty on the result, and has not been occasioned by the agency of the party seeking to derive benefit from it, should be overlooked in a proceeding to try the right to an office depending upon the election." (Cooley, Const. Lim., pp. 618, 619.)

Now, test the question of counting these four rejected boxes by this rule. The irregularity upon which contestee asks their exclusion did not deprive a single legal voter of his right to vote, did not admit a disqualified person to vote, did not cast doubt or uncertainty upon the result, and was caused by the failure and neglect of the partisan friends of him who seeks to profit by it.

By every rule of law and of justice the votes of these four boxes should be counted, and to the vote of Smalls should be added 328 votes and to Elliott's 8 votes.

(8) *A* cognate question arises as to Brick Church precinct, of which the majority report says:

As to Brick Church it appears that managers were regularly appointed, but that two of them did not serve, one because he was sick, the other because he was afraid of being mobbed. Only one legally appointed manager conducted the election. It further appears that three times during the day this manager was compelled to close the polls for a time because of the riotous and violent conduct of contestant's friends; that the poll remained closed in all about thirty minutes. For these reasons both boards of managers rejected this poll.

The minority do not agree to the propriety of the rejection of this poll by the boards of canvassers, denying that there was riot or that the polls were in fact closed:

The statute of South Carolina requires the polls to be kept open from 7 a.m. to 6 p.m., "without interruption and adjournment." It does not void an election because of temporary adjournment. The purpose of the law is that all shall be given an opportunity to vote and that the eleven hours set apart for the exercise of that right shall not be curtailed. It is nowhere alleged or shown that the twenty-five minutes interruption deprived any man of the opportunity to vote or had the slightest effect upon the result of the election the one way or the other.

The law is clearly laid down in McCrary (p. 104, par. 142):

"1. If the statute fixing the hours during which the polls shall remain open expressly declares that a failure in this respect shall render the election void, it must be strictly enforced.

"2. But in the absence of such a provision in the statute it will be regarded as so far directory only as that unless the deviation from the legal hour has affected the result it will be disregarded.

"3. If the deviation from the legal hours be great or even considerable, the presumption will be that it has affected the result, and the burden to overthrow this presumption will be on him who upholds the election. But if the deviation be slight, the presumption will be that the result was not affected, and the onus will be shifted to him who attacks the election to show that the deviation did affect the result."

Such is undoubtedly the law.

In the case at bar the whole interruption was slight.

It is not pretended that the result was affected thereby.

The statutes of South Carolina do not void an election because of deviation from the hours fixed.

The evidence shows that the election was fair and peaceable.

Under this condition of law and fact, upon what principle the board of canvassers threw out the Brick Church box we are unable to see.

In argument before the committee contestee's counsel claimed that there was not a quorum of managers at Brick Church box.

This question was not raised by the contestee in his replication. But if it were we need only cite the law, which provides for three managers; that Tripp was one, and that he obtained authority to appoint others, and that under that authority he "appointed Gabriel Eddings, a Republican, and a good man." (See Tripp's testimony, Rec., 627.) Eddings served "under color of authority" at least, and was a de facto officer, and with Tripp constituted a quorum of managers present.

Up to the Forty-first Congress the authorities conflicted, but the weight of authority was as laid down in Jackson *v.* Wayne, to wit, that, when the law required three magistrates to preside at the election, a return by three persons, two of whom were not magistrates, was defective. In three other cases it had been held that a failure on the part of election officers to take the required oath voided the election. (McFarland *v.* Culpepper; Easton *v.* Scott; Draper *v.* Johnson.) In another case a precinct was thrown out because only two inspectors were present, the law requiring three. (Howard *v.* Cooper, I Bartlett, 375.)

The minority next quote Milliken *v.* Fuller, Clark *v.* Hall, Flanders *v.* Hahn, and Blair *v.* Barrett to show that in the absence of fraud the acts of a de facto officer of election are valid as to third persons and the public. And finally the minority quote the case of Barnes *v.* Adams as giving the settled law on this question.

(9) The majority thus discuss the failure to open polls:

It appears from the evidence that at several of the precincts in the district the polls were not opened, and contestant claims that such failure was designed by the political friends of contestee for the purpose of depriving him, contestant, of a large number of votes. Indeed, he claims that he was thus deprived of about 2,000 votes, and while contestant does not aver that this number of votes should be counted for him, he does insist that in the event that the committee finds that he has not a majority of the votes cast, that then a new election should be ordered. Out of the whole number of precincts in the district there was a failure to open the polls at only four. The registered voters of these precincts were but an inconsiderable part of the voters of the entire district, and unless the failure to open the polls there can be traced to the contestee, or it appears that such failure was the result of a design on the part of his political supporters to thus deprive legal voters of an opportunity to vote for contestant, under no rule of law with which your committee is acquainted could such failure of itself justify the ordering of a new election. We have very carefully considered the evidence bearing upon the points made, and find that contestee, the Democratic executive committee, and the appointing officers did all they could to secure the opening of the polls at each precinct. We further find that at some of these precincts there appear to be as many Democratic as Republican voters who were deprived of an opportunity to vote, and there is no satisfactory evidence of the number of either class who were thus deprived of the right of suffrage.

(10) The majority of the committee decided that the returned vote of Beaufort and Ladies Island precinct should be rejected because of intimidation practiced by friends of contestant. The report thus summarizes the evidence:

James G. Cole testifies, at page 542, that he was born at Woburn, Mass.; graduated at Harvard in 1862; moved to South Carolina in 1863; was Government superintendent of abandoned lands during the war, and has resided twenty-one years on Ladies Island, Beaufort County, S. C.; that ordinarily he is the only white voter on the island; that in 1886 the total vote was 206, of which 11 were cast by white men, and that contestant got 129 and contestee 77; that Ladies Island lies between Beaufort and St. Helena Island and is 1 mile from Beaufort; that most of the colored voters are landowners and taxpayers, and since 1886 have had a general tendency to vote the Democratic ticket in consequence of reduction of taxation by the Democrats, improvement of the public schools, and general security of their rights; that after the mass meeting at Beaufort in October, 1886, which the Ladies Island Democratic Club attended, and of which accounts are elsewhere given, most determined efforts were made by the Republican leaders to break up this club; that a club of women was organized to beat all men voting the Democratic ticket, and that many threats were made against Democratic men and women; that it had been announced that contestee would speak on the island the day before the election; but in consequence of many threats

that he would not be allowed to speak the meeting was abandoned, although contestee was ready and anxious to attend; that prior to the election the Democratic voters were in a state of fear for their personal safety, and that there would specially be trouble on election day.

That in consequence of this, deponent distributed Democratic tickets on the night before the election himself—stayed all night with many of the voters at a house near the polls, so as to quiet their fears, and that all were instructed to be early at the polls, so as to vote as soon as the polls were opened, and to take Republican tickets from the runners for that party. That during election day many women were near the polls, armed with sticks, making a good deal of noise and disturbances, threatening talk, cursing, threats of what ought to be done and would be done with Democrats; that a Republican runner jerked from the hand of a voter a Democratic ticket which deponent had given him; that early in the campaign deponent had good reason to believe that Democrats would carry the poll, but that in consequence of this intimidation "numbers that intended voting the Democratic ticket did not vote at all, and others voted the Republican ticket." That the Democrats were specially fearful of trouble after the polls were closed, and many left the polls on that account, and for a month after the election many did not dare go out at night, and some so continued up to the date of witness's deposition; that in every contest between the parties for ten years past some Democrat had been beaten; that it required a great deal of nerve and courage, not only on Ladies Island, but at Beaufort and St. Helena (or Brick Church) for a colored man to admit that he was a Democrat,

After quoting evidence, the report continues:

The record contains much more evidence of this character, and it also contains much evidence submitted by contestant in rebuttal. Your committee find that at the precinct now under consideration almost all the voters were colored persons; that a large number of these voters were bitterly opposed to contestant, and had determined to vote for Colonel Elliott; that the leading supporters of contestant were very much incensed at this, and resorted to all means in their power to overawe and intimidate such voters and force them to vote for contestant. Colored men inclined to vote or expressing an intention to vote for contestee were rudely assailed and violently assaulted; they were threatened with expulsion from their churches; they were threatened with expulsion from the island, where many of them owned land; they were threatened with a denial of sexual intercourse with their wives; they were threatened with beating; they were cursed and abused; and this conduct on the part of the followers of contestant began early in the campaign and continued uninterruptedly down to the dosing of the polls on the day of the election. Smalls himself was a party to these acts; indeed he incited his followers to their perpetration.

After citing the testimony of those who heard contestant incite his followers to deeds of intimidation, the report calls attention to the fact that Smalls did not deny this, and continues:

Your committee venture the opinion that, in the whole history of election contests in this country, no case can be found where one of the candidates for election so openly and publicly advised and counseled his followers to perpetrate wrong and outrage upon those who supported his opponent. Without doubt many colored persons who desired to vote for Elliott were deterred from doing so through intimidation and fear of violence; how many it is hard to say. Men do not like to admit that they axe controlled by such influences, and yet we know they are. Beaufort County, the home of the contestant, was the theater of most of the violence and intimidation. The methods and practices resorted to in this county at the election in 1886 were of the same kind, only worse in character, as those resorted to by this same contestant in the same county at the election in 1876 (see Tillman *v.* Smalls, Forty-fifth Congress, second session, Report No. 916). Because of such violence, threats, and intimidation of voters by the contestant himself and his leading followers, your committee do not believe the vote returned at Brick Church, at Beaufort precinct, and at Ladies Island, in Beaufort County, should be counted. Your committee are reluctant to recommend the exclusion of a poll or polls, but in this case the ends of truth and justice, as well as the protection of the voter and the purity of the ballot box, imperatively demand it.

The majority, to account for the alleged fact that many colored voters wished to vote for sitting Member, brought in the fact that contestant had been convicted of bribery and alleged that he was unpopular with his race. The minority

minimized all this and also the testimony tending to show intimidation, claiming that it did not bear out the contention of the majority.

In accordance with their reasoning the majority concluded:

According to the return as canvassed and declared by the State board, the vote was: William Elliott, 6,493; Robert Smalls, 5,961.

We give to Smalls and Elliott each the votes cast for them at Fort Mott, Adams Run, Cedar Creek, and Greer's precinct, and we deduct from Smalls his majority at Beaufort precinct, and at Ladies Island precinct, and the count stands as follows:

Returned vote for Elliott	6,493	Returned for Robert Smalls	5,961
Vote at Adams Run	37	Vote at Fort Mott	236
Vote at Fort Mott	58	Vote at Adams Run	177
Vote at Cedar Creek	0	Vote at Cedar Creek	18
Vote at Greer's precinct	4	Vote at Greer's	65
Total vote for Elliott	6,592	Total vote for Smalls	6,457

Deduct from Smalls:		
Majority at Beaufort	136	
Majority at Ladies Island	52	
	.....	188
	.....	6,269
Total vote for Elliott		6,592
Total vote for Smalls		6,269
Majority for Elliott		323

Your committee find that the sitting Member was duly elected, and recommend the adoption of the following resolutions:

Resolved, That Robert Smalls was not elected a Representative to the Fiftieth Congress from the Seventh district of South Carolina.

Resolved, That William Elliott was duly elected a Representative to the Fiftieth Congress from the Seventh district of South Carolina, and is entitled to his seat.

The minority recommended these resolutions:

Resolved, That William Elliott was not elected and is not entitled to a seat in the Fiftieth Congress from the Seventh South Carolina district.

Resolved, That Robert Smalls was elected and is entitled to a seat in the Fiftieth Congress from the Seventh South Carolina district.

The report was debated at length on February 11, 12, and 13,[1] 1889, and on the latter day the question was taken on substituting the minority for the majority resolutions, and the motion was disagreed to, yeas 127, nays 142.

Then the resolutions of the majority were agreed to without division.

1016. The California election case of Sullivan v. Felton in the Fiftieth Congress.

Instance wherein the Elections Committee considered as a suspicious circumstance a variation from the vote of the preceding election.

Although a portion of the election officers were disqualified persons, corruptly appointed, the Elections Committee did not reject the poll, but corrected the return by a recount.

[1] Record pp. 1754, 1785, 1860–1878; Journal, pp. 537, 615.

Ballots tainted with bribery and distinguishable by a mark were deducted from the return.

Discussion of directory and mandatory requirements of law as applied to the ballot and in relation to the rights of the voter.

December 12, 1888,[1] Mr. J. H. O'Neill, of Massachusetts, presented the report of the majority of the Committee on Elections in the California case of Sullivan, *v.* Felton.

The sitting Member had been returned by a certified majority of 119 votes.

The examination of the various charges in this case brought out the following discussions of principles:

(1) In the eighth precinct of the forty-sixth assembly district of San Francisco the vote returned showed a change, as compared with the vote of the preceding election, which the majority of the committee consider suspicious. There was testimony, corroborated by a recount, tending to show that the judges miscounted, also that they were corruptly organized, as the majority report says:

The testimony as a whole shows that the election board was illegally organized, and in the light of all the evidence it is very plain that the illegal organization was in the interest of Felton. The law of California requires, in the city of San Francisco, that the election board shall be composed of an inspector and of two judges, and an additional inspector and two additional judges, six in all; that these inspectors and judges should belong equally to the parties casting the most votes; that all should be electors in the precinct where appointed. A man by the name of James Hughes was Democratic committeeman of this precinct, or Democratic "captain," as he was called. He it was that selected the Democratic or reputed Democratic members of the election board—D. D. Sullivan and Thomas J. Barden. His own evidence (see Record, p. 962) shows that he received Felton's money. He screens himself, however, under the plea that the money was distributed to certain parties, of whom he was one, who had suffered loss from fire. Most singular, other sufferers from that fire received none of it and heard nothing of it until it dropped out in the evidence of Mr. Hughes in this contest. When asked under oath how he voted, whether for Sullivan or Felton, he refused to answer.

The majority conclude that the men in question were not residents of the precinct, not legal electors therein, and for that reason not eligible as judges:

In short, no one can read the testimony in relation to the election in this precinct without being convinced that Hughes was hired to import, and did import, these men—D. D. Sullivan and Thomas J. Barden—for the purpose of having them placed on the election board to deliberately assist in counting Frank J. Sullivan out and Charles N. Felton in, and that had no recount been called for and had, the purpose would have been accomplished to the extent of a change of at least 92 votes.

The majority rule as to this precinct:

The organization of the election board and the manner of holding and certifying to the election in this precinct is so tainted with fraud as to warrant the throwing out of the precinct vote as returned in toto. The evidence in the case would fully justify such a course. That being done, under well-established rules of law (see McCrary on Elections, sec. 442) each party would have the right to prove his vote aliunde. Should this course be adopted Felton's entire majority of 119 would be more than overcome by this precinct alone. Sullivan called more than enough of the electors of this precinct and by them proved that they voted for him to overcome Felton's majority of 119, while Felton did not Call a single voter of the precinct to prove a vote for himself. By accepting the result as shown by the recount we think, under all the circumstances, the ends of justice will be best subserved. Hence we here deduct 92 from Felton's 119 majority.

[1] Second session Fiftieth Congress, House Report No. 3538; Mobley, p. 747.

The minority views, signed by Mr. J. H. Rowell, of Illinois, and five others of the committee do not place credence in the testimony as to this precinct and say of the recount:

This vote was not recounted until the last day of taking rebuttal testimony in San Francisco, with no opportunity to answer.

The ballots were not identified as the real ballots cast at the election, and there were strong indications that they had been tampered with.

(2) As to alleged bribery:

The majority report finds suspicious changes in the vote of the Fourth Ward of San Jose, when the vote for Felton is compared with the results of prior elections; and conclude from the evidence that the changes were brought about by the questionable use of money. The testimony of sitting Member admits that he sent money to the county, direct to one J. H. Barbour, the county committeeman; but Mr. Barbour declined to say how much he received or expended. After quoting the testimony the report says:

From the above it will be seen that Barbour testifies he received $250 from the Congressional committee, but refuses to say whether he received more than $250, or whether he received any money from Felton direct. Felton, however, testifies that he sent money to Barbour direct, but to some of the committee "less money than they thought was sufficient and necessary."

Now, let us inquire further into the methods practiced at this precinct. We find that one Bailer and one McKenzie hired a room on election day, in the Cosmopolitan Hotel, in which to buy up such of the purchasable vote as could be inveigled therein.

Then, as to the application of money in this ward, the report gives the testimony of Baler and others, and concludes:

A careful reading of Bailer's testimony, coupled with other testimony hereinafter referred to, shows that he (Bailer) and one McKenzie had a room rented in the Cosmopolitan Hotel, and within less than 100 feet of the polling place. To this room electors willing to make merchandise of their right to vote were invited and taken; that the price paid started at $2.50 per vote in the forenoon, and increased to $4 later in the afternoon. The tickets given to the voters in this room were, for the purpose of "branding" them, "marked" with a red pencil across the items:

31. For the Amendment No. 1; and
32. Against the Amendment No. 1.

Of this class of tickets, 53 were found in the ballot box, and were all Republican tickets, with the name of Charles N. Felton thereon. To say nothing of the fact that they were bought and paid for in a most shameful and unblushing way by Mr. Bailer and his friend, McKenzie, who would get around the voter "like a Sheeny," and "tote," "influence," and "soup" into him. The tickets are in contravention of section 1197 of the Political Code, which reads:

"No ballot or ticket must be used or circulated on the day of election having any mark or thing thereon by which it can be ascertained what persons, or what class of persons, used or voted it, or at what time in the day such ballot was voted or used."

Contestee insisted that to come within the purview of this statute the mark or thing must be placed on the back of the ticket, and that the object and purpose of the statute was to secure to the voter the right of a secret ballot, and to prevent intimidation by rendering it impossible for the looker on to determine how the elector, when depositing his ballot, was voting. If we could persuade ourselves that such was the only object and purpose of the statute we might so conclude. To hold that only on the back or outside of the ticket was contemplated would make it "permissible" to place a mark "on the inside of a ticket to indicate the person or class of persons who voted it," and thus encourage "combinations of voters engaged in the greatest of all outrages against the elective franchise and free government—selling their votes—and to make proof of their perfidy." (Note of the code commissioner to section 1197, Political Code, California.)

The majority report cite Kirk *v.* Rhoads (46 Cal., 404) to show that irregularities beyond the voter's control do not vitiate the ballot, and say:

A statute in relation to such irregularities, as want of uniformity in size, color, texture, or appearance of ticket, or something of that character, under the control of those clothed with the power and duty of providing tickets, would and should be construed as directory. But an irregularity in contravention of a statute intended to protect the purity of the ballot box against frauds, which irregularity is within the control of the voter himself, must not be tolerated. A statute applied to such irregularities is, by the courts, and of right should be, construed as mandatory. Mr. Bailer says these "marks" placed upon the tickets were placed there as a "brand," and that a memoranda was kept of them, but that the memoranda had been lost six months later, when he was testifying.

The report further finds that the law providing that there should be no interference with the voters within 100 feet of the polls was disregarded.

As to the witnesses the report says:

Much of the testimony of these witnesses is hearsay. Aside from the hearsay the facts testified about and of which the witnesses had knowledge, and properly constituting a part of the res gesta, sufficiently and abundantly establish, first, that a room within 100 feet of the polling place was being used to deal in "merchantable" votes, and that such voters were marched up and down and watched when depositing their ballots; and, secondly, that 53 marked Republican tickets are found in the box and that they were "fixed" in that room, and that when these tickets were being counted out they were so well understood that they were denominated the "McKenzie tickets," and when so denominated McKenzie, who was standing by, "smiled." (See Record, p. 780, testimony of Julius Kraig, a member of the election board.) As to these electors who voted these 53 tickets the testimony shows that most of them were Democrats.

1017. The case of Sullivan v. Felton, continued.

One candidate's name being scratched and another's written in with a pencil of illegal color for a corrupt purpose, the ballot was vitiated as to both names.

The Elections Committee knowing judicially that paupers could not, by reason of living in the county almshouse, have a residence in the precinct, and there being no proof that any did have a residence there, their votes were rejected.

The Elections Committee rejected returns tainted with fraud on the part of an election officer.

Instance wherein final action in an election case was prevented by obstruction.

(3) The majority find also in the Fourth ward of San Jose the following condition:

In addition to these 53 tickets there were, in this Fourth Ward of San Jose, 13 other tickets—Democratic tickets—with Sullivan's name erased with blue or red pencils, and with the same kind of pencil Felton's name written in place of Sullivan's. The testimony sufficiently shows that these tickets were likewise "fixed" in the Bailer-McKenzie room. Bailer testifies that when they (himself and McKenzie) could not induce an elector "to go the whole hog" by "toting influence" and "soup" into him they would get him to vote for Felton and as much of the ticket as possible.

To say nothing of the testimony showing the corrupt influence used to secure these votes, let us examine them in the light of the California statutes. Section 1191, specification 3, provides: "That the names of the persons voted for, and the offices designated, are printed in black ink." Section 1204 provides: "When, upon a ballot found in any ballot box a name has been erased and another substituted therefor in any other manner than by the use of a lead pencil or common writing ink, the substituted name must be rejected and the name erased, if it can be ascertained by an inspection of the ballot." * * * These requirements are that it must be printed in black ink, and when so printed

all erasures must be made with lead pencil or common writing ink. Common ink is black ink. A ticket printed in red ink would not conform to the requirements of the statute, but as to a ticket so printed and furnished the voter by the authorities the statute might be construed as directory. But when the voter himself undertakes to change the uniformity of the ticket, then that is under his control, and the statute must be construed as mandatory. The letter and spirit of the statutes were intended to secure uniformity in the appearance of the tickets, and we think the tickets should be written and printed in common black ink or common lead pencil, and that all the erasures and substitutions should be made with like black ink or pencil.

Placinging this construction upon the intention of the law we might deduct 13 votes from Felton and give them to Sullivan, thus adding 26 more to the majority already found for Sullivan.

This accords with the justice of the case, because if 13 Democrats were bought to vote these tickets 13 were taken from Sullivan and given to Felton, making a difference of 26. We insist for that reason and for the reason that Sullivan's name was erased with red or blue pencil, and Felton's name substituted with such pencil, that they should at least be deducted from Felton's vote.

(4) In the county of San Francisco were two almshouses, and the majority report declares that 25 or 30 paupers, most of them shown to have been Democrats, voted for sitting Member, who was a Republican. The majority report takes the ground that these votes should be excluded, because the paupers were shown to have resided elsewhere than at the almshouse.

The law requires that the registration of an elector shall show the correct residence of the elector. These paupers were registered as residing at the almshouse. We judicially know that they did not reside there, because the constitution and laws of the State expressly provide that persons do not gain or lose a residence while residing in the almshouse at public expense. At whose expense does the evidence show these paupers were residing at the almshouse? At the public expense, of course. Then they do not gain any residence there, nor do they lose the residence from which they came. While residents, presumably, of the county, still under the laws of the State electors can not vote anywhere in the county wherein they reside, but must vote only in the precinct of the county wherein they reside. It would seem from the evidence in this case, and from the briefs of contestant and contestee as well, that these paupers are treated as residing at the almshouse.

Without any proof whatever on the point, we judicially know otherwise. Thus, by judicial knowledge, we know these paupers did not reside at, and could not be registered and vote from, the almshouse on account of any residence therein. Then, can it be presumed that these men were legal residents of the precinct in which the almshouse is located? We think not. From the evidence in the case, and by reference to the statutes of the State, it appears that there is but one almahouse in a county. That part of the county of San Francisco in this Fifth Congressional district, described in the record and the evidence as the southern half of the city and county of San Francisco, contains some 80 precincts. If the northern half contains as many that would make 160 in all. In view of these facts can we presume that these paupers, prior to being domiciled at the almshouse, all resided in the fifth precinct of the forty-eighth assembly district? We think not; and if not, when shown to have registered and voted from a place where they did not reside, does not that of itself shift the burden upon the other side to show that, notwithstanding they did not live at the almshouse, still that they lived in the precinct where the almshouse was located. We think the burden is thus shifted. There being no evidence offered on that point it is our duty to throw out these votes to the number at least of 25.

(5) In the second precinct of the forty-eighth assembly district of San Francisco the returns gave Felton 172 votes and Sullivan 117. The majority of the committee decided to throw out this return because it was tarnished with fraud. The report says:

To understand the merits of the controversy had before the board it will be necessary to refer to the statutes of California, which provide that in each precinct there shall be an inspector and two judges, an additional inspector and two additional judges, two clerks and two additional clerks. The inspector, additional inspector, judges, and additional judges—six in all—constitute the precinct board. At least

four of these, a majority, must sign certain papers and returns hereinafter stated. As the election progresses the clerks make and keep a list of the voters as they vote and these lists are duplicates. At the close of the polls two tally sheets are made out. These are duplicates of each other. When the count is completed the tickets are placed in an envelope, provided for that purpose, sealed, and the board, or a majority—which requires at least four members—sign their names across this envelope, which has printed thereon "Envelope No. 1." One of the duplicate copies of the poll lists and tally sheets, and certain registration papers, are placed in a second envelope, which is sealed, and the names of the members of the board signed thereon, as on the first envelope. This envelope beam upon it the printed words "Envelope No. 2." The other tally sheet and poll list are placed in a third envelope, "Envelope No. 3" which is not required to be signed or sealed.

Envelopes numbered 1 and 2 the law requires the inspector to file with the county clerk within eighteen hours after the close of the count. The other envelope, No. "3," the inspector is required to retain.

The evidence before the board showed that so far as the signatures were concerned the names of all six members of the election board were placed on one of the poll books, one of the tally sheets, and lists attached. Doctor Humphrey and E. J. Morrison not being present, their names were signed by one of the clerks. Not a single one of the judges testify to having examined the poll books, tally sheets, and lists attached before or at the time of signing. They all, the four members who were there, testify that they signed envelopes Nos."1" and "2." The clerks likewise testify that the envelopes "1" and "2" were signed; Lincoln himself testifies to this. These envelopes and returns were then turned over to Lincoln, the inspector, who took them home with him. It was then 9.30 o'clock p.m. of Thursday, November 4, 1886. The next day, about 10 o'clock, Lincoln appeared at the office of the registrar to place on file that portion of the returns which it was incumbent upon him to so file. The clerk refused to receive envelope No. "2," because not signed. In fact, Lincoln or someone else had made away with envelope No. "2," and had substituted an unsigned No. "3" therefor.

The report goes on:

Lincoln went back to the polling place, got a No. "2" envelope, broke the seal of the No. "3," took out the contents and placed them in the No. "2," calling the attention of Strozynski, a shoemaker, and Jurgens, a groceryman, to witness the performance. He then sealed the No. "2," wrote his own name thereon, and coolly requested both Jurgens and Strozynski to sign the names of certain other members of the board under his own (Lincoln's) name. Jurgens, thinking he wanted his name as a witness merely, took the pen and innocently inquired, "Where do you want my name?" "Well," says Lincoln, "sign Sweeny's name first." (Sweeny was a member of the board.) "What" says Jurgens, "you don't want me to sign some other man's name? "Oh, yes," rejoined Lincoln, "it is nothing but a form." Jurgens thought otherwise.

A like request was made of Strozynski with a like result, both of these men telling him that it would be forgery, and for him to sign them himself. "No; it won't do for me to sign more than one name," said Lincoln. Later, Morrison, one of the members of the board, and one who up to this time had signed nothing, was hunted up and procured to sign it. The names of the other members of the board were thereafter signed by someone; by whom the evidence does not disclose. The members themselves testify that they were not signed by them, or by anyone by them authorized. The envelope No. "2," purporting to be signed by the members, was returned to the clerk's office, by him received and placed on record. In canvassing the returns, it was claimed before the board of election commissioners that their functions were simply ministerial and not judicial. This view seems to have been held by a majority of the board, for they failed to call attention to anything connected with the returns, or to go into any investigation further than to examine the signatures of the members of the precinct board. From the evidence, these names had been affixed in a most careless manner.

The report concludes that during Lincoln's custody, after the polls were closed, someone removed the envelope signed by the board and substituted another. Testimony showed Lincoln to be an unreliable man.

(6) The majority report also discusses reasons for supposing that in sitting Member's party there was a conspiracy to defraud, and cites circumstances sug-

gesting intimidation, but as a matter of fact makes no definite rejection of votes for these reasons.

As a result of its conclusions, the majority find that sitting Member's majority is overcome by reasons of the following deductions:

(1) In the eighth precinct, forty-sixth assembly district, San Francisco, votes out of which Sullivan was counted, 92.

(2) In the fourth ward, San Jose, we find votes bought for Felton in a room within 100 feet of the polling place, and the tickets "branded" with a red pencil to the number of 53.

(3) In the same ward, and in the same room, 13 other votes bought and Sullivan's name erased and Felton's substituted, with red or blue pencil. These we think might not only be deducted from Felton, but counted for Sullivan, but we simply deduct them from Felton, 13.

(4) In the second precinct, forty-eighth assembly district, San Francisco, because of frauds, and uncertainty, we throw out the precinct, with its majority for Felton of 55.

(5) Illegal pauper votes bought for Felton, at least 25.

And the majority recommend these resolutions:

(1) *Resolved,* That Charles N. Felton, the contestee, was not elected a Representative in the Fiftieth Congress from the Fifth Congressional district of the State of California, and is not entitled to a seat on this floor.

(2) *Resolved,* That Frank J. Sullivan was duly elected to represent the Fifth Congressional district of California in the Fiftieth Congress, and is entitled to a seat therein.

The minority, who had denied the competency of the testimony and generally dissented from the conclusions of the majority, recommended the following:

Resolved, That Charles N. Felton was duly elected a Member of the Fiftieth Congress from the Fifth Congressional district of California, and is entitled to retain his seat.

Resolved, That Frank J. Sullivan was not elected to the Fiftieth Congress from the Fifth Congressional district of California.

An attempt was made to consider the report on February 18, and again on the 25th,[1] but in each case the purpose was defeated by dilatory tactics. So the sitting Member, Mr. Felton, continued to occupy the seat.

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[1] Record, pp. 2029–2032, 2296–2304; Journal, pp. 537, 615.

Chapter XXXVI.

GENERAL ELECTION CASES, 1889 TO 1891.

1. Cases in the Fifty-first Congress. Sections 1018–1040.[1]

1018. The Arkansas election case of Clayton v. Breckinridge in the Fifty-first Congress.

An election case having been suspended by the assassination of contestant, the House directed the Elections Committee to inquire and report as to further proceedings.

A resolution relating to the prosecution of an election case was held to involve a question of privilege.

The House authorized an investigating committee to take testimony in a district wherein the contestant had been assassinated.

Where the taking of testimony was suspended by contestant's death, the House itself took additional testimony, but considered the original case continued.

A returned Member whose seat is contested is nevertheless eligible to appointment on any committee.

On December 16, 1889,[2] Mr. John F. Lacey, of Iowa, rising in the House, and being recognized, offered the following:

Whereas, it is well known that a contest for a seat in this House was duly commenced by Hon. John M. Clayton, of Arkansas, against Hon. C. R. Breckinridge, a sitting Member; and

Whereas it is a matter of public notoriety that the said Clayton, while engaged in taking testimony in the said contest, was assassinated, and all further proceedings thereby suspended:

Resolved, therefore, That the Committee on Elections be, and is hereby, directed to inquire and report what further proceedings should be had in relation to the said case; and they are authorized to send for persons and papers if deemed necessary by them for the investigation of the said matter.

The Speaker[3] having ruled that this resolution involved a question of privilege, the House proceeded at once to its consideration, and the resolution was agreed to without division.

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[1] See also cases of—

Mudd *v.* Compton, Maryland. (Vol. I, sec. 577.)

Smith *v.* Jackson, West Virginia. (Vol. I, sec. 581.)

[2] First session Fifty-first Congress, Record, p. 196.

[3] Thomas B. Reed, of Maine, Speaker.

On March 10, 1890,[1] Mr. Lacey submitted from the committee the following report:

In pursuance of the directions contained in the foregoing resolution, the committee have obtained the notice of contest and answer of the contestee and all the evidence which had been taken up to the time of the death of Mr. Clayton. The attorney for Mr. Clayton has presented to the committee a memorial in relation to the said contest, which memorial has been submitted to Mr. Breckinridge, and he has presented to the committee a statement in his own behalf. We have directed that the foregoing papers be printed for the information of the House.

The committee have proceeded as far as they can under the said resolution, and they therefore report: [The following resolution is as adopted by the House, a slight amendment having been added by the House.]

"That, owing to the alleged assassination of Colonel Clayton, whereby the contest has been suspended, it is of the highest importance that the facts in the case should be thoroughly investigated, and recommend the passage of the following resolution:

"Resolved, That a subcommittee of five be appointed by the chairman of the Committee on Elections to make a full and thorough investigation of the contested election case of Clayton *v.* Breckinridge; to take and report all the evidence in regard to the methods of said election; to the contest and all events relating thereto or arising therefrom after said election, and as to whether the contestant or the contestee or either of them was lawfully elected, and report such evidence to the Committee on Elections, and said committee will report said evidence and its findings to the House for further action.

"Said subcommittee is empowered to issue subpoenas for witnesses; to send for persons and papers; to employ a stenographer and deputy sergeant-at-arms, and to sit during session of the House. Said subcommittee may proceed to Arkansas, if deemed necessary by them, to take any part of said testimony.

"That all expenses of said committee shall be paid out of the contingent fund of the House. That all vouchers or expenditures shall be certified by the chairman of the subcommittee of the Committee on Elections. The Clerk of this House is authorized to advance the necessary funds to the chairman of said subcommittee upon his drafts therefor in sums not exceeding $1,000 at any one time, to be accounted for under the terms of this resolution, under the supervision of the Committee on Accounts."

This resolution was agreed to without division.

On August 5[2] Mr. Lacey submitted the report of the majority of the committee.

At the outset of the debate in the House on this report, a preliminary question was raised as to the nature of the proceedings. Mr. Charles F. Crisp, of Georgia, raised the question that this case was not a statutory contest, but an investigation.[3] The contest of Mr. Clayton had by his death abated, and the existing proceedings were an investigation by the House to determine the "election" of the sitting Member. Therefore Mr. Breckinridge had not been charged with the duty of proving votes aliunde in precincts where returns were rejected for fraud. And it was further urged that in this case, where returns were rejected, the committee might not count votes proven aliunde for Mr. Clayton, and at the same time omit Mr. Breckinridge's vote, because he had not proven it.[4] It appeared that Mr. Breckinridge, after the investigation was over in Arkansas, had asked leave to take testimony in proof of his votes.

In reply to this contention it was argued[5] that the committee had obtained the notices of contest and answer of contestee and all the evidence taken up to the time of Mr. Clayton's death, also a memorial of Mr. Clayton's attorney. The plead-

[1] Record, pp. 2097–2098; Journal, p. 326.

[2] House Report No. 2912; Rowell, p. 681.

[3] Record, pp. 9561, 9616, 9620.

[4] Speech of Mr. Wilson, of Missouri. Record, p. 9568.

[5] By Mr. Dalzell, of Pennsylvania. Record, pp. 9747, 9748.

ings were made up and the case defined. It mattered not how the testimony was taken, whether before a notary under the law or by the committee. In the case of Thoebe *v.* Carlisle it had been taken in part by the committee, but it did not cease thereby to be a contested-election case. There was nothing in the point that this was an investigation and not a contest. It was also pointed out [1] that the committee while in Arkansas had offered subpoenas to sitting Member and to his party friends on the committee to summon witnesses to prove the vote aliunde had he chosen so to do.

The report of the majority of the committee shows that sitting Member had received his certificate:

> The contestee received the governor's certificate by a majority certified as amounting to 846, and has not only taken part in the organization of the House, but has during this contest filled the exalted place of a member of the Committee on Ways and Means.

1019. The election case of Clayton v. Breckinridge, continued.

The ballot box being stolen and no returns made, the vote was proven aliunde.

Where the law provided for identification of the ballot cast by a voter, and where 62 voters examined ballots credited to them and disowned them, the returns were rejected for fraud.

Fraudulent election returns are good for proof of no part of the vote, but both parties must resort to proof aliunde.

In a contested-election case involving alleged fraud by election judges the acquittal of those judges in the courts is not an adjudication binding on the House.

The contestant being dead, the swearing in of returned Member creates no estoppel to prevent further prosecution of the contest.

Discussion as to counting votes which would have been cast had there not been a failure to open the polls.

Forms of resolutions declaring a seat vacant in a case wherein the contestant has died.

The House declined to reopen an election case to enable returned Member to prove his vote aliunde at several precincts whereof the returns had been rejected.

After giving an account of the political conditions in the district, of the murder of Mr. Clayton, and other alleged murders which were presumed to have been connected with the investigation, the committee proceeded to consideration of the election itself.

(1) At Plummerville, which had of old been a disorderly precinct, the sheriff of the county raised a posse of partisans of sitting Member, ostensibly to guarantee a fair election. The report describes the proceedings:

> These men appeared upon the scene in time for the opening of the polls, which, under the Arkansas law, is 8 o'clock a. m. The judges of the election consisted of two Republicans and one Democrat. The Democrat, Thomas C. Hervey, had been appointed by the county judge in vacation, and to set at rest all questions as to the validity of his appointment the county judge had suggested that Mr. Hervey's appointment should be confirmed by the voters at the time of opening the polls. Accordingly,

[1] Record, p. 9621, speech of Mr. Lacey.

one of the Republican judges nominated Hervey as a judge of the election, and the assembled voters, regardless of party, voted for him and confirmed his appointment. Mr. Hervey then announced that this was an attempt to question his authority, and that he would also submit to the voters who the other judges should be, and nominated Mr. Hobbs and Mr. Palmer as judges, both Democrats, and put it to vote, calling for the affirmative and declining to put the negative, and at once declared the Republican judges ousted who had without question been lawfully selected by the county court.

The Republican judges objected to this summary ejectment from office, and insisted on taking part in the election. The purpose and character of the deputy sheriffs at once became manifest. They took the matter in hand and prevented the two Republican judges from exercising their rights. The election was therefore held by three Democratic judges and two Democratic clerks.

There was, however, a Federal supervisor present, and of his acts the report speaks:

Mr. Wahl, the Federal supervisor, seems to have been a man of much nerve and presence of mind; he watched the box constantly and accompanied Mr. Hervey, the same am who had taken part in a previous trouble about the Plummerville ballot box and who was one of the judges, when he took the box to supper. Hervey complained that Wahl "watched him like a thief, "and subsequent events justified Wahl in his so doing.

The judges separated, and left Wahl and one of the judges in charge of the box. After dark some one came to the room where the box was and, looking into the door, asked if they had commenced counting. Mr. Wahl answered that they had not. Mr. Hobbs, the judge, whose back was turned at the time, asked Wahl who that was, and Wahl replied that it was O. T. Bentley.

This same Bentley is still the deputy sheriff of the county, and the duty of capturing the murderers of Clayton and thieves of the ballot box has been largely intrusted to him. He has been in a position to know all that the governor and other State officials have been doing to disclose the crimes in Conway County. A few minutes after Bentley, or the man whom Wahl recognized as Bentley, disappeared, four men with handkerchiefs over their faces and with revolvers in hand entered and took the ballot box and poll books away by force. Mr. Hobbs says that they had white faces, and there was no evidence to the contrary. In the light of these well-known facts it is strange that contestee should have charged that the ballot box with nearly 500 Republican majority was stolen by Republicans.

The committee found, by proof aliunde—no returns having been made or tabulated from this precinct—that Clayton received 560 votes and Breckinridge 125, a majority of 435 for Clayton. This testimony consisted principally of the testimony of the voters themselves, and it will be noted that in this precinct sitting Member's vote was proven.

(2) With the correction for Plummerville, there was left a majority of 411 for sitting Member in the district. There were four other disputed precincts, whence a majority of 422 votes had been returned for sitting Member. The committee threw out these returns for frauds, thereby leaving a majority of 11 for contestant in the district. But enough votes were proven aliunde for contestant in these precincts to make his majority in the district 459. The method of procedure as to these precincts is illustrated by the following from the majority report as to White River precinct:

The return shows:.

Breckinridge	210
Clayton	44

Under the laws of Arkansas the judges are required to mark a number on the outside of the ballot before putting it in the box, and such number corresponds with the number opposite the voter's name on the poll list. In this precinct 62 persons who swear they voted for Clayton deny that they cast the tickets numbered as having been cast by them. The original tickets were presented to them before the committee, and are shown to be the opposite of what they voted. These 62 tickets were evidently changed by or with the connivance of the Democratic judges of the election, and when corrected make a difference of 62 off of Breckinridge's vote and 62 to be added to that of Clayton.

These ballots had manifestly been substituted after they were deposited, and this could not have been done if the judges had not either permitted it or committed the act themselves This change of 124 invalidates the return. A fraudulent return of this character can have no effect, and as a matter of law we must deduct from—

Breckinridge's reported majority of	846
The votes so fraudulently returned	210
Leaving a majority of	636

In counting Clayton's vote, 44 votes were credited to him in making Breckinridge's original majority. The proof shows that he got 62 votes where the tickets were changed, 39 votes where his tickets were not changed, as shown by the voters themselves, and 5 others where the proof is that the voters were furnished with and cast Clayton tickets, and that the voters were Republicans. Total vote proved for Clayton, 106. He has already been credited with 44, so he should now be credited with the balance, 62. There were also two names of voters not on the book, who voted for Clayton. We will insert the names of all these voters in an appendix, which we think will be more convenient for reference than to incorporate them here.

In general as to this method the majority say:

Contestee complains that the committee may refuse to accept the impeached returns as of any validity, and thus work a hardship upon him.

If the returns have been falsified by the election officers, it is a well-settled rule of law that they cease to have any prima facie effect, and each party can only be credited with such votes at the box in question as he may show by other evidence. This rule is one of long standing, and one of which contestee, as an old Member of Congress, must have had notice. It works no hardship upon contestee which does not fall as heavily on the contestant. The contestant is required in the first instance to show the fraud in the return, and then must follow that up by proving his vote; or, in some instances, the proof of the fraud is connected with the proof of his vote.

In the present case the fraud is in a large degree shown by proving that votes cast for Clayton were substituted by ballots for Breckinridge, and in proving the fraud the votes for contestant are proved at the same time. Contestant is required to go outside of the returns to prove up his vote, because the judges of the election have falsified the returns. It is no more a hardship upon the contestee to prove up his vote by outside evidence than it is upon the contestant. If contestee's partisans had perpetrated no fraud, the returns would be accepted as true on both sides. His friends having falsified the returns and substituted his ballots for those of his opponent, there is no return at all of any legal effect. He might as well complain of the hardship of being compelled to prove up his vote at Plummerville, where his adherents stole the ballot box before the vote was counted. No doubt contestee received some votes at the boxes where the returns were falsified, which votes he wholly failed and neglected to prove whilst he had the opportunity in Arkansas.

If the holder of a promissory note alters the note and raises the amount from $1,000 to $2,000, he is met in court with the rule of law which prevents him from using the fraudulent instrument in evidence. It is not even good proof as to the $1,000. The same principle is applied to fraudulent election returns. Courts can not take the fraudulent statements of the election officers and analyze them and select the true from the false. The whole stream is sullied by the impurity, and all that can be done is to reject the returns altogether and seek other sources of evidence.

Speaking of their disposition of the four precincts, the majority say:

The above is the computation upon the settled rules of election law in this House. We will now state the return upon the most favorable view that contestee could claim, under the case of Jones *v.* Glidewell (supreme court of Arkansas, A. D. 1890). If we were to throw out the whole vote in the impeached precincts, and inasmuch as Breckinridge has not proved his vote there, to ignore the proof of Clayton's vote, it would show the following results:

Breckinridge's majority	846
Deduct Howard Township, Conway County, majority shown	435
Majority remaining	411

Now deduct the vote returned for both parties in the disputed precincts:

Precinct.	Breckinridge.	Clayton.
White River	210	44
Cotton Plant	186	132
Augusta	98	34
Riverside	197	59
Total	691	269

By thus considering the proof for the purpose of showing fraud alone, and not for the purpose of counting the votes, Breckinridge would lose the difference between 691 and 269, or 422, which would leave Clayton elected by 11 majority without taking into consideration Freeman Township. But this method, so favorable to contestee, is not the rule of this House, and we only make the computation in this form to show that by the most favorable method of calculation the contestee is not entitled to the seat which he holds after the proof is adduced as to the Plummerville box.

(3) The majority report also passes on the following question:

Contestee claims in his application for further time, and also upon the floor of the House, and more surprising still, his counsel, General Garland, also claims that the acquittal of the judges and others charged with frauds in this election is a fact binding upon this House and the committee; that such result in a criminal case before a jury is practically an adjudication that there was no such fraud, and that such adjudication should be so accepted by Congress. It is a common saying in criminal proceedings that it is better that ninety-nine guilty men should escape than that one innocent man should be convicted.

All of the Woodruff County officials who were indicted were convicted. In fact, all the persons who were indicted were convicted, except the persons indicted for the crime against Wahl and those for the stealing of the Plummerville box. Two persons were indicted and convicted on one trial, and acquitted on a new trial. This only shows that the evidence in the cases of conviction satisfied the minds of the jurymen to the exclusion of every reasonable doubt. Upon the new trial when there was an acquittal, no one can say whether it was a difference in the evidence or a difference in the character of the jury. It is sufficient for us to determine this proceeding upon the evidence introduced before us, without speculating upon the causes that might have led an Arkansas jury to acquit or convict.

The distinction between the rules governing juries in criminal cases and those prevailing in civil proceedings is well known, and we can not but express surprise at the persistence with which the contestee and his counsel cling to this theory that the verdict of the Arkansas juries upon the indictments for violating the election law should be treated as an adjudication that contestee is entitled to his seat. It might as properly be contended in an action of replevin, brought by the owner of a stolen horse against a party claiming title through the thief, that the thief had been able to prove an alibi on a criminal trial, and that therefore this should be regarded as an adjudication divesting the true owner of his title, although the owner was not a party to the criminal proceeding, and had no right to cross-examine witnesses or produce testimony in his own behalf, nor to appeal from an adverse decision.

Such a legal proposition could only excite attention by its entire novelty in a court of justice, where rights of property were involved. But when it is seriously contended that a seat in Congress obtained by fraud and ballot-box stealing can not be contested unless the Government authorities have been able to convict the parties charged upon indictment, we can only express our surprise at the persistence with which contestee insists upon so evident an error. The rule contended for in behalf of contestee does not apply even in small matters, involving only the rights of property, and to allow the control of the legislative branch of the Government to be thus decided would be monstrous. The Constitution, in express terms, declares that Congress shall judge of the qualifications and election of its members; and the right to exclude from its body men whose title is procured by crime does not depend upon the ability of the Department of Justice to capture and punish the criminals.

The receiver of stolen goods, even though innocent of all guilty knowledge, can not claim title based upon the failure to catch or punish the thieves. Only the seriousness with which it is urged justifies any extended notice of so evident an error.

(4) Also the majority report passes on the following point:

Upon the hearing before the full committee the contestee presented a brief from ex-Attorney-General Garland. He claims that by reason of the swearing in of Major Breckinridge at the organization of the House some sort of an estoppel arises by which no contest can be afterwards carried on. Such is not the rule as to living contestants. They or their friends are neither required nor permitted to object to the swearing in of a Member who holds the formal certificate.

No estoppel will arise against the dead. Clayton could not object to Breckinridge taking the disputed seat. No one else had a right to appear for him. Other Members present at the time had no apparent title higher than that of Major Breckinridge. The House was in the process of organization, and the Members were sworn in by groups.

(5) Also the following case is discussed:

In Freeman Township, Woodruff County, no election was held. This failure was occasioned by the act of the Democratic sheriff in furnishing the poll books locked up in the ballot box and with no key. The Republican supervisor was informed that if he would break open the box they would hold the election, but not otherwise, as the act, it was suggested, involved a penitentiary offense. Though anxious to hold the election, the supervisor did not deem it prudent to incur this risk, and the election was not held. The precinct had been a very close one, according to the returns at the State election, but the Republicans claimed that with the aid of proper supervision, so as to insure a fair count, there would be a good majority for their ticket.

In fact but few Democrats of this precinct appeared at the polls, whether because they knew there would be no election or not does not appear, and the proof did not show how many Democrats were prevented from voting at this box by the failure of the election officers to hold the election. Eighty-three persons made proper effort to vote for the contestant and were prevented by the failure to open the polls. We attach a list with the other lists in the appendix. This state of facts raises an interesting question upon the law of elections, to which we have given some attention, and which, under the peculiar facts of this case, appears not yet to have been heretofore directly decided. It becomes, however, an important fact as bearing upon the issue of a concerted plan to prevent a fair election. If this vote claimed be counted it would only increase the majority of contestant, and its omission from the count would not change the result, and therefore we do not deem it necessary to pass upon the question.

In accordance with their conclusions the majority recommended the following resolutions:

Resolved, That Clifton R. Breckinridge was not elected to the seat which he now holds as Representative in Congress from the Second Congressional district of the State of Arkansas.

Resolved, That John M. Clayton was elected as Representative in Congress from the Second Congressional district of the State of Arkansas, and because of his death the seat is declared vacant.

The minority views, presented by Mr. Levi Maish, of Pennsylvania, dissented from the reasoning of the majority and recommended:

Resolved, That Clifton R. Breckinridge was elected to the seat which he now holds as Representative in Congress from the Second Congressional district of the State of Arkansas, and he is entitled to the same.

The report was debated at length on September 2, 3, 4, and 5,[1] and on the latter day the question was first taken on a motion to recommit with instructions for the committee to ascertain the vote cast for both parties in the four precincts where the vote of 2&. Breckinridge had not been proven aliunde. This motion was disagreed to, yeas 83, nays 111.

Then the motion to substitute the resolution of the minority for those of the majority was disagreed to, yeas 103, nays 141.

On agreeing to the resolutions of the majority there were, yeas 105, nays 62; so the sitting Member was unseated.

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[1] Record, pp. 9559, 9616, 9684, 9735–9751; Journal, pp. 1011, 1012, 1014–1016.

1020. The West Virginia election case of Atkinson v. Pendleton, in the Fifty-first Congress.

A recount, although authorized by law, does not avail to overthrow the count of the election officers unless the ballots are affirmatively shown to have been kept inviolate.

As to whether a correction of the returns changing the result may throw the burden of establishing his title on the returned Member.

On February 19, 1890,[1] Mr. J. H. Rowell, of Illinois, submitted the report of the majority of the Committee on Elections in the West Virginia case of Atkinson *v.* Pendleton.

The returns on which the governor of West Virginia gave the certificate to Mr. Pendleton showed for the latter a plurality of 19 votes. This result was brought about by a recount, the first count by the precinct officers having shown, when tabulated, a plurality of 7 votes for the contestant.

At the outset, then, there arose a question as to the competency of this recount; and then there arose a question also as to the legality of certain votes impeached on both sides.

(1) As to the validity of the recount.

The law of West Virginia provided:[2]

> They [the county court] shall, upon the demand of any candidate voted for at such election, open and examine any one or more of the sealed packages of ballots and recount the same, but in such case they shall seal up the same again, along with the original envelope, in another envelope, and the clerk of the county court shall write his name across the place or places where it is sealed, etc.

It was alleged on behalf of contestant that a recount which was made was untrue. The report says:

> The fraud complained of is alleged to have been committed with reference to the two precincts of Martin's schoolhouse and Archers Fork.
>
> The claim of the contestant is that after the ballots of these two precincts had been counted by the judges and clerks of election, and had been delivered with the poll books to the clerk of the county court, 14 ballots of those from Martin's schoolhouse and 10 ballots of those from Archers Fork were changed, or "scratched," by having the contestant's name erased, so that upon the recount by the county court the votes for the contestant at Martin's schoolhouse appeared to be 111 instead of 125 as returned by the election officers, and those at Archers Fork 148 instead of 158.
>
> Two of these "scratched" ballots not only had the contestant's name erased, but the contestee's inserted, so that 2 votes were thus improperly added to the aggregate for the contestee.
>
> If these 24 votes should be restored to the contestant and these 2 votes deducted from the votes for the contestee, and the other returns sent to the governor allowed to remain unchanged, the result would be

For the contestant	.....	19,242
Plus	.....	24
.....	19,266	
For the contestee	19,261	.....
Less	2	.....
	.....	19,259
Showing a plurality for contestant of	.....	7

[1] First session Fifty-first Congress, House Report No. 299; Rowell, p. 45.

[2] See speech of Mr. Lacey, Record., p. 1742.

The rule has been announced over and over again that returns which are tainted with fraud can not be made the foundation of the title to a seat in the House. In the case of Washburn *v.* Voorhees (3 Congressional Contested Election Cases, 54) a number of authorities are cited in support of the rule which is there laid down, as follows:

"When the result in any precinct has been shown to be so tainted with fraud that the truth can not be deduced therefrom, then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction but call for the rejection of the entire poll when stamped with the characteristics here shown."

While all agree that where fraud is shown, the result of the fraud should be in some way avoided, there has been much discussion as to the manner in which this result is to be reached, and it may be regarded as settled that the poll will be "purged" of the fraud if that be practicable, and only rejected when no other alternative remains but to give effect to the fraud or to reject the poll.

In the present case it is unnecessary to enter into the discussion of this question, for the result will be the same whether the polls in the two disputed precincts be purged by a resort to the returns made by the election officers or be rejected altogether.

In order to authorize a recount of ballots in an election contest it must affirmatively appear that they have been kept as required by law, and that there has been no opportunity to tamper with them. (Paine on Elections, sec. 787.)

Before courts or legislative bodies can give weight to the result of a recount there must be absolute proof that the ballot boxes containing such ballots have been safely kept and that the ballots are the identical ballots cast at the election (Paine on Elections, sec. 776, and authorities cited). An impartial public count of the ballots by sworn officers made at the close of the polls is better evidence of what the ballot boxes then contained than a subsequent count made after a long exposure of the boxes to the tampering of dishonest partisans (Paine, sec. 787).

Taken together, the adjudications upon this question, judicial and legislative, establish conclusively the doctrine that the returns of election officers are to be held prima facie correct; that a recount changing the result will not be regarded unless it affirmatively appears that the ballots recounted are the same and in the same condition as they were when originally counted.

An opportunity to tamper with the ballots by unauthorized persons, or a failure to keep them as the law directs, will destroy the value of the ballots as evidence when recounted and a different result reached than the one returned.

Changing ballots by scratching or by substitution, after return made, is an old method of committing fraud to change the result of elections in cases of close contest.

Even when the ballots have been in the sole custody of sworn officers of the law, it has been found practicable for dishonest men to make such changes in such a secret way as to defy detection, and on that account laws have been enacted requiring the destruction of the ballots as soon as counted, so that they could not thereafter be used to overthrow the election returns. In large cities especially is it thought safer to risk the possibility of error in the original count than to take the chances of subsequent changes.

While in West Virginia the law makes provision for a recount, it does not dispense with the legal requirements of safekeeping of the ballots, pending the recount.

We now consider the facts as they appear in the record with reference to the recount in Wetzel County

The report goes on to quote testimony showing that the election officers of both parties in the precincts named testified as to the correctness of their count, while the ballots themselves, where they were alleged to have been scratched by the voters, bore suspicious signs of fraud. Furthermore the ballot box was shown not to have been kept properly, especially being accessible to a notorious man who was alleged to have offered for a bribe to give testimony discrediting the recount. The report says:

These two precincts were not recounted until after the president of the county court had procured an adjournment by telegram, referred to in the evidence and brief, known to him to be false and designedly used by him to deceive.

This telegram was by him shown to a leading Republican, Mr. McIntyre, engaged in watching the proceedings, and his opinion asked about going home. The judge talked quite a while about his wife's sickness and appeared to be much affected. (Record, pp. 214, 215.)

This, of course, was for a purpose, and designed to deceive. On the same day this judge had been in an upper room of a hotel in the town, in company with Wells, the sender of the false telegram, and of Lee Snodgrass, the deputy clerk. (Record, p. 224.)

Up to this time the plurality for Atkinson had not been overcome and the count was nearly completed.

Previously, at a late hour of the night, that same judge had entered the vault where those ballots were kept, with one Grail and the clerk of the court, on the hunt, as he says, of a bottle of beer.

Grail was staying around the court during the recount, and remaining after the work of the day was over, usually pretty drunk; a fit tool for dirty work, if he could be trusted, and this a fit opportunity to find just where the ballot box containing the ballots was located.

But Grail didn't sober up. Wells and Arnett visit the town. Judge Ernshaw and Lee Snodgrass have a private interview with them. Weils leaves town and sends a false telegram in another name, by previous arrangement. The court adjourns for two or three days, and then comes the recount with the extraordinary result. Ballots, too, which had been expressly forbidden to be resealed at the beginning of the recount by the same judge, over the protest of the attorney for Mr. Atkinson, who had asked that the ballots, after they had been opened on the first day of the recount, might be resealed until wanted during the recount.

The false telegram, sent by Wells in the name of Black, was dated November 21, 1888. The recount did not begin again until November 23 or 24.

The majority conclude:

The correctness of the original count is dearly established outside of the presumption in its favor, and therefore the committee adopt the returns as a correct statement of the vote in the two precincts of Wetzel County, and hold that contestant was elected by a plurality of 7 votes according to the correct returns.

The minority views, presented by Mr. Charles O'Ferrall, of Virginia, analyze the testimony, and do not consider that it impeaches the recount. They say:

To hold that the contestee shall be deprived of the gain he made by the recount would be to hold that an act done is fraudulent because some official connected with it and standing fair and unimpeached in the community at the time was guilty of conduct demanding censure at some period thereafter.

We believe the judges of the election at Martin's schoolhouse and Archer's Fork precincts in Wetzel County made mistakes in counting the ballots, and that the recount subsequently made by the county commissioners was correct and truly represented the actual vote cast at these precincts.

The majority of the committee also set forth this proposition, after they have concluded that contestant was elected by a plurality of 7 votes according to the corrected returns:

By this conclusion the burden shifts, and it now devolves upon contestee to establish his right to the seat which he occupies by affirmative evidence.

This he seeks to do by charging that illegal votes were cast and counted for contestant sufficient to overcome this apparent majority and to outnummber the illegal votes alleged to have been cast and counted for contestee.

The minority views do not discuss this, but in the debate [1] Mr. O'Ferrall argued on this point:

I have read the law on contested election cases to a very poor purpose indeed if I am mistaken in the assertion that the prima facie case is always with the man who holds the certificate issued by the governor. If that certificate is issued in accordance with the returns which are made to the governor,

[1] Record, p. 1736.

you can not go behind the returns and inquire whether those returns were right or not, whether the officers of election did their duty or not, whether there were illegal votes cast in this or that precinct, or whether any recount which may have been had after the returns were sent to the clerk's office was fraudulent or not. These are questions to be determined in a contest.

In support of this Mr. O'Ferrall quoted the case of Wallace *v.* McKinley.

1021. The case of Atkinson v. Pendleton, continued.

The law providing that employees of the State do not thereby gain a residence in the place where employed does not imply that presumption of nonresidence may not be overcome by proof.

It having been assumed for many years that a territory was included within a precinct, voters should not be disfranchised by discovery of a technical defect.

On a question of residence qualification of voters, ward lines in cities should be shown by record evidence of boundaries.

In determining qualifications of voters the presumption is in favor of actual residence as against a claimed intent to reside elsewhere.

A man does not necessarily retain his right to vote in his old home until he acquires a right to vote elsewhere.

Discussion as to method of determining the nature of unsegregated votes cast by disqualified voters.

(2) As to certain votes alleged to be illegal. A number of principles of law were discussed preliminary to the decisions in the individual cases:

(*a*) From Nos. 95 to 104, inclusive, are employees of the State asylum for the insane. We think the evidence shows that they have fixed their residence there and were entitled to vote.

The statute which declares that employees of the State shall not thereby become residents of the place where employed does not prevent their becoming residents if they so elect. The presumption of nonresidence can be overcome by proof, as in this case.

(*b*) From 120 to 154, inclusive, the voters voted at Braxton Court House, and it is insisted that the territory in which they lived had not been legally annexed to that voting district. An attempt had been made to so annex it, the residents had so voted for twelve years, and we do not think they can be disfranchised on account of technical neglect of the court, after years of acquiescence in what was supposed to be a legal order, and we hold the votes good.

From 159 to 194, inclusive, it is alleged that the voters voted out of their wards in the city of Wheeling. While from the oral evidence introduced it is quite evident that some 10 or 12 of these voters voted out of their proper wards, the committee are not disposed to include them in the list of illegal voters, for the reason that no record evidence was introduced as to ward boundaries, and while both parties seemed to concede the competency of the evidence introduced, we do not feel like going into the question in the absence of that better evidence which must have been easily accessible.

In country precincts common repute and generally acknowledged boundaries will suffice, but the boundaries of city wards, when disputes arise about them, ought to be proven by better evidence. But for this technical neglect the committee would be obliged to find at least 10 illegal votes in this list. According to our finding there were cast and counted for contestee 76 illegal votes, as above named. As to most of these votes there can be no doubt under the evidence. As to a very few there may be a question depending upon the weight attached to the evidence of different witnesses.

Also another case similar in principle:

The attacked votes from 13 to 85 voted at Wellsburg, where they have been in the habit of voting for the last eleven years. And it is charged that they lived in a portion of the town not belonging to the Wellsburg voting precinct.

The facts are well stated in contestant's reply brief at page 16:

"It seems that before the year 1887 the north line of the town of Wellsburg and the district of the same name have been coincident, and that immediately north of the town and in Cross Creek district lived a considerable population who vote at a precinct known as 'Harvey's.'

"In September, 1878, the circuit court of the county entered an order extending the corporate limits of the town of Wellsburg so as to include the voting precinct at Harvey's, and so as also to include the residences of those 73 voters. * * *

"The voting precinct at Harvey's was abolished and a new one opened, first at Devenney's and then at Lazarville, before the general election of 1878. This change was made because it was the understanding that the voters who resided within the recently included territory would vote in the Wellsburg district, and the old voting place needed not therefore to be retained for their convenience, and so from that time for eleven years the voters and the county authorities have treated the region included in the town as being also a part of the district of Wellsburg. The persons residing in this region have continuously and without objection voted in Wellsburg."

Officers were appointed from persons residing in this territory required by law to be residents of Wellsburg district.

In August, 1878, the county court established by an order of record a new precinct "in lieu of Harvey's, which is now within the boundaries of the district of Wellsburg," thus recognizing this territory as being within Wellsburg district.

It is not necessary to inquire whether all the forms of law have been complied with to take this territory into Wellsburg district.

The court and the people recognized the fact; it was accepted as something accomplished, and the addition has been accomplished as a matter of fact.

Voters are not to be disfranchised under such circumstances any more than the acts of de facto officers are to be held invalid in collateral proceedings. The committee hold that these votes were legally cast, and do not enter upon any investigation of the evidence as to who got the benefit of them.

(*c*) The committee have given the presumption in favor of actual residence, as against a claimed intent to return to an abandoned residence when the intent only appears by the act of voting.

We have refused to reject the votes of actual residence even when it appears that the voter had been in the habit of calling a former residence his home.

It is quite clear that at this election a strong effort was made to bring back to the State all absentees who had formerly resided in the district, and who had not lived abroad long enough to acquire a right to vote.

Some election officers seem to have adopted the erroneous view that a an retains his right to vote in his old home until he acquires a right to vote elsewhere.

Residence may be acquired in a day, but the right to vote may depend on the length of residence. There are several other illegal votes in the list challenged by contestant, but no evidence deemed admissible by the committee as to how they voted. These have been left out of consideration, the committee adhering to the rules laid down in Smith *v.* Jackson, reported at this session.

(*d*) The minority views set forth certain principles as to the determination of the candidate for whom an illegal vote was thrown:

These voters either testified themselves for whom they voted, or it was shown satisfactorily that they were pronounced in their political opinions at the time of the election, or that they declared on the day of election which ticket they had voted, or that they were accompanied to the polls by-well-known party workers, or that their votes were challenged by the supporters of one and their right to vote defended by the supporters of the other ticket, or like circumstances, raising a strong and legal presumption as to the ticket they voted and the candidate for whom they voted.

This was as much latitude as we believe the law as heretofore generally administered in this House would allow and, in our opinion, the extreme limit to which sound public policy, the security of elections, and the ends of justice in this case, as well as all others in this or future Congresses will permit.

As to another class of votes the minority say:

But we have not deducted any of these votes, for the reason that the proof as to how they voted does not come within the rule already stated. As to class 1, the testimony simply shows that they were

considered or reputed to be Democrats, but when they had expressed themselves, or what opportunities the witnesses had for ascertaining their sentiments, does not appear. As to class 2, the testimony is of the same character, only differing in this, that they were considered or reputed to be Republicans.

In a country like this, where the political opinions of voters are constantly changing and new issues are constantly springing up, where party votes fluctuate from year to year and majorities shift from one side to the other, where each of the two great dominant parties strain every nerve in every campaign to convert those who have been in the ranks of its enemy to its policy, and the other weaker parties seek to gather strength from both, we think it would be dangerous, indeed, to hold that a Democrat or Republican in 1884, or even later, was presumptively a Democrat or Republican in 1888. Particularly strong does this reasoning apply, in our opinion, to the election of 1888. In that election a most important issue, which had been dormant at least for years, sprung into preeminent prominence and became at once the shibboleth of both the Democratic and Republican parties. In many sections former party lines were broken; Republican communities became Democratic, and vice versa. It is a well-recognized fact that it was an election of surprises to both parties.

But without pursuing this line of argument further, we think that the authorities are almost uniform in support of the proposition that mere proof that a voter was considered or reputed to belong to a particular party is not admissible to show how he voted at an election, and certainly not unless it appear conclusively no better evidence could have been procured.

The majority report did not bring these principles distinctly in issue.

The majority of the committee, in accordance with their conclusions, found a majority of 49 votes for contestant, and reported this resolution:

Resolved, That George W. Atkinson was duly elected a Representative to the Fifty-first Congress from the First Congressional district of West Virginia at the election held November 6, 1888, instead of John O. Pendleton, and that mid George W. Atkinson is entitled to his seat as such Representative.

The minority found a majority of 25 votes for contestant, and reported these resolutions:

Resolved, That George W. Atkinson was not elected a Representative in the Fifty-first Congress from the First Congressional district of West Virginia, and is not entitled to a seat therein.

Resolved, That John O. Pendleton was duly elected a Representative in the Fifty-first Congress from the First Congressional district of West Virginia, and is entitled to his seat therein.

The report was debated at length on February 26 and 27, 1890,[1] and on the latter day the question was taken on substituting the minority for the majority proposition, and decided in the negative, yeas 142, nays 159. Then the resolution of the majority was agreed to, yeas 162, nays 0, the Speaker counting a quorum.

Then Mr. Atkinson appeared and took the oath.

1022. The Arkansas election case of Featherston v. Cate, in the Fifty-first Congress.

Forcible usurpation of county offices whereby the entire election machinery of the county was placed in the hands of one party, in violation of law, with subsequent fraudulent acts, constituted evidence of a conspiracy.

A county clerk having failed to forward certain returns to State canvassers, the House admitted a certified copy of the returns on file as evidence of the vote.

On February 19, 1890,[2] Mr. L. C. Houk, of Tennessee, presented the report of the majority of the Committee on Elections in the Arkansas case of Featherston *v.* Cate.

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[1] Record, pp. 1731, 1774–1781; Journal, pp. 283, 284.

[2] First session Fifty-first Congress, House Report No. 306; Rowell, p. 77.

The sitting Member had been returned by a majority of 1,348 votes over contestant. The latter assailed this majority, alleging conspiracy, intimidation, and fraud. The examination of the case involved the discussion of several questions:

(1) The majority of the committee found evidence which they considered sufficient to establish a conspiracy to defraud in Crittenden County. Contestant was a member of a political association known as the "Wheel," and was supported not only by members of that order, but also by the Republican party. Sitting Member admitted that the Wheel had drawn many men from his own party—a sufficient number to make political conditions in the district uncertain. Crittenden County was one of the counties where contestant would naturally receive a large vote.

It appeared from the testimony that on July 12, 1888, a mob armed with rifles seized certain country officers and others, and drove them out of the county, it being asserted by members of the mob at the time that "this is a white man's country and we will control it. We been waiting for two years for this thing, and you got to get out." The report of the committee continues:

In determining the object of a conspiracy the law is that you may refer to the acts, words, and conduct of the conspirators to fathom and ascertain its existence and purpose, intent, etc. It is apparent from the evidence that a conspiracy existed and that the conspirators had made up their minds to wrest the political control of Crittenden County from the Republicans, who had held it for many years.

This could not be done by obtaining a majority of the votes, for it contained a Republican majority of at least 2,000, and there was no dissension in the party.

By examining the statutes of Arkansas in relation to elections it will be found that the county judge, the county court clerk, and the sheriff are important factors in conducting elections.

In the county judge is vested the appointment of all the judges of election. The clerk creates the county board of canvassers; and the sheriff, through his deputies, at every poll, is a power for good or evil they can faithfully execute the law and protect the ballot box, or they can wickedly violate the law and debauch the suffrage. That the conspirators seized upon and obtained these offices is not denied. It therefore becomes pertinent to inquire, as a means of ascertaining the purpose of the conspiracy, whether the power of these offices was exercised in accordance with the law or as a mean to aid the conspiracy to place the county under the political control of about one-sixth of its legal voters.

For this purpose we will now examine the laws of Arkansas relating to elections, and after quoting the law, try to ascertain whether it was complied with in good faith.

"HOW AND BY WHOM JUDGES ARE APPOINTED.

"SEC. 2654. The county court, at its last term held more than thirty days before any general election, shall appoint three discreet persons, in each township, having the qualifications of electors, to act as judges of election within the township." (Mansfield's Digest of Arkansas.)

Under this provision the judges of election must be appointed at the July term of the county court. It was in July the Democrats exiled the Republican county judge, with others.

"JUDGES SHALL BE OF DIFFERENT POLITICAL PARTIES.

"SEC. 2757. The judges of election appointed by the county court, or chosen by the assembled electors, under the provisions of this act shall, if practicable, be from different political parties, so that each party may be represented, and they shall, in addition to the qualifications required by the constitution and this act, be able to read and write." (Mansfield's Digest of Arkansas.)

At the time the Republican county judge was exiled he had appointed the judges of election according to law, so that each political party was represented.

After the exiling of the Republican judge and the office had been seized and appropriated by the Democrats, the Democratic county judge, who had come into possession of the office by reason of the conspiracy, revoked these appointments and appointed all of the judges of election from the Democratic party.

After quoting the law as to the providing of ballot boxes, poll books, etc., the report goes on:

Instead of the county court procuring the ballot boxes, as the law requires, the Democratic sheriff procured fraudulent ballot boxes, one of which is produced in evidence in this case.

Instead of delivering the poll books, as required by law, for the November election, he neglected to perform that duty, but left that matter to the wisdom and discretion of the Democratic sheriff.

There was also evidence that the partisans of sitting Member endeavored by corrupt means to keep their opponents from putting a county ticket in the field. In conclusion on this point the report says:

The lawlessness of the partisans of the contestee is fully shown; that the title to the office of the county judge, who appointed the judges of election of and from the Democratic party, was based on fraud and violence; that the county clerk, whose duty it was to certify the November vote to the secretary of state, obtained his office by the same and like means, and that the judges of election were chosen as agencies by and through which the frauds were to be committed and were committed does not admit of question, or they would not have used the fraudulent ballot box.

We have already said the evidence fully establishes the conspiracy.

The majority then proceed to consider results at several precincts in Crittenden County.

(*a*) The county clerk failed to certify to the secretary of state the votes cast for contestant in seven townships at which elections were held, and in which, as it afterwards appeared, contestant proved a majority of 531 votes for himself. The laws of Arkansas provided that the clerk of the county with certain assistants should canvass the votes, and further provided:

"SEC. 2699. Informality in the certificate of the judges and clerks at any election held in any township shall not be good cause for rejecting the poll books of said township." (Mansfield's Digest of Arkansas.)

"PENALTY FOR FAILURE TO COUNT THE VOTE.

"SEC. 2701. Should any clerk of the county court and the two accompanying justices, or householders, or either of them, under any circumstances reject or refuse to count the vote on any poll book of any election held by the people, such rejection or refusal by such clerk, etc., or either of them, shall be deemed a high misdemeanor," etc. (Mansfield's Digest of Arkansas.)

The report goes on:

"(In Patton *v.* Coates, 41 Arkansas.)

"These sections being under construction, the supreme court of Arkansas said:

"'The board of canvassers of an election have no judicial discretion whatever. They are merely for the purpose of a fair and correct computation of the votes, under public surveillance, presented to them by the clerk.'"

In view of these sections of the Arkansas election law, and the construction thereof by the highest court of the State, the failure of the clerk to certify the returns of the seven townships alluded to is simply a willful disregard of duty, but no greater than those indulged in by the county judge and sheriff.

For the purpose of procuring the evidence in relation to the vote of the seven townships, W. B. Eldridge, one of the attorneys of the contestant, went to the county seat of Crittenden County and obtained a certificate showing the returns were on file.

This certificate showed the vote of the seven townships and was signed by the clerk. As to this return and evidence of Mr. Eldridge the report quotes:

CLERK'S CERTIFICATE TO TRANSCRIPT.

STATE OF ARKANSAS, *County of Crittenden:*

I, Saml. Keel, clerk of the circuit court, within and for the county and State aforesaid, do hereby certify that the annexed and foregoing pages contain a true and complete transcript of the above as therein set forth, and as the same appears of record, in my office at Marion, Crittenden County, Ark.

Witness my hand and official this 21st day of February, 1889.

[SEAL.]

SAML. KEEL, *Clerk.*

—— ——, *D. C.*

Q. I see from the face of the clerk's certificate that there is an assertion to the effect that the returns were not sworn to as the law directs. Please state the circumstances under which these words were put upon the face of the certificate.—A. It was dictated by Mr. Berry, the lawyer of Mr. Cate in this contest, to the clerk, who wrote it word for word at his dictation, and only gave me this abstract after mature consultation with Mr. Cate's lawyer. (Printed Record, pp. 227–228.)

The majority report considers this vote sufficiently proven, and ought to be allowed for contestant.

1023. The case of Featherston v. Cate, continued.

Returns being rejected for fraud, the statement of a witness who saw a definite number of votes thrown for contestant, corroborated by general testimony, was received as proof aliunde.

The friends of returned Member having prevented taking of testimony for contestant, the House did not require strict and technical proof in proving a vote aliunde.

Contestant having been prevented from proving his vote aliunde by intimidation, the House did not reject fraudulent returns made by partisans of contestee and giving contestant a plurality.

With no proof to show what the vote might have been, the House did not attempt to rectify the wrong caused by failure of election officers to open polls.

(*b*) The certificate of the clerk showed that in one of the seven townships, Scanlin, Mr. Cate received 61 votes and Mr. Featherston 2. After quoting testimony the report says:

It appears from this testimony that John Johnson saw 73 Republicans vote the Republican ticket, and that others voted after that; and that the Republican vote of the township was 112 or 113. E. B. Fields swears the judges were all Democrats and that they had the fraudulent tin box. Willis McGee swears that the judges were all Democrats, that there was a good turn-out of the Republicans, and that there was from 100 to 125 Republicans in the township. The return shows 2 votes for contestant.

On this state of proof the question is: How many votes should be allowed the contestant?

It was held in Bisbee *v.* Finley that—

"Where the evidence shows a return to be false, and not a true statement of the votes cast, such return is impeached and destroyed as evidence, and the true vote may be proven by calling the electors whose names are on the poll books as voting at such poll, and no votes not otherwise proven should be counted."

Under this rule, and we know of no exception to it, the return must be rejected.

The rejection of the return does not necessarily leave the votes actually cast at a precinct uncounted. It only declares that the returns, having been shown to be false, shall not be taken as true, and the parties are thrown back upon such other evidence as it may be in their power to produce in order to

show how many votes and for whom; so that the entire vote, if sufficient pains be taken and the means are at hand, may be shown and not a single one be lost, notwithstanding the falsity of the returns.

The contestant shows that he received 73, and perhaps more, votes, and these, we think, should be allowed him. Deduct these from Cate's remaining majority and the vote stands thus:

Cate's majority	811
Deduct the	73
Leaving Cate's majority	738

The return having been overthrown, the contestee, having failed to prove any vote in the township, is not allowed the 61 returned for him.

(*c*) As to Cat Island precinct the report holds:

It appears from this testimony that the Republicans turned out well; that they did not scratch the ticket; that the fraudulent ballot box was used; that the Republicans before the election had met and agreed to vote their ticket at all hazards; that there were from 180 to 182 Republicans in the township; that the judges were all Democrats; that there were not more than 14 or 15 Democrats in the township; that there was a full vote by the Republicans; that the judges were not sworn; that the ballot box was so placed that the voter could not see it.

The return shows 120 for Featherston and 88 for contestee, and the question is, under the proof, what ought to be done?

The total vote cast is 208, and the proof is that there are but 15 Democrats in the township, and that the Republican did not scratch their ticket. By giving the Democrats their full vote, Featherston ought to have received 193 votes out of the 208, and he is returned as receiving 120.

In view of the conduct of the partisans of the contestee in Crittenden County whereby the contestant and his attorneys were prevented from taking testimony and which will be referred to hereafter, strict and technical proof will not be required.

We think the true rule was laid down in the case of Smalls *v.* Elliott (session of 1888–89), by the minority of the committee, where it is said:

"Contestee's partisan friends deliberately violate the law in suppressing the box, and contestee himself (acting through his counsel), by force and threat of violence, suppresses and hinders the judicial inquiry as to the box and its contents.

"Suppressio veri—suggestio falsi. All things are presumed against him who suppresses the truth and prevents inquiry.

"Shall contestee be permitted to take advantage of his own wrong and of the willful and criminal violation of the law by his partisan friends? Is the sin of the guilty to be visited on the innocent? Shall he who suppresses the best evidence by force, fraud, and violence stand up in the face of the court of last resort and insist that secondary evidence shall not be produced and admitted?"

In this case, assuming the testimony to be true, and we do not doubt but that it is true, it appears that before the election every provision looking to a fair and honest election was violated, and that after the election every attempt to show the true vote was suppressed by the partisans of the contestee.

We think the proof clearly shows that the contestee could not have received more than 15 votes in Cat Island Township, if that many. Therefore, we give to the contestant 73 votes more than were returned for him, and deduct 73 from the vote returned for contestee. These two changes aggregate 146. The result would then stand thus:

Cate's majority	738
Deduct the	146
Leaving Cate's majority	592

(*d*) As to Crawfordsville precinct the report holds:

It appears from this testimony that the fraudulent tin ballot box was used; that the judges of election were all Democrats; that there was a good turn out, the total vote polled being 395.

It was at this township the contestant went to take testimony and was prevented from so doing by the friends of the contestee.

The nearest approximation to proof of how the vote stood in that township is found in the testimony of E. D. Sanders (p. 200), where he says that the vote of the Republicans is about 6 to 1 of the Democrats, and when interrogated as to Crawfordsville he says that would not be a fair proportion for that township, nor does he say what would be.

The return from the township shows the following:

Cate	88
Featherston	147
Barrett	160
Total	395

It does not appear from the record who Barrett is, or what party put him in nomination, or whether there is any such man.

Had the contestant made proof of any vote received, as was done in Scanlan and Cat Island, we would set aside the return and give him the vote proven; but he has not done so. If we should set aside the return it would have to be done on suspicion, or from the fact that returns should not be regarded where the use of a fraudulent box is shown, and that the judges of election were all of the Democratic party in a strong Republican township. To set aside the return in a township where the contestant has a majority, but not as great as he claims it should be, in a case where he was prevented from making full proof of his vote, would be to reward the fraud complained of, and punish him for undertaking to expose it. Where there is no proof upon which we would be justified in setting aside the return, we therefore let it stand. As both parties have had credit for this vote, it having been certified to the secretary of state, it makes no change in the majority.

(*e*) As to failure to hold elections in two precincts the report rules:

The townships of Idlewild and Furgeson may be treated together. The proof shows that the judges of election at Idlewild were Democrats; that they failed to open the polls, and that the Republican majority in the precinct usually ranged from 100 to 125. It also shows that at Furgeson the judges of election were all Democrats; that they failed to open the polls, and that the Republican majority in the precinct is 115; i. e., this had been the usual Republican majority.

We know of no rule by which these votes can be counted under the state of proof as to these townships. The action of the Democratic judges in these precincts no doubt deprived the contestant of somewhere about 250 majority; but it is no worse, in fact not nearly so bad, as the conduct of the judges of election in Scanlan, Cat Island, and Crawfordsville in the use and manipulation of a fraudulent ballot box.

It is nearer on a level with the action of the county court clerk already referred to, who willfully failed to certify the vote of seven townships to the secretary of state. Nor is it quite as bad as the action of the county judge who appointed such creatures of a conspiracy as judges of election. But it does show that the conspiracy formed in July, 1888, to control the county of Crittenden politically, with less than one-sixth of the legal voters, was still alive and active in November in depriving the Republicans of their votes.

1024. The election case of Featherston v. Cate, continued.

The House, in an exceptional election case, admitted ex parte affidavits taken outside the district and State.

A question as to the making of a motion to suppress affidavits in the record of an election case.

The House may determine the vote of a county as settled by an agreement of the parties to the election case.

A recital of apparent facts in the notice of contestant, such as the figures, of a returned vote, may not be construed as a concession of the truth thereof.

Agents of contestee having intimidated contestant's witnesses, the House did not require the best evidence for proof aliunde of the vote.

(2) An important question arose as to the competency of the testimony taken as to Crittenden County. The report says:

There is objection to the testimony taken before Avery, a notary public at Memphis, Tenn., which testimony we have admitted and considered as competent in arriving at a conclusion in this case. The ground of objection is that the contestee did not have notice of the taking. The contestee does not deny that Berry, the person upon whom it is claimed notice was served, was his attorney, but his claim is the technical one that he was not his attorney for taking depositions outside of Crittenden County. The technical character of this objection is still more apparent when it is remembered that the record shows that Berry was employed to take the testimony relating to Crittenden County.

It appears from the testimony objected to that contestant with his attorneys went to Crittenden County and there met Berry, the attorney of contestee; that before going there an understanding existed that Berry should act as notary public to take depositions; that in the face of this agreement he declined to so act; that a justice of the peace was asked to take the testimony and refused; that there was danger of violence, and threats were made calculated to produce the belief that bloodshed would follow; that under that state of facts Berry was notified as the attorney of contestee that the testimony in relation to that county would be taken at No. 59 Madison street, Memphis, Tenn., at 9 o'clock, on February 25, 1889.

We think under this state of facts notice to Berry would be sufficient, for it related to the taking of the very testimony which he was employed to take. It will not do to say that Berry's employment ended when contestee's partisan friends had succeeded in preventing the taking of testimony in Crittenden County. W. B. Eldridge (pp. 226, 227) testifies:

"Q. Did you all go with Berry, the lawyer of Cate, and did he say anything about acting as notary public?—A. He said he would act as notary public, which he afterwards refused to do.

"Q. Did you all take any depositions there?—A. We did not.

"Q. What was the reason for not taking depositions?—A. We could not get a notary public; there was a magistrate there, but he refused to act, and Mr. Berry refused, contrary to his promise and our expectations."

After detailing his treatment at Crawfordsville, in Crittenden County, in response to a question he states:

"I notified L. P. Berry, the attorney of Mr. Cate, that Mr. Featherston would take proof in Memphis, Tenn., at my office, on the Congressional contest; and on February 24, Walsh (an attorney) and myself both notified Mr. Berry that we would begin taking proof at 59 Madison street, Memphis, Tenn., at 9 o'clock, February 25, 1889."

Contestee produces an ex parte affidavit from Mr. Berry, his attorney, denying notice to take depositions at Memphis, and now asks that these depositions be suppressed, and this request was made for the first time after the printing of the record.

The act of Congress of March 2, 1887, provides among other things that—

"Before the record is printed the Clerk of the House shall notify the parties to be present at a day named at the opening of the testimony, and of agreeing upon the parts thereof to be printed; that the depositions shall be opened in the presence of the parties or their attorneys, and that such portion of the testimony as the parties may agree upon shall be printed; that in case of disagreement between the parties, the Clerk shall decide what portion of the testimony shall be printed."

The intent and object of this statute is obvious. Had it been followed the testimony now complained of might not have appeared in the printed record. Had it been followed, the objection of the contestee, now interposed, would have been made known and the contestant would have been placed in a position to elect whether he deemed the testimony of sufficient importance to make application to the committee or the House for permission and time in which to retake it. Instead of pursuing that course no objection to the printing of the testimony now objected to appears to have been made. It is said that this testimony had not been filed at the time the parties appeared before the Clerk of the House. It does appear from the Clerk's record "that on account of the nonreceipt" of certain packages of testimony for contestant he was granted further time in which to file testimony.

It is not improbable, indeed it is probable, to say the least, that the attention of the contestee was at that time called to the character and contents of the testimony the contestant was thus granted leave to file.

In the case of Lowry *v.* White, Fiftieth Congress, after the record was printed, motions were filed by both parties during the consideration of the case by the committee to exclude certain portions of the testimony, and these motions were denied, and the attention of the parties was called to this statute, and in the syllabus this language is found:

"No part of the testimony submitted in a case will be suppressed where the parties fail to take advantage of the statutory provisions allowing parties to agree upon what portion of the record shall be printed prior to the hearing of the case."

In the case of a judgment by default the court will not set aside the judgment unless the defendant can show a good defense to the action.

In the case of a decree pro confesso the decree will not be set aside unless a meritorious defense is shown.

If the contestee had filed a motion to suppress the depositions, on the ground he was taken by surprise, and alleged that he could disprove the state of facts shown by them, he would stand in a much better light than he now does. He now makes an objection which should have been made under the act of March 2, 1887, before the record was printed. After the record was printed he must have had knowledge of these depositions. Had he then filed a motion to suppress them he would stand in a much better light, but he failed to do so and does not tender any excuse now for that failure. Had he notified the contestant, on the receipt of the printed record, of an intention to file a motion to suppress these depositions, if such was his intention, he would have performed a commendable act, and would have at that time placed the contestant on notice. Instead of doing so, however, he remained silent until after contestant filed his brief, and then, instead of filing a motion to suppress, contented himself until he could afterwards raise the question of a want of notice. Instead of coming here and insisting that he has a meritorious defense to the matters charged in relation to Crittenden County, and asking time to establish that defense by proof, he simply asks us to suppress the testimony taken by the contestant, showing and tending to show fraud, violence, and intimidation, before and at the election, and threats and danger of violence to those who proposed to make proof of the frauds.

It appears from the testimony of Eldridge, the attorney of contestant, that Berry, the attorney of contestee, was notified of the time and place at which the contestant proposed to take depositions, and it appears that a copy of the printed record was sent to the contestee on the 15th of September, 1889.

The long silence of contestee on the question of notice, after he received a copy of the printed record, and the neglect to exercise his right to object before the record was printed, and no tender of proof made to contradict what is shown by the testimony, are facts from which the inference arises that the testimony can not be contradicted, and is in the nature of a tacit admission of the existence of the state of facts shown by the depositions.

We find these depositions in the printed record, and find the contestee made no objection to them before they went there; we find that after they had appeared in the printed record he did not file any objection or protest with the Clerk of the House because they were placed there; we find that after he saw them in the printed record he failed to notify the contestant that he would object to them. Being a lawyer of experience, and having been a judge, contestee's silence and failure to offer more tangible defense than mere technical objections can only be accounted for by the assumption that he has no real defense.

In view of these facts we are of opinion that the testimony should not be suppressed. We are not deciding that testimony may be taken without notice, though there are authorities which, under the facts of this case, would justify the admission of ex parte evidence. We might quote, to sustain even this view, from Bisbee *v.* Finley, Buchanan *v.* Manning, and Thoebe *v.* Carlisle et al., but as we do not decide on the question of ex parte evidence, in the admission of the depositions in this case, it is unnecessary.

Under the broad provisions of the Constitution, making each House of Congress "the judge of the elections, returns, and qualifications of its own Members," it would seem that we are not bound by the strict rules of evidence known to the "common law." But we are not deciding that question. What we are deciding is, that where depositions are found in the printed record, or where they appear in the printed record, and no objection is made to the Clerk of the House or to the opposite party, the party failing to object at the earliest opportunity, or at least within reasonable time, so as to put the opposite party on notice, will be deemed to have waived all question of notice, especially where there is no offer of proof to show a different state of facts than those shown by the depositions.

The minority views, submitted by Mr. J. H. Outhwaite, of Ohio, oppose this view:

We shall now discuss the question whether testimony taken as this was should be considered by the House, and weigh it for its worth. As we have repeated, it was taken without notice and in violation of law.

Act of March 2, 1875 (Laws 2, 43, p. 338): It is provided that the party desiring to take depositions under the provisions of this act shall give the opposite party notice in writing of the time and place when and where the same will be taken; of the name of the witness to be taken, and their places [his place] of residence, and of the name of the officer before whom the same will be taken.

To pretend not to evade these requirements of the law W. B. Eldridge says in his deposition:

"I notified L. P. Berry, the attorney of Mr. Cate, that Featherston would take proof in Memphis, Tenn., at my office on February 24, 1889. Walsh and myself both notified Berry that we would begin taking proof at 59 Madison street, Memphis, Tenn., February 25, 1889."

We here introduce the affidavit of Mr. Berry, which flatly contradicts Mr. Eldridge upon this point:

STATE OF ARKANSAS, *County of Crittenden:*

I, L. P. Berry, an attorney at law, resident at Marion, Crittenden County, Ark., being sworn, do state that I have before me a printed copy of the evidence in the case of L. P. Featherston *v.* W. R. Cate in the contest for a seat in the Fifty-first Congress of the United States from the first district of Arkansas, wherein it appears, on page 227 of said printed record, that one W. B. Eldridge states or testifies as follows: "I notified Mr. L. P. Berry, the attorney of Mr. Cate, that Mr. Featherston would take proof at Memphis, Tenn., at my office on the Congressional contest; on February 23 Mr. Henry Walsh and myself both notified Mr. Berry that we would begin taking proof at 59 Madison street, Memphis, Tenn., at 9 o'clock on February 23, 1889," and I further state that this statement is untrue and without any foundation in fact; that Mr. Eldridge and Mr. Walsh did not give me any such notice, nor either of them, as he states, and I never knew of evidence relating to Crittenden County until I saw it printed in the record, nor do I to this day know at what place said supposed evidence was taken.

I further state that I was only authorized to act for Mr. Cate as his attorney in said county so far as related to taking proof in Crittenden County, Ark., and had no authority to represent him or take proof elsewhere, or accept, receive, or waive any notice relative to taking proof elsewhere.

L. P. BERRY.

Sworn to and subscribed before me this January 10, 1890.

[SEAL.]

SAM'L KEEL, *Clerk.*

BY O. M. TUFTS, *D. C.*

If, however there were no questions of the truthfulness of Mr. Featherston's lawyer, it is clear that the notice could not have been in writing giving contestee the material facts concerning the witnesses to be examined. It was a plain violation of the law in that respect for some covert reason.

"The officer shall cause the testimony of the witnesses, together with the questions proposed by the parties or their agents, to be reduced to writing in his presence and in the presence of the parties or their agents, if attending, and to be duly attested by the witnesses respectively." (Rev. Stat., sec 122.)

The certificate of the notary, E. M. Avery (p. 185 of the record), shows that this provision of law was violated. Although he attempts to give the impression that the words of the witnesses were reduced to writing by typewriter and submitted to witnesses and attested by them, he says the shorthand reporter's notes are herewith transmitted, etc.

The performances with the witnesses he said occurred in February and early in March. His certificate is dated July 13, and upon the original papers on file in the committee room the names are all signed by typewriter, even of those who are represented as signing their own names, except Eldridge's and one other's.

"All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed and without unnecessary delay, certify and carefully seal and immediately forward the same by mail or express to the Clerk of the House of Representatives." (Act approved Mar. 2, 1887.)

This provision of the law is also disregarded. What good reason can be given for this unlawful course? In this case the legal time for taking testimony closed April 15. As required by statute the Clerk of the House of Representatives notified parties that they should appear before him June 28 for

the purpose of being present at the opening of the sealed packages of testimony and of agreeing upon the parts thereof to be printed. They came here. Only part of the depositions were in the hands of the Clerk. None of those taken in Memphis were on file.

Contestant asked for further time, which was granted, and contestee remained here waiting until July 7; but these papers were not filed. On July 21 they were at last filed. Contestee never saw them or learned their contents until a printed copy of them reached his hands late in September. The contestant and his attorneys have never attempted any explanation or offered any excuse for this extraordinary, suspicious, and illegal delay. The contestee was without any opportunity to be present and see and hear these witnesses while they were telling their tales or to cross-examine them or to bring proof subsequently to explain or contradict their statements. Their record is full of the abuses which occurred under such circumstances.

(3) In four other counties of the district, Phillips, Cross, St. Francis, and Lee, certain questions arose, some like those already discussed and others different.

(*a*) The report says:

There is an agreement in the record as to the vote of Phillips County, whereby it is agreed that the contestant is to have 57 more votes than were returned for him, and that the contestee is to have 57 votes stricken from his returned vote, and that the contestant is to be credited with a majority of 18 in Hickory Ridge Township. These numbers added together make 132, which should be deducted from Cate's majority.

(*b*) As to Independence, in Lee County, this question is set forth in the report:

Here, then, is a case where we have 239 votes not counted for anyone for Congress, and this, too, in the face of testimony of witnesses saying the Republicans turned out well and were in the majority and voting the party ticket.

The contestee claims that the contestant has admitted that he received 224 votes in Independence Township and can not now invoke the protection of that rule where the return is overthrown and the parties put to proof.

The view we take of the matter renders it unnecessary to pass upon the question of estoppel.

What is claimed as a concession by the contestant, that the contestee received 224 votes in this township, is contained in the notice of contest on page 7, as follows:

"That at the precinct of Independence, in the county of Lee, in said district, at an election held on the 6th day of November, 1888, I received 397 votes and you received 224 votes; that the election officers of said township, who are partisans of yours, through fraud or mistake, returned that I received 89 votes, and that you received 224; that the votes as thus returned by the election officers of said township were by the county clerk of said county certified to the secretary of state, and by him laid before the governor of said State, and by him counted in determining the number of votes cast for each of us for Representative in said district. I shall therefore claim on contest that I be allowed 308 more votes than were returned and certified for me from said township."

This is not a concession that contestee received 224 legal votes, but is in the nature of a recital of the state of facts which he would be able to establish by proof.

This was at the inception of the contest, when contestant may not have had full information.

But be that as it may the recitals in the notice can have none of the sanctity and binding force of an agreement or stipulation and can not be construed into a concession.

The contestee did not treat this statement as a concession that he received 224 votes, but on the contrary he filed the following answer:

"As to the precinct of Independence, in the county of Lee, I deny all the charges of fraud and mistake, and say that the votes were correctly counted, returned, and certified. I deny that you received 397 votes, but you received 89 votes, and I received 244 votes in said precinct or township." (Record, p. 17.)

Instead of the record making a stipulation or concession that contestee had received 224 legal votes, the number of legal votes was not admitted by contestant, nor was the alleged concession accepted as such by the contestee in lieu of evidence, but he set up a claim to 244 votes instead of 224, which he now claims as having been conceded.

(*c*) Also the report rules as to testimony:

Only one witness was examined in Independence Township. The witness giving the testimony on leaving the stand was arrested for perjury and placed under $1,000 bond to answer to the State court. The attorney for contestee from that time on proclaimed he would cause the arrest of all persons who testified for contestant if he thought they testified falsely.

After that time testimony was taken in relation to that township outside of the county.

The conduct of the contestee's attorney could have but one object and effect, and that was to intimidate other witnesses. There is direct testimony from one witness, and no attempt was made to impeach him, showing that 92 votes went into the box for the contestant. The returns show 89 for Featherston and 224 for the contestee. There is enough evidence to impeach the return and put the parties to proof. The friends of the contestee in Independence Township, like his friends in Crittenden County, prevented fall proof being made, and can not complain if we apply the rule as to Independence Township that was applied to Scanlan and Cat Island, which we do. Full proof of the vote was not allowed to be made, and in such a case he who prevented it should suffer, if any one.

We have no hesitation in adopting this rule in relation to this township, because the contestee knew of the proof made by the contestant. He could have taken proof and shown his true vote. He elected to rely on intimidation of contestant's witnesses, and must abide the consequences of his election. He was at liberty to have shown that 319 of the persons voting at that election did not vote for either candidate for Congress, and thus have explained why it was that the contestant ran behind the Republican electors, but he has not done so.

The result is, that the contestee must lose 224 votes returned for him, and the contestant must be allowed 3 more votes than were returned for him.

In accordance with their reasonings, the majority found that the contestant was elected by a majority of 86 votes, and reported these resolutions:

Resolved, That W. H. Cate was not elected as a Representative to the Fifty-first Congress from the First Congressional district of the State of Arkansas, and is not entitled to the seat.

Resolved, That L. P. Featherston was duly elected as a Representative from the First Congressional district of the State of Arkansa to the Fifty-first Congress, and is entitled to his seat as such.

The minority considered that sitting Member was entitled to a majority of 595, and recommended resolutions confirming his title to the seat.

The report was debated at length on March 1, 3, 4, and 5,[1] and on the latter day the question was first taken on substituting the proposition of the minority declaring contestant not elected, and this was disagreed to, yeas 138, nays 144.

Then a motion to recommit with instructions that an investigation should be made in the district as to the elections was disagreed to, yeas 138, nays 147.

The question then recurred on the first resolution proposed by the majority, and it was agreed to, yeas 147, nays 138.

Then the second resolution was agreed to, yeas 145, nays 135.

Thereupon Mr. Featherston appeared and took the oath.

1025. The Alabama election case of Threet v. Clarke, in the Fifty-first Congress.

Evidence of a conspiracy of election officers to defraud may not be sustained by contradicted testimony of two or more persons who declare they saw more votes cast for contestant than were returned.

Voters being prevented by no fault of their own from obtaining the registration certificates required for voting, the House counted the votes as if cast.

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[1] Record, pp. 1843, 1888, 1907, 1943–1955; Journal, pp. 306–308.

The illiteracy of election officers having prevented the ascertainment of any substantiated return, the House rejected the poll.

Failure to give party representation on election boards, when the same is required by law and practicable, is evidence of conspiracy to defraud.

Although there may be evidence establishing a conspiracy to defraud, it is still necessary to show effects in order to change the result.

On February 21, 1890,[1] Mr. Nils P. Haugen, of Wisconsin, from the Committee on Elections, submitted the report of the majority of the committee in the Alabama case of Threet *v.* Clarke.

The report, after giving the table of the votes, says:

A plurality for contestee of 4,488 on the face of the returns. This plurality the contestant contends was obtained by systematic frauds on the part of the inspectors and clerks of election in counting votes in fact cast for contestant as having been cast for contestee in a number of precincts, large enough to have elected him (contestant) had the returns been honestly made. The contestant in his brief describes the method pursued by his party friends at the polls, and the evidence he relies upon to establish the charges of conspiracy to defraud him as follows:

"At every beat or voting precinct two or more leading Republicans would give out the Republican ballots to their Republican friends, and two or more trusted Republicans would watch and witness that they were voted; each kept an accurate account of the number of tickets he gave out and the number he saw voted. The contestant put these witnesses on the stand to prove these facts, and the vote proven was almost in the inverse ratio of the vote as counted by the precinct officers.

"Such is the status of the present contest and mainly the character of the testimony of the contestant."

The charges of contestant are confined to the four counties of Choctaw, Clarke, Marengo, and Monroe, and only to those precincts in said four counties hereinafter discussed.

It appears upon examination of the evidence that the contestant has strictly confined himself to the method of proof described in his brief.

The majority review the testimony taken after the above-described method, and while admitting that standing alone and uncontradicted it would overcome the prima facie character of the returns, yet is not sufficient to overturn the return when rebutted by testimony showing that the proceedings were fair and legal.

The report says:

If the results at all these polls were, as alleged by contestant, tainted by fraud and corruption to such an extent that the polls should be excluded, he has failed, in the opinion of your committee, to exercise that diligence which the law asks of every suitor before granting him the relief prayed for. Bearing in mind that the character and tendency of the proof is very similar in all these precincts, the contestant might reasonably have been expected to have, at least, in one or few of them, called in the body of the voters of the precinct and established his claim of fraud, if fraud existed, beyond question. He does not even pretend to have made an effort to do so in this contest, but tries to excuse his want of effort in this respect because, as he alleges, in some previous contest that course had failed.

To quote from his brief:

"To call the voters themselves was the best and surest means of successfully proving that the count was fraudulent. When this was attempted by the contestant the contestee would cross-examine each witness for three days, and in some instances a whole week, asking the witness all about the Bible and the history of the world from Adam down. (See testimony in the contest of McDuffie *v.* Davidson, Fiftieth Congress.) The object of this proceeding was to consume time, and as the contestant only had forty days allowed by law in which to take testimony in chief, it can be readily seen how difficult, if not impossible, it was to secure sufficient proof from the voters to establish the fraud, as only a few could be examined by reason of the obstructive tactics of the contestee."

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[1] First session Fifty-first Congress, House Report No. 363; Rowell, p. 175.

It is only fair to the contestee to say that the evidence fails to disclose that any of the obstructive methods mentioned in contestant's brief were resorted to by him, and he can not be held responsible for the sins of his predecessors. A close examination of the record bears evidence that the taking of testimony was conducted in a very leisurely manner on the part of contestant, and that, although the number of his witnesses is relatively small, his side of the case was not closed until the middle of March.

In Jefferson beat he calls 3 witnesses to prove the alleged frauds; contestee calls 13 to prove the honesty and fairness of the election.

So in Linden, contestant calls 2 witnesses, contestee 12; in Macon, contestant 2, contestee 5; McKinley, contestant 4, contestee 3; Nixon's Store, contestant 2, contestee 3; Spring Hill, contestant 2, contestee 8; Shiloh, contestant 3, contestee 11.

In Choctaw County the majority of the committee decided to count certain votes tendered but not received at Mount Sterling beat:

The contestant charges that at this precinct he was deprived of 59 votes for the reason that the regularly appointed registrar refused to issue to that number of Republican voters proper certificates of their registration. It seems to be conceded by witnesses for contestee that 59 voters with tickets having the name of contestant upon them appeared and offered to vote, but were refused because they could not furnish certificates of registration, the registrar about 10 o'clock a.m. refusing to issue further certificates, stating that he was out of blanks, and shortly afterwards being called away; that several hours intervened before the inspectors offered to appoint another registrar, which they finally did, failing, however, to find any person willing to serve.

It is not charged that the registrar acted fraudulently in refusing to continue to issue certificates. His supply of blanks seems to have been exhausted, and he was called away to attend the sick bed of his father-in-law, who, in fact, died a few days later. The probate judge of the county, who was present according to his own testimony, between 3 and 4 o'clock p.m., with the consent of the inspectors, offered to swear, orally, those who had previously voted in the precinct, and the inspectors offered to receive the votes of those so sworn.

But there is no evidence showing how many of the 59 voters yet remained at the polls or how many of them, being legal voters, had previously voted at the precinct.

Section 2007, Revised Statutes of the United States, reads as follows:

"Whenever under the constitution or laws of any State, or the laws of any Territory, any act is required to be done by a citizen as a prerequisite to qualify or entitle him to vote, the offer of such citizen to perform the act required to be done, shall, if it fail to be carried into execution, by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, or offer to perform or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing to vote, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had in fact performed such act."

Under this law the 59 votes at the precinct under discussion must be counted for contestant.

In Clarke County the majority rejected the poll of Gainesville precinct:

The returning officer was the only officer of election who appeared at the opening of the poles on the day of election.

He proceeded, at the instance of contestant's friends, to appoint three inspectors, who were chosen from the colored party friends of contestant. These appointed two clerks.

This was in pursuance of section 262, Code of Alabama, 1876. Two of these inspectors and one of the clerks testify on behalf of contestant, and from their testimony it appears that the election proceeded quietly until about 3 o'clock p.m., when during a lull in the voting and following a seemingly well-established custom in that precinct the election officers opened the ballot box and proceeded to count the votes cast. It then transpired that none of the inspectors could read the ballots. This broke up the election and the ballot box was carried off by the returning officer, seemingly without protest or objection.

One of the inspectors swears that 179 votes had been cast at the time the balloting was interrupted. His testimony also tends to show that 4 of these were white men and the rest colored. There is no evidence showing how these parties voted.

The voters were not called as witnesses, and no effort has been made to ascertain how the votes actually cast stood, and the committee can find no precedent for counting the 175 votes claimed by

contestant for him. If these votes were cast for him, he has failed to show it, and the failure to have the true result declared was caused by no fault or fraud of contestee or his party friends, unless the failure of the regularly appointed inspectors of election to act be considered a fraud, but was occasioned wholly by the illiteracy of the party friends of contestant.

There can be no effective citizenship that is not based upon intelligence and education sufficient to take part in the active administration of the laws.

As to Monroe County the report says:

Section 259, Code of Alabama, provides:

"SEC. 259. *Inspectors and precinct returning officers, how appointed.*—The judge of probate, sheriff, clerk of the circuit court, or any two of them, must, at least thirty days before the holding of any election in their county, appoint three inspectors for each place of voting, two of which shall be members of opposing political parties, if practicable, and one returning officer for each precinct to act at the place of holding elections in each precinct; and it shall be the duty of the sheriff to notify such inspectors and returning officers of their appointment within ten days after such appointment."

The testimony of Anthony R. Davison, chairman of the Republican executive committee of Monroe County, is to the effect that he prepared lists of inspectors in the various precincts, one for each precinct who could read and write, and who were reputed to be good Republicans, and gave the list to the sheriff, and requested the board to appoint them. They were not appointed, but men were appointed in lieu of them who could not read and write, or were not Republicans, but they were all colored men, and some of them had been recognized by Republicans as being colored Democrats for years.

The majority of the committee hold that such conduct on the part of the appointing power "ought of itself to be considered evidence of conspiracy to defraud on the part of the election officers." But the contestant only took evidence as to two precincts in the county.

And as to the district, the contestant failed to show that the number of votes counted for contestee illegally or as the result of such frauds was sufficient to change the result of the election.

Therefore the majority reported the following resolution:

Resolved, That Richard H. Clarke was duly elected a Representative to the Fifty-first Congress of the United States from the First Congressional district of Alabama at an election held November 6, 1888, and is entitled to a seat therein, and that Frank H. Threet was not elected a Representative at said election.

The minority views, presented by Mr. Charles F. Crisp, of Georgia, concurred in the recommendation of the report, but did not agree to the reasoning.

On March 7, 1890,[1] the resolution was agreed to by the House without debate or division.

1026. The Virginia election case of Waddill, jr., v. Wise, in the Fifty-first Congress.

The House decided that the votes of duly qualified voters, in line and ready to vote but fraudulently prevented, should be counted as if cast.

Votes received at an outside poll by a United States commissioner and confirmed by evidence of the voters themselves were counted by the House.

Discussion as to what constitutes a tender or offer to vote.

On March 31, 1890,[2] Mr. John F. Lacey, of Iowa, from the Committee on

[1] Record, p. 2007; Journal, p. 315.

[2] First session Fifty-first Congress, House Report No. 1182; Rowell, p. 205.

Elections, submitted from the majority of that committee the report in the Virginia case of Waddill, jr., *v.* Wise.

The sitting Member had been returned by an official majority of 261 votes.

The report states the issue involved:

The pivotal question in the case is as to whether certain votes in Jackson ward, in the city of Richmond, shall be counted. If these votes, or such of them as are clearly shown, should be counted for the contestant the contestant is entitled to the seat, but if the votes in question are not counted the contestant is not elected.

It is claimed by contestant that in Jackson ward 722 legal voters were wrongfully prevented from voting; that these voters were lawfully registered and qualified electors; that they presented themselves in line on the day of the election prepared to take their turns in voting, and had in their hands, ready to deposit, ballots properly prepared to cast for the contestant for Member of Congress.

That the partisans and friends of the contestee hindered and obstructed these voters by making frivolous challenges of lawful voters, and that the judges of the election colluded with and aided the challengers in delaying the casting of the ballots by entertaining such challenges, by consuming unnecessary time in hearing and taking action upon them, and by making needless explanations to the voters as to the effect of certain, constitutional amendments which were being voted on at the election; that by needless and fraudulent delays in receiving and depositing the ballots, these 722 voters were prevented from casting their votes for contestant. Contestant further claims that 557 of said voters thus prevented from voting remained in line at the time of the closing of the polls, and that thereupon United States commissioners prepared ballot boxes and received the ballots of such voters and deposited the same in the boxes and preserved the same, which ballots were in evidence before the committee.

The votes thus in controversy are confined to three precincts of Jackson ward. Of these voters 457 were examined as witnesses.

The evidence clearly shows that from 457 to 722 legal voters ineffectually attempted to cast their ballots for the contestant in Jackson ward. It will not be necessary to discuss the evidence as to the exact number, for if this class of votes is to be counted for contestant he would be entitled to his seat upon the smallest number that the evidence could be fairly held to show. We are of the opinion that at the least 457 of such votes are clearly shown, which is more than sufficient to overcome the majority of 261 returned for contestee.

The report goes on to quote testimony to show that the delay in the voting was in pursuance of a conspiracy entered into by the party friends of sitting Member, saying:

The plan complained of by Mr. Duncan was carried out fully by adherents of the contestee and resulted in the exclusion of more than enough votes for contestant to change the result. The object of the persons engaged in this mode of disfranchisement clearly appears when it is known that out of all the great number of voters who were prevented from voting none of them belonged to the political party of the contestee.

The voters were divided into two lines, white and colored, and the great majority of the voters were colored.

The colored voters and white voters took equal turns in voting. The white voters resident in the first precinct were 132 and colored 883; third precinct, white voters, 254, colored, 797; fourth precinct, white voters, 392, colored, 692. See record, 1635. By voting alternately the white voters were all enabled to cast their votes, leaving the excluded voters at the rear end of the long colored line.

The minority views, presented by Mr. Charles F. Crisp, of Georgia, conceded that voters were prevented from voting, although denying that there was any conspiracy or improper conduct on the part of the officers of election. The principal issue was as to the treatment of such a case.

The majority believed that contestant should be seated:

It has been held in New York, Alabama, and California that a vote lawfully tendered and not received should not be counted, but if the result was changed thereby that a new election should be ordered. (See State *v.* Judge, 13 Ala., 805; Hartt *v.* Harvey, 19 Howard's Practice, N. Y., 245; Webster *v.* Byrnes, 34 Cal., 273.)

But this rule we think is not founded in reason and is against the weight of authority. It was seemingly though not directly sanctioned in the Nineteenth Congress in case of Biddle *v.* Wing, Clarke and Hall, 504.

The Revised Statutes of the United States, section 2007, provides:

"That whenever, by or under the authority of the constitution or laws of any State or the laws of any Territory, any act is, or shall be, required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance or offer to perform or acting thereon, be deemed and held as a performance in law of such act, and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had performed such act."

The offer to perform the prerequisites to the right to vote is by this statute made equivalent to a performance of the act itself, where the wrongful act or omission of an officer prevents carrying such offer into execution.

This carries the doctrine of tender back one step further, and makes a tender of registration or other prerequisite sufficient to entitle the citizen to the right to vote. The doctrine that such votes should be counted is strengthened by this statute.

If the voter, in the language of the statute, "shall be entitled to vote," the right would be a very barren one if the vote tendered and refused could not be counted.

"So far as Congressional elections are concerned, the offer by a voter otherwise legally qualified to perform any act which is a prerequisite to voting will be in law a performance of the act." (Paine on Elections, p. 519.)

This House has uniformly, since the Nineteenth Congress, recognized the rule that a legal vote lawfully tendered and unlawfully rejected shall be counted and given the same force and effect as if actually cast. Whatever the rule may be in any of the States of the Union this principle is well settled as a rule of Congress.

The report then cites various Congressional cases, and the rule in England (Heywood, 5 ed., 500), and continues:

But it is claimed by a minority of the committee that under the facts of the present case there has been no such an offer to vote on the part of the several hundred voters as would entitle them to have their votes counted. This brings us to the discussion of what constitutes a tender or offer to vote.

It is eminently proper in approaching the polls where there are a large number of voters that the voters should form a line and take their orderly turns in voting. To prevent any race troubles it is not unusual in many places to form two lines, one white and one colored, approaching the polls in their order and casting their ballots in regular turns or rotation.

Is the ability to reach the window and actually tender the ticket to the judges essential in all cases to constitute a good offer to vote? A voter, who is at the polling place in due time, and has taken his place in line, ticket in hand, offering to vote, and by the wrong of the judges is prevented from reaching the window, surely has as much right on principle to have his vote counted as the voter who happens to be further up in the line and actually reaches the window and is there refused.

From the time the voter reaches the voting place and takes his position in line to secure his orderly turn in voting the elector has commenced the act of voting. It is a continuous act, and if by the wrongful act of fraudulent challenges unduly prolonged by the connivance and collusion of the judges of the election the voter is deprived of the opportunity to vote we think that the interest of our form of government and the purity of elections demand that the vote should be counted. If the fraudulent exclusion of votes would, if successful, secure to the party of the wrongdoer a temporary seat in Congress, and

the only penalty for detection in the wrong would be merely a new election, giving another chance for the exercise of similar tactics, such practices would be at a great premium and an election indefinitely prevented. But if where such acts are done the votes are counted upon clear proof aliunde, the wrong is at once corrected in this House and no encouragement is given to such dangerous and disgraceful methods. Where an illegal vote is tendered and cast it is universally conceded that it should be excluded in a contest, and the result declared the same as if such vote had not been cast.

It is clear upon principle that where a legal vote is offered and excluded it should be counted upon furnishing proof as satisfactory as that upon which an unlawful vote is eliminated from the count. There is no more difficulty or uncertainty in the proof in the one case than in the other. We are not disposed in the present case to treat the deposit of the votes in the box of the United States commissioners as a casting of the ballots. But such fact is strong corroborating evidence and is entitled to weight in determining the purpose of the voters, and is further of value in preserving the ballots which the voters say they actually intended to have cast. These ballots were at once deposited in a safe receptacle and preserved until they were delivered into the custody of the House. Over 400 of the voters testified to the deposit of these ballots, and that they were the same ballots which they were prevented from casting.

If a number of persons desirous of making a tender of money at a bank should form in line during banking hours, with their money in hand, and the officers of the bank should purposely delay the transaction of business in such a way as to prevent a large number of the persons desiring to make the tender from reaching the receiving teller's window during banking hours, there would be no question, we apprehend, but that this would be a good tender of money. In the present instance the voters in depositing their tickets in a separate box in the custody of a United States commissioner were attempting to carry the analogy further by making their tender good.

The voter who was standing at the window, ticket in hand, and offering it at sundown when the window was closed in his face, had done no more to have his vote cast than the next man in the line or the other voters standing ready to the extreme rear of the line. They were all doing their best to exercise their constitutional rights.

It is the duty of the judges to afford every reasonable facility to the voters in casting their ballots. We think that all these votes were tendered or offered within the fair and reasonable meaning of the law and that they should be counted, and that the action of the judges in delaying the election was equivalent in law to a refusal to receive the ballots.

We therefore recommend the passage of the following resolution:

Resolved, That George D. Wise was not elected as a Member of the Fifty-first Congress from the Third district of Virginia and is not entitled to a seat therein.

Resolved, That Edmund Waddill, jr., was elected as a Member of Congress from the Third district of Virginia and is entitled to a seat therein.

The minority views contend:

The court of appeals of New York in Hartt *v.* Harvey (19 Howard Pr. Reports, p. 252), had before it the express question whether a vote not cast could be counted for the candidate for whom the voter intended or desired to vote, and uses the following language:

"The result of the election must be determined by the vote cast. If illegal votes can be ascertained they may be rejected; but votes not received can never be made available in favor of either party."

The supreme court of California in passing upon the same question, in Webster *v.* Byrnes (34 Cal., p. 276) say:

"The court below erred in counting for contestant the supposed votes of Gonsalves, Larkin, and Haas, under the pretense that they would have voted for him had they been allowed to vote. In all contests of this character the question is, Which candidate received the highest number of legal votes? The idea that the supposed votes of persons who did not vote, but who could have voted had they taken the necessary legal steps to entitle them to do so, should be counted for the candidate for whom they would have voted, is simply preposterous."

The supreme court of Alabama in the case of the State ex rel. Spence *v.* The Judge of the Ninth Judicial Circuit (13 Ala., p. 811) say:

"Smoot offered to vote at the election, but his vote was not received, and he would have voted for Spence. * * * It is perhaps unnecessary to inquire whether the managers should have permitted Smoot to vote or not, for he did not vote, and even if his vote could have had any influence in changing

the result of the election, as in fact it was not given, it could only have authorized the circuit judge to have declared the election void, but could not authorize him to count it as actually given to Spence."

To the same effect see Newcum *v.* Kirtley, supreme court of Kentucky, reported in 13 B. Munroe, page 515.

It will thus be seen that the highest courts in the States of New York, California, Alabama, and Kentucky have held that even though a legal voter should tender his ballot to the managers of the election, and they should reject the same, yet such vote could never be counted for either party. The fact that the vote was illegally rejected, and that the voter declared under oath for whom he intended and desired to vote would not authorize the tribunal that must "judge" of the election to count such vote, the election must be determined by the votes actually cast; and if it appear that a sufficient number of votes to change the result were unlawfully or improperly rejected, the effect would be to render the election void. The undersigned have not had their attention called to, nor are they aware of any decision of any court in any of the States, or of the United States, which establishes or maintains any other or different rule from that here laid down.

After discussing the Congressional cases the minority continue:

The act of Congress referred to in the report of the committee refers only to qualification of voters and not to the act of voting. The citations from McCrary and Paine on elections, referred to in the report of the committee, are based upon the decisions of the House herein reviewed, and as we have shown are not sustained by any of the cases referred to except Niblack *v.* Walls, which is a departure from and contrary to the established rule and which stands alone, unsupported, so far as we have been able to learn, by a decision of any court or of any legislative body in this country.

It seems to us that the rule contended for by the majority in this case would open wide the door for fraud and invite false swearing, which the opposing party would have no means of refuting. To hold that anything short of an actual tender of the ballot to the election officers and a rejection by them was an offer to vote would be a most dangerous and uncertain rule, and one to which we can not give our sanction. Where the evidence plainly establishes the fact that a legal voter offers his ballot to the election officers and they unlawfully reject the same, under the precedents heretofore established such vote may be counted for the candidate for whom the voter offered to vote. Conceding for the purpose of the argument all that is claimed by the contestant in this case, to wit, that by fraud and intentional hindrance and delay a large number of voters who intended to vote for him were unable to reach the poll to tender their ballots, although they used diligence; that when the polls closed a large number of voters present on the ground desiring to vote for him had for such reasons been unable to do so, and that thus a sufficient number of voters were prevented from voting to have changed the result had they succeeded in voting; still, inasmuch as there was no actual tender of their votes and rejection thereof by the election officers, such votes can not be counted for contestant; they have not been offered and rejected, and the most that can be claimed under this assumed state of facts is that there has been no fair and full election within the meaning of the law, and that neither party shall be adjudged entitled to the seat.

In the case before us we have before said we do not believe there was any considerable obstruction of the voters in their right to vote; but it appears that at the time the polls were closed at three precincts of Jackson Ward there were a number of voters present at each polling place desiring and intending to vote who were prevented from doing so through no fault of their own, and it is possible that such voters were sufficient in number to have changed the result had they all voted for the contestant. Under these circumstances we have been somewhat embarrassed to determine what recommendation we should make to the House. As we have shown, under such a state of facts, the courts determine the result by the vote actually cast. The enforcement of that rule in this case would give the seat to the sitting Member.

But we are not satisfied of the justice of such rule. While it is true that neither the contestee nor his partisans can justly be held responsible for the failure of any of the voters to exercise their right of suffrage, yet we believe that some were deprived of the opportunity to vote and that the number might have been sufficient to change the result, and so believing, in the interest of fair play and complete justice, we are not inclined to hold the contestant responsible for the inefficiency of the Republican judge or the conduct of the Republican Federal supervisors, but are of the opinion that the ends of justice will be subserved by remitting the election to the people of the district, who can, unembarrassed

by the constitutional convention question, freely declare their choice, and we therefore submit the following resolution:

Resolved, That the seat now held by George D. Wise as the Representative in the Fifty-first Congress from the Third Congressional district of Virginia, be, and the same is hereby, declared vacant.

The report was debated at length on April 11 and 12,[1] and on the latter day the question was taken on a motion to substitute the minority proposition for that of the majority. This was negatived, yeas 119, nays 133.

Then the first resolution of the majority, unseating Mr. Wise, was agreed to without division.

The second resolution, seating contestant, was agreed to, yeas 134, nays 120.

Mr. Waddill thereupon appeared and took the oath.

1027. The Virginia election case of Bowen v. Buchanan in the Fifty-first Congress.

The existence of a corruption fund and the use of it, even by county officers, does not vitiate an election beyond the actual votes shown to be affected.

Returns will not be rejected because returning officers informally make a necessary correction after they have formally made them up.

Temporary absence of the election judges, the voting being left under charge of honest election clerks, did not vitiate the poll.

Only preponderating testimony that there was no fraud saved from rejection a poll whereat the election officers adjourned for dinner and removed the ballot box illegally.

On April 3, 1890,[2] Mr. J. H. Rowell, of Illinois, submitted the report of the majority of the Committee on Elections in the Virginia case of Bowen *v.* Buchanan.

Sitting Member had been returned by a majority of 478 votes.

In reaching a conclusion the report discusses several questions:

(1) As to bribery, the report says:

> In Russell County the existence of a corruption fund and a willingness to use it are clearly established. Several votes were purchased and attempts were made to purchase others. Enough appears to arouse suspicion that more votes were purchased than the evidence discloses. The committee, however, can only deal with the facts established by the evidence, however strongly they may suspect the existence of more extensive corruption than appears.

The report then enumerates the names of voters who were proven to have sold their votes, to the number of ten, including one man purchased by the sheriff of the county, who procured the satisfaction of a fine standing against the voter; and continues:

> These 10 votes were directly purchased, and no attempt is made to disprove the direct evidence establishing the fact. There is considerable circumstantial evidence tending to show that others were influenced in like manner in this county; the money was provided, the will to use it was not wanting, and if there were other corruptible voters in the county known to the corruptors they were undoubtedly reached in the same way and by the same representatives of the majesty of the law, the sheriff and State's attorney of Russell County. We can go no further than the evidence justifies and deduct these 10 votes from contestee's majority.

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[1] Record, pp. 3294, 3348–3363; Journal, pp. 462–464.

[2] First session Fifty-first Congress, House Report No. 1214; Rowell, p. 195.

In Dickinson and Wise counties inducements were held out to illicit distillers by United States revenue officers of immunity from prosecution for violation of the revenue laws in consideration of support to the Democratic ticket. Three or four voters are shown to have voted for contestee on account of this kind of pursuasive argument. If others were so pursuaded it does not appear in the evidence. Altogether some 20 votes were lost to contestant in the manner above stated.

(2) Contestant claimed that the returns of Giles County should be rejected. The report says:

Here it is claimed that the returns from the county should be rejected because the returning officers of the county corrected their abstract of the precinct returns after it had been made up and the board had adjourned.

It seems that in making up the abstract, by a clerical error, one precinct had been left out. Before the returns were transmitted to the secretary of the commonwealth the mistake was discovered and corrected. This was just what ought to have been done, and if this precinct return had been omitted it would have been the duty of the committee to include it in the total vote. The objection is technical and without merit.

(3) As to conduct of election officers:

It is further insisted that the return from Pembroke district should be rejected on account of the misconduct of the election judges.

Sometime during the day a fight took place near the polling place, and the judges of election ad went out to witness it, leaving the ballot box in the custody of the clerks, who were of opposite political faiths. During this temporary absence the Democratic clerk was seen to push a ticket into the box, and it is claimed that this circumstance proves that other ballots than those of the voters were deposited in the box. The circumstance is explained in a like manner quite consistent with the honesty of the clerk. Just as the fight commenced, one of the judges had received a ballot and attempted to deposit it in the box, but in his hurry did not quite succeed, leaving the ballot in the opening, and the clerk pushed it down with his pencil. During the absence of the judges no one interfered with the box, no one was prevented from voting by the delay, and there is no evidence to impeach the return. Two or three illegal votes were cast at this poll, but there is nothing to show unfairness on the part of the judges.

In Russell County also there was a question as to the conduct of the officers:

We are asked to reject the returns from Honaker precinct, Russell County, on account of alleged misconduct of the election officers. At this precinct the election judges adjourned for dinner and supper, and each time two of them took the ballot box from the polling place and carried it to a private house where they went for their meals. By this conduct the box was removed from the presence of the United States supervisor, in violation of the statute. The supervisor claims that he protested against the removal, but the preponderance of the evidence is against his claim. The majority for the contestee at this precinct was 89, a large increase over former elections. This illegal act of the judges gave opportunity for fraud, such fraud as the statute was designed to prevent. In the examination of other cues we have found that adjournment and removal of the ballot box from the presence of the supervisor is a common method resorted to when it is intended to change the ballots or the boxes. But for the strong affirmative proof that no wrong was intended or done in this case, the committee would unhesitatingly reject the return.

The increase in the Democratic majority is accounted for, to some extent, if not fully, by the existence of the corruption fund spoken of in this report.

1028. The case of Bowen v. Buchanan, continued.

Registry being required in towns of a certain population and the population of a town not having been determined accurately, votes rejected for lack of registry were counted by the House.

Indefinite and uncertain intimidation by employers of labor does not justify rejection of a poll.

An ascertained number of voters being intimidated by roughs, the House corrected but did not reject the poll.

Fighting at the poll, no injury resulting in the vote of either party, does not justify rejection of the poll.

(4) As to alleged illegal rejection of votes:

At Pocahontas precinct, Tazewell County, 40 votes tendered for contestant were, in our view, illegally rejected. By the statutes of Virginia it is provided that in all towns of over 2,000 inhabitants a transferred voter must have his transfer recorded at least ten days prior to the election. At all other precincts a transferred voter may vote without such registry. It was claimed by the election officers that Pocahontas was a town of over 2,000 inhabitants, and these 40 voters were denied the right to vote because they had failed to have their transfers registered. Pocahontas is a new mining town; no census, State or national, has disclosed the number of its inhabitants, and there is a difference of opinion among the inhabitants as to the number of people. In the absence of any legal determination of the number, we do not think the election judges had any right to decide that this town was within the exception.

Contestee lost 4 votes by the same ruling, and there was a net loss to contestant of 36 votes.

(5) As to intimidation:

At Loup or Johnson's Store precinct it is claimed that the returns should be rejected because of the undue and improper influence of the Stewart Land and Cattle Company over their employees, some 40 or 50 in number. The proof tends to show that at previous elections these employees had been given to understand that they must vote the Democratic ticket or lose their places. It was generally understood in the community that one of the conditions of employment by this company was that the men should vote the Democratic ticket. It is unquestionably true that many of the men believed that to vote otherwise would cost them their places, and that belief undoubtedly induced some of them to vote against their convictions; but there is no direct evidence implicating any of the members of this company in an attempt to control their employees at this election other than the presence at the polls of one of their foremen distributing tickets to the men. How many men were influenced, by the prevalent belief does not appear, and this supposed influence is too uncertain and indefinite to justify the rejection of this poll or other neighboring polls where some of the employees voted.

At Slate or Sander's precinct, in Buchanan County, where there were from 10 to 15 Republicans, a crowd of drunken roughs assaulted 6 or 7 Republican voters, and only 3 voted. These, while voting the National Republican ticket, voted for sitting Member as a measure of prudence. The report says:

The majority of the voters at this precinct were peaceably disposed, but a few vicious, drunken partisans of contestee deprived contestant of the Republican vote of the precinct. Were their number uncertain we would exclude the return, but as their number is not a matter of uncertainty, and as contestee would have had a considerable majority in this precinct in any event, it is not in accordance with the precedents to reject the return; if a sufficient number were so intimidated as to overcome the majority of contestee the committee would hold that he had no right to retain his seat.

At Colly and one or two other precincts there was fighting at the polls, but the evidence showed the full Republican vote to have been polled.

The committee also discussed several questions of fact, and concluded that sitting Member would still have a majority of over 200 votes after all deductions had been made. Therefore they recommended:

Resolved, That John A. Buchanan was duly elected to the Fifty-first Congress from the Ninth Congressional district of Virginia, and is entitled to retain his seat.

Resolved. That Henry Bowen was not elected a Representative to the Fifty-first Congress from the Ninth Congressional district of Virginia, and is not entitled to the seat.

The minority concurred in the conclusions, but dissented from some of the statements made in the report.

On April 16 [1] the House agreed to the resolutions without debate or division.

[1] Record, pp. 3451, 3452; Journal, p. 479.

1029. The Indiana election case of Posey v. Parrett, in the Fifty-first Congress.

Direct testimony taken in time of rebuttal and objected to at the time was not considered by the House.

When a student is in a place simply for the purposes of education, a presumption is thereby raised against his intent, and other proof as to residence is necessary.

Persons within a precinct as laborers must by proof establish the intention and other conditions of residence.

On April 3, 1890[1] Mr. C. A. Bergen, of New Jersey, submitted the report of the Committee on Elections in the Indiana case of Posey *v.* Parrett. The sitting Member, by the official returns, had a plurality of 20 votes.

The evidence by which contestant tried to prove bribery was deemed by the committee insufficient.

A preliminary question as to evidence was thus determined:

It is proper to observe here that much of the testimony in the case has been taken out of time, or to speak more accurately, in rebuttal, when by its substance it is evidence in chief. This is in violation of the act of Congress, and was at the time objected to on the part of the contestee, who, though present, also refused to cross-examine on that ground. No reasons for this course on the part of the contestant have been presented to the committee, and the committee has felt itself bound to exclude such evidence from its consideration of the case. It believes that the rights of the House under the Constitution are not abridged by the act referred to, but that each Congress in enforcing those rights will not depart from the terms of the act except for cause.

The remaining question in the case related to the qualification of certain voters in relation to residence, and is thus discussed by the committee:

There are two classes of voters brought in question in this case under the head of nonresident—those known as the St. Meinrad voters and the Kentucky voters, though the last description is not accurate, for not all included under it are spoken of as from Kentucky.

The St. Meinrad votes were 30 in number and were cast for the contestee by students of the college or seminary at St. Meinrad. These students were young men there solely for the purpose of an education in preparation for the priesthood. They had come mostly from Indiana, but many of them from other States and some of them from foreign countries. Their tuition and support were furnished to them by their respective bishops. They all testified that their residence was at St. Meinrad. It might well be doubted if they meant more by this than that they had been at that place the time necessary to make it their home. A proper cross-examination would probably have disclosed the misunderstanding of the witnesses. But we must consider the case as it is presented. No one doubts the evidence of these very respectable gentlemen that they had been at the institution most of the time for a number of years and sufficiently long to have gained a residence if that were the only requisite; but residence is a mixed question of fact and intention, the fact without also the intention is not sufficient of itself to establish a legal residence. And it is a well-settled principle of the cases that one who leaves his home to go to college for the purpose of an education does not from continuance there the required time gain a residence. On the contrary, the very object of his stay raises a presumption against such result. This is not because the law adopts a rule in the case of students different from that in other cases, but because it also reasons from analogy and must in all cases be consistent.

The votes of those who in this case have been described as "Kentucky voters" depend upon the same principles of law as those of the St. Meinrad students, and both depend upon solving the problem whether the individual voter ever in contemplation of law changed his place of residence from that last had to that now insisted upon or opposed.

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[1] First session Fifty-first Congress, House Report No. 189; Rowell, p. 189.

The law places a child's residence with his parents, not because they are his parents, but because theirs is the home into which he is born; so, also, with his guardian if his is his actual home. There he has the right to vote the day he becomes of age and there he has the protection of law, the right of support if ill-health, misfortune, or poverty overtakes him whether in infancy or mature years; there a citizenship, which he has the right to prove and the flag to defend and against which simple actual absence, no matter how long, will be no defense. Nor does such residence depend upon the maintenance of the parental roof. (Fry's Elec. Cases, 71 Penn. St., 302.) It moves with it only when the law from other circumstances concludes the child is still a component part. The homestead may have disappeared and yet the legal right of the child or man be unaffected. The State will not disown its son, and it recognizes the family when a component part but not its sole dependence.

The intention of the voter is an important factor in determining the place of residence, and the proper way is to examine the surrounding circumstances to discover that intention. Plainly one who is a student at a college or toiler in Kentucky may be a voter, but he may not more than any other citizen have two places at either of which, according to whim or convenience, he may on election morning determine to vote. The law does not mean that a matter so vital to the rights of others shall be concealed and hidden within the single breast of one of the parties. Residence at the college, or in Kentucky, like residence at any other place, gives and takes away the right to vote, but when of a person simply for the purpose of an education, as in the case of the St. Meinrad students or of labor, as with many of the "Kentucky voters," it raises a presumption of want of bona fides and necessity for other proof to show that it was the intention of the voter it should have such effect.

The student voters were Catholics, and the form benefactions took with them was from the bishop, and from this it was argued that the bishop stood in loco parentis. Even if granted, it would not affect the question involved, nor have more to do with it than if the students had been in a Protestant college, there supported, as is commonly the case, by their churches for the Protestant ministry. The question would still be, not whether their residence was that of the church by which they were supported, but whether they had ever given up their last residence and undertaken to acquire another at the college. To do so, they must either directly have renounced their former home and assumed the obligations of citizens in their place of adoption, or done acts, open and acknowledged, inconsistent with the one and assertive of the other. Every one has a well-recognized right to change his place of residence, and may do so if he proceed in consonance with known principles.

Contestant's case must fail in regard to the students, not so much because in fact they were entitled to vote, as to use the language of the supreme court of Indiana, in Pedigo *v.* Grimes (112 Ind., 148), "because there is no evidence that this (their intention of making that place their residence) was not their intention formed and acted upon in good faith." Each party at the hearing relied upon this case to support his position. It is sufficient to say, while thus citing from it, that it will not bear the extreme construction put upon it by contestee. That would not only do violence to its language, but place it in opposition to the trend of decisions elsewhere upon which it claims to rest.

An application of these principles to the other votes brought in question shows that the following were improperly cast and counted for the contestee and should be deducted from his number, to wit, Solon Hedges, Neeley Borden, Samuel Bogan, J. Nickens, A. Nickens, Thomas Hampton, Harry Hampton, Dink Miller, Frank Wiseman, Homer Campbell, E. T. Conway, John Oaks, Thomas Crosnow, and Stephen Winters—total, 14; and that the following were improperly cast and counted for the contestant and should be deducted from his number, to wit, James Smith, James Eskridge, Alex. Boyd, Philip Dailey—total, 4.

This still leaves the contestee with a plurality of 10 (20–14+4=10).

The committee is of the opinion that the certificate of election was rightfully issued to William F. Parrett and that he is entitled to the seat. It therefore submits the following resolutions and recommends their adoption:

Resolved, That Francis B. Posey is not entitled to a seat in the Fifty-first Congress as Representative from the First Congressional district of Indiana.

Resolved, That William F. Parrett is entitled to a seat in the Fifty-first Congress as Representative from the First Congressional district of Indiana.

The report was debated on April 16,[1] and on that day the resolutions were agreed to—ayes 125, noes 4.

[1] Record, pp. 3444–3451; Journal, p. 479.

1030. The Alabama election case of McDuffie v. Turpin, in the Fifty-first Congress.

Instance wherein the history of previous elections in a district and common knowledge as to its political condition was held to raise a presumption against the returns.

A general plan of evasion of the law providing for boards of fair election officers combined with attempts to prevent examination thereof was considered proof of conspiracy to defraud.

Proof of a conspiracy to defraud may but does not necessarily require the returns to be rejected unless sustained by oral testimony.

There being evidence of a conspiracy of election officers to defraud, the returns were satisfactorily impeached by evidence falling short of the best evidence; i.e., the testimony of the voters themselves.

Evidence of declarations of voters when they took their tickets and went to the box availed to discredit returns of election officers of doubtful honesty.

On May 7, 1890,[1] Mr. J. H. Rowell, of Illinois, submitted the report of the majority of the Committee of Elections in the Alabama case of McDuffie *v.* Turpin.

Sitting Member had been returned by an official majority of 13,153 votes. The report says:

> With such a returned majority for contestee it is apparent either that this contest is a huge farce or that this whole district is honeycombed with fraud.

The report then goes on to review the political history of the district, showing that in preceding years the House had found fraud enough to justify unseating the returned Member, and concluding:

> From this account of the action of the election officers and returning boards of this district it is clearly evident that there has existed a fixed determination on the part of the Democratic managers there that the will of the majority should be disregarded and a willingness to resort to any methods, however unlawful and criminal, to accomplish the defeat of their Republican opponents. The record in this case justifies and fully confirms the above conclusion and shows that the same conditions continue to exist.
>
> If the certified returns in this case are true, it follows (allowing for 500 increase in white voters since 1880, and 2,000 increase in colored) that all the white voters and at least 11,800 colored men voted for contestee, while only 5,625 voted for contestant and more than 11,500 did not not vote at all; that is to say, more than two-thirds of the colored men who cast their ballots voted for contestee and 43 per cent did not vote at all.
>
> In the light of history, and of that knowledge common to all well-informed men, it is not too much to say that such a report is a self-evident falsehood, unless there is a present condition of affairs in the Fourth district of Alabama taking that district out of the rule which prevails everywhere else.
>
> The record in this case demonstrates its falsity beyond a reasonable doubt. The evidence in this record, as in other records from the same district, shows conclusively that the great majority of the colored men there are Republicans and that when they vote they vote the Republican ticket.
>
> The evidence of the certified returns, on the other hand, shows that a large majority of them vote the Democratic ticket. The conflict is between the returns and the men who cast the ballots on which the returns purport to be based.
>
> The evidence also shows that in almost every voting district there are a few colored Democrats well known to both white and black. It also shows that where the whites are in a majority a greater

[1] First session Fifty-first Congress, House Report No. 1905; Rowell, p. 257.

number of colored men vote the Democratic ticket than in localities where the blacks greatly preponderate.

The evidence further discloses that the Republicans have kept up their party organization, that they continue to take great interest in elections, and, as a rule, are eager to exercise the right to vote. It further shows that at this election there was entire harmony in the ranks, the only exception being a so-called Republican paper of small circulation and less influence, which lent itself to the Democracy.

The evidence further establishes the fact that throughout the district there was a general belief among the Republicans that there would not be an honest count of the votes; that, whatever the actual result, contestee would be declared elected and that it would be necessary to prove the true vote by other means than the returns and to appeal to the House to correct the anticipated wrong to the voters. Such belief does not exist so universally without cause. The history of this district, the common knowledge of the mass of voters in it of announced results at former elections, and the action of county officers in appointing inspectors of election, fully justified the belief, and results prove that the belief was foreknowledge.

The report next reviews the law of Alabama relating to elections, especially on the following points:

The inspectors appointed by the probate judge, sheriff, and circuit clerk (or any two of them) must be appointed at least thirty days before the election; and, if practicable, must be of different political parties.

The sheriff must, at a given time, summon the probate judge and circuit clerk as a board of supervisors to ascertain and certify the result of the election. If these officers are all of the same political party, then this returning officer must summon three reputable householders, citizens and voters, of the opposite political party, to make up this returning board or board of supervisors. In connection with this section of the statute it may be remarked that all the officers made returning officers by law were of one political party, but nowhere was it deemed by them or the sheriff necessary to comply with the terms of the law and summon members of the opposite political party to act as supervisors. Such little formality, designed to secure honest returns, seems to have been entirely forgotten.

The following from decisions of the supreme court of Alabama have a bearing upon the case:

"It is the election which entitles the party to office, and if one is legally elected by receiving a majority of legal votes, his right is not impaired by any omission or negligence of the managers subsequent to the election. (13 Ala., 885.)

Nor will a mistake by the managers of the election in counting the votes and declaring the results vitiate the election. Such a mistake should be corrected; the person receiving the highest number of votes becomes entitled to the office." (9 Ala., 338.)

In considering the evidence with reference to particular precinct returns, it is first necessary to inquire by whom the election was held, in order to determine what weight should be given to the returns.

Returns are, as a rule, prima facie evidence of the result; but if the integrity of the inspectors is in any way impeached, either by showing that their character is such as to cast suspicion on their acts, or that their belief is that frauds upon elections are justifiable, or that the manner of their selection was such as to indicate a purpose to procure a false statement of results, then the returns lose much of the weight that would otherwise attach to them. (English *v.* Peele, Forty-eighth Congress.) In this case the committee says:

"When once the taint of fraud or unreliability is attached to the official count its value is gone, and we must look to other sources for better information."

In Lowndes County the precinct inspectors were appointed on the 25th day of September. A few days afterwards the contestee visited the county, and on the 6th day of October an entire change was made in the list of inspectors appointed to represent the Republicans. The first list was satisfactory, and made up in the greater part of intelligent men. The second list was made without any authority in the law, and its composition shows that the change was made for a dishonest purpose. Judge Coffey (Record, p. 745) says that the reason for this change was that the sheriff and several other gentlemen told him that the Republican inspectors, being school teachers, did not wish to serve and mix up in politics. Hence the change. Let us see whether that was the true reason.

After reviewing the several precincts the report concludes:

Twelve of the first list either served or tried to serve, and eight of the new list who served could neither read nor write. The reason for the removal of intelligent and trustworthy Republicans and replacing them with ignorant and unreliable men, in pretended compliance with the law, is evident from the foregoing statement, and the falsity of Judge Coffey's reason is made apparent.

That contestee had something to do with this change does not admit of much serious question.

When the law provides that each of the two political parties shall have representation on the election board of inspectors, it is a provision to prevent dishonest partisans from making false returns; and in such case the appointment of men incompetent to determine whether the return is honest or not to represent the party opposed to the appointing power, tends to prove an intent to prevent that watchfulness intended to be secured by the statute, and raises a strong suspicion (if it does not fully prove) of conspiracy to falsify the returns.

After showing that the inspectors appointed to represent the Republican party were generally ignorant and disloyal, the report continues:

Such uniform violation of the statute and such uniform pretense of complying with its terms by appointing colored Democrats to represent the party, or by appointing illiterate colored Republican show method in the action of the county boards, with dishonest designs behind the method.

Under these circumstances it would be safe to apply the rule adopted in regard to this district by the House Committee on Elections in the Forty-eighth Congress, and consider as trustworthy only such returns as are sustained by oral testimony. But the committee has not gone to that extent in this case.

It is worthy of remark that in almost every precinct in the fourth district there were reliable and intelligent Republicans, competent to discharge the duties of election inspectors and to protect the voters to the extent of securing an honest count and a correct return.

Another feature of the election, which can not be overlooked, was the precaution everywhere taken by the Republican to ascertain with accuracy the number of votes cast by them, showing a universal distrust of the precinct officers. In many precincts complete poll lists were kept by clerks selected for that purpose, voters going to the extent of refusing to vote unless such precaution was taken. On the other hand, vigorous efforts were made by the Democrats in many places to prevent the keeping of such lists, under the pretense that the keeping of such lists was intimidation. Deputy sheriffs were active in trying to suppress this attempt to keep a check upon the distrusted election officers.

In one instance the attempt of a deputy sheriff, acting under the direction of the sheriff of the county, to stop the further keeping of a poll and to secure possession of the one that had been kept, resulted in the murder of one Republican and the wounding of two others by the deputy and his supporters. The murderer has escaped even the formality of a prosecution.

These officials who were thus attempting to prevent the measures taken by the Republicans to preserve the evidence of the vote cast, well knew the purpose of these measures, for, only two years before, in the election contest of McDuffie *v.* Davidson, this kind of evidence had been used all over the district to show up the frauds in the election of 1886. The conclusion is inevitable that these acts of the Democratic officials and their aiders and abettors were done in furtherance of contemplated frauds.

The printed record discloses another unpardonable attempt to suppress testimony. This attempt was the deliberate act of contestee and his attorneys. Frivolous objections, covering whole pages of the record, and cross-examinations of witnesses which would disgrace a police court shyster, were the means by which contestee and his attorneys sought to use up the time allowed to contestant in which to take testimony to prove his allegations. This conduct resulted, beyond a reasonable doubt, from a deliberate purpose to suppress as much of contestant's evidence as possible, and prevent a disclosure of the whole truth.

These are some of the general features of the case proper to be considered in applying the specific evidence in regard to the various precinct returns brought into question.

The general method of proving charges of fraud in the several precincts was to show that more votes were cast for contestant than were returned for him, and was, as described in the debate,[1]

to select intelligent men and let them stand as near the polls as they would be permitted to do, in order to distribute tickets among the electors, as they did, the colored or Republican elector in nearly every instance taking his ticket, and in some of the precincts carrying it over his shoulder, so that the man who gave him the ticket could watch him until he gave it to the inspector at the polls, who received it and deposited it in the box. Returning, to make assurance doubly sure, he would state to a list keeper that he had voted the Republican ticket that he received, and wanted his name taken down as a Republican voter.

Where this method showed a wide variance between the number of votes thus proven for contestant and the vote accorded him in the official returns, the majority of the committee did not reject the poll, but counted for contestant the number of votes proved by the tally keeper, and allowed to sitting Member such votes as were proven for him or conceded to him.

In many precincts there was found other evidence of fraud, such as names of voters arranged on the poll list alphabetically.

As to the method of proof the majority report says:

Here we have 170 voters declaring at, the polls their intention to vote the Republican ticket, taking the ticket from one chosen by them to issue tickets by prearrangement, holding their tickets in such a way that they could be seen until voted, and then having their names registered so as to be able to prove how they voted. These acts are a part of the res gestae of the election—the deliberate declaration of the voters while engaged in the act of voting, not only of how they voted but of their utter want of confidence in the election board, upon which they had no representation.

And also:

The violation of the letter and spirit of the law in the appointment of the election officers, so universal as to show deliberate intent, the universal knowledge of the purpose of such violation, and 0 the various acts of the partisans of contestee, including all the officials throughout the district, are what give weight and character to the evidence which shows the results in individual precincts, or beats, as they are called in Alabama.

The admissibility of this kind of testimony has been fully recognized by the courts, and its weight in this class of cases admitted.

Judge Howell E. Jackson, late a United States Senator and now a judge of eminence, in his charge to the jury in the recent trial of Tennessee election officers for violating the Federal election laws at Memphis, Tenn., used the following language:

"Said witnesses testified that the voting population of the fourth civil district of Fayette County on November 6, 1888, numbered between 490 and 500-say, about 500. That about 80 to 100 of such voters were white men or Democrats; the remainder, numbering about 400, were colored men and Republicans. That on the day of the election there was a large turnout of such voters. That the colored voters present exceeded 300 in number. John McGowan, the Republican chairman of the district, states that there were over 300 colored Republican voters present. That he directed many or most of them to go for their tickets to John C. Reeves, who occupied a position 10 or 20 steps from the voting place, and was distributing Republican tickets to Republican voters. That Reeves's position was in full view of the window at which the ballots were handed in to the officer. That he saw many of the tickets deposited or handed in to the officer holding the election, and can not swear to the actual number that voted that had Republican tickets. John C. Reeves testified before you that he was present. That he had in his possession Republican tickets, a sample of which is produced in evidence, having on it a full list of Republican candidates, from Presidential electors and Congressmen down to State and county officers. That he issued to the colored voters on that day, upon their application

[1] Record, p. 5545.

for the same, 325 of those tickets while at the voting place. That on his way home he met 4 or 5 other voters going to the polls, to whom he gave Republican tickets; the names of 2 of those voters he finds upon the poll list at Nos. 407 and 409. Reeves further states that he saw over 100 of those to whom he gave tickets go directly from him to the window where the votes were received and hand them in to the officer holding the election. He could not swear that they actually deposited the identical tickets received from him, but he saw no change of ticket or change of purpose on the part, of the voter after procuring from himself the Republican ticket. He recognizes on the poll list the names of about 100 of such Republican voters. Now, gentlemen of the jury, Reeves and McGowan are in no way impeached, nor are their statements in any wise contradicted. They stand before you as in every way credible witnesses, and their testimony is entitled to full faith and credit. If the case for the prosecution stopped with Reeves and McGowan, it would present a case of circumstantial evidence as to the vote actually cast having exceeded that which was counted and returned by the election officers and judges. When circumstantial evidence is relied on to convict, as counsel for defense has suggested, it should be of such conclusive character as to exclude any remote hypothesis of innocence."

It is to be remembered that the last remark has reference to the proof required to convict in a criminal case.

Speaking in regard to individual voters who had testified to their votes, he said:

"If the prosecution had simply shown that each one of these witnesses was seen going to the poll with a Republican ticket in his hand which he had received from Reeves, with a declaration of his intention to vote said ticket, such facts and acts would have constituted circumstantial evidence that they voted said ticket."

It is to be remembered that the evidence in this case is more direct and more certain than was the evidence upon which Judge Jackson's charge was based, and that the witnesses and voters take much greater pains to be able to know the exact facts.

The minority attack the evidence, both as to its credibility—a question of fact—and as to its competency, a question of law:

Section 265, before opening the polls the inspectors and clerks must take an oath to perform their duties at such election according to law.

"The return must stand until such facts are proven as to clearly show that it is not true." (McCrary on Elections, 438 and authorities there cited.)

The object of this investigation should be to ascertain the truth. In all such investigations each party should be required to produce the highest and best evidence attainable. This rule of evidence will not be disputed.

In the debate [1] it was urged on behalf of the minority by Mr. Charles F. Crisp, of Georgia, who had presented the minority views, that the highest and best evidence was the testimony of the voters themselves, and that this had not been taken. The presumption in favor of the honesty of election officers and the testimony of the officers declaring the election honest were also urged.

1031. The case of McDuffie v. Turpin, continued.

In extraordinary cases, and where it appears that in no other way can the will of the voter be ascertained, resort to methods not technically legal may be justifiable.

An outside poll informally held and rejected by State canvassers may, under certain circumstances, be counted by the House.

The voters are not to be disfranchised by any neglect of the officers after the election if the correct vote can be ascertained.

The ballots not being counted at the close of the poll and the box being

[1] Record, p. 5552.

taken away in violation of law by election officers of doubtful honesty, the returns were rejected.

A question of a somewhat different nature was brought up in relation to Uniontown precinct in Perry County. The majority report says:

There were two boxes in this beat, and returns were made by the officials holding each election. At one the Republicans voted, at the other the Democrats. The return which was counted gave Turpin 210, McDuffie 2. The other return gave McDuffie 953. Dr. J. H. Houston's testimony (306) gives the history of the election where the Republicans voted, and shows that all the forms of law were complied with. The sheriff of the county (446) shows that the returns were presented to him and he refused to receive them. The box was retained and its contents counted in the presence of the commissioner taking the testimony.

There is a dispute about the time of opening the different polls, but in our view the question is not material in this particular case. That the two polls taken together constitute an honest statement of the result of the election, and show the exact state of the legal vote, we have no doubt. They also show that where there is an honest count the Republicans adhere to their party ticket.

The action of the election inspectors for this precinct at the election for the Fiftieth Congress justified the action of the Republicans. Indeed, it was apparently the only course left open to them to prevent their votes from being counted for the Democratic candidate. At that election the returned vote was:

Davidson (Democrat)	720
Turner (Independent)	203
McDuffie	65

The majority of the committee in that case found from the evidence such frauds as destroyed the return, and from the evidence gave McDuffie 400 and Davidson 8. The evidence indicated a Republican vote of over 800, but the majority of the committee found that only 400 were satisfactorily proved.

In extraordinary cases, and where it appears that in no other way can the actual will of the voter be ascertained, a resort to methods not technically in accordance with statutory direction may be justifiable, and upon proof that a full, fair, and honest election has been held by those only who are qualified voters, under these circumstances the returns from such an election, when duly proved, may be considered and counted.

None of those guards provided by statute to secure honest results should be neglected, but when statutory provisions designed to protect qualified voters in the exercise of their legal rights are made use of with deliberate purpose to suppress the will of the majority, such action will be regarded as fraudulent.

The minority say:

The election officers, two Democrats and one Republican, under oath returned that the vote cast was 201 for Turpin and 2 for McDuffie. The officers at this poll were regularly appointed by the proper officers, opened the polls at the proper time and place, and received all legal votes tendered. The officers properly certified the return; they were properly delivered to the returning board for county and counted.

Another box or poll was opened in a remote part of the town, not the usual place of holding elections, by persons unauthorized so to do, and in this box a number of tickets were deposited, one witness says 953, another 1,153, all for McDuffie. This box was not counted by the returning board, and should not have been; there is no pretense that the regular return was not correctly counted; the majority admit this second box or voting place was not authorized by any law or statute of the State, and the evidence shows that there was no mistake or misapprehension on the part of the voters. It was deliberately done, avowedly for want of confidence in the regularly appointed and acting officials of the election. Under no view of the law or facts can the tickets deposited in this box, even if we knew how many there were, be counted for either party.

The majority count this precinct: Turpin 210, McDuffie 955, thus including the illegal with the legal return. This can not be done, and the undersigned believe the return as made must stand.

A similar question arose as to Liberty Hill precinct, in Dallas County. The majority ruled:

No return from this precinct is found among the records of the county. The evidence shows that the Democratic inspectors failed to appear at the polling place, nor did any of the Democrats of the beat appear during the day. It was the intention to have no election here, but the colored inspector was on hand, as was the United States supervisor. An election board was organized according to law, the election held, and 197 votes cast for McDuffie. Returns were made out according to the vote; what became of the returns designed for the county board does not appear, but the supervisors made returns to the chief supervisor (p. 763). The voters are not to be disfranchised by any neglect of the officers after the election if the correct vote can be ascertained. In this case it is duly proved.

The minority report contends that poll was illegally and incompetently held. The law of Alabama provided:

SEC. 285. *Counting out votes.*—It is the duty of all inspectors of elections in the election precincts, immediately on the closing of the polls, to count out the ballots so polled.

As to the precinct of Pence, in Dallas County, the majority rule:

All the inspectors and clerks were Democrats. When the polls were closed one of the inspectors took the ballot box to his home, some 200 yards away, and when the supervisor would not go to that house to witness the count the box was brought back and handed to the colored Democratic inspector and carried away, and the count was not made until the following day. This violation of the law so invalidates the returns as to require proof of their correctness. Witness says that there are only three colored Democrats in the beat, one of whom was an inspector. He estimates the colored vote of the beat at 190, it being only an estimate.

Instead of calling the officers of the election, contestee calls one William Bell (p. 646), who testifies to the effect that Isaacs could not have seen the window when the tickets were taken in. He made a bad guess at population, and only estimates 30 or 40 white voters in the beat.

Remarks upon the character of the evidence and the reversal of returns in other beats will apply to this one as well. We count it according to notice of contest.

As a result of their conclusions, the majority of the committee found a majority of 4,481 for contestant in the district, and reported resolutions providing that he be seated.

The minority found that sitting Member was entitled to 9,104 majority.

The report was debated at length on June 3 and 4,[1] and on the latter day the question was taken on substituting the minority proposition, confirming the title of sitting Member, for the majority resolutions; and the motion was disagreed to—yeas 114, nays 130.

Then the resolutions of the majority were agreed to—yeas 130, nays 113.

Thereupon Mr. McDuffie appeared and took the oath.

1032. The Virginia election case of Langston v. Venable, in the Fifty-first Congress.

A succession of unexplained irregularities on the part of intelligent election officers destroys the presumption in favor of the returns.

The House counted returns rejected by State canvassers for mere informalities.

The election officers being irregularly chosen and of suspicious conduct, an excess of ballots over the poll list was held to justify rejection of the box.

[1] Record, pp. 5542, 5598—5601; Journal, pp. 699, 700.

Returns not being signed by the election officers and not being sustained by evidence, they were rejected.

On June 16, 1890,[1] Mr. Nils P. Haugen, of Wisconsin, submitted the report of the majority of the Committee on Elections in the Virginia case of Langston *v.* Venable. The report says:

The official returns from the Fourth Congressional district of Virginia of the election of Representative in Congress, on the 6th of November, 1888, give E. C. Venable 13,298, John M. Langston 12,657, and R. W. Arnold 3,207 votes, a plurality of 641 votes for Venable over Langston.

The contestant, Mr. Langston, claims that this is not the true vote of the district, but is the result of fraud and corruption on the part of the election officers in certain counties and at certain precincts specified in his notice of contest, and that had the vote been honestly received and honestly returned in accordance with the laws of Virginia, a clear plurality over Mr. Venable would have appeared for him Langston.

The committee has selected from the voluminous record (which contains some 1,200 pages of closely printed matter, much of it irrelevant and tedious cross-examination) a few precincts which appear to the committee to sustain the charges of the contestant and completely overcome the plurality for contestee on the face of the returns.

Mere irregularities in the conduct of the election, where it does not appear that the legally expressed will of the voter has been suppressed or changed, is insufficient to impeach officially declared votes and have been disregarded. But a succession of unexplained irregularities and disregard of law on the part of intelligent officials removes from the ballot box and the official returns that sacred character with which the law clothes them, and makes less conclusive evidence sufficient to change the burden upon the party who maintains the legality of the official count.

Paine on Elections, section 596, says:

"While it is well settled that mere neglect to perform directory requirements of law, or performance in a mistaken manner where there is no bad faith and no harm has accrued, will not justify the rejection of an entire poll, it is equally well settled that when the proceedings are so tarnished by fraudulent, negligent, or improper conduct on the part of the officers that the result of the election is rendered unreliable the entire returns will be rejected and the parties left to make such proof as they may of the votes legally cast for them."

The laws of Virginia recognize the weaknesses of human nature and the necessity of having friends of the candidates representing different views upon the election boards to guard against the temptation to which a board whose members all affiliate with one political party might be subject.

After quoting the law of Virginia as to elections; the report goes on:

There are numerous instances in the record of unwarranted changes in judges of election, made without reason or excuse only a few days before the election. These are suspicious circumstances, but standing alone and not supported by evidence of fraud at the polls, affecting the result of the election, they have been disregarded, and the certified returns permitted to stand as made. In arriving at results, specific acts at certain designated precincts are alone considered, without unnecessarily dwelling on the general political and race features of the district.

As the case was examined the decision turned on the disposition of a few precincts.

(1) In an election district known as "Porch and Ross" the following ruling is made by the majority:

At this precinct 69 votes were cast for Venable and 141 for Langston, a plurality of 72 for Langston. This vote was regularly returned to the county commissioners, but not counted for the alleged reason that the same returns showed certain votes cast for candidates for President and Vice-President instead of for electors of President and Vice-President. For this mistake of the judges not only the electoral vote of this precinct was thrown out, but the vote for every other candidate upon the ticket was rejected by the county commissioners. This fraud now stands confessed.

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[1] First session Fifty-first Congress, House Report No. 2462; Rowell, p. 437.

The minority say:

We find that these returns were rejected because they were not made in accordance with the directory provisions of the election statute of Virginia; and in the absence of any suspicions of fraud, or evidence tending to impeach their correctness, we think they should be counted.

(2) In Lewiston precinct the report discloses:

The regularly appointed judges at this precinct, appointed January 27, 1888, were W. P. Austin, B. H. May, and T. C. Fowlkes. Austin and May were present at the opening of the polls, but did not serve as judges. Mr. May acted as one of the clerks. The acting judges were E. G. Bayne, T. F. Robertson, and E. C. Goodwin. All the judges and clerks and the United States supervisor present were political opponents of contestant. With the exception of Mr. Austin, who testifies that on account of illness it was impossible for him to serve, no explanation is given for this sudden change of judges on the very morning of election; but that it was in pursuance of prearranged plans is apparent from the presence of Mr. Robertson at sunrise on the morning of election to serve as judge, he living some 8 or 9 miles distant from the polls.

The judges excluded the clerks of election and everyone else when the ballots were counted, and when the count was over there was found an excess of ballots over the names on the poll list. The report says:

The excess of ballots appears by the return of the judges to have been 26. Mr. Smith also testifies to the fact that the polls were held in an unusual place. The customary place for holding the election at this precinct had been the court room of the court-house. At this particular election it was found advisable to occupy a small jury room and exclude all witnesses, not excepting the clerks of election, which would have been impracticable in the large and commodious court room.

Only one judge was sworn as to their acts, and he testified that the election was fair and honest "so far as I saw." He also testified that he was inexperienced in election matters. The report says:

The clerks were not called as witnesses.

The only United States supervisor serving, W. J. Bragg, left immediately after the closing of the polls, not to return, and was consequently ignorant of any of the illegal acts of the judges charged. The committee is of the opinion that the excess of 26 ballots in a total vote of about 200 could not have occurred without the connivance of the judges of election, and is such evidence of fraud as must necessarily exclude this box. Contestee does not in his briefs even mention the excess of ballots. The returns awarded Venable 119, Langston 48, and Arnold 46 votes. The returns are impeached and rejected. No competent evidence was offered as to the true vote cast.

The law as to appointment of judges provided:

Should any judge of election fail to attend at any place of voting for one hour after the time prescribed by law for opening the polls at such election, it shall be lawful for the judge or judges in attendance to select from among the bystanders one or more persons possessing the qualifications of judges of election, who shall act as judge or judges of such election and who shall have all the powers and authority of judges appointed by said electoral board.

The minority views, presented by Mr. Charles T. O'Ferrall, of Virginia, agreed that the judges were not appointed according to the statute, but held that the statute was not mandatory, and that the judges were at least de facto officers, and that the voters should not be made to suffer for the irregularity. The other points dwelt on by the majority did not appear to the minority to suggest fraud, and they concluded:

These excessive ballots could not affect the result. How they got into the box no one, so far as the record shows, can tell. Suppose they were put there by one of the judges. Should that disfranchise more than 200 voters?

There is no evidence that the Democratic vote at this precinct was unusually large or the Republican vote unusually small. In the draw Venable suffered more than Langston or Arnold, they losing, respectively, 13, 8, and 4 votes. Langston's supporter and witness (J. W. Smith) testified that he believed Langston received 66 votes (Record, 814, question 45); the return gave him 48 votes, or 18 less than his friend and worker believed he received.

Would it not be more in consonance with justice to give Langston 18 votes more and deduct them proportionately from Venable and Arnold, or even take all from Venable, than reject the entire returns? Would not that course be more equitable than depriving Venable of the entire advantage he had at this precinct? Could Langston complain?

While adhering firmly to our position that the vote at this precinct should be counted as returned, yet if it is not to stand we insist that the contestant should not have more than his worker and witness claims for him, or Venable made to lose everything.

(3) The majority thus dispose of Mannboro returns:

The electoral commissioners of Amelia County reported this precinct as having given votes for Venable and 111 for Langston. The regularity of this return was challenged by contestant in his notice of contest. The only thing in the record bearing upon this question is found on page 173, giving the following unsigned statement:

FOR CONGRESS.

E. C. Venable rec'd (122) one hundred and twenty-two votes.

John Mercer Langston rec'd (111) one hundred and eleven votes.

R. W. Arnold rec'd (73) seventy-three votes.

After the names, etc., are all set down, and at the foot of the list, a certificate in the following form is required to be given:

We hereby certify that———had———votes for———; and———had———votes for———that had———votes for———, &c.

_____ _____ _____ _____

_____ _____ _____ _____

Clerks. Judges.

If this is the act of the officers of election, it is difficult to see why the contestee did not introduce some evidence to show that fact. As it is, the plurality of 11 returned for contestee must be deducted from his former vote.

The minority say:

It is true the returns from this precinct were not signed by the officers of election, and if the question had been raised in the notice of contest and no evidence taken to show their correctness, we would agree with the majority that they should be rejected. But the notice of contest will be examined in vain for any charge or reference to this precinct.

But in the debate [1] it was pointed out that the contestant did in fact raise this question in his notice of contest.

1033. The case of Langston v. Venable, continued.

Friends of contestant having been excluded from the count and contestee's agents having prevented the best testimony, the House excluded the return on secondary evidence.

Instance wherein returns were impeached on evidence of a person who saw and listed the ballot of each voter as he deposited it.

An election board being unfairly constituted, the returns were successfully impeached by the testimony of individual voters as to their ballots and qualifications.

[1] Record, p. 10155.

In order to justify counting votes of voters standing in line to vote, but not voting, each voter should be called as a witness.

The fact that a decisive number of voters stand in line to vote and are prevented justifies a declaration that the seat is vacant.

Where a poll has been rejected and proof aliunde is resorted to, only the vote proven should be allowed.

(4) In the city of Petersburg fraud was expected by contestant, and he instructed his followers how to meet it. The report says:

At the Republican Langston clubs in the city of Petersburg it was agreed that every supporter of Langston should vote an open ticket; that he should show his ticket to some reliable friend of Langston selected for the purpose of registering the names of the Langston voters and witnessing the deposit of their ballots in the box. This plan was very generally followed by the enthusiastic supporters of contestant, and the results promptly reported to him after election.

And as to the Third Ward:

The returns from this ward give Venable 518, Langston 174, and Arnold 105 votes.

M. N. Lewis, the witness referred to above, testifies that he was at the polls all day, from the opening of the same until long after they closed, and kept tally of the Republicans voting for Langston an Harrison, in pursuance of the instructions of his party.

The judges and clerks of election were all Democrats and bitterly opposed to contestant. Only one United States supervisor served, and he a Democrat.

The report quotes the testimony of Lewis, who gave an account of how he took his evidence of the vote for contestant. The following quotations of testimony, with comments of the report, disclose its nature:

"72. Q. Please examine the ticket I hand you and state whether or not the ballot you saw in the hands of each voter of the Third Ward on election day, November 6, 1888, and which was delivered to and received by the judge of election, was identically like the ballot I hand you, and did you or did you not enter upon your said books the name of each colored voter who cast a ballot identically like the one here presented to you?—A. This is the identical ballot voted by each voter whose name I put upon my book."

The ballot here filed is a straight Republican ballot, with Langston for Congress.

"73. Q. You have stated that you stood at the polls of the Third Ward all the day of election from the opening to the closing of the same, excepting about thirty minutes, and that you were immediately at the polling place of the Third Ward in this city; that then and there you took down in the four books which you have here identified and handed to the notary public the name of every colored voter, showing you a ticket identical with the one you have just examined, and which is filed with these depositions, marked "Exhibit M," after said ticket had been delivered to and received by the judge of election at said ward on election day, November 6, 18M. Now please give the name of each voter whom you so entered in said books as you have stated."

The witness here gave the names of 286 voters recorded by him as all (except two indicated) having voted for contestant, and filed the four books containing the names with the notary taking the evidence, and they are in the possession of the committee. The names appear in the record. The word "Langston" is written after each name in these books, except the names numbered 222 and 227, which are marked "Dem."

"74. Q. You have stated that you occupied the position immediately at the window of the polling place in the Third Ward, on the side at which the colored people voted, all the day of election except about thirty minutes. Please state how many names were entered upon the books you kept during your absence, if any were so entered.—A. Sixteen."

These 16 names were fully identified by William J. Smith, who entered them in the absence of Mr. Lewis.

"78. Q. You have stated that on election day W. J. Smith, during your temporary absence from the polls, entered the names of 16 colored voters upon the four books which you kept. Please state, if you

remember, how many names you recorded upon the said books on that day at the time and under the circumstances already testified to.—A. I recorded 201 names. The others, with the exception of 16 names, were recorded in my presence and by my instructions by William J. Smith and S. B. McE. Jones.

"79. Q. Have you, since the 6th day of November, 1888, compared the four books as to which you have been testifying with the poll books of the Third Ward on deposit in the clerk's office of this city, or with either one of said poll books, or with a certified copy thereof?—A. I have compared the four books with one of the poll books.

"80. Q. State what object you had in making such comparisons, and state the result of it.—A. I compared the books to ascertain if they agreed. I found that a great many of the names were misspelled, and some few whose names I took and whose ballot I saw deposited, their names do not appear on the poll book which I examined."

The majority call attention to the fact that not one of the 286 voters to whom Mr. Lewis referred was called by sitting Member to disprove the testimony, although in another voting precinct such a course had been rewarded with success.

The majority report concludes:

With the friends of contestant studiously excluded from witnessing the count, and with 284 votes proved to have been cast for him, while the returns gave him only 174, this box stands impeached and must be rejected.

In the case of Washburn *v.* Voorhees (3 Congressional Election Cases, 62) it was held that "where in one precinct but 143 votes were returned, while 173 were cast for contestant (a difference of only 30 votes), and in another 20 less were returned than were proved, and the officers were shown to be violent partisans of the party in whose favor the frauds were, the whole vote of the precinct was rejected."

In the case of Bisbee *v.* Finley (6 Congressional Election Cases, 177), where 259 votes were cast at one precinct for a candidate and only 69 were returned for him, it was said in the report: "That any considerable number of votes proven for one candidate in excess of the number returned for him has always been regarded as evidence of fraud and a legitimate method of impeaching the returns. We think it is sufficient to exclude the return from the count without further evidence."

The majority give to contestant the 284 votes proven aliunde and to sitting Member none, as he proved none.

The minority say:

The case of the contestant stands upon the testimony of Lewis alone (for if it falls Smith's testimony must fall), which is overwhelmingly rebutted and contradicted by no less than four witnesses.

We have, then, the sworn returns of three judges and two clerks and one Federal supervisor and the testimony of four witnesses on the one hand and the uncorroborated and contradicted testimony of one witness (Lewis) on the other.

They endeavor to impeach the character of Lewis also.

The majority comment on the fact that no one of the election officers was called to testify as to the correctness of his work, and that only the United States supervisor gave testimony, which the majority consider inconclusive.

The majority admitted, especially in debate,[1] that ordinarily the testimony of two witnesses would not be sufficient to overturn the presumption that the officers had done their duty; but the sitting Member had suppressed further testimony. Moreover, the affidavits of the voters had been taken, but as they were taken after the time for taking testimony had expired and were somewhat irregular, they had not been brought into the record, although they were in the committee room. The majority thus describes the suppression of testimony:

On Saturday, the 9th day of February, contestant began taking depositions as to Third Ward of the city of Petersburg, in pursuance of notice which contained a list of 292 names of Republicans, every one

[1] Record p. 10157.

of whom it is claimed would have testified that he was a qualified voter, and voted for Langston in Third Ward. (Record, pp. 514–516.) The first witness sworn, M. N. Lewis, was asked by the contestee's counsel 809 questions on cross-examination, and was kept on the witness stand from February 9 (p. 523) until February 25 (p. 588), both inclusive, a period of seventeen days. The second witness, W. J. Smith, was sworn Monday, February 25 (p. 588), was asked 148 cross-questions, and was kept on the witness stand until Saturday, the 2d day of March, 11 o'clock at night, a period of six days (p. 599), when the time limited by law for the contestant to take testimony expired, and the notary closed the depositions. (Record, pp. 588–599.) By such wanton waste of time contestant was robbed of the opportunity of examining a large number of witnesses who he claims voted for him. And contestee is estopped from claiming that the evidence of these two witnesses is insufficient, having by his own acts prevented the taking of further evidence in this ward.

The minority say:

The majority of the committee decide a great and important question upon the assumption that the contestant might have proved his case if he had not been interfered with by the contestee; they decide upon what might have been in the record, not upon what is in it. With all due deference we submit that this is hardly in the line of legal procedure and even-handed justice.

(5) As to the Sixth Ward of Petersburg the report says:

The returns in this ward give Venable 352, Arnold 160, and Langston 139 votes, a plurality in favor of Venable over Langston of 213. In this ward the negroes have a large majority and the evidence shows that they were active and united supporters of contestant. The contestant placed upon the stand 283 witnesses, each of whom swears that he is a qualified and duly registered voter of the Sixth Ward, and that he voted for contestant on November 6, 1888. Each one was cross-examined by counsel for contestee. This dearly shows that the poll must be rejected and the parties left to other evidence than the falsified returns to establish their vote. The judges appointed in May for this ward were all political opponents of contestant, and all served.

Not a vote was challenged on either side during the day of election. Although the colored voters at this precinct stood to the white voters in the ratio of nearly three to one, Mr. Akers and his associates thought it fair to put up in front of the polls a barrier to separate the negroes from the whites in two lines, one upon the right hand and the other on the left hand, and then to receive the ballots from each side alternately, a white man's ballot and then a negro's ballot, and so on throughout the day, unless some colored man who wished to vote the white men's ticket could get permission to fall in in the line of whites. The plain consequence of enforcing such a rule is evidenced by the fact that out of 265 registered white voters all voted except 14, and out of 709 registered colored voters there were 308 (nearly half) who did not vote. (Aker's deposition, Record, 831 et seq.) Consequently when the polls were closed at sunset there stood in line at the door of the polling place 124 Republican voters with Langston ballots open in their hands anxious to vote and denied their right of suffrage.

After quoting testimony the majority continue:

A cross-examination commencing on February 14 and continuing until February 22, and consuming all the time allowed by law to contestant to take evidence in this ward, and containing 323 questions, confirms the above, and shows that 377 voters were seen by witness to deposit ballots for contestant. Their names were filled with the notary and are found on pages 280 and 281 of the record. This evidence is further corroborated by that of Richard Townes (p. 282) and J. York Harris, member of the common council and chairman of the ward (p. 291).

The only officer of election called to sustain the returns is Mr. Akers, one of the judges. He excuses the delay charged upon the officers by claiming difficulty in finding names of colored men. He says the man least familiar with the work was given charge of colored registration book; why this particular man he does not say. He is unable to find on the book more than two colored men in the ward of the same name, but swears that because of the similarity of their names it is more difficult to find colored than white voters.

It is attempted by the testimony of the witness Akers to contradict and break down the facts established by seven witnesses called by contestant, who were present at the polls and whom he disputes in detail, and at least 213 individual voters in excess of those returned for Langston, each of whom swears he voted for Langston.

Coming to this poll with 141 plurality, contestant's count must be increased by the plurality returned against him, which is equivalent to throwing out the poll. This adds to his total:

Vote brought forward	141
Plurality in Sixth Ward returned for Venable	213
Add to this vote proved for Langston	377
Makes a total plurality for Langston of	731

Besides the votes cast, 124 colored men were by the delay of the officers prevented from casting their ballots.

The majority also say:

It appears by the record (p. 191) that the contestant gave notice that on the 31st day of January, 1889, he would commence to take the depositions of 149 witnesses in addition to the 283 above referred to as having been called and having sworn that they voted for him, whose name were given, mostly negroes, who were expected to testify that they were qualified voters, and that they cast their ballots for John M. Langston. The first of these witnesses, called and sworn January 31 at 12 o'clock m., was F. N. Robinson (p. 192). His direct examination was completed by eight questions. The cross examination began the same day, January 31 (p. 197), and was prolonged until late in the day of the 5th of February (p. 223)—six days—by the asking of 316 questions, nine-tenths of which were useless, irrelevant, and frivolous, and intended without disguise or motive only to consume time.

And then occurred an outrage without a parallel in the history of election cases. Just as the witness answered the three hundred and sixteenth cross-question (p. 223) he was arrested and taken into custody by a deputy United States marshal by virtue of a warrant or capias falsely, maliciously, and without probable cause sued out against him by two persons, attorneys-at-law, who had, as counsel for the contestee, appeared and participated in said cross-examination, upon their complaint on oath that the witness refused to testify in this case.

An examination of the record shows the absolute falsity of this charge. The witness maintained under the most provoking and insulting cross-examination remarkable self-possession and dignified courtesy, and the only explanation of this outrageous conduct on the part of contestee's counsel must be that they hoped by their perjury to intimidate other witnesses from taking the stand to expose the frauds by which their client obtained the certificate of election.

Having themselves stopped the cross-examination by the arrest of the witness they impudently objected to the consideration of his testimony for the reason that they had not had the opportunity to cross-examine him, and for the further reason that his deposition was not signed.

The majority did not, however, count the votes which were not deposited. After quoting evidence, they say:

It appears from the above that by the intended delay 124 voters were prevented from casting their ballots, and that in all human probability 121 of them would have voted for contestant and 3 for Mr. Arnold. The committee has not counted these votes for contestant, distinguishing between this case and the case of Waddill *v.* Wise, decided at this session of Congress, where a somewhat similar state of affairs was presented in certain wards of the city of Richmond. But in Waddill *v.* Wise each voter counted for contestant by the committee had been called as a witness by contestant, and had sworn to his right to vote, and that he would have voted for contestant had he been permitted to cast his ballot. This supplemental proof was not furnished in this case.

The committee is, however, of the opinion that if these 124 votes equaled or exceeded the plurality returned for the contestee, so that the legality of the election depended upon them, it would invalidate his election with no further proof and make a new election necessary, and to that extent the committee agrees with the reasoning of the report of the minority in Waddill *v.* Wise.

Taking this view of the case, the 124 voters prevented from casting their ballots must be considered for the purpose of unseating the contestee only, but can not be considered in favor of contestant's right to his seat. The contestee's lack of a plurality would then be the plurality found for contestant, viz, 731 plus 124 equals 855.

The minority dissent entirely from the proposition of the majority as to the rejection of the returns, holding the evidence faulty in character and insufficient in law.

(6) The majority discuss the question of what votes to count in proceedings aliunde when a poll has been rejected. Their approved plan, which they state first, is to allow only the votes proven. A second plan, by which sitting Member would be allowed the votes not accounted for, did not meet approval:

> The committee adheres to the first of the above statements as being the legal method of ascertaining the true vote, and uses the latter illustrations simply for the purpose of demonstrating that in any view of the case the contestant is elected and entitled to his seat. It is evident that giving to contestee the vote not accounted for would be a direct encouragement to election frauds, as it would give him the benefit of every fraudulent vote which his friends had made it impossible for the opposition to expose, even after the proof clearly established fraud to such an extent as to destroy absolutely the integrity of the official returns. In no case has such a rule been adopted.

The majority, in accordance with their reasoning, found a plurality of 731 for contestant, and recommended these resolutions:

> *Resolved,* That E. C. Venable was not elected a Representative of the Fifty-first Congress from the Fourth Congressional district of Virginia, and is not entitled to a seat therein.
>
> *Resolved,* That John M. Langston was elected a Representative of Congress from the Fourth Congressional district of Virginia, and is entitled to a seat therein.

The minority considered that sitting Member had at least 183 votes more than contestant, and recommended:

> *Resolved,* That John M. Langston was not elected a Representative in the Fifty-first Congress from the Fourth Congressional district of Virginia, and is not entitled to a seat therein.
>
> *Resolved,* That Edward C. Venable was duly elected a Representative in the Fifty-first Congress from the Fourth Congressional district of Virginia, and is entitled to retain the seat he holds.

The report was called up September 9, but dilatory proceedings on the part of the majority delayed the decision until September 23. It was debated on September 17,[1] On September 19[2] the first resolution of the minority was rejected, ayes 9, noes 159, and then the second resolution was also rejected, ayes 4, noes 155.

On September 23[3] the first resolution reported by the majority was agreed to, yeas 151, nays 1, the Speaker noting the presence of a quorum.

The second resolution was then agreed to without division, the yeas and nays being refused.

So the House seated the contestant.

1034. The South Carolina election case of Miller v. Elliott in the Fifty-first Congress.

Instance wherein the general outlines and population of a district were considered as bearing on an election contest.

A shifting of numerous ballot boxes, done to deceive the voter, was held to be unlawful, although not forbidden by law.

Ballots placed by the voter in the wrong box through deceptive acts of election officers were counted by the House.

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[1] Record, pp. 10154–10169.

[2] Record, p. 10243.

[3] Record, pp. 10338, 10339; Journal, pp. 1051, 1072.

The returns being rejected, the House counted for sitting Member, apparently somewhat as a matter of grace, the votes conceded to him by contestant's brief.

Returns being rejected and the boxes impeached, the vote was proven aliunde by calling the voters whose names appeared on the poll list.

Instance wherein the minority party in the course of obstruction left the Hall in a body.

On June 20, 1890,[1] Mr. J. H. Rowell, of Illinois, from the Committee on Elections, submitted the report of the majority of that committee in the South Carolina case of Miller *v.* Elliott.

Sitting Member had been returned by an official majority of 1,355 over contestant. Contestant alleged fraud, irregularities, etc., as reasons for overturning this majority.

The majority report considers first the general outline of the district, and its population, which was largely colored, and therefore supposed to be of contestant's political party.

Then the registration law of the State is examined and pronounced unconstitutional by the report, which concludes, however:

> By means detailed by these witnesses, thousands of Republicans of the Seventh district were deprived of such certificates of registration as the managers would recognize. Hundreds of them went to the polls and presented their old certificates, only to find their names stricken from the books. Many of them were voters who had not changed their residence, even within the precinct of their residence. Some who, after much trouble, had secured transfer certificates, went to the polls and found that the description copied into the precinct registry did not agree with the description in their certificates, and so were unable to vote.
>
> We do not make any account of the number of these voters who failed to get certificates and who tendered their votes, because in this case it would not affect the result further than to increase contestant's majority; but we hold that all such persons, otherwise qualified, were legal voters.

The majority thus preface their examination of the first question on which they base a ruling as to votes:

> The election machinery of the State, while not so bad as its registration laws, is still of a character which can not well be overlooked. All the machinery of elections is in the hands of the Democratic party. The governor appoints commissioners of election for each county, without provision for minority representation, there being two sets of these commissioners, one for State and the other for Federal elections. These in turn appoint precinct managers. To these commissioners the returns of the precinct managers are returned, to be by them canvassed and certified to a State returning board, composed of certain State officers. Both the county and State returning boards have quasi-judicial powers, instead of being limited to the canvass and certification of the vote as cast.
>
> From seven to nine ballot boxes are required to hold an election; one for governor and lieutenant governor, one for other State officers, one for circuit solicitor, one for state senator, one for member of the State house of representatives, one for county officers, one for Representative in Congress, one for Presidential elector, and a ninth box if any special question is to be voted on at that election.
>
> These boxes are to be labeled according to the officers, the two Federal boxes to be presided over by one set of managers, and the six or seven State boxes by another set. Polls for Federal and State elections may be widely separated. All the tickets are to be of a specified description, and none others can be counted. The voter is required to deposit his own ticket, and find out for himself the right box, the managers on demand only being required to read the names on the boxes, but there is no require-

[1] First session Fifty-first Congress, House Report No. 2502; Rowell, p. 507.

ment that they shall designate the boxes while pronouncing the names, or read the names in any particular order. No other person is permitted to speak to the voter while in the polling place. No tickets found in the wrong box are to be counted.

This, in fact, makes an educational test, in direct violation of the constitution of the State. Its practical operation will be seen when we come to consider the details of this case.

In the Seventh district, except in one county, all the supervisors of registration, all the commissioners of election, and all the precinct managers, were Democrats, the Republicans being denied representation on any of the boards. The only way to have watchfulness at the election, by persons not politically hostile to contestant, was to secure the appointment of United States supervisors, one of each party, who, under the present law, are required to serve without compensation.

The majority found from the testimony that the boxes were so shifted and ballots were so mixed thereby that contestant lost a thousand votes, because these votes, being found in the wrong boxes, were destroyed by the election managers. The report says:

It was gravely argued before the committee by an eminent lawyer that there was nothing wrong in this shifting of boxes, and that contestee was entitled to all the benefits accruing to him by reason of such action. An act may not expressly be forbidden by law, but if it is done with an unlawful purpose, and succeeds in accomplishing that purpose, the act is thereby made unlawful.

At this election, in a large number of precincts, this shifting of boxes was resorted to. The facts and the motive are proven beyond a reasonable doubt.

And after citing from the testimony descriptive of the way the voters were deceived the report continues:

This resulted in a net loss to contestant of over a thousand votes. This account excludes from consideration all votes in those precincts where the voters deposited the same kind of a ballot in each box, so as to make sure that one of them would be counted, and only takes into consideration those ballots which are shown by the number voting, the number of ballots in the box, or by corresponding electoral ballots in the wrong box, to have been placed in the wrong box by mistake and against the intention of the voter.

In every instance but one the shifting of the boxes is shown. The purpose was unlawful, the result was the failure to have counted and the destruction of over 1,000 ballots cast for contestant by duly qualified voters.

The managers of election took no account of these ballots, immediately destroyed them under a claim that the law so directed (a claim not sustained by the statute), and as witnesses almost universally show a remarkable forgetfulness as to their number. The United States supervisors, present at all the polls when this destruction occurred, kept an account of the number, and by that means we are able to ascertain with reasonable certainty the whole number lost.

An enumeration of the precincts showed 1,049 votes lost to contestant in excess of what were lost to sitting Member by reason of voters mistaking the boxes. The report continues:

Making large allowance for any mistake in numbers, we add 1,000 to the returned vote for Miller, making his vote 8,003 after this addition and leaving Elliott's majority 355.

It will hardly be claimed by anyone that this unlawful attempt by the partisan friends of contestee, acting as managers of election, to disfranchise a thousand voters ought to be permitted to succeed in a contest. Both law and justice forbid.

"If the intention of the elector can be ascertained, it is not to be defeated merely because the inspector, through mistake or fraud, deposits his ballot in the wrong box; nor because the elector himself, by mistake without fraud, places it in the wrong box." (People *v.* Bates, 11 Mich., 368.)

Here the elector placed his ballot in the wrong box by mistake, the result of the unlawful and fraudulent acts of the managers of the election. It is no answer to say that the counting of such ballots is prohibited by statute (even admitting that the statute is a reasonable regulation, which, under the

peculiar circumstances in South Carolina, we do not), when the mistaken deposit has resulted from the active deception of the managers. It is a crime at common law to enter into a conspiracy to commit any offense against the purity and fairness of a public election. (Paine on Elections, sec. 496, and authorities cited.)

The minority hold the law to be constitutional, and that the ballots were properly rejected.

The majority report next proceeds to the examination of eight precincts where proof was offered to show that there had been frauds in favor of sitting Member. As a result of this investigation the majority find for contestant a majority of 757 in the entire district, or 1,448 under strict rule as to proof aliunde.

In dealing with these frauds, which were generally in the nature of ballot-box stuffing, the majority rejected the returns and proceeded to proof aliunde. As an illustration of their method the following extracts from their report are cited:

As to Jonesboro precinct:

The validity of the count and return having been destroyed each party is left to prove his own vote, so far as he is able. Contestant proves by calling the voters (pp. 97–124) that 67 of them, whose names all appear on the poll list, voted for him. Under a strict rule of law the whole return would be rejected and 67 votes allowed to contestant on the proof. In his original brief filed with the committee contestant conceded to contestee 46 votes, the remainder of the 113 not proven to have voted for contestant, and for that reason, and because it is now only a question of the amount of contestant's majority, we state the vote as in this brief:

Elliott's vote by last statement	8,045
Deduct difference between vote as returned and as stated in brief	22
And we have for Elliott	8,023
Add 22 to Miller (8,183+22)	8,205
Miller's majority	182

Counting the vote according to the strict rule of law, under the evidence, would make Miller's majority 228.

Also as to Eastover precinct, where no returns were made and of which the vote was not included in the official returns:

One hundred and ninety-seven colored voters testify to having voted for Miller (pp. 478–570). Forty-two affidavits of other voters were filed with the committee to the same effect. These voters' names are all on the poll list kept by the supervisor, showing 385 votes cast, 298 by colored men, 11 of which were Democratic. Aside from the testimony of the supervisor, which shows painstaking care, there is positive testimony taken in due process of law of 197 voters who cast their ballots for Miller. As we have said, no return for this precinct ever reached the county board.

J. C. Eason (332), the Democratic supervisor, confirms Johnson as to the managers shifting the boxes, as to the whole number of votes cast, and as to Johnson's keeping a poll list, and as to his being present all the time and in a position to see each vote when deposited. He also says that the colored voters in this district largely preponderate, at least two to one, and that when the colored men vote they mostly vote the Republican ticket. He did not keep a tally when the vote was counted, did not keep a poll list, did not watch the tally nor notice the names on the tickets when they were being counted; in other words, did nothing that was required of him as a supervisor, but after the managers had made up their return he took the tally and made his return from that, without any knowledge whether it was right or wrong. According to his report the vote was:

Elliott	262
Miller	87
Simmons	36
Total	385

The majority report concludes:

Other allegations are made and proof taken in regard to them, such as failing to hold election at large Republican precincts, etc., but we do not deem it necessary to make further comment on the record. The frauds, false returns, and ballot-box stuffing which we have detailed are so conclusively proven, and the true vote so well established in the various precincts noticed, that there is left no room to doubt that Thomas E. Miller was legally elected, and was, through the crimes of election managers in the seventh district of South Carolina, deprived of a certificate of election. We therefore recommend the adoption of the following resolutions:

Resolved, That William Elliott was not elected a Representative in the Fifty-first Congress from the Seventh Congressional district of South Carolina and is not entitled to retain a seat therein.

Resolved, That Thomas E. Miller was duly elected a Representative in the Fifty-first Congress from the Seventh Congressional district of South Carolina and is entitled to his seat as such Representative.

The minority views, presented by Mr. R. P. C. Wilson, of Missouri, discuss the evidence fully, and conclude:

We have considered all the cases in which the majority has made any change in the vote as returned and have given our views thereon, together with the testimony. We do not agree with the majority in their conclusion, but conceding, for the purpose of the argument, that they are correct in all respects excepting as to the 1,000 votes alleged to be found in the wrong box and given contestant, still the contestee would have a majority of 243.

We would therefore offer the following substitute for the resolutions of the majority:

Resolved, That Thomas E. Miller was not elected a Representative from the seventh district of South Carolina to the Fifty-first Congress.

Resolved, That William Elliott was duly elected and is entitled to retain his seat.

On September 23[1] the House, without debate, agreed to the resolutions proposed by the majority by a vote of ayes 157, noes 1.[2]

So contestant was seated.

1035. The Mississippi election case of Chalmers v. Morgan, in the Fifty-first Congress.

Although glaring frauds and intimidation have existed, yet conceded fairness in a portion of the district and the legal presumption in favor of other portions have saved the seat to contestee.

Where the examination so far as made showed fraud, but not sufficient to change the result, the House declined to presume fraud also as to other boxes which might change the result.

After an election case is reported on by the committee, the House is reluctant to recommit for further examination.

On June 20, 1890,[3] Mr. John Dalzell, of Pennsylvania, presented the report of the majority of the Committee on Elections in the Mississippi case of Chalmers *v.* Morgan.

Sitting Member had been returned by a plurality of 8,161 votes, which the report speaks of as "four times as great as his legal plurality." The report also says:

The Second Congressional district of Mississippi consists of nine counties, Benton, De Soto, Lafayette, Marshall, Panola, Tallahatchie, Tate, Tippah, and Union. No question is made as to the

[1] Record, p. 10339; Journal, p. 1072.

[2] Incident to obstructive tactics on the part of the minority they had left the hall and were not present to oppose these resolutions.

[3] First session Fifty-first Congress, House Report No. 2503; Rowell, p. 331.

honesty of the election in the two last named, and no reason has been shown why the honest voters thereof should be disfranchised.

With respect to the other seven counties, there is a number of boxes as to which no testimony was taken, but it may safely be affirmed that in not one of these counties, taken as a whole, was the election an honest one. Fraud in various forms, including intimidation of voters, corrupt manipulation of registration, stuffing and stealing of ballot boxes, and illegal voting, finds ample illustration in all of them.

If we may judge from the evidence, this state of things is to be accounted for by the existence in that district of a different standard of morals from that which is generally accepted as the correct one by communities recognized as moral.

The report quotes evidence which it summarizes as follows:

Not to indulge in further comment on this subject, it will be manifest to any fair-minded man who will read the testimony in this case, that measures were resorted to in many places in the Second Congressional district of Mississippi at the election in question, to terrorize the colored voters and to keep them from the polls, and the record abounds in proof that many of the colored men were prevented by fear from attempting to exercise their right of suffrage. Nor is evidence wanting that this is a favorite method of long standing of "shutting down upon "the Republican voters of this district, which up until 1876, and prior to the inauguration of the "shotgun policy," was a Republican district by a large majority.

The claim that the military company at Hernando was organized to promote the peace is, of course, too transparent to fool even the most credulous. The possibility that such company, openly proclaimed to be constituted of the adherents of one political party only, and styling themselves "unterrified" and "determined," could exist under authority of, and be armed by, the State of Mississippi is a disgrace to that State.

Your committee find that there were other methods pursued in the Second Congressional district of Mississippi "to shut down" upon the Republican voters, which were in contravention of law. Among these were—

The constitution of partisan election boards having no members other than Democrats.

The appointment in many cases of parties on such boards to represent the Republicans who, by reason of ignorance and illiteracy, were not "competent and suitable men."

The unlawful removal of ballot boxes from the polling places and from the view of the United States supervisors.

The illegal erasure from the registration list of duly qualified and registered voters, and the refusal to permit them to vote.

The stealing of ballot boxes.

After elaborating more fully the irregularities and frauds, the report concludes:

Sufficient has been shown to make certain that the election methods of the Second Congressional district of Mississippi include such as, if continued, must prove destructive of popular government. Their existence calls loudly for relief by law, of such a kind as shall secure to every citizen, without distinction of race or color, his constitutional right of suffrage.

Notwithstanding these frauds, your committee are of opinion that upon the case as presented to them on the record, the proof does not sustain the contestant's claim to an election, nor does it prove that the contestee was not elected.

Applying to the evidence the well-recognized rules of law heretofore recognized by your committee, they have in all cases, where satisfied that the integrity of the returns had been successfully impeached, set aside the returns and recounted the vote in accordance with the evidence.

Pursuing this method, your committee find that the contestant was not elected.

In two counties of the nine constituting this Congressional district, in which counties there are 23 polling places, the election is conceded to have been fair and honest. In the remaining seven counties there are 97 polling places. The validity of the election is assailed at 55 of these, but not successfully, in the opinion of your committee, at to exceed 22 or 23.

In Benton County, for example, consisting of 11 polling places, only two are assailed, to wit, Michigan City and Lamar. No evidence has been offered which affects the legal presumption of honesty

attaching to the 9 unassailed boxes. So, again, in Tallahatchie County there are 14 boxes, only two of which were assailed. This is sufficient to show that the evidence as to the assailed boxes can not affect those unassailed.

In the opinion of your committee, following the rules of law to which they have already given adherence, the conceded fairness of the election in Tippah and Union counties, and the legal presumption in favor of the unassailed boxes, must save to the sitting Member his seat, notwithstanding the fact that glaring and reprehensible frauds were committed in connection with his election.

Upon the case as presented, therefore, your committee feel themselves constrained to recommend the passage of the following resolutions:

Resolved, That James R. Chalmers was not elected a Representative in the Fifty-first Congress from the Second Congressional district of Mississippi, and is not entitled to a seat therein.

Resolved, That James B. Morgan was elected a Representative in the Fifty-first Congress from the Second Congressional district of Mississippi, and is entitled to retain his seat therein.

Mr. L. C. Houk, of Tennessee, submitted his views in opposition to the conclusions of the majority, saying:

This statement shows that at 23 boxes out of 97 the committee find fraud enough to reduce the plurality returned for the contestee at least three-fourths, or, to put it in figures, from 8,161 to 2,040. So that by an examination of one-fourth of the boxes three-fourths of the returned plurality is wiped out.

I have examined 38 boxes, where I think the validity of the election is successfully assailed and which wipe out the total returned majority for the contestee, and give a majority to the contestant.

After quoting from the conclusions of the majority, Mr. Houk further says:

This contains two startling conclusions, from which I am compelled to dissent.

First. I can never agree that there can be any "legal presumption in favor of the unassailed boxes" in the seven counties, where the committee say: "It may be safely affirmed that in not one of these counties, taken as a whole, was the election an honest one."

Second. I can never agree that two little counties, casting only one-fifth of the vote, shall control seven other counties casting four-fifths of the vote. There were cast at this election 19,795 votes for these two candidates, and of these 3,520 were cast in the two counties of Tippah and Union 16,275 were cast in the other seven counties.

In these seven western counties, where the contest is made, the contestee was returned a plurality of 6,465. Take from this three-fourths of the returned plurality, to wit, 6,121, which the majority report says were fraudulently returned, and it leaves to the contestee in these seven counties a plurality of only 344, where he was returned 6,465. This practically wipes out those seven counties and gives them no voice in the election.

* * * * * * *

The minority would be willing right here to submit this case to any court in the country with a full assurance of obtaining a judgment on the facts on which there is a substantial agreement. There is substantial agreement that the contestee was returned as elected by a plurality of 6,465 votes in the seven western counties, which, in a fair election, are largely Republican; that at 23 boxes in these counties 6,121 of this plurality was found to be fraudulent; that this reduces the total returned plurality to 2,040; that in these seven counties "there is a number of boxes as to which no testimony was taken, but it may be safely affirmed that in not one of these counties, taken as a whole, was the election an honest one;" that at these unexamined boxes the returned plurality for the contestee is 2,266; that, if they be rejected, it leaves a plurality for the contestee of 226; that there was a general terrorizing of Republican voters in this district; that counsel for contestant stopped taking testimony at Hernando to avoid bloodshed; that his counsel at Oxford, on account of the great excitement there, did not deem it prudent to take testimony at that place; that the taking of testimony at Holly Springs was prevented by the refusal of the Democratic mayor to proceed, after he had agreed to take the testimony; that the contestant exhausted his time and took a large amount of testimony, but was delayed by dilatory cross examinations by counsel for contestee. On this statement of facts, on which there is a substantial agreement, we confidently ask the judgment of the House in favor of the contestant.

The principle upon which the majority report gives verity to the unexamined boxes is that the precinct is the unit and each must stand or fall by itself. While this is true in Pennsylvania, it is not true in Mississippi, where the proof shows a complete election machine.

The State board of election appoints the commissioners of each county. The commissioners can and do disfranchise voters at their will by erasing their names from the poll books without notice. The commissioners appoint the inspectors; the inspectors appoint the clerks. The clerks are the tools of the inspectors, the inspectors of the commissioners, and the commissioners of the State board, and each does the bidding of his master.

In conclusion, after examining the case minutely, Mr. Houk concludes:

From this it will be seen that if the unexamined boxes be rejected and the rejected voters outside of Lafayette County be counted for contestant, it will give him 606 plurality upon the count as admitted to be made by the majority report. If they be added to the count, as made by this report, it gives to the contestant 2,427 plurality by the count leaving out Tallahatchie County, and 2,644 if Charleston box, in Tallahatchie County, be counted according to the rule, so frequently held by this committee, of rejecting the vote when fraud is proved, and counting only the vote as proved by the ticket distributors to have been issued and voted. We have given our count in detail, and we append a tabulated recapitulation for easy reference, and we challenge anyone to show that in making it we have departed at any box from the rules laid down in Featherstone *v.* Cate, Threet *v.* Clarke, or McDuffy *v.* Turpin. The committee acted on these rules in all these cases, and we see no reason why we should depart from them in this case.

When the majority of the committee found fraud enough at 23 boxes to reduce the returned plurality 6,122 votes, can it be possible that a further examination would not have shown further fraud at the unexamined boxes sufficient to give contestant even a greater majority than is here counted for him?

For this House to declare the contestee legally elected, after all the fraud shown in this report and the first sixteen pages of the majority report, with which we agree, will be to uphold and maintain a state of things disgraceful to our civilization and to encourage its continuance and repetition so that it will grow with their growth and strengthen with their strength until it becomes embedded in the politics of that section, never to be eradicated except by revolution.

Therefore, in consideration of the premises, the minority recommended the following resolutions:

Resolved, That James B. Morgan was not elected a Representative in the Fifty-first Congress from the second Congressional district of Mississippi, and is not entitled to a seat therein.

Resolved, That James R. Chalmers was elected a Representative in the Fifty-first Congress from the Second Congressional district of Mississippi, and is entitled to a seat therein.

The report was debated on August 18,[1] and after debate the question was first taken on a motion to recommit the case for further examination. This motion was disagreed to, yeas 31, nays 136.

Then the question recurred on the first minority resolution, which was disagreed to, ayes 11, noes 102, the yeas and nays being refused. The second minority resolution was then disagreed to, ayes 15, noes 115.

Then the resolutions proposed by the majority were agreed to without division.

1036. The West Virginia election case of McGinnis v. Alderson in the Fifty-first Congress.

Criticism of a governor who issued a certificate on a canvass omitting decisive county returns because of legal proceedings to secure a recount.

Opinion of the Elections Committee that prima facie right wrongfully conferred should not relieve returned Member of the burden of proof.

It is a dangerous step to disfranchise a precinct because elections officers have failed to take the required oath.

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[1] Record, pp. 8758–8767; Journal, pp. 965, 966.

On July 23, 1890,[1] Mr. John F. Lacey, of Iowa, submitted the report of the majority of the Committee on Elections in the West Virginia case of McGinnis *v.* Alderson.

Sitting Member had received his certificate from the governor of West Virginia, on the basis of a tabulation which left out the entire vote of Kanawha County. With that county left out, the plurality for sitting Member was 1,313 votes.

The reason for leaving out the returns of Kanawha County were set forth by the governor in an executive order:

EXECUTIVE DEPARTMENT, *February 28, 1889.*

The governor having received from the commissioners of the county courts of the several counties of the Third and Fourth Congressional districts of the State of West Virginia, excepting the county of Kanawha, certificates of the result of the vote cast at the election held on the Tuesday next after the first Monday in November, 1888, for Representative in the Congress of the United States, and it being apparent, for the reasons hereinafter stated, that the returns from Kanawha County can not now be made before the beginning of the Congressional term on March 4, 1889, this day proceeded to ascertain and declare the result of said election in said Congressional districts.

The county commissioners declared the result of the election in Kanawha County December 15, 1888. The certificate was mailed in this city on the 17th of said month and received in this office late in the afternoon.

On the same day a writ of certiorari was awarded by the circuit court of Kanawha County on the petition of John D. Alderson, who claimed to be elected to said office, against the said commissioners, and against James H. McGinnis, who also claimed to be elected to said office. The order awarding the certiorari provided for a supersedeas to the judgment and decision of said commissioners upon the execution of bond, as required by statute. The bond was forthwith executed, and said judgment and decision suspended. A certified copy of the record in the certiorari proceedings shows that said commissioners, in declaring the result of the election in said county, excluded from the recount, had, under the statute, on the demand of said Alderson, a sufficient number of ballots in his favor to have secured his election to said office.

I have time and again personally urged counsel on both sides of this controversy to insist upon a prompt decision by the circuit court, in order that a final conclusion might be reached before the 4th of March next, the beginning of the Congressional term. I can see no reason why it should not have been done. The circuit court aforesaid on the 23d inst. entered judgment reversing the entire proceedings and finding of said commissioners, and remanding the cause. Upon inquiry, I find that no steps have yet been taken for the reassembling of said commissioners to ascertain the election result, and it is evident that such result can not now be ascertained before the beginning of the Congressional term.

Therefore I believe it to be my duty to certify an election on the returns now in this office.

E. W. WILSON.

By the governor:

HENRY S. WALKER,
Secretary of State.

The majority report says:

It thus appears affirmatively from the record before the committee that because of the legal proceedings referred to above the governor certified the "election on the returns now in this office" on the 28th of February, 1889, although the governor had ineffectually urged "both sides" to secure a prompt decision from the courts.

The fact that the contestee, Mr. Alderson, had attempted to supersede the returns by the legal proceedings gave him no right to have the certificate, based upon a count of the district omitting the most important county therein. The county of Kanawha cast a vote larger than the average of three of the other counties in the district. That county cast an undisputed majority of over 1,300 in favor of the contestant.

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[1] First session Fifty-first Congress, House Report No. 2806; Rowell, p. 633.

A certificate of election showing upon its face that nearly 8,000 votes were wholly ignored in the count can have no binding force and effect in a contest of this character. It is true that it has been sufficient to entitle the contestee to sit in the House, to take part in its organization, and to perform all the duties of a Member of Congress, whether elected or not. But when his title is smiled in a direct proceeding by way of a contest we think that a certificate showing the above facts gives the contestee no superior standing over the contestant as to burden of proof. For the purposes of the contest a certificate which, on its face, shows that a large vote for the contestee was wholly ignored, and giving no data from which the true results could be ascertained, ought not to be considered as binding upon anybody

As the governor did not decide the result and issue the certificate upon the returns from the whole district, the first duty devolving upon the committee was to take the returns and make a statement of the same.

The committee then show that in the district outside of Kanawha County Alderson had a plurality of 1,313. In Kanawha County McGinnis had, by the first count, a majority of 1,329, and therefore had in the district a majority of 16. The correction of an error in the county of Boone would increase this to 25 votes.

The majority say:

If these returns remain unimpeached the tables are turned and the burden is cast upon the contestee to overcome the prima facie right which the returns give to the contestant.

To meet this question the contestee asserts that under the laws of West Virginia he was entitled to a recount of the ballots, and that upon such recount in Kanawha County this result was changed and that the contestee gained 12 votes and the contestant lost 20, making a change of 32 votes, which would give him a majority of 7 upon the basis above set out.

As to the recount the majority report says:

The law of West Virginia is as follows:

"They shall, upon the demand of any candidate voted for at such election, open and examine any one or more of the sealed packages of ballots and recount the same, but in such case they shall seal up the same again, along with the original envelope, in another envelope, and the clerk of the county court shall write his name across the place or places where it is sealed, and indorse on the outside: 'Ballots of the election held at ———, the district of ———, and county of ———,' etc."

The law also provides that the original packages shall be sealed up at the place of voting, as follows:

"When the said certificates are signed, the ballots shall be inclosed by the commissioners in an envelope, which they shall seal up, and write their names across the place or places where it is sealed, and indorse on the outside of the said envelope as follows: 'Ballots of the election held at ———, in the district of ———, and county of ———, the ——— day of ———,' etc."

In order to justify a recount it ought to appear that these requirements have been complied with, or clearly shown that the failure to comply therewith has resulted in no injury. We are constrained to find that in the present case there was not that care of the ballots contemplated by this statute, nor such care of the same as would justify us in overturning the count made at the time by the judges of the election.

The ballots of Alum Creek precinct were put in a paper package, and the package placed in a bag and carried to the court-house, where the bag was thrown up over a storm door at the clerk's office.

When the recount was commenced this package was found broken open, or else it had never been sealed.

In a conflict between the first and second count it is evident that the one or the other does not show the true result.

If every opportunity to change the ballots has been prevented, and if the law in relation to a recount has been complied with, the recount becomes entitled to the greater credit and should prevail. But if, on the other hand, the ballots have been so kept that they may be readily changed, our observation upon this committee would hardly justify us in indulging in the conclusion presumptive that no one had been found wicked enough to make the change.

The report points out that in other precincts there was evidence that the ballots had been tampered with, and concludes:

We think the recount should not be considered and that the examination of the case should therefore proceed upon the assumption that contestant was entitled to the certificate of election, and that he should be seated, and that he should retain his seat unless his plurality of 25 votes shall be overcome by the investigation of the alleged illegal votes cast for the contestant.

The majority also say as to Coalburg precinct, in Kanawha County:

At Coalburg precinct, contestant claims that the officers were not sworn. Section 8, chapter 3, of the code of West Virginia, provides as follows:

"The said oath shall appear properly certified on one of the poll books of every election, and in no case shall the vote taken at any place of voting be counted unless said oath so appears, or unless it be proved to the satisfaction of the commissioners of the county court, convened at the court-house as hereinafter required, that said oath was taken before said commissioners, canvassers, and clerks entered upon the discharge of the duties of their appointment."

Contestee claims that this law, which in terms is mandatory, should be held unconstitutional.

If the commissioners of the county court had counted this precinct it would be presumed that the proof of the oath was made to their satisfaction, as provided in the statute. (See Smith *v.* Jackson, 51 Cong.) It may well be doubted whether such a statute could be held to be other than merely directory in any event. As the general result arrived at would not be changed by excluding the Coalburg vote we refrain from directly passing upon the question.

Whilst it might be very proper to punish the officers in some way for violating a duty imposed by statute, it would be manifestly a dangerous thing to disfranchise a precinct because the officers of the law through accident, oversight, or design fail to take the prescribed oath of office.

Such a construction would place it in the power of the officers to have their return rejected at will if the majority should be contrary to their political preferences.

There is some evidence to show that a part of the officers were sworn and we do not feel willing to so construe this law as to disfranchise the voters of Coalburg, where Mr. Alderson had a majority of 20. The supreme court of the State has never passed upon the question.

The report then says:

Having thus reported our views upon the election and as to the right of the contestant to the seat upon the face of the returns, we will next review the question as to illegal voters challenged on both sides. This is a laborious and difficult task and we have endeavored to consider the evidence as to each particular vote.

The report proceeds to examine the alleged illegal votes, discussing at length questions of fact. As a result they find for contestant a majority of 30 votes, and report these resolutions:

Resolved, That John D. Alderson was not elected to the office of Representative in Congress for the Third Congressional district of West Virginia.

Resolved, That James R. McGinnis was duly elected as Representative in the Fifty-first Congress for the said district and is entitled to his seat as such Representative.

The minority views, presented by Mr. J. H. Outhwaite, of Ohio, contend that the governor properly omitted the Kanawha vote, that the recount was valid, and that sitting Member had a clear plurality of 174 votes.

The report in this case was not considered by the House.

1037. The Florida election case of Goodrich v. Bullock, in the Fifty-first Congress.

Voters complying with all other requirements of the law should not be disfranchised by the neglect of public officials to register them.

A small star placed on the ballot as the result of a conspiracy of the printer with election officers is not a distinguishing mark justifying its rejection.

A printer's dash between the names of candidates is not such a distinguishing mark as to justify rejection of a ballot.

Pencil marks made by election officers on ballots in pushing them into the box were held not to be distinguishing marks.

Very small specks on a ballot, perhaps ink mark, were held not to be a distinguishing mark.

On August 4, 1890,[1] Mr. J. H. Rowell, of Illinois, submitted the report of the majority of the Committee on Elections in the Florida case of Goodrich *v.* Bullock.

Sitting Member had been returned by an official plurality of 3,195, which contestant attacked, alleging in general refusal to receive legal votes tendered, false counting, false returns, destruction of ballot boxes, and the commission of various other frauds by the election officers.

The report says:

Much of the evidence in this case is directed to the misconduct of supervisors of registration and of district registering officers. Other portions of the evidence are directed to the misinterpretation of the law by managers of election. The misconduct of registering officers consisted in unlawfully striking from the books large numbers of duly registered voters, in refusing or neglecting to restore the names ordered to be restored by county commissioners, in keeping their offices closed on days of registration, in unreasonably delaying applicants, in unlawfully requiring colored applicants to prove their places of residence by white witnesses known to the registering officers, in unlawfully refusing or neglecting to make transfers on due application, in furnishing unequal facilities for registration, as between their party friends and their party opponents, and in fraudulently registering persons not qualified.

Complaint is made, in some instances, against county commissioners for failing to meet to revise the work of the supervisors, and to order restored those names that had been unlawfully stricken from the books.

Managers of election unlawfully refused to receive the ballots of colored Republican voters who were duly registered, and whose names were on the registry books in the hands of the managers, because they did not present their registration certificates. They also refused to accept such certificates as proof of the right to vote of voters whose names had been unlawfully stricken from the rolls.

They also refused to accept the tendered votes of Republicans who were marked as having moved within the precinct in which they were registered. In many instances this removal had not, in fact, taken place, and when it had it did not disqualify the voter, under the law, from voting. While the law provides for issuing a new registration certificate to a voter who has changed his residence, either within the precinct or to another one, it does not require such a new certificate as a condition precedent to voting when the change of residence is within the precinct or voting district. On the contrary, it expressly provides that a new certificate shall be necessary if the change of residence is from one voting district to another, thus implying that it shall not be necessary if the change is not from one voting district to another. Inclusio unius, exclusio alterius.

(1) In examining the case the majority ruled on a number of questions of law:

The vote in Dade County was: Bullock 95, Goodrich 45. It is claimed by contestant that this whole vote should be rejected, because no registration was had in the county under the statute. It appears that no supervisor of registration was appointed in this county until after the election. This was not the fault of the voters, and we do not think they should be disfranchised because of the failure of the governor to commission a supervisor of registration, as required by law. The old registration was in existence, and the election was held under it in full compliance with the law, with the exception noted.

[1] First session Fifty-first Congress, House Report No. 2899; Rowell, p. 583.

The committee are clearly of opinion that voters complying with all other requirements of the law can not be disfranchised by the neglect of public officials to furnish them opportunity to register.

The minority views, presented by Mr. Levi Maish, of Pennsylvania, hold:

There was no charge of fraud in this county, and it appears that the vote returned was about the usual vote as cast in preceding elections. We concur with the majority that the vote as returned from this county should be counted.

(2) In one district of Orange County 31 ballots cast for contestant were not counted, "on the ground that there was a distinguishing mark upon them. On the lower right-hand corner of these ballots was a printed star (*), so small as not to attract attention. Careful voters, on examining their tickets, would scarcely notice it. The ballots were printed in a Democratic newspaper office, and the star was undoubtedly placed there for the purpose of deception and to secure the rejection of these ballots by the precinct inspectors. This was not such a distinguishing mark as, under the circumstances, authorized the inspectors to refuse to count these ballots."

The minority views concurred in this.

Also the majority say as to district No. 2, in Hamilton County:

One hundred and four votes cast for contestant and 2 for contestee were not counted on the ground that there was a printer's dash under the names of some of the candidates on the tickets. We do not think that this was such a distinguishing mark as authorized the rejection of these ballots. One Hundred and four votes should be added to contestant's vote and 2 to contestee's.

Also as to district No. 7 of this county:

Forty-eight votes for contestant were not counted because of a printer's dash (—) separating each name on the ticket. These votes should be counted. (See McCrary on Elections, 2d ed., see. 104.)

The minority say:

We also concur with the majority in holding that the 104 votes cast for contestant and the 2 votes cast for contestee in district No. 2, which were thrown out because there was a printer's dash under the names of some of the candidates on the tickets, should be counted. We do not believe that this was such a distinguishing mark as justified the rejection of these ballots.

The same remark may be made as to the 48 votes claimed for contestant in district No. 7.

In district No. 12, Duval County, the majority hold:

Twelve votes cast for contestant were illegally not counted, on the ground that they were marked. There were pencil marks on the tickets made by the judges pushing them into the box with a pencil.

The minority agree to this.

In district No. 21 the majority rule:

District No. 21.—Eight out of the 14 claimed legal voters who tendered their votes for contestant should be counted, and 9 votes for contestant not counted under pretense that they were marked should be counted for him. The rejection of these 9 ballots was on the ground that there was a printer's dash on the ticket in a place where no person was named for a particular office.

The minority concur in this.

As to district No. 8, also of Duval County, the majority hold:

Twelve of the 14 claimed legal voters were duly qualified, tendered their votes for contestant and were rejected, and 13 ballots for contestant were illegally rejected on the claim that they had some specks on them. One Democratic ticket was rejected in the same way. One witness testified that he could discover nothing on them, another that there appeared to be small ink spots. These tickets ought not to have been rejected.

The minority concur in this.

1038. The case of Goodrich v. Bullock, continued.

A mandatory law providing that writing on a ballot should be in black ink; may colored ink be used by an honest voter who can obtain no other?

Discussion as to the counting of ballots cast at outside polls by voters fraudulently prevented from voting at the regular polls.

Discussion as to counting votes cast at an election adjourned by the officers, for fear of outrage, from the legal place to another.

As to evidence on which votes may be proven aliunde when the ballot box has been taken by armed force and witnesses are intimidated.

As to proving a vote aliunde by testimony of a United States inspector who distributed tickets and saw them voted.

(3) As to color of ink used in writing names on the ballot, the majority held:

In Fauntville precinct, Marion County, 83 ballots for contestant were thrown out on the ground that names on the ticket for justice of the peace and constable were scratched off and other names written on in red or purple ink. Persons desiring to vote for these officers applied at the only store in the place for ink and could only get the kind of ink used in scratching these tickets, and hence the use of the red or purple ink. The committee do not think that under the circumstances these voters should be disfranchised, notwithstanding the terms of the statute, as the marking was not done for any improper or unlawful purpose and the use of this ink was, in a manner, compulsory. The committee count the 83 votes for contestant. (See McCrary on Elections, secs. 400, 401, 404.)

The minority dissent from this.

We differ from the majority in holding that the 83 ballots for contestant at Fauntville precinct, thrown out because certain names were written in red ink, should be counted. It appears from the testimony that the inspectors were unanimous in the rejection of those ballots; that it was not known at the time of their rejection whether they had on them the names of the Democratic or Republican candidates, and they were rejected solely for the reason that they were written in red ink. Section 23 of the Florida election laws of 1887 provides as follows:

"The voting shall be by ballot, which ballot shall be plain white paper, clear and even cut, without ornaments, designation, mutilation, symbol, or mark of any kind whatever, except the name or names of the person or persons voted for and the office to which such person or persons are intended to be chosen, which name or names and office or officers shall be written or printed, or partly written and partly printed, thereon in black ink or with black pencil, and such ballot shall be so folded as to conceal the name or names thereon, and so folded shall be deposited in a box to be constructed, kept, and disposed of as hereinafter provided, and no ballot of any other description found in any election box shall be counted."

(4) As to "side boxes" the majority say:

In Marion County large numbers of duly registered voters were unlawfully stricken from the registration lists by E. M. Gregg, supervisor of registration, in reckless disregard of the law, and, as your committee believe, with the deliberate and criminal purpose of depriving the Republican voters of the county of their rights.

After enumerating the numbers of those stricken from the registration lists, the majority continue:

These 466 rejected voters in Marion County had all been duly registered. Some 366 of the number had their names stricken from the registry rolls just previous to the election. The supervisor of registration refused to allow the Republican campaign committee to have a copy of the registration list, or to inspect the list. He also refused to restore names that he had stricken from the rolls, after having been ordered by the county commissioners to restore them. He closed his office on the day before election, and thus prevented a large number of applicants from obtaining transfer certificates. He refused to submit his registration books to the county commissioners, as the law required.

These 466 duly qualified voters appeared at their proper polling places and tendered their votes for contestant, which votes were rejected. The names of 100 of them were still on the registry lists, and yet the precinct inspectors rejected the votes, either saying that they could not find the name on the registry, or setting up some frivolous pretext for rejection. Voters duly registered were required, in violation of law, to present their registration certificates. Others, who presented registration certificates, were rejected because their names had been stricken from the registry. The illegal action of Supervisor Gregg can not be permitted to disfranchise these voters.

Most of the tickets in these various precincts were preserved in Republican side boxes, and the names of the various voters so disfranchised, with the pages of the record establishing their right to vote, and the tender of their ballots, will be found on pages 15 to 28 of contestant's brief.

These 466 rejected votes, added to the 83 votes not counted in Fauntville, make 549 votes to be added to contestant's vote in Marion County.

The minority say:

As to the "side boxes" referred to in the testimony of Monroe, Tidwell, and Robinson, we submit that they were used without any authority of law, and that the so-called returns made from them are entirely worthless for the purpose of setting aside the official returns made from the ballot boxes provided by law and by the sworn officers of the election. We call attention to the testimony of E. M. Gregg, supervisor of registration, as a complete refutation of the charges preferred against him, and as showing that he made no discrimination whatever between Republicans and Democrats in the discharge of his official duties.

In Columbia County ballots tendered by qualified voters who were duly registered were refused. In one precinct these rejected ballots were received and preserved by the county judge, and in another case by the United States inspector. The majority of the committee decided to count these ballots.

(5) At Cherry Lake district, in Madison County, the regularly appointed inspectors of election (all of sitting Member's party) appeared at the polling place but declined to hold an election, having in some way received warning of an intended raid on the ballot box. Thereupon the voters present proceeded to elect a board of inspectors. These inspectors refused to hold the election at the place, fearing danger, and so adjourned the election to a point three-quarters of a mile distant. The members of sitting Member's party refused to participate, although they had due notice of it. The majority say:

One hundred and thirty-one votes were cast for contestant, canvassed, and duly returned to the supervisor of elections for the county, but the canvassing board of the county refused to consider the return. It was the fault, first, of the Democratic election inspectors, and, second of the Democratic voters themselves, that the few Democratic votes there were in the precinct were not cast. The committee count for contestant the 131 votes cast for him in this precinct.

The minority hold:

Whatever may be thought of the reasonableness of the apprehension of personal danger, which they evidently felt, and their failure to perform the duties required of them by law, we submit that the vote claimed for the contestant at this precinct can not properly be counted for him. There was no election held in this precinct. The persons who undertook to conduct an election had no authority whatever to open polls at a place different from that appointed by law, and the Democratic voters, well knowing that fact, declined to recognize or to participate at all in the so-called election. The provisions of law which fix the time or place of holding elections are to be construed as mandatory and not as merely directory. The reason for this is obvious. Every voter is presumed to know the law, and to be thereby informed as to the time when and the place where he may deposit his ballot; but if that time or place be changed without proper authority and due notice, no voter can be held as legally bound to take notice of the change. (See McCrary on American Law of Elections, sec. 114.)

(6) At Madison precinct, in Madison County, it appeared that an election was duly, held as provided by law, and 615 votes were cast. At the close of the polls, apparently with the connivance of the election officers, who were of sitting Member's party, the ballot box was forcibly taken away by armed men. No count was made and no return. It appeared that there was a side election, held at the same poll by members of sitting Member's party only, to take the sense of the party as to whom the governor should appoint county commissioner. A total of 210 votes were cast at this side election. The majority say:

Presumably all, or nearly all, of the Democrats voting in the precinct voted at this side box. There is evidence that some four did not. Inasmuch as the party friends of contestee destroyed the evidence of the result of the election at this precinct, and because of the disturbed condition in the county at the time this contest was pending, making it dangerous to attempt to take testimony in the county, the committee take the result at the side box and the other evidence in regard to the vote as the best evidence attainable as to the result at this precinct. Accordingly, they count 210 votes for contestee and 405 votes for contestant.

The minority say:

As to Madison district No. 1, the testimony shows that the ballot box and ballots were taken and carried away about 10 o'clock at night while the inspectors were in the act of canvassing the votes. No return whatever has been made from this district, and yet the contestant's attorney claims that of the 615 votes said to have been cast, 206 should be counted for contestee and 409 for contestant. The best evidence would of course be that of the voters themselves, but instead of producing that, an effort is made to show the Democratic vote by proving the number of votes cast for county commissioners at an informal election held on the same day. We submit that according to contestant's own testimony the vote given for the county commissioners can not be accepted as a fair test of the Democratic strength in that precinct, while the testimony of contestee shows that very little interest was felt by the Democrats in that matter, and that a great many of them would not vote because they regarded it as a farce.

At Hamburg district, also, there occurred a similar raid, of which the majority report says:

At this district an election was held in an orderly manner, but just before the closing of the polls an armed body of mounted men, variously estimated at from 44 to 90, rode down upon the polls and seized and carried away the ballot box. They were white men and friends of contestee. The evidence shows that 259 Republicans voted there that day. There is no evidence as to what the Democratic vote was. The committee accordingly count 259 for contestant.

(7) The majority also adopted a rule, as follows, in determining the votes cast at two polls:

Elaville district No. 2.—The returns from this district gave contestant only 29 votes. J. H. Stripling, United States supervisor, was refused admission to the polling place by the precinct inspectors, which refusal discredits the return. Being refused permission to act as United States supervisor, he took his place outside of the polling place, distributed Republican tickets, and kept account of the number voted. From his evidence it appears that 97 instead of 29 Republican votes were cast for contestant. No attempt is made to refute or discredit this testimony and the unlawful action of the inspectors of election leaves it as the only valid evidence of the vote. Counting the vote, however, as claimed in contestant's brief, which is the method most liberal to contestee, the committee add 68 to contestant's vote and deduct a like number from the vote of contestee.

Macedonia district.—In Macedonia district No. 11, 29 votes only are returned for contestant. The proof shows that he received at least 65 votes at this poll. The committee add 36 to contestant's vote and deduct a like number from that of contestee, following the liberal method of counting conceded in contestant's brief.

(8) Certain questions of fact were also discussed.

In accordance with their reasonings the majority found for contestant a majority of 337 votes in the district and recommended resolutions seating him.

The minority found a majority of 2,808 for sitting Member and recommended resolutions confirming his title to the seat.

This report was not considered by the House.

1039. The Mississippi election case of EIM v. Catchings in the Fifty-first Congress.

The Elections Committee held that wherever a United States inspector was prevented from performing his legal duties at the poll the return should be rejected.

Ex parte affidavits are not considered in an election case, although they would be decisive if admitted.

In a district shown to be permeated by fraud and intimidation the contestant must still show sufficient effects to change the result.

Should participation of returned Member in a scheme of intimidation relating to the election cause the seat to be vacated?

On February 25, 1891,[1] Mr. J. H. Rowell, of Illinois, submitted the report of the majority of the Committee on Elections in the Mississippi case of Hill *v.* Catchings.

Sitting Member had been returned by an official majority of 7,011.

After stating that the district was naturally Rebublican, the report goes on to say:

> The committee, however, are of opinion, from the evidence presented to them, that T. C. Catchings was elected by a majority of all the legal votes cast, but by a much less majority than was returned for him. He was popular with his party, was believed to be especially efficient in representing the interests of his district, and to be able to do more in the way of securing Government aid in protecting the lands of the district from the ravages of the Mississippi River than was his opponent. He was stronger than his party and was supported in some parts of the district by influential colored Republicans. In addition his party was well organized and more fully registered than the opposition.
>
> Mr. Hill was popular with the colored Republicans in most of the district, but failed to secure the active support of the white Republicans. In a portion of the district his adherents were not organized and in only a small portion of the whole district did he have that kind of effective organization which would enable his followers to poll anything like a full vote.
>
> In reporting that contestee was duly elected, as shown by the evidence, we by no means mean to be understood as saying that the election as a whole was free and fair. On the contrary, we are satisfied that preparation was made to commit fraud if necessary to secure the election of contestee and that in some instances the preparation ripened into action. By the statutes of Mississippi the election machinery of the State is primarily in the hands of the governor, lieutenant-governor, and secretary of state. Previous to each general election these State officers are required to appoint three commissioners of election for each county, not all of whom shall be of the same political party. These commissioners appoint the precinct inspectors, with a like limitation as to party affiliation.
>
> Such a statutory provision for allowing opposing parties to have representation on all election boards having charge of the conduct of elections is usually deemed necessary to secure honest results, and when fairly executed in letter and spirit may as a rule be relied on, at least so far as counting and returning the vote is involved. A general and willful disregard by the appointing power either of the letter or spirit of the law raises a strong presumption of an intent on the part of the appointing officers to afford opportunity for fraud. In this case it clearly appears that the State officers in appointing county commissioners intentionally disregarded the spirit of the law, and in some instances violated

[1] Second session Fifty-first Congress, House Report No. 4005; Rowell, p. 803.

its letter. In like manner the county commissioners quite generally violated the letter and spirit of the law in appointing precinct inspectors, Republican committees were ignored, their wishes disregarded, and their recommendations rejected.

While the statute does not direct how these appointing bodies shall make selections, its spirit clearly requires that in selecting representatives of the different parties the wishes of those representing the party organization shall be considered, and that the appointees shall be men having the confidence of their political associates. The selection of men to represent a political party on an election board who habitually vote the opposite ticket, who are not trusted in their party, or who are notoriously incompetent, is not a compliance either with the letter or the spirit of the statute. We are glad to note some honorable exceptions to the general rule in this district, in the selection of precinct inspectors, and to commend the effect in producing confidence in the returns from such boards.

In a majority of the precincts, about which evidence was taken, we find that the precinct inspectors appointed to represent the Republicans were either Democrats in fact, or were incompetent and untrustworthy. While suspicion attaches to all such precincts, such suspicion is not sufficient to invalidate the return, in the absence of other evidence, but it does have the effect of requiring less evidence to overturn the prima facie correctness of the returns. In regard to a few of the precincts this evidence is not wanting, while in others there is an entire absence of evidence tending to impeach the validity of the returns. In some instances there is affirmative proof sustaining the correctness of the returns.

In several large Republican precincts no elections were held, and it is manifest that the neglect to hold elections was intentional and for the purpose of depriving contestant of the votes which he otherwise would have received. In one instance the poll books were carried off to prevent the holding of an election. While there is some conflict in the evidence, we are convinced that the whole matter was arranged at a Democratic meeting the night before the election.

In district No. 2, Sharkey County, Hill received 129 votes and Catchings 25. When the returns came in the vote was found to be reversed. All the inspectors of the election testify to the correct returns, and are at a loss to explain how the change took place. The error is conceded. The committee have no doubt that the change was intentionally made by some one connected with the election. In five or six instances United States supervisors were prevented from discharging their duties according to law, either by being refused admission to the polling place, or by being prevented from witnessing the count, or by the removal of the ballot box from their presence.

In every instance where a United States supervisor is prevented from discharging his duties, as provided by statute, the committee hold that such fact destroys the validity of the return and requires its rejection, leaving the parties to prove the vote by other competent evidence.

After allowing such correction of the vote as the evidence requires, and after rejecting all the returns which have been proved to be untrustworthy, and even conceding to contestant such majority as he might have received in the districts where no election was held, there is still left to contestee a good majority.

After quoting instructions issued by the chairman of the district committee in relation to treatment of Federal supervisors, the report goes on:

This was not only a direction to violate the United States statute, but was in other respects calculated to cause a breach of the peace and prevent an orderly election. Had this advice been generally followed the committee would reject all returns of elections held under such circumstances.

Ex parte affidavits were filed in the case by contestant, which, if considered by the committee, would materially change the result; but the committee find nothing in the record to justify the resort to this kind of proof, and reject all the affidavits as not being legitimately in the record.

After the election and pending the contest General Catchings, the contestee, wrote a letter to Chairman McNeily, in which occurs the following language:

"After his (Hill's) time is out we have so many days in which to take testimony, and will have to give him similar notice. I do not think it would hurt at all if one or two of them should disappear. It might have a very happy effect on Hill, his witnesses, and lawyers."

General Catchings filed the following written acknowledgment with the committee, submitting the above quotation from his letter:

"The following extract from a letter written to J. S. McNeily, chairman Congressional committee, Third Mississippi district, by Hon. T. C. Catchings, contestee, under date December 28,1888, is admitted

as having been written and delivered to J. S. McNeily, chairman Democratic Congressional committee, Third Mississippi district, and is admitted in evidence in this case by agreement.

"T. C. CATCHINGS,
"JAMES HILL,
"PER DUDLEY & THOMAS,
"Attorneys for Contestant."

The language speaks for itself. It was a suggestion to hinder unlawfully the taking of testimony in the case. Had the advice been acted upon the committee would have had more difficulty in reaching the conclusion that contestee was elected. But so far as appears in the evidence the suggestions of the letter were not acted upon in any instance, and it is a reasonable conclusion that they were not approved by Chairman McNeily. Such suggestions, coming from a reputable source, but emphasize the truth of the charge that the public sentiment of the dominant race in this district is hostile to the exercise by the colored voter of the rights granted him by the Constitution, and looks with leniency upon crimes against the purity of the ballot box.

So the majority conclude that after making all legitimate deductions required by the evidence, sitting Member still had a majority of the votes, and they recommended resolutions confirming his title to the seat.

Mr. John F. Lacey, of Iowa, submitted the following minority views:

The report of the majority of the committee concedes that the district has a large Republican majority. The majority report further concedes that there were gross frauds, and that when these frauds are eliminated from the count the majority of the contestee would be greatly reduced. I will not recite these frauds fully, as they are for the purpose of this report sufficiently set out in the report of the majority.

It appears, however, that in selecting the officers to hold the election neither the letter nor spirit of the law was complied with, and the Republican party had no fair representation upon the election boards. In some precincts where there was a Republican majority no election was held. The returns showing a majority for Hill were fraudulently reversed, showing a like majority for the Democratic nominee. Federal supervisors were interfered with in the discharge of their duties. In short, there were frauds of various kinds, materially affecting the result, but the evidence does not show enough in detail to change the result and give a majority for the contestant.

Mr. Hill contended that the occurrence of certain political murders and outrages in other localities justified him in not incurring the danger of taking further testimony in his case, and that if the evidence had been fully taken his election would have been clearly shown. That his fears were not groundless is shown by well-known bloody occurrences which have startled the whole country. But I agree with the majority in their conclusion that the contestant has not introduced enough testimony to show that he did in fact receive a majority of the legal votes cast. This, however, leaves for discussion the question as to whether enough has been shown to require that the election should be held void.

I think that the law ought to be held as follows:

Where the friends of a successful candidate, without collusion or combination with such candidate engage in fraud, bribery, intimidation, or other violation of law to influence the election, and the number of votes affected thereby is insufficient to change the result, the election will not be invalidated thereby; but if such candidate takes part in such wrongs, or confederates with those engaged therein, and it does not appear that the election has been changed in its results thereby, the election should be held void, and a new election ordered.

The question as to the effect of connivance with or participation in such wrongful acts by a candidate is one in which the law ought to be clearly laid down and unhesitatingly enforced.

I concede that the preponderance of the authorities hold to the effect that such acts upon the part of the contestee will not render the election void unless it appears affirmatively that such unlawful acts changed the result. The effect of bribery in parliamentary elections has been settled by statute in Great Britain, and renders the election void although the votes affected were insufficient to change the result. The interests of good government and the importance of purity of elections require that the rule should be laid down and enforced against every candidate that he should not participate in or incite any violations of the laws under which the election is held.

Whilst a candidate should not be held accountable for the acts of his partisans, committed in the heat of a political campaign, yet he should be held to instigate or participate in such acts at his peril. He should understand that in case of his instigation of violations of the law or of his participation in such violation he shall not be permitted to hold his seat. A contestant should not be compelled to prove just how many votes were affected by such wrongful acts of the contestee in order to have the election declared void. The full effect of such wrongs may often be hard to prove. The sitting Member should have his skirts clear of all participation.

In order to give the seat to the contestant, it should be necessary to prove that the results were changed by the transactions in question, but to unseat the participant a less amount of proof should be sufficient.

A vigorous contest was made in this district, which was naturally a Republican stronghold. The contestant and the contestee took, an active interest and participated in the campaign pending the election. It is not probable that any widespread and obviously preconcerted violation of the election law, such as is shown, should have occurred against the wishes of the contestee.

But after the election, and while the contest was in progress, it appears that the contestee wrote the chairman of his party a letter in which appears the following language:

"After his (Hill's) time is out we have so many days in which to take testimony, and will have to give him similar notice. I do not think it would hurt at all if one or two of them should disappear. It might have a very happy effect on Hill, his witnesses, and lawyers."

In the light of the deplorable events which have occurred in some parts of Mississippi in connection with elections and election contests, it is unnecessary to discuss the full scope and meaning of this letter. The language is of contestee's own choosing and speaks for itself. General Catchings had a full opportunity to explain this letter before the committee, but wholly failed to avail himself of that opportunity. He argued his own case in person, and when the letter was read to the committee an opportunity was given him to contradict or explain, but he did not see fit to do so.

Does the fact of writing such a letter, under the circumstances, sufficiently connect the contestee with the various frauds described in the majority report? I think it does. Where the recipient of the benefits of such a fraud not only accepts its advantages, but attempts to suppress the testimony of the crime, such attempted suppression, or attempted suppression when unexplained and uncontradicted, ought to be regarded as sufficient to show the contestee's original connection with these various wrongs. The frauds are general and widespread, the party of the contestee were acting in concert, and a just suspicion will always attach to a leader where his followers are so generally guilty of offenses against fair elections. But when such acts are followed by active attempts at suppression of the evidence, such as appears in the letter to McNeily, the inference is irresistible. Taking the letter of the contestee into consideration, in the light of all the surrounding circumstances, the conclusion follows that the contestee is responsible in some degree for the acts of his party and partisans, as set out in the majority report.

The seat ought, therefore, to be declared vacant and an election stained with so much fraud and corruption ought to be set aside. I recommend the adoption of the following substitute for the resolution reported by the majority:

Resolved, That T. C. Catchings was not elected as Representative in the Fifty-first Congress from the Third Congressional district of Mississippi, and that the seat is hereby declared vacant.

This report was not considered by the House.

1040. The Mississippi election case of Kernaghan v. Hooker, in the Fifty-first Congress.

Although widespread frauds are shown in a district, yet contestant must show that they affect enough votes to change the result.

On February 25, 1891,[1] Mr. J. H. Rowell, of Illinois, submitted the report of the Committee on Elections in the Mississippi case of Kernaghan v. Hooker.

The report begins:

At the election held in the Seventh Congressional district of Mississippi on November 6, 1888, Henry Kernaghan and Charles E. Hooker were the Republican and Democratic candidates, respec-

[1] Second session Fifty-first Congress, House Report No. 3991; Rowell, p. 785.

tively, for the office of Representative in Congress. According to the declared result of the election, Hooker received 8,491 majority.

In due time, and in accordance with law, Kernaghan filed his notice of contest, alleging, in substance, that the commissioners of election in the several counties of the district were not appointed, as provided by law, by the governor, lieutenant-governor, and secretary of state, but were, in fact, appointed by one D. P. Porter, deputy secretary of state and chairman of the Democratic executive committee of the Seventh Congressional district; that in making such appointments the recommendations of the Republican executive committees were ignored and boards were appointed either composed entirely of Democrats or with a Republican minority member who could be controlled by his Democratic associates; that in appointing precinct judges the county commissioners of election, in violation of law, either appointed boards composed entirely of Democrats or with one illiterate Republican; that in holding the election fraudulent registrations were made, false counting resorted to, ballot boxes stuffed, United States supervisors prevented from discharging their duty, violence and intimidation resorted to keep voters from the polls, and that other like frauds were prevalent, with the result of changing a majority for contestant into a minority.

Answer was duly filed by Hooker denying the charges, and testimony was taken by both parties upon the issues joined.

While the committee have reached the conclusion that upon consideration of the whole evidence, and restating the result so far as the evidence enables us to do so, contestee has remaining a majority of the votes cast, yet the facts developed in the evidence are such as to require more than a formal report.

After reviewing questions of fact as to irregularities in various counties, the report concludes:

Irregularities of a similar character took place in other precincts of this county. Precinct inspectors asked for by the Republican commissioner of elections to represent the Republicans on the election boards were refused, and taking into consideration all the evidence the committee are convinced that frauds sufficient to invalidate the returns were committed in the precincts noted and some others in this county, but, inasmuch as these frauds do not affect a sufficient number of votes to overcome the majority returned for contestee, the committee do not attempt to restate the vote in full, and determine what reductions ought to be made from contestee's returned majority.

Taken altogether the record discloses a deplorable condition of affairs in the Seventh Mississippi district, such as can neither be excused nor palliated. For the reason that the frauds developed in the evidence and described in this report are insufficient in amount to overcome all the majority returned for contestee, the committee recommend the adoption of the following resolutions:

Resolved, That Henry Kernaghan was not elected a Representative in the Fifty-first Congress from the Seventh Congressional district of Mississippi, and is not entitled to a seat therein.

Resolved, That Charles E. Hooker was elected a Representative in the Fifty-first Congress from the Seventh Congressional district of Mississippi, and is entitled to retain his seat therein.

This report was not acted on by the House.

Chapter XXXVII.

GENERAL ELECTION CASES 1892 TO 1894.

1041. The Pennsylvania election case of Craig v. Stewart in the Fifty-second Congress.

Where nonregistered voters were required to file affidavits on voting and these affidavits did not appear on file, the House rejected the votes.

As to the mandatory or directory nature of a law requiring nonregistered voters to file affidavits when they vote.

As to the duty of the House in an election case to follow the judgment of a State court rather than their own precedents.

Affidavits of nonregistered voters not being found in the depository specified by law, it was held that the burden of proof shifted to the party benefited by the votes.

On February 16, 1892,[2] Mr. Jason B. Brown, of Indiana, from the Committee on Elections, submitted the report of the majority of that committee[3] on the contested election case of Craig *v.* Stewart, from Pennsylvania. The sitting Member was returned by a plurality of 162 votes, which the contestant attacked. The report says:

> The contestant has stated many reasons why he should be declared elected to the Fifty-second Congress, but the principal one and the only one the committee deems it necessary to report on is: That there were a large number of ballots cast at the election of November 4, 1890, for the contestee by persons whose names were not on the registry list, and who did not furnish the affidavits required by the laws of Pennsylvania to entitle them to vote. That a sufficient number of such ballots were cast to change the result of the election.

The response of the minority defines the single issue involved in the case:

> The minority concede that the contestant has shown a sufficient number of votes to have been cast by nonregistered persons for the contestee and counted for him by the election officers to overcome his plurality, but they strenuously deny that the contestant has proved that these persons failed to make and procure affidavits required of nonresident voters and they doubt whether he is entitled to be seated even if he has.

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[1] See also cases of Belknap *v.* Richardson (prima facie), Volume I, section 56; Noyes *v.* Rockwell, Volume I, section 574; Reynolds *v.* Shonk, Volume I, section 682.

[2] First session Fifty-second Congress, House Report No. 367; Rowell's Digest, p. 472; Stofer's Digest, p. 7; Record, pp. 1449, 1488–1498.

[3] The minority views were presented by Mr. Henry U. Johnson, of Indiana.

The constitution of the State defines the qualifications of voters; and the laws of the State prescribe a registration of voters as a prerequisite to the exercise of the franchise, with the additional provision that a person otherwise qualified to vote shall not be debarred by a failure to register if he conform to certain requirements thus set forth:

On the day of the election any person whose name shall not appear on the registry of voters, and who claims the right to vote at said election, shall produce at least one qualified voter of the district as a witness to the residence of the claimant in the district in which he claims to be a voter, for the period of at least two months immediately preceding said election, which witness shall be sworn or affirmed, and subscribe a written or partly written and partly printed affidavit to the facts stated by him, which affidavit shall define clearly where the residence is of the person so claiming to be a voter.

The person presenting himself to vote must also make out an affidavit setting forth his qualifications.

The law of Pennsylvania also provided, as related to the above requirements:

And no man shall be permitted to vote at the election on that day whose name is not on said list, unless he shall make proof of his right to vote as hereinafter required.

The majority of the committee say as to the above requirement:

The courts of Pennsylvania have ruled that a compliance with the law in this regard is absolutely indispensable. (58 Pa. St., 338; 59 Pa. St., 109; 1 Brewst., 103; 2 Stew., 239; 71 Pa. St., 302; 11 Phila., 631; 10 Phila., 213; 5 W. N. C., 9; 2 S. and R., 267; 1 Brewst., 102, 103; 135 Pa. St., 459.)

Under the act of January 30, 1874 (P. L., 31), it is the duty of the elector, whose name is not on the registry list, to produce the required affidavits at the time he offers his vote. Election officers can not waive such production. A vote received without such affidavit is illegal, and can not be made legal at a subsequent investigation in the courts. (McDonough's election, 105 P. S., 488; Lower Oxford contest, 2 C. C., 323; In re contested election, 42 L. 1., 304; Marks *v.* Park, 2 Leg. Rec., 62; Fowler *v.* Felthoff, Ibid, 403; Commonwealth *v.* Cornelius, 8 W. N. C., 215; In re contested election, 4 Kulp, 196.)

The contestant claims that a large number of votes were received at certain polling places from men whose names were not on the registry lists, and who failed to make affidavits and produce witnesses as required by law.

The law of Pennsylvania also had this requirement:

The said affidavits of all persons making such claims and the affidavits of the witnesses to their residence shall be preserved by the election board, and at the close of the election they shall be inclosed with the list of voters, tally list, and other papers required by law to be filed by the return judge with the prothonotary, and shall remain on file therewith in the prothonotary's office subject to examination as other election papers are.

The majority then continue:

On this point the committee is unanimous in the opinion that more than a sufficient number of votes from unregistered voters whose affidavits are not on file as required by law were cast for the contestee to change the result and give the seat in contest to the contestant. But a minority of the committee contend that there is no sufficient evidence in the record that the affidavits required of all the unregistered voters were not duly executed.

The evidence shows that when the papers filed by the return judge with the prothonotary were delivered up by him for use in this contest, the affidavits in question were not with them. The contestant offered no other or further evidence to show that they were not taken than this failure to find them on file in the office of the prothonotary. He contends that the absence from the prothonotary's office of a large number of such affidavits which were required to be there, especially when a large number were found there, is sufficient proof to raise the prima facie conclusion that they never were taken.

The majority of the committee agree in this view. We insist that the presumption is that if these affidavits had been executed they would have been found where the law provides they should be filed, and that on failure of the officer to produce them the burden of proof was cast on the contestee to show that they were in fact executed. He offered no evidence on this point, and by this failure of the contestee the prima facie case of the contestant becomes conclusive.

The minority consider two general propositions in opposition to the views of the majority.

(1) The first proposition is thus stated:

It has not been expressly decided in any case that has fallen under the observation of the minority that the failure of a nonregistered person to make an affidavit required by law as a prerequisite to voting renders his vote illegal after it had been cast and counted. The supreme courts of Pennsylvania and Wisconsin, however, have held that such was the effect where the nonregistered voters made and furnished affidavits which were defective in material particulars, and in so deciding they stated that laws requiring affidavits of nonregistered voters were mandatory rather than directory. It is a plain inference, however, that if in these cases there had been no affidavits whatever made by the nonregistered voters the holding would have been the same way. (See In re contested election of Martin McDonough, 105 Pa., p. 488; contested election of Owen Cusick, 136 Pa., p. 459; State on complaint of Doerflinger *v.* Helmantel, 21 Wis., p. 574; State ex rel. Bancroft *v.* Stumpf, 23 Wis., p. 630.)

The supreme court of Illinois, on the other hand, has twice held that a law of the kind referred to was simply directory, and that the vote of a nonregistered person, cast upon affidavits materially defective at an election where affidavits were by law required to be made by a nonregistered person before voting, was valid. (78 Ill., p. 170; 88 Ill., p. 498.)

In the case of Campbell *v.* Weaver, a contested election of the Forty-ninth Congress from one of the Congressional districts of the State of Iowa, reported at page 455, volume 7, of the House Contested-Election Cases, the contest turned on the construction of the election law of that State which required of all nonregistered persons the making of certain affidavits before they could vote. The persons whose right to vote was in controversy had made affidavits defective in very material particulars. The majority of the Elections Committee reported that the law should be held to be directory and not mandatory, and that the votes of such persons were legal and should be counted. The House adopted this report and retained Mr. Weaver in his seat.

In the contested election case of Curtin against Yocum, from a Congressional district of Pennsylvania in the Forty-ninth Congress, reported at page 416, volume 5, of the House Contested-Election Cases, the construction of the very election law of that State under which the election in the case now under consideration was held is discussed in the report of the minority of the Committee on Elections, and it was therein declared that the provision of the law requiring affidavits of nonregistered voters was purely directory. This report was adopted by the House.

In so much, however, as the report was clearly right upon other grounds it can not fairly be said that by adopting it and retaining Mr. Yocum in his seat the House necessarily held with the minority in their view that the provision of the law referred to was directory.

In the course of the debate, speakers sustaining the minority views combated [1] the theory that the House must follow the holdings of the State courts, and declared in favor of the authority of the House's own precedents, made in the performance of a constitutional duty. But in conclusion of this branch of the question, the minority say:

In view of the conflict in the authorities on this question, as hereinbefore pointed out, and in so much as there are weighty reasons in support of each view, which reasons will be found fully set forth in the decision of the courts and in the reports adopted by the House of Representatives, your minority feel that if the rule that the statutes requiring nonregistered voters to make affidavits before voting is to be held mandatory by this House, and the voter thereby cut off from the privilege of proving,

[1] Speeches of Messrs. Henry U. Johnson, of Indiana, and Charles W. Stone, of Pennsylvania, Record, pp. 1458, 1488.

after the election, that he possessed the constitutional qualifications of an elector at the time he cast his ballot, the House should require of all contestants proof of a clear and satisfactory character that the nonregistered electors really did not make and produce the necessary affidavits.

(2) The minority, proceeding to the next proposition, contend that the burden of establishing his contention rests upon the contestant at all stages of the case, and insist that he has not sufficiently proven that no affidavits were made and produced by the nonregistered voters. The minority say:

"When a person offering to vote is challenged at the polls no presumptions are indulged in favor of his right to vote. He is then and there called upon to furnish evidence of his qualifications as an elector. But when he has once voted unchallenged and his ballot has been deposited in the ballot box and counted and canvassed and a certificate of election issued upon it, quite a different rule prevails. Every reasonable intendment should then be indulged in his favor and his vote should not be rejected upon technical presumptions and because some degree of doubt may be thrown upon it. Particularly is this the case where a contestant upon whom rests the burden of proof and who asks that the vote shall be rejected refuses to make positive proof of the voter's disqualification, which it appears it is easily within his power to do if the voter, in point of fact, had not the right of suffrage.

The minority go on to cite authorities in support of this proposition, and then comment on the failure of the contestant to produce the testimony of the officers of election as to whether or not they allowed nonregistered persons to vote without making the affidavits. Party challengers at the polls, as well as citizens, would also be knowing to these facts.

The sufficiency of the evidence furnished by the prothonotary two months after election as to affidavits on file in his office is thus discussed by the minority:

Now, the minority submit whether the certificate of the prothonotary that certain affidavits appeared on record in his office, a public one to which all persons had access, on January 27, 1891, and the oral testimony of his deputy that these were all the affidavits on file in the office at that time, satisfactorily establishes the fact that they were all the affidavits originally filed by the return judge. But, assuming that it does, the minority earnestly insist that this fact simply rebuts the presumption of the regularity of the action of the return judge in the filing of all the affidavits of the nonregistered voters, and does not reach back, as claimed by the contestant, and prove either that the nonregistered voters did not actually make or that the officers of the election did not actually take the affidavits. The making of the affidavits by the voters was one thing, the action of the election officers in taking another, the delivering of the affidavits by the election officers to the return judge another, and the action of the return judge in filing them still another. The act of taking by the board and the act of filing by the return judge were separable and distinct acts. The taking of the affidavits may well have been done by the election officers, and yet the filing of them by the return judge may have been neglected. That the acts are separable and that the first may have been performed but the second neglected holds good whether the board and the return judge are considered as one official or as different officials. The affidavits may have been lost, mislaid, or deposited in the wrong place by the return judge. Indeed, this would be the legal inference on its being shown that he had not filed them. To infer this would be to put upon him no additional presumption of having failed to perform his duty than already attaches to him by the certificate of the prothonotary that the affidavits were not filed by him.

The contestee is not required to prove that this improper disposition of the affidavits was actually made by the return judge, for the reason that the contestant has the burden of proving that the affidavits were not taken, and his having merely shown that they were not filed in the prothonotary's office does not establish the fact that they were not taken, does not discharge the burden of proof resting upon him, but only rebuts the presumption that the judge complied with the laws by filing all the affidavits. In support of this position there is ample authority. The very point was discussed in the minority report in the Forty-ninth Congress in the contested-election case of Curtin *v.* Yocum, hereinbefore referred to. In this case there were three reports made; one by the majority, one by the minority, and one by certain members of the Elections Committee. The House adopted the report of the minority and retained Mr. Yocum in his seat.

The minority therefore insisted that the title of sitting Member to the seat should be confirmed.

The report was fully and ably debated in the House on February 25 and 26, 1892, and on the latter day the resolutions proposing the views of the minority were disagreed to, yeas 57, nays 152. Then the resolutions of the majority were agreed to without division, and Mr. Craig appeared and took the oath.

1042. The Michigan election case of Belknap v. Richardson, in the Fifty-second Congress.

Instance wherein, after a delayed decision as to the prima facie right, the House itself fixed the time for instituting proceedings to contest.

Inmates of a Soldiers' Home do not gain a residence in a precinct from the mere fact that they are quartered in the Home.

Discussion as to the binding effect on the House of the decision of a State court as to a State law.

Examples of what were held to be distinguishing marks on an Australian ballot.

On September 9, 1893,[1] Mr. T. H. Paynter, of Kentucky, from the Committee on Elections, submitted a report recommending the adoption of the following preamble and resolution:

Whereas in the Fifth district of the State of Michigan two certificates of election were issued, one to Hon. George F. Richardson, after which, upon proceedings in the supreme court of the said State, a new canvass was ordered in certain portions of said district, upon which a new certificate was issued to Hon. Charles E. Belknap; and

Whereas each of said parties claimed to hold the proper certificate entitling him to a seat in the House; and

Whereas either party by commencing a contest would have been deemed to have waived his claim under his certificate; and

Whereas the prima facie legality and sufficiency of such certificates could not be lawfully or finally determined except by the action of this House; and

Whereas this House have decided that the said Hon. George F. Richardson's certificate entitles him prima facie to the said Seat;[2] and

Whereas by reason of the peculiarity of the said facts a contest could not be commenced in the usual form and in the usual time; and

Whereas said Hon. Charles E. Belknap desires to contest the right to said seat: Therefore be it

Resolved, That said Hon. Charles E. Belknap is authorized and empowered to file his notice of contest and institute proceedings to contest said election. That in making said contest the general statutes and the rules of contest of this House shall apply, the time fixed by the statutes being hereby extended and the right of contest being declared to have commenced at the date of the adoption of this report.

On the same day the resolution was agreed to by the House.

On February 27,1895,[3] Mr. Daniel N. Lockwood, of New York, from the Committee on Elections, presented the report on the merits of the above contest. The original returns from the precincts of each county gave a pluralty of 18 votes for the contestant, Mr. Belknap, at the election of 1892.

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[1] First session Fifty-third Congress, Journal. p. 39.

[2] This was decided August 8, 1893 (Journal, pp. 8–10). See also section 56 of Volume I of this work.

[3] Third session Fifty-third Congress. House Report No. 1946; Rowell's Digest, p. 494; Journal, p. 162.

The examination of this contest is divided into two branches:

1. The report shows that—

In the county of Kent the number of votes cast for Mr. Richardson was 12,779, and the number cast for Mr. Belknap was 12,392, showing a plurality of 387 in that county for Mr. Richardson by the original returns as canvassed by the local boards. But there was included in the original canvass, as shown by the record, 199 votes cast in the first precinct of the township of Grand Rapids by inmates of the Soldiers' Home who were not residents of that precinct and were not qualified electors under the laws and constitution of the State. Of these votes 152 were cast and counted for Mr. Belknap, and 41 were cast and counted for Mr. Richardson.

The supreme court of the State of Michigan has, since the election in 1892, passed upon the legality of the votes of inmates of the Soldiers' Home, and decided that those who were not legal residents of the precinct in which the Home is located at the time they were admitted to the Home can not gain a legal residence while quartered in the Home, and consequently were not legal voters.

The report, after quoting this decision at length, deducts the votes thus decided to be illegal, with result of destroying the plurality of 18 votes for contestant in the district, and giving a plurality of 93 votes to sitting Member.

The minority views, submitted by Mr. Henry F. Thomas, of Michigan, held to this view:

It is clearly the duty of this House to accept the soldiers' vote, if in its judgment they have a right to vote while domiciled at the Soldiers' Home.

The fact that three of the five judges decided against them is no reason why this House should follow their decision.

The Constitution says: "Each House shall be the judge of the elections, returns, and qualifications of its own Members."

I might cite numerous precedents, but I will call attention to only one, that of Noyes *v.* Rockwell, from the Twenty-eighth district of New York, which was decided by the Fifty-second Congress. In this case Noyes asked the supreme court for a mandamus, which was granted, and after the vote was retabulated by the board of canvassers under the order of the court, Noyes had a majority of 16 votes in the district. But notwithstanding this, the House of Representatives of the Fifty-second Congress gave the seat to Rockwell.

There is no dispute as to whom these men in the Soldiers' Home voted for. It is admitted that they voted for Mr. Belknap; therefore, what a wonderful responsibility this House assumes in attempting to set aside the will of 42,000 voters in the Fifth Michigan district, by reason of a contention between five men, who differ as to the language of a statute regarding the place at which a man may exercise the right of suffrage. The Congress of the United States has no higher obligation resting upon it, or a more sacred duty to perform, than to see that the will of the majority is allowed to have its full course and operation in all public affairs, for by this are we assured of the safety of our institutions.

Mr. Thomas furthermore showed that since the decision of the court the constitution of Michigan had been amended so as to allow the inmates of the Soldiers' Home to vote in the precinct in which it is situated.

2. The second question is thus stated by the report of the committee:

The Michigan statute (Public Acts, No. 190) of the session of 1891, page 269, under which this election was held, provides for the introduction of the so-called "Australian" system of voting, and provides that any ballot which shall have any distinguishing mark or mutilation shall be void, and shall not be counted. A distinguishing mark may be defined as "any mark by which a ballot may be identified when it is counted, and by which parties making an agreement before voting can show by the ballot that they have carried out the agreement;" no such vote should have been counted by the inspectors, and the supreme court of the State, in a very recent decision, has so decided (see Attorney-General ex rel., Scott *v.* Glaser at the October term, 1894), reported in 61 N. W. Reporter, page 648.

The committee found 49 ballots in Kent County which had distinguishing marks and which had been improperly counted for contestant. The committee give an enumeration of these distinguishing marks, of which the following are samples:

One vote in the township of Solon was counted for Mr. Belknap with two crosses at the head of the Republican ticket, and two crosses at the upper left-hand comer on the face of the ballot.

One vote was counted for Mr. Belknap in the township of Plainfield marked with a double cross at the head of the Republican ticket and the letter "H" over Mr. Belknap's name in his space.

One vote was counted for Mr. Belknap in the township of Cascade marked regularly for the Republican ticket, with two crosses on the right-hand upper corner of the ballot.

One vote was counted for Mr. Belknap in the first precinct of the Second Ward of the city of Grand Rapids marked with a cross each side, and one below the voting square on the Republican ticket.

One vote was counted for Mr. Belknap in the third precinct of the Third Ward, Grand Rapids, having the words "This I vote for" written in the space containing the vignette on the Republican ticket.

One vote was counted for Mr. Belknap in the first precinct of the Eighth Ward marked regularly for the Republican ticket; the ballot being about three-fourths of an inch narrower than the regular ballot, a strip having been cut from the right-hand margin.

One vote was counted for Mr. Belknap in the second precinct, Fourth Ward, marked regularly for the Democratic ticket with a cross in the space in front of Mr. Belknap's name, Mr. Richardson's name not being erased, but having a line drawn under it.

One vote was counted for Mr. Belknap in the first precinct, Twelfth Ward, Hubbell's name being erased and the words "For Ben Harrison" written in.

One vote was counted for Mr. Belknap in the second precinct of the Twelfth Ward marked regularly for the Republican ticket with a diagonal line running through the voting space on the Democratic ticket, below which was written, "No good."

One vote was counted for Mr. Belknap in the township of Oakfield with three crosses at the head of the Republican ticket.

One vote was counted for Mr. Belknap in the third precinct, Eleventh Ward, marked with voting stamp after the names "Hubbell, Aaron Clark, Swensburg, and Rich," and over the name "Diekma," and partially over and partly on the name "Wilson," with no other marks on the ballot.

One vote was counted for Mr. Belknap in the township of Vergennes not having the initials of the inspector.

One vote was counted for Mr. Belknap in the township of Caledonia marked at the head of the Republican ticket with a circle each side the voting square, having no other marks upon the ballot.

Deducting from contestant these 49 ballots, and crediting sitting Member with 8 ballots to which he was indisputably entitled in one precinct, the majority find a plurality of 150 for sitting Member in the district. Therefore they reported resolutions confirming his title to the seat.

No action was taken by the House on this report, sitting Member thereby retaining the seat.

1043. The Alabama election case of McDuffie v. Turpin, in the Fifty-second Congress.

The House did not permit the returns of election officers to be impeached by testimony of partisan workers who tallied the ballots cast.

Discussion as to the status of the ballots as evidence when the honesty of the election officers is impeached.

The returns being stolen after they were made out by the election officer, their contents was proven orally by one witness.

The evidence failing to establish as legal an election whence no returns were received, the House declined to take it into account.

On January 17, 1893,[1] Mr. Daniel N. Lockwood, of New York, from the Committee on Elections, submitted the report of the majority[2] of the committee in the Alabama case of McDuffie *v.* Turpin. The state of the returns is described:

By the returns of such election as filed with the secretary of state of Alabama, Louis W. Turpin received 9,595 votes, John V. McDuffie received 4,931, and G. T. McCall received 3,899, the majority for Turpin over McDuffie being 4,664. The certificate of election was issued by the governor of the State to Louis W. Turpin.

The contestant claimed his election on the general ground that the election officers of the district, by what amounted to a fraudulent conspiracy, had failed to count and return the votes cast for him. The minority of the committee, sustaining the contention of the contestant, notice the previous history of the district, the census returns, and the circumstances attending this election, to show that the voters of the district were overwhelmingly colored; that these colored voters were Republicans and supporters of contestant, and that they despised McCall, the third candidate, who was alleged to have become a candidate in pursuance of a corrupt arrangement with the Democratic managers, in order that they might count for him enough of contestant's votes to leave a plurality to sitting Member. The minority further set forth that in pursuance of the conspiracy, the party supporting sitting Member manipulated the election machinery:

The entire machinery of election was in their hands. The board of county supervisors of each county, whose duty it was to appoint the inspectors of elections for the various election precincts therein, and to canvass the votes as returned therefrom, was composed of the sheriff, clerk, and probate judge of the county, and all of these were white Democrats.

In some few instances this board of county supervisors appointed all three of the local inspectors of election from their own party, contrary to the law of the State, which required one inspector to be of opposite politics to the other two. In a few other instances they appointed as the Republican inspectors colored men who were strongly under Democratic influence and who did not enjoy the confidence of the colored Republican voters of the precinct. But in a very great majority of instances they selected for the Republican inspectors ignorant colored Republicans who could neither read nor write and whose presence upon the election boards in nowise interfered with the perpetration of fraud upon the voters, for the reason that they were too dull and illiterate to detect or expose it. This course was pursued right in the face of the well-known fact that in every voting precinct of the district where such appointments were made were some colored Republicans of fair intelligence, who could read and write, and who were qualified to discharge the duties of inspectors.

That these incompetent Republicans were so appointed inspectors of election is not only proven by the uncontradicted testimony of credible witnesses, but is also shown by an inspection of the returns of the election inspectors set out in the record in this case. They show that the Republican inspectors were, with scarcely an exception, unable to write, and that they signed the certificate by making their marks.

The law of Alabama also provided for the appointment by the board of county supervisors of a returning officer in each precinct, whose duty it was to receive the ballot box containing the returns of the election from the inspectors of the precinct and convey it to the sheriff of the county, to be by him submitted to the board of county supervisors for canvass, and it also provided that the inspectors of election in each precinct should appoint two persons to act as clerks at the election.

In not a single instance in the entire district was a Republican appointed either returning officer or clerk of election, the white Democrats invariably being appointed to these places. In some precincts no United States supervisors appear to have been present at the election, while in others these

[1] Second session Fifty-second Congress, House Report No. 2261; Rowell's Digest, p. 477; Stofer's Digest, p. 51; Journal, p. 121: Record, pp. 2291–2310.

[2] The minority views were presented by Mr. Henry U. Johnson, of Indiana.

officers were refused admittance, and in still others were, after being admitted, not allowed to see the ballots while they were being counted. Having thus obtained complete control of the entire machinery of election in the district, and having also procured the candidacy of McCall that they might rob the contestant of many of his votes by counting them for the former under the pretense that they had actually been cast for him, and with an ignorant and helpless population to operate upon, the Democratic managers deliberately and systematically went to work to consummate their scheme of electing contestee to Congress from the district against the wishes of the majority as expressed at the ballot box.

To thwart this alleged conspiracy the supporters of contestant arranged in each precinct of the district to have several of their number at the polling places to issue contestant's tickets to the voters and keep a list of those whom they saw vote these tickets. The persons who thus kept the lists were produced and swore to these facts, and produced and identified the lists, which were incorporated in the evidence. In only one precinct did the sitting Member offer evidence that any of the voters thus enrolled did not vote for contestant.

The minority went into the evidence, precinct by precinct, showing the working of the plan to get evidence. They also showed that in some precincts the election officers refused to open the polls, forcing the friends of contestant to organize an election themselves. that in some cases the returning officers failed or refused to make the returns, and that in other cases the returns were not canvassed as returned.

The majority members of the committee in debate denied the pertinency of considerations as to the past history of the district, and denied also that the colored voters belonged entirely or even to an overwhelming extent to contestant's party. In their report they assail the testimony:

About the only well-substantiated facts as appear in the case are the returns made to the boards of supervisors and their returns to the secretary of state. The contestant could not hope or expect to make a successful contest by declarations in notice of contest and secondary evidence for proof.

It is a well-established rule of law that the best evidence shall be produced if possible to produce the same. In this case it was within the power of the contestant to have produced from each of the precincts the ballot boxes with the ballots in each of the election precincts, with the exceptions herein before stated, and the ballots, together with a list of all the voters, could have been placed in evidence, as there is no proof of their loss or destruction, and if a fraudulent count of the ballots by the inspectors and a fraudulent return of the votes for the several candidates had been made the same would have fully and satisfactorily appeared by a recount and an examination of the ballots. The contestant in this case makes the grave charge that the inspectors made fraudulent return of the votes actually voted and put in the ballot boxes. To establish this charge he produced from the election precincts not the ballot boxes containing the ballots as voted and deposited in the box, all of which had to be and were preserved and were accessible to contestant, and which he admits were correct, but called witnesses who had been stationed at the several precincts who testified that on election day they were at the beat or precinct in dispute and distributed McDuffie ballots, and that witness kept or had kept a list of names of those voters to whom they passed out McDuffie ballots and that the persons receiving such ballots voted the same.

It would appear from the statute governing elections in Alabama, and from the evidence, that the witnesses who handed out the McDuffie ballots were at least from 30 to 100 feet from the ballot boxes. The majority of the witnesses were ignorant, and some of them could not read or write. The proposition sought to be established, and which must be established by the contestant in order that he should succeed in this contest, is that persons working in his interest, who kept a list or had a list kept of those to whom they gave ballots, that their return should be taken and counted as the correct return instead of the sworn statement of the inspectors, clerks, and the officers of the election districts. It would be an exceedingly dangerous precedent to permit the actual returns, as made by the inspectors and sworn officers of the election, to be disregarded and impeached by returns made out by irresponsible partisan workers at the polls.

The minority urge, on the other hand:

Contestee has argued in this case that the returns of the election officers are prima facie evidence of the result of the election, and are also the best evidence thereof. While this is doubtless true, it is also undoubtedly true that these returns may be and have been shown to be false in this case. Having been thus impeached by the evidence, they are no longer of any value either in law or fact. The contestee, however, insists that even if the integrity of the returns is thus overthrown, the best evidence of the number of the voters at the election, and of the way in which they voted, is the poll lists of the voters and the ballots which they cast. It is claimed that these poll lists and ballots are expressly required by the Alabama election laws to be preserved as evidence, and that they should either have been produced or proven to have been unattainable before evidence of the kind offered by contestant as to the number of votes cast for him could be received.

It is insisted that at least the voters should have been produced and should have testified in person as to how they voted. In other words, the contestee seeks to shelter himself behind the well-known rule of evidence that the best attainable evidence of a fact must always be produced, and that until this is shown to be unattainable secondary evidence of the fact is not admissible. In reply to this proposition we have to say that under the plenary powers conferred upon the House by the Federal Constitution to determine the election of its own Members it possesses the undoubted power to determine this contest in favor of contestant on any evidence which in its opinion establishes fraud in this election. Not only does the House possess this power, but in view of all the circumstances of this case every consideration of justice and right require that it should be exercised in contestant's favor, unfettered by this rule which the contestee invokes. But the contestant does not have. to rely upon this position. The rule of evidence invoked by contestee has been complied with.

The testimony which he has introduced in this case, and which is set forth herein, not only impeaches the returns of the inspectors of election, but it goes further. It impeaches the inspectors and returning officers themselves. It shows them to have been utterly unscrupulous and dishonest in conducting the election from beginning to end. It taints every step they took with fraud and chicanery. It attaches to the poll lists and ballots which passed through their disreputable hands and were intrusted to their disloyal custody, and impeaches the integrity of these as well as that of the returns. Having been subjected to such influences, it is very apparent that as instruments of evidence these poll lists and ballots are utterly without value or reliability in this case.

This being the case, their primary character as evidence is lost, and contestant's evidence is clearly admissible. It would be a remarkable requirement that contestant should produce the very records made by these election officers in order to show the names and number of the voters, or that he should produce the ballots which he might find in their possession long after the election to show for whom the electors voted, when he has clearly established the fact that these officers conducted the entire election with the grossest dishonesty, and practiced thereat all manner of fraud and cunning in order to prevent a fair election.

The majority ruled as follows on other questions:

(a) In three precincts the returns were properly made out, and, with the ballots, were sealed and delivered to the returning officer, but did not reach the board of supervisors, whose duty it was to canvass the returns. One of the returning officers alleged that the package given to him was stolen. In each precinct one witness, who was uncontradicted, testified as to the vote received by contestant, and this vote was allowed. In another precinct, under similar circumstances, the testimony of the witness was supplemented by a copy of the certificate of the election inspectors, and the vote was allowed.

(b) In Leaderville precinct the duly appointed inspectors failed to attend, and polls were opened by the organization of a new board of inspectors. Votes were cast and received, but no returns reached the board of supervisors when they met to make the canvass. Therefore the majority refused contestant's claim to votes., for the reason that the evidence failed to establish that a legal election was held.

The majority concluded, in accordance with the above reasoning, that the official returns should be modified by adding to sitting Member's vote 13 votes, to contestant's 684 votes, and to McCall's 1 vote. Thus the plurality would still remain with sitting Member, and resolutions confirming his title were reported.

The minority found from their examination that contestant had a plurality of at least 604 votes.

The report was debated in the House on February 28, and on that day the motion made on behalf of the minority to substitute resolutions seating contestant was decided in the negative, yeas 64, nays 190.

The resolutions of the majority were then agreed to without division, and sitting Member retained the seat.

1044. The Pennsylvania election case of Greevy v. Scull in the Fifty-second Congress.

Where ballots are numbered in connection with the voter's name, the ballots themselves are the best evidence, and the testimony of the voter should not be taken.

The ballots are among the papers of which the officer taking testimony in an election case may demand the production.

The State law requiring the voters to vote in the precinct in which they reside, the House insists on absolute and technical adherence thereto.

Voters who have performed fully their own duty as to registration are not to be disfranchised because of defects in the lists caused by establishment of new voting places.

Votes received before the election board was legally organized were rejected.

Although a sticker for one candidate left the name of the other exposed, the House considered the voter's intent evident and counted the sticker.

On January 19, 1893,[1] Mr. Charles T. O'Ferrall, of Virginia, from the Committee on Elections, submitted the report in the Pennsylvania case of Greevy *v.* Scull. The sitting Member had been returned by a majority of 524, which contestant sought to overcome, on grounds described in the report:

> In the notice of contest it was charged that a large number of illegal votes were cast for the contestee—illegal because the voters were not registered, or had not made the proof on the day of election, or had not paid a tax as required by the constitution and statute of Pennsylvania, or were nonresidents of the State, county, or election district, or had voted in boroughs, when they resided in townships, or had voted in wards of cities or townships, when they had not lived in the me the time prescribed by law. All of these allegations were denied in the answer of the contestee, and countercharges were made that many illegal votes were cast for the contestant, alleging the same grounds of illegality as those just recited.

The case involved the investigation of the illegality of over 1,300 votes, and the committee in this connection laid down the following rule:

> It is proper here to state that the contestant relied upon the testimony of the voters themselves to show for whom they cast their ballots. Upon an examination of the statutes of Pennsylvania it was

[1] Second session Fifty-second Congress, House Report No. 2333; Rowell's Digest, p. 478; Stofer's Digest, p. 141; Record. p. 805.

found that the ballot of every voter is required to be numbered by the election officers, the number to correspond with the number opposite the voter's name on the poll list, and that all the ballots cast at an election are required to be preserved "to answer the call of any person or tribunal authorized to try the merits of such election."

It is a well-established principle that the ballot of a voter which has been safely preserved by some authorized custodian is the best evidence as to how or for whom he voted and must be produced, and that the testimony of the voter himself is secondary and inadmissible.

In this case, however, the language of the statute "to answer the call of any person or tribunal authorized to try the merits of such election "seems to have led the contestant to believe that he could not call for the ballots, and acting apparently upon this belief he introduced the voters themselves.

In the opinion of the committee the contestant would have found ample authority for the production of the ballots in sections 122 and 123 of the Revised Statutes of the United States. In section 123 full power is given the officer engaged in taking depositions in a contested election case in the House of Representatives "to require the production of papers," and if "any person refuse or neglect to produce and deliver up any paper or papers in his possession pertaining to the election," he is made liable to heavy penalties.

The ballots were papers pertaining to the election; they were numbered so that each one of them could be identified as the ballot cast by the particular voter whose vote was in controversy; they were the best evidence; they were mute witnesses, yet told their own story and were unimpeachable; they could not be bribed nor corrupted. In most instances, according to the testimony, they had been safely preserved and no corrupt fingers had handled them.

But while the committee adhere to the opinion that the evidence of the voters was inadmissible, and to the uniform current of decisions that where the ballots cast at an election are required to be so numbered as to enable them to be identified, and they have been safely preserved by some legal custodian, they must be produced as the best evidence, and the testimony of the voters is secondary and inadmissible, yet it has been considered proper to report the names of such voters who cast illegal votes, and who, as shown by their own testimony, voted for the contestee.

It is also proper, in this connection, to state that in the counties of Blair and Bedford the contestee resorted to the same character of proof as that to which reference has just been made, but in the counties of Cambria and Somerset he introduced the ballots, after first showing that they had been securely kept, except in certain instances which were disregarded by the committee and are not included in the illegal lists herein reported, but allowed to stand in the contestant's column.

Several other questions arose in the determination of this case as follows:

1. The constitution of Pennsylvania provided that a voter "shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election." The evidence showed certain violations of this provision:

(a) In the township of Somerset the electors voted for many years at a precinct which, when the borough of Somerset was created, was taken into the borough, and became the borough precinct. No precinct was established for that part of the township left outside the borough, and at the election in question the township voters cast their ballots in the old precinct, as usual.

(b) At Elk Lick Township there was a precinct within the township, but on the day of election the owner of the house in which the elections had been held for some years refused to allow the polls to be opened in it, and the officers of the election crossed a narrow alley into the borough of Salisbury and there opened the polls and received the ballots of the township voters.

(c) In six townships in Bedford County the electors voted in neighboring boroughs, as had been done for many years, and because no voting places had been established in the townships.

In regard to these cases the committee conclude:

While the committee regard it as a hardship upon the electors in these different townships to reject their votes, yet the constitution and laws of Pennsylvania must be obeyed. The provision of the constitution of that State requiring, without qualification, the electors to vote in the districts in which they had resided for at least two months immediately preceding the election must be enforced. A mistaken idea of the law upon the part of the electors, however honest, or a neglect or refuel upon the part of the lower courts to establish voting places within the townships, can not render void the plain provisions of the constitution. The power to fix the qualifications of voters is vested in the State, subject only to the limitation contained in the fifteenth amendment to the Constitution of the United States. Each State fixes for itself these qualifications, and the United States must adopt and has uniformly adopted the State law upon the subject, and the House of Representatives should not in any case fail to act in conformity with it.

2. As to the voting of electors alleged to be unregistered, question arose from the following conditions: Prior to October 1, 1890, the township of Somerset was divided into two election districts, the northern end being designated as No. 1 and the southern as No. 2. On October 1, 1890, Lincoln Township was formed, and included all of district No. 2 and a small portion of district No. 1, and the old No. 2 voting place was made the precinct of the new township. The committee thus describe the resulting difficulties:

There was no new registration made or ordered for the new township, but the old registration of district No. 2, which embraced all the voters in the new township except about 20 who resided in that part of district No. I which was annexed to district No. 2 in the formation of Lincoln Township, was used at the polls, and the voters of the former district No. 2 and the annexed part as aforesaid voted.

In the opinion of the committee there can be no question as to the legality of all of these votes except, perhaps, those cast by voters who resided in the territory taken from district No. 1, about 20, as already stated. They had not in any manner changed their location; they still resided in the territory in which they were registered and cast their ballots at the identical place at which they had formerly voted.

All that had been done was to annex a wall strip of territory to the territory in which they lived, and change the name of district No. 2 to Lincoln Township. If there had been no change, there is no pretense they would not have been legal voters. The registration list had been made a very short time prior to the election as required by law, and the registering officer could with propriety have taken it and changed the caption of it from district No. 2 to Lincoln Township. Nothing was done, in our opinion, to change the legal status of these voters, nor to deprive them of the right to vote in said township in the territory in which they had resided at least the two months required by the constitution of their State. They were guilty of no wrong; no fault could be laid at their door; no negligence on their part could be charged; they had done all that they could do to qualify themselves to vote, and to hold that they could be deprived of their right of suffrage by an order of the court over which they had no control, on the eve of an election, and when they had no time for redress, is a doctrine to which the committee can not subscribe.

The intention of the legislatures in all of the States in providing for registration lists is to guard against fraudulent voting, to prevent colonizing, and men without fixed habitations from depositing their ballots wherever they may chance to be on an election day, and to require residence sufficiently long in a community that the voter may become known and regarded as a bona fide resident and not a mere floater or bird of passage. The registration list as used in the township of Lincoln was as effective in these respects and filled the purposes of the law as completely as if it had been used in district No. 2 before the township was formed.

As to the 20 voters in the annexed territory, it will be found that their names were on the registry list of district No. 1, and this list was at the polls in Lincoln Township on the day of election, and the committee think this was a substantial compliance with the law under all the surrounding circumstances; but, in any event, there is no evidence for whom they voted, and if their votes were illegal and affected the result they would, under the authorities, have to be deducted proportionately from both candidates, according to the entire vote returned for each.

The committee quote McCrary and Paine in support of this view, and say:

In the cases of these voters, they had registered in the districts wherein they lived at the time the registry lists for the November, 1990, election were made as required by law; they remained in the very territory sad at the very spots wherein and whereon they lived when these registry lists were prepared; they were guilty of no wrong and neglected no duty, impliedly or otherwise; they could not register again after the changes were made, as the time for registration had passed; they could not control the action of the court and were not responsible for it, and "it would seem a very unjust thing to deny them the right to vote."

In every instance the record shows that the registry lists of the original precincts or districts were at the polls, in the bands of the election officers, and the mere failure upon their part to perform the clerical work of transferring should not deprive the voters of the right to cast their ballots." We should look at the substance and not the formality."

The township of Fairhope and a portion of Altoona were in the same condition as Lincoln, and were considered with it by the committee.

3. As to votes received before the organization of the board, the committee concluded:

The committee also find that 29 votes were received and deposited in the First Ward of Tyrone, Blair County, before the election board was organized or complete as required by law. Twenty-six of these votes were cast for the contestee and should be deducted from the contestee's column, if the testimony of the voters themselves is received as proper evidence.

4. As to the force of the voter's intent they found:

In the first precinct of the First Ward of Altoona a ballot was counted for the contestee which had on it a paster bearing the name of the contestant, but leaving the name of the contestee exposed; it was a Republican ticket. The committee think that the placing of the sticker on the ballot indicated the intention of the voter to vote for the contestant, and that one vote should be deducted in the contestee and one added to the contestant.

The committee found that after the deductions had been made in accordance with the above reasoning, and adhering to the principle that the testimony of the elector as to how he voted should not be received when the ballots themselves were accessible, the sitting Member had a majority of 687 votes. Therefore the committee (no minority filing views in dissent) recommended resolutions confirming sitting Member's title to his seat.

This report was not acted on by the House, and so sitting Member remained in the seat.

1045. The South Carolina election case of Miller v. Elliott in the Fifty-second Congress.

Discussion as to the degree of variations permissible from size and style of printing of ballots prescribed by a mandatory law.

Use of the word "for" before the designation of the office condemned as a distinguishing mark on a ballot.

The size and impression of the type, permitting a ballot to be read on the back, was held to be a distinguishing mark.

Instance wherein a variation of one-sixteenth of an inch from the legal size contributed to condemnation of a ballot.

The color of a ballot is considered in determining as to distinguishing marks.

On February 25, 1893,[1] Mr. Thomas H. Paynter, of Kentucky, from the Committee on Elections, presented the report of the majority[2] on the South Carolina case of Miller *v.* Elliott. The issues as to this case arose under the following provisions of the South Carolina law:

SEC. 115. The voting shall be by ballot, which ballot shall be of plain white paper of two and a half inches wide by five inches long, clear and even cut, without ornament, designation, mutilation, symbol, or mark of any kind whatsoever, except the name or names of the person or persons voted for, and the office to which such person or persons are intended to be chosen, which name or names and office or offices shall be written or printed, or partly written and partly printed, thereon, in black ink; and such ballot shall be so folded as to conceal the name or names thereon, and so folded shall be deposited in a box to be constructed, kept, and disposed of as hereafter provided; and no ballot of any other description found in any election box shall be counted.

The contest arose over acts of South Carolina election officers, which are described fully in the minority views:

The boards of precinct managers, or local election officers, of which there were a large number in the district, were, in a great majority of instances, made up entirely of Democrats, and in the remaining instances the Republicans had only a minority representation. When the vote had been polled at the election, the precinct managers at Port Royal, in Beaufort County, and Muster House, in Berkeley County, rejected in the aggregate 324 ballots that had been cast for Miller, being all the ballots he had received at these precincts, and returned to the boards of county canvassers in all 46 votes for Elliott and 4 votes for Brayton, being the total votes polled for these candidates.

In no other precinct in the district were there any ballots rejected by the boards of precinct managers, but the entire vote as cast was certified by these local boards to the boards of county canvassers. The vote so certified showed Miller to have received 7,026 votes, Elliott 3,793 votes, and Brayton 1,413 votes in the district, and that Miller had therefore been elected to Congress over Elliott by a plurality of 3,233 votes. Every board of county canvassers in the district was Democratic, and Elliott appeared before each one of them either in person or by counsel, and moved that the entire vote cast for Mr. Miller in the county be thrown out and rejected on four grounds, to wit:

First, that his ballots were one-sixteenth of an inch shorter than required by the statute of the State; second, that the word "for "appeared on his ballots just preceding the word "Congress; "third, that the ballots were not printed on plain white paper as the statute directed, and, fourth, that the name of Thomas E. Miller was so printed upon the ballots as to be seen through their backs when folded.

The boards of county canvassers in the counties of Beaufort, Berkeley, Colleton, and Orangeburg sustained this motion of Elliott, rejected all of the ballots cast for Miller in these counties, and certified to the board of State canvassers simply the vote cast for Elliott and Brayton. The county canvassers in the counties of Georgetown, Williamsburg, Charleston, Richland, and Sumter, however, overruled Elliott's motion, refused to throw out the Miller ballots, and certified to the State board the vote as certified to them by the local election officers. The effect of the action of the boards of county canvasses in the fast-named counties in rejecting the Miller ballots was such that Elliott appeared to have been elected to Congress over him in the district by a plurality of 478 votes. From the decision of each of these county boards an appeal was taken to the board of State canvassers, Miller appealing from the action of the first-named boards and Elliott from the decision of those last named.

The board of State canvassers was composed of the attorney-general, the secretary of state, the treasurer of state, the comptroller of state, the adjutant and inspector-general of state, and the chairman of the committee on privileges and elections of the house of representatives of the State legislature, all of whom were Democrats. On the questions involved in the appeals these members of the State board divided evenly, the attorney-general being one of the members who voted in favor of counting the rejected Miller ballots. Thereupon, the board of State canvassers being unable to come to any conclusion in the matter on the application of Elliott and his friends, the supreme court of South

[1] Second session Fifty-second Congress, House Report No. 2569; Rowell's Digest, p. 480; Stofer's Digest, p. 165; Journal, p. 116.

[2] The minority views were presented by Mr. Henry, U. Johnson, of Indiana.

Carolina issued a writ of mandamus against the members of the board commanding them to make out a statement of the vote as returned to them by the boards of county canvassers, and to certify it and the election of Elliott, and deliver the same to the secretary of state.

At the outset the majority of the committee assert that—

The evidence shows in the case that the contestant designed in the method of having his ballots printed to destroy the secrecy of the ballot; that his purpose was to procure the kind of material on which they were printed, and have the printing so executed that it could be told by himself and friends how an elector was voting, thus attempting to disregard utterly the wise purpose of the law, which was to enable an elector to vote as he desired, without intimidation and in secrecy. Contestant in 1890 gave his printer one of the ballots, the like of which was used by him in the election of 1888, and ordered his ballots printed like that one; that instead of having them printed on "plain white paper," he had them printed on "dirty white paper; "that he had the printing on the tickets spread out, and his name dropped a little lower down than on the ticket of 1888, for no purpose except the name Thomas E. Miller would not be so likely to be in the crease when the ticket was folded, thus enabling the name to be easier seen. In the language of his printer, he wanted "his name in bold black type which he selected himself."

The minority attempt to discredit the testimony attributing such a motive to contestant, and express the opinion that such a charge is unwarranted.

The majority upheld the action of the election officers on the ground that the law was mandatory:

It will be observed that the law prescribes—

The size of the ballot.

That it shall be of "plain white paper."

That it shall be clear and even cut.

It shall be without ornamentation, designation, mutilation, symbol, or mark of any kind whatsoever, except the name or names of the persons voted for and the office to which such person or persons are intended to be chosen.

The ballot can be either written or printed or partly written or partly printed in black ink.

The ballot shall be so folded as to conceal the name or names thereon and so folded shall be deposited in a box.

It provides further: "No ballot of any other description found in any election box shall be counted."

That the statute is mandatory there can be no question.

The object of the law was to so far as possible prevent bribery and intimidation of the voters; that for whom the elector voted should alone be his secret, thus preventing anyone from knowing or questioning him as to the ticket which he voted.

The purpose was to make the elector a freeman in the exercise of the election franchise.

The legislature intended that there should be uniformity in size, so that the ballots could not be distinguished by a difference in size. That "plain white paper" should be used, so that neither the voter, the candidate, their friends, nor the officers conducting the election could tell from the texture or tint of the paper for whom the elector voted.

So exact was the ballot to be that it was required to be "clear and even cut."

It was intended that no ornamentation, mark, etc., should be on the ballot as another safeguard against the knowledge of anyone as to how the elector voted.

As an additional precaution to secure secrecy the law requires the ballots shall be "printed or written in black ink."

After taking all these precautions, so as to secure secrecy in voting, the law requires that "the ballot shall be so folded as to conceal the name or names thereon."

The law-making power knew that a statute of this kind was of no value without a penalty; that if the candidates for office, their friends, the electors, or the managers of elections could disregard the law and defeat its beneficent purposes its enactment was folly; therefore, notice was given to the electors that if you do not comply with the provisions of this law, by voting that kind of ballot which is prescribed by law, then the penalty shall be incurred, to wit: "No ballot of any other description found in any box shall be counted."

In support of their position the majority cite Nichols *v.* Board of Canvassers (129 N. Y.), Reynolds *v.* Snow (67 Cal., 497), Talcott *v.* Philbrick (59 Ann., 477), Oglesby *v.* Legman (58 Miss., 511), and Steel *v.* Calhoun (61 Miss., 563), and say:

If the legislature had merely prescribed the form of the ballot, without declaring those in any other form illegal or commanding their rejection, then it might be a question whether the statute was directory or mandatory. But here the law makes a ballot not in the prescribed form illegal, and declares it shall not be counted; there is no place for the question as to whether the statute is mandatory or directory. The ballot not in the prescribed form is illegal and must be rejected, because the law in terms declares that it shall not be counted.

No court in South Carolina, so far as the committee is aware, has passed upon this law.

The minority opposed the contention of the majority, and argued that the authorities cited had no exact bearing on the case in issue:

(a) As to the shortness of the ballots, the minority show that some, not all, of the rejected ballots varied from the required size by one-sixteenth of an inch in length, and that this was occasioned by accident in printing, and not from wrongful intent. The minority say:

Nor can it be claimed that this shortness in some of the ballots operated as a distinguishing mark, or that any living soul was deceived or otherwise injured thereby.

But it is claimed that the statute is mandatory in its terms and that, this being the case, there is no room for construction, and that any deviation from its requirements as to the length of the ballot, however occasioned or however trifling, renders the ballot void and necessitates its rejection. The minority submit that such a view as this is absurd. It abandons reason and throws common sense to the winds. The object of this statute is to give the elector the right to vote and to aid and protect him in the enjoyment of this right. The rule contended for by the contestee would invariably defeat this very object. There can not, in the very nature of things, ever be absolute perfection in conforming to the requirements of election statutes. Slight deviations here or there will necessarily occur.

The legislature which enacted this statute evidently did not intend to entrap the elector or to hold him responsible for defects so trivial that he could not reasonably observe them. It did not proceed upon the theory either that workmen were infallible or that printing machinery was perfect, nor intend to require that each voter should carry a rule with him to the polls in order to accertain by actual measurement whether his ticket varied the tithe of a hair in length or breadth from the legal requirement. There is ample scope in this case for the application to these ballots of the legal maxim, de minimis non curat lex. The minority also insist that the statute is question is in no wise exempt from the rule of construction laid down by the supreme court of one of the leading States of the Union that "all statutes tending to limit the citizen in the exercise of this right (the right of suffrage) should be liberally construed in his favor."

The minority further refer to the case of Campbell *v.* Morey, and to acts of South Carolina election officers in a late election.

(b) As to the use of the word "For" the minority say:

It is not pretended that there was any unlawful purpose in having the ballots printed in this way, nor that the word "For" constituted in any manner a distinguishing mark, for all of Mr. Miller's ballots were printed alike in this particular; nor is it claimed that anyone was deceived or injured by this word appearing on the ballots, or that the result of the election was in anywise affected by it; but it is contended here, as in the case of the shortness of the ballots, that the South Carolina statute is mandatory and requires that for this alleged defect the ballots shall be rejected. We have no desire to repeat in this connection what we have already said with respect to the construction of the statute. It is worthy of note that in only two precincts in the entire Congressional district were any of Miller's ballots rejected by the local officers of election.

The minority further discuss authorities bearing on this question.

(c) The minority reply to the third objection:

The minority assert that no ballot can be rejected, even under the terms of this mandatory statute, which is printed upon what is known and recognized as plain white paper, even though, owing to a difference in shade, it can be distinguished at the election from the ballots of other candidates printed on paper of the same general description.

These rejected ballots of Mr. Miller are unquestionably within the words "plain white paper" as employed in this statute, whether these words are construed in their usual and ordinary acceptation or as understood by expert printers and paper dealers. Four such experts, one of whom resided in Charleston, S. C., examined these very ballots and swore that they were of plain white paper, and that the paper on which they were printed was usually and commonly known by that designation among those of their profession. These witnesses were not contradicted. A number of persons, not experts, also testify in this case that these ballots are of plain white paper. As heretofore stated, every one of these ballots claimed to have been illegal are in evidence in this case and are now in the custody of the committee, and are easily accessible to the House. That they fully answer the requirements of the statute as to color is apparent at a glance.

(d) The minority do not admit the fact as alleged in the fourth objection, and also deny that the conclusions of the majority were in fact true:

It was evidently contemplated by those who framed this South Carolina statute that it might sometimes happen in the printing of tickets, because of the thinness of the paper, the amount of ink used, the force of the impression in printing, or some other cause, that the name of a candidate would show through the back of the ticket. It is also apparent that it was not the intention of the legislature to declare such a ballot illegal solely for this reason; nor does the statute, in point of fact, declare such a ballot void.

It was foreseen that a ballot so printed might still be folded and voted by the elector in such a manner as to conceal the name entirely from view. The statute was not designed to render such a ballot so voted illegal, but to protect it, and its language was so framed as to accomplish this purpose, for the statute provides "and such ballot shall be so folded as to conceal the name or names thereon, and so folded shall be deposited." Even if Miller's ballots were so printed, then, as to disclose his name through the back, still, if so folded and voted as to conceal the name from observation, the minority believe that such ballots would be legal.

The majority of the committee reported resolutions declaring contestant not elected, and confirming sitting Member's title to the seat. The minority insisted that contestant should be seated. The House did not act on the report, sitting Member of course retaining his seat.

1046. The Alabama election case of Whatley v. Cobb in the Fifty-third Congress.

The common-law rules of evidence which govern in the courts of law obtain in the trial of election cases in the House.

It is a rule of law that public officers are supposed to do their duty, and this presumption becomes conclusive if not rebutted.

On January 19, 1894,[1] Mr. Alfred A. Taylor, of Tennessee, from the Committee on Elections, submitted the report in the Alabama case of Whatley *v.* Cobb. The contestant made numerous charges of irregularities and fraud, but so far as the evidence went the only claim seemed to be that certain returns were not transmitted from the inspectors of election to the boards of county canvassers. Admitting the legality and regularity of the evidence on this point, a majority of 515 votes would

[1] Second session Fifty-third Congress, House Report No. 267; Rowell's Digest, p. 483; Journal, p. 268.

still be left to sitting Member. But the committee do not admit the validity of this testimony, and say:

It is well established that the common-law rules of evidence which govern in the courts of law obtain in the trial of cases of contested elections in this House. Tested by these rules the whole of the evidence produced by the contestant, except only the official returns made by the secretary of state of Alabama to this House, is inadmissible. It is either secondary when the primary was obtainable, or mere hearsay. It is also incomplete for the attainment of the results sought by the contestant.

Without going into detailed argument on these points one instance will suffice. After proving, as he claims, that regular elections were held at certain precincts and the results properly and legally ascertained, and the official returns duly given to the returning officers, whose sworn duty it was to transmit them to the county returning officer, whose duty, in turn, was to deliver them to the county boards to be counted, the contestant made no effort to show that the returning officers, either for the precincts or the counties, failed to discharge their sworn duty. To this statement there is perhaps one exception.

The inference is plain. It is a rule of law that public officers are presumed to do their duty, and this presumption becomes conclusive if not rebutted. In this case it is conclusive.

It is needless to protract this report. There is nothing in the case fairly considered to disturb the officially ascertained majority in favor of the contestee.

In his brief the contestant supposes many things, and proceeds to argue on these suppositions, but in this course the committee must decline to follow him.

We see nothing in the record to justify the charges in the notice of contest or the strictures made by the contestant in his brief. The latter could well have been pretermitted. We are bound to presume that if legal evidence existed to sustain the charges made, it would have been produced, and as it has not been produced we presume it was not to be had, and that, therefore, the contestant suffered a fair defeat.

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

On March 23 these resolutions were agreed to by the House without debate or division.

1047. The Missouri election case of O'Neill v. Joy in the Fifty-third Congress.

It being assumed that a State law required the rejection of ballots not properly indorsed or numbered by election officers, the House corrected the poll in accordance therewith.

Discussion as to whether a voter should be disfranchised for failure of election officers to obey a law requiring indorsement and numbering of the ballot.

On January 19, 1894,[1] Mr. Josiah Patterson, of Tennessee, from the Committee on Elections, submitted the report of a majority of the committee in the Missouri case of O'Neill *v.* Joy. The contestant claimed the seat on the ground that he received a majority of the legal votes.

The majority consider only one aspect of the case, which they consider decisive. Preliminarily they give this description of the essential features of the Australian ballot law of Missouri:

When a citizen presents himself as a voter and asks for a ballot, the judges can see at a glance whether he appears on the registration list, and if so the distributing judges take one ballot, and after writing their respective signatures or initials on the back of the ballot, they deliver it to the voter. The voter then retires to a booth where, unmolested and unobserved, he prepares his ballot to suit himself.

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[1] Second session Fifty-third Congress, House Report No. 268; Rowell's Digest, p. 497; Journal, pp. 304, 305; Record, pp. 3420–3424.

If by accident or carelessness he so mutilates his ballot as to render it useless he can return it to the distributing judges and receive another, indorsed in like manner. In this way the distributing judges are required to keep track of every ballot.

When the voter has prepared his ballot and folded the same, he is prepared to vote, and it is offered by him to two other judges who also belong to opposing political parties, called the receiving judges. The ballot is by them examined to see if it is indorsed by the signatures or the initials of the distributing judges. It is proper to observe in this connection that the requirement of the law is that both judges shall write their signatures or initials on the ballot, otherwise one of the judges might collude with fraudulent voters. The requirement is that judges opposed to each other politically shall concur in issuing the ballot.

If the ballot is legally indorsed by the distributing judges, it is received by the receiving judges, who are required to call out in an audible voice the name of the voter. Then the receiving judges indorse on the back of the ballot the voting number, or the number of the ballot in the order in which it is offered, this being the only writing which the law permits them to indorse on the ballot; and at the same time the voting number is entered on the registration list opposite the name of the voter with the word "voted." Then the receiving judges, or one of them. call out the voting number in a voice sufficiently loud to be heard by the bystanders and the ballot is placed in the box.

The majority thus state and apply the law in regard to deviations from the prescribed method of voting:

In section 4785, Revised Statutes, 1889, as amended by section 11 of the act of April 4, 1891, it is expressly provided that—

"Every ballot shall be numbered in the order in which it shall be received. No judge of election shall deposit any ballot upon which the names or initials of the judges as hereinbefore provided for does not appear."

In section 1005, Revised Statutes, 1889, it is provided that—

"No ballot not numbered as herein provided shall be counted."

In section 4671, Revised Statutes, 1889, chapter 60, it is further enacted—

"Any ballot not conforming to the provisions of this chapter shall be considered fraudulent and void."

Section 4780, Revised Statutes, 1889, chapter 60, as amended by section 8 of the act of April 4, 1891, reads as follows:

"On any day of election of public officers in any election district, each qualified elector shall be entitled to receive from the judges of election one ballot. It shall be the duty of such judges of election to deliver such ballot to the elector. Before delivering any ballot to the elector the two judges of election having charge of the ballots shall write their names or initials upon the back of the ballot with ink or indelible pencil, and no other writing shall be on the back of the ballot, except the number of the ballot."

Now, these provisions of the law of Missouri are plainly and emphatically mandatory. This is too clear for discussion, and we refrain from citing authorities or quoting decisions in support of a proposition so free from doubt. It may be said that to enforce these statutes according to their plain intent and purpose will work injustice to the voter, and that he ought not to be held responsible for the failure of the distributing judges to write their signatures or initials on his ballot, or the failure of the receiving judges to number it.

But it must be borne in mind that no man has the natural or inherent right to vote. The voter is an agency of the State, clothed by the State with the elective franchise, and the same power which prescribes who shall have the franchise can also prescribe the manner of its exercise and throw such safeguards around the ballot as will protect it from fraud and dishonesty. Again, the voter is presumed to know something of the law which secures to him the elective franchise and prescribes the conditions on which it is to be exercised. When he receives his ballot, he can plainly see whether it bears the names or initials of the distributing judges. The receiving judges are required to announce the number of his ballot in a voice sufficiently audible as to be heard by the bystanders.

As the voter is the nearest bystander it may well be presumed he will hear the announcement of his number, and as the numbering is required to be consecutive there is neither temptation or opportunity to write other than the proper number and announce it to the bystanders. The opportunity of the voter to

inform himself and to guard against the loss of his ballot by complying with the law is ample. Especially is this true in view of the fact that at least one of the judges is his political associate and friend and is there to protect him. But aside from all this we have nothing to do with the severity or the hardships of the law. It is plainly mandatory, and precedent and sound public policy alike demand that it should be enforced and obeyed.

(See Ledbetter *v.* Hall, 62 Mo., 422; State *ex rel. v.* Cook, 41 Mo., 693; West *v.* Ross, 53 Mo., 350; Gumm *v.* Hubbard, 97 Mo., 311; McCrary on Elections, sec. 126.)

The majority found 607 ballots counted for sitting Member invalid because some were not numbered, or had no initials of the distributing judges, or had the initials of only one judge. They also found that 330 ballots counted for contestant should be rejected for the same reasons. As sitting Member had been returned by a majority of only 67, the effect of this was to show the election of contestant by a majority of 210.

There were other questions in this case which the majority briefly notice, but say:

However, it is not deemed necessary to go into an analysis of the evidence as to these matters, as it is conceded by all parties that if the ballots not numbered or initialed as required by law axe to be thrown out the contestant was duly elected

The minority contended that the provisions of law in section 1471, Revised Statutes, quoted above, providing that ballots not conforming to the law should be considered fraudulent and void, related to elections as they were before the passage of the new law of 1891, and say:

And where one system of law is enacted as a substitute for a preceding law the rule of construction is that the preceding law is repealed, although there may be no express declaration of that intention contained in the later act.

The minority further say:

Neither the act forming article 3, of chapter 60, of the revised statutes of the State of Missouri, nor the amendatory act of 1891, in any manner sanctions the construction that the ballot of the elector shall be rejected for the omission to place the voting number upon it. Nor does it forbid the ballot without this number, as it probably would have done in terms if that had been intended, to be placed in the ballot box. And it was to this ballot alone that the language of the statutes of 1889 and 1891 were expressly directed, and the preceding law had no possible reference to this ballot, for it was not then a ballot which could be used under the laws of the State of Missouri. This new system for the first time provided that the ballot should be indorsed with the names or initials of the two judges before its delivery to the voter. No such provision was contained in any form in the preceding law, and therefore the preceding law could not act upon this direction in any form whatever. It is by the law providing for the Australian ballot alone that the direction for the indorsement of the initials of the judges has been given, and they have been forbidden to deposit a ballot in the box not containing the or initials of the two judges.

The prohibition, it will be seen from the language of the section, is directed to the judges themselves, and not to the voter. When he passed back his ballot to the judges as the ballot he intended to vote, all had been done by him which the statute required from him to have his vote deposited and counted. The law does not attempt to deprive him of this right, as it probably could not under the language of the constitution of the State, which defines the qualifications of the voter, and then declares that the person possessing these qualifications shall be entitled to vote. By no construction of this language can it be said that it was intended by the legislature that the disability should be imposed upon the voter, or that his vote when prepared by him to his own satisfaction, and returned to the judges, should be rejected because of any default on the part of the judges in complying with the language of the statute. Neither do these statutes declare that an unnumbered ballot shall not be deposited in the box.

Cases have frequently arisen where the validity or legality of the ballot has been brought in controversy, but no case has been discovered sanctioning the conclusion that the voter shall be deprived of his vote by the omission of the election officers to discharge a duty imposed upon them by law. It is only when a statute has declared the ballot to be void, or forbade it to be counted, that the courts have felt obliged to sanction its exclusion. As the preceding law did not apply to these ballots, but applied solely and wholly to the ballot furnished by the voter himself, it could not consistently be invoked to deprive the voter of his vote, on account of the omission on the part of the judges to initial or number the ballot. It has been assumed by the majority that section 4671 of that law justified the exclusion of the ballots indorsed with but one initial. But it will be seen by a reference to that section, which has already been made, that it is restricted expressly to the ballots voted under the provisions of that law, and it contains no such flexibility of language as will permit it to be applied to the ballots voted under article 3 of chapter 60, and the law of 1891, amending and extending that article.

The minority further call attention to the fact that the evidence proves the ballots to have been honestly voted and received, and condemn the harsh construction of law which would thus unseat sitting Member.

This case was the occasion of prolonged dilatory proceedings, but on April 3, 1894, the House finally came to a vote on the resolution of the majority declaring sitting Member not elected, and it was agreed to, yeas 156, nays 24. The resolution seating contestant was next agreed to, yeas 155, nays 28.

1048. The North Carolina election case of Williams v. Settle in the Fifty-third Congress.

The House should be governed by the construction given to a State law by the supreme court of the State.

The burden is on the party objecting to the vote to show that the elector objected to for illegal registration was illegally registered and for whom he voted.

The registration and poll books are the primary evidence of registration and fact of voting, and when in existence should be produced.

As to proving the act of voting by the elector or by another as well as by the poll book.

The color of the voter should be sustained by other conclusive evidence in order to establish a presumption as to how he voted.

The fact that registration officers register the voter raises the presumption that the latter gave proper answers to questions necessary to the act.

On January 31, 1894,[1] Mr. Thomas H. Paynter, of Kentucky, from the Committee on Elections,[2] submitted a report in the case of Williams *v.* Settle, from North Carolina. The state of the vote is described:

The certified plurality of contestee, by the board of State canvassers, was 329. The precinct returns gave him a plurality of 623. The board of county canvassers, in the county of Granville, rejected the returns from Dement precinct which gave the contestee a plurality of 36; from Wilton precinct, which gave contestee a plurality of 107; from Buchannon, which gave contestee a plurality of 70; from Royster, which gave contestee a plurality of 8. In the county of Guilford the board of county canvassers rejected the returns from one precinct which gave contestee a plurality of 73. Adding these pluralities to that given contestee by the State board of canvassers it will be seen that contestee's plurality in the district is 623.

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[1] Second session Fifty-third Congress, House Report No. 337; Rowell's Digest, p. 484; Journal, third session Fifty-third Congress, p. 169; Record, p. 2945.

[2] The minority views were submitted by Mr. F. A. Woodard, of North Carolina.

Contestant attacked this plurality principally because of alleged illegal registration of many electors who voted for sitting Member, registration being a requirement of the State constitution. He also urged that the returns of certain precincts be rejected for the following reasons:

First. Certain judges or inspectors of election were not sworn.
Second. Registration books were not kept open thirty days.
Third. Some of the officers absented themselves from the polling place for a brief time during the election.
Fourth. Because parties other than the officers handled the ballots.
Fifth. The officers of election began to count some of the ballots before the polls closed.
Sixth. An inspector or judge of the election was candidate.

(a) As to the votes attacked because of alleged illegal registration. The law of North Carolina provided:

SEC. 2676. No registration shall be valid unless it specifies, as near as may be, the age, occupation, place of birth, and place of residence of the elector, as well as the township or county from whence the elector has removed, in the event of removal, and the full name by which the voter is known.

The majority in their report say:

Contestant seeks to overcome this plurality by showing that certain electors were not properly registered and not entitled to exercise the elective franchise. Certain electors were registered, giving name of State or country only as place of birth. Several hundred Republicans and several hundred Democrats were thus registered and voted. It is contended under the interpretation given to the North Carolina statute by the supreme court of that State, in Harris *v.* Scarborough (110 N. C.), by a divided court, that all persons who were thus registered were not entitled to vote. The effect of this opinion is to sustain the claim.

The committee believes that it was the duty of the registrar, when the elector presented himself for registration and was asked where he was born, and his answer was too indefinite by saying he was born in a State, to have asked him the further question as to the locality in the State where he was born. It was made the duty of the registrar under the statute to record his place of birth. To obtain the necessary information to make this record he should have propounded reasonable inquiries to elicit such responses as would have enabled him to discharge his duties properly. It may have been that the elector could not have been more definite as to the place of his birth. However, the highest court in the State has construed the statute, and the committee feels it should follow where that conclusion leads.

The minority dwell at greater length on this point:

That a State has a right to make registration a prerequisite to voting, and that an elector who does not comply with the requirements of the registry laws is not entitled to vote, is now too well settled to admit of discussion.

And it is equally well settled that in adjudicating any matter affecting the election of Members of this body it is the duty of this House to follow the law of the State from which a contest may come, in order to arrive at a proper determination of the controversy. Judge McCrary, in his learned treatise on the law of elections, second edition, page 277, says:

"The House of Representatives of the United States in construing a State law will follow the construction given it by the authorities of the State whose duty it is to construe and execute it. When a construction has been adopted and acted upon by the State authorities, the Federal Government should abide by and follow it."

The minority quote the cases of Wright *v.* Fuller, Holmes *v.* Wilson, Miller *v.* Elliott, and Grevy *v.* Scull in further support of this contention, and make the claim that the majority of the committee had in several instances during its examination of the case disregarded this principle. The principle announced by the

majority as to the duty of registrars was from the opinion of a dissenting judge, and the majority are criticised for giving it a quasi indorsement:

The supreme court also held that if the registrar read the headings calculated to elicit the requisite answers, he certainly did all that the law required of him, and that the failure to enter upon the registration books such facts connected with his history as the statute requires must be considered due to the carelessness or inexcusable ignorance of the elector. But at the same time the court held that if the failure to register properly was due to the neglect or willful act of the registrar, then the voter should not be disfranchised. It is upon this point that the report of the majority of the committee fails to follow the supreme court. * * *

The act of the legislature on the subject of registration, which has governed us in considering this contest, is mandatory. Its intent and meaning have been clearly defined by the highest court in the State.

The majority of the committee, passing to another phase of the question, say:

The burden is on the contestant to show the illegal registration of the elector, that the elector voted, and that he voted for contestee before he can ask to have the vote excluded from the count. The facts should be shown by competent testimony. Unless the board of county commissioners made an order for new registration the statute legalized the previous registration, and the burden being upon the contestant to show that electors were illegally registered and failing to do so he has not placed himself in a position to have any returns excluded. If this is a correct view of the statute then there is a failure of proof to sustain the claim that there were illegal registrations. In the case of Boyer *v.* Teague (106 N. C., 579) it was expressly decided, head note 18:

"When an elector is allowed to deposit his ballot, the burden is on one who questions its validity to show, by a preponderance of testimony, the truth of such facts or circumstances as are relied on to establish the disqualification."

Neither the poll nor registration books have been presented in this case as evidence; neither has a transcript of either been presented as evidence from any county in the Congressional district except in Granville, where transcript of certain registration books has been presented, but not of the poll books. These are the primary evidence of the elector's registration and as to the fact of his voting. The record shows that the poll and registration books were in existence when the testimony was taken. If this conclusion be correct, it settles the case for contestee, because there would be no competent evidence as to the registration of any elector except in Granville County. It is not, however, necessary to take this view of the case, nor the one that there was a failure of proof that there were illegal registrations in order to reach the conclusion that the contestee is entitled to hold his seat.

In another portion of the report the majority also argue this question:

Section 2678 provides that the poll books shall be kept in which shall be entered the name of every person who shall vote; and that at the close of the election the judges of election shall certify same over their proper signatures, and shall deposit them with the register of deeds. It would seem by this that the register of deeds is the custodian of the poll books; and it was further provided in this section that "said poll books shall in any trial for illegal or fraudulent voting be received as evidence."

Section 2686 provides that the registration books shall be deposited with the register of deeds in their respective counties. The register of deeds is the legal custodian of both the registration and poll books.

Neither in the counties of Rockingham, Stokes, Durham, or Caswell is the transcript made of the registration or poll books and presented as evidence in this case; nor is there anything purporting to be a transcript of the poll books presented in this case for any precinct or county.

In the county of Rockingham there is a certificate of the register of deeds stating that certain names are those of certain colored and white electors appearing on the registration books. The certificate simply certifies to the facts which the books purport to show. The registration books are the primary evidence as to who was registered. The poll books are the primary evidence as to the fact that the elector voted. (Paine on Elections, secs. 756, 759; McCrary on Elections, see. 472.) It is certainly not competent to prove the contents of the poll books or registration books except they are lost or destroyed. Such a certificate of the register of deeds could not be received as evidence under any

circumstances. If this conclusion is correct, then there is no competent testimony in this record as to how any elector was registered or as to whether or not he voted either in the counties of Rockingham, Stokes, Durham, or Caswell.

The minority take issue with this proposition:

On page 3 of the majority report objection is made that the entire registration and poll books were not produced. This was not necessary, nor was such an issue made while taking evidence.

Section 2678 of the code of North Carolina, a portion of which is in these words, "They shall keep poll books, in which shall be entered the name of every person who shall vote, and at the close of the election the judges of election shall certify the same over their proper signatures and deposit them with the register of deeds for safekeeping. And said poll books shall, in any trial for illegal or fraudulent voting, be received as evidence," is quoted in the majority report, and much stress is laid on the fact that copies of the poll book of each precinct at which illegal votes were cast were not made and presented as evidence in this case.

While it is provided that "said poll books shall, in any trial for illegal or fraudulent voting, be received as evidence,[2] nowhere is it stated that they shall be the only evidence. Voting is a fact that can be proved, not only by the poll book, but by the evidence of the elector himself, or any other person who may have witnessed the act. And it will be noted just here that the statute refers to the "poll," not the registration book, that "shall in any trial for illegal or fraudulent voting be received as evidence.

The votes alleged to be void were cast in various precincts in Rockingham, Caswell, Stokes, Durham, and Granville counties. The majority, waiving their technical objection as to proof of this illegal registration, entered into an examination, precinct by precinct. In this examination the majority and minority disagree as to questions of fact. Neither deny that many voters, both white and black, appear to be registered illegally, but the majority do not admit that the proof justifies striking the black voters from sitting Member's vote, on the ground that the blacks all voted for sitting Member; and the minority do not admit that because an illegal voter was white he should therefore be stricken from contestant's vote. The voters themselves were not called on to give testimony as to how they voted, but contestant introduced the testimony of election officers, deputy sheriffs, party leaders, etc., to prove from seeing the ballots thrown or from general knowledge that the negroes voted the Republican ticket. The majority denied the conclusiveness of this testimony. The majority also, in the case of Berea precinct, raised this objection:

It is claimed that 33 votes should be taken from contestee at this precinct. J. G. Shotwell was registrar at this precinct and kept registration books. The law provides that the party who seeks to register shall give his place of birth. The registrar was not introduced to say what answers were made by these electors to the inquiry as to the place of birth. There is no evidence that he asked in what county, township, or State they were born, or, if so, what answers were made by the electors. They may have stated the county and State and the registrar failed to make record of it. They may have stated they were unable to state where they were born. If they were unable to do this, they certainly stated as nearly as may be the place of their birth.

In other words, suppose the elector was ignorant as to the place of his birth, he would so state; then he, being unable to be more definite, would certainly not be deprived of the right to exercise the elective franchise. The fact that the registrar placed the name upon the registration books should create the presumption that he gave the proper answers to all questions that were put to him by the registrar. The legal presumption would be in the absence of proof, where the registration book failed to show that his place of birth was stated, that the elector was unable to state his place of birth. This presumption should be indulged, because the other presumption should be that the registrar did his duty. We do not think that these votes should be rejected because of the reasons claimed.

From all these considerations the majority deny contestant's claim that the illegally registered voters should be rejected.

1049. The election case of Williams v. Settle, continued.

The sole objection that election officers are not sworn does not justify rejection of the poll.

Failure to keep the registration books open the required time does not justify rejection of the return if harm is not shown to have resulted.

No fraud being alleged, absence of election officers from the poll for dinner or other reason does not justify rejection of the poll.

Handling of the ballots by parties other than the officers does not necessarily cause rejection of the poll.

Although the law requires ballots to be counted only after close of the voting, a partial count earlier does not necessarily vitiate the poll.

When the law forbids a candidate to be an election officer, is a poll for Congressman void because a candidate for a local office is such officer?

Where a minor may not hold an office, may such minor as a notary take testimony in an election case?

(b) As to the objections to counting the returns of certain precincts:

(1) Because certain judges or inspectors of election were not sworn.

The law of North Carolina provided:

> The said judges of election shall attend at the places for which they are severally appointed on the day of election, and they, together with the registrars for such precinct or township, who shall attend with the registration books, after being sworn by some justice of the peace, or other person authorized to administer oaths, to conduct the election fairly and impartially according to the constitution and laws of the State, shall open the polls and superintend the same until the close of the election.

The report, after citing Payne and McCrary, refers to the case of De Berry *v.* Nicholson (102 N. C.), which in turn cites People *v.* Cook (8 N. Y., 67), and concludes that the court of North Carolina has recognized the principle which should prevail when it held that—

> The neglect of the inspectors or clerks to take an oath would not have vitiated the election. It might have subjected the officers to indictment if the neglect was willful.

In Buchanan precinct it was claimed that the registrar was not sworn, in Royster several were not sworn, and in Delmont one of the judges, who was a justice of the peace, swore his associates, but was not himself sworn. In none of these precincts was fraud alleged, but in Buchanan and Royster other irregularities were alleged. But the committee did not consider that the omission of the oath was sufficient to justify the county canvassers in rejecting the Delmont return, where that was the only objection, or the returns of Buchanan and Royster, where other objections were urged, as appears below.

(2) Because registration books were not kept open thirty days under this provision of the State law:

> SEC. 2675. Registrars shall be furnished with a registration book, and it shall be their duty to revise the existing registration books of their precinct or township in such manner that said books shall show an accurate list of electors previously registered in such precinct or township, and still residing therein, without requiring such electors to be registered anew; and such registrars shall also, between the hours of sunrise and sunset on each day (Sundays excepted), for thirty days preceding the day for closing the registration books as hereinafter provided, keep open said books for the registration of any electors residing in such precinct or township, and entitled to registration, whose names have never before been registered in such precinct or township, or do not appear in the revised list.

This objection had been one of the contributing reasons which caused the county canvassers to reject the return of Wilton precinct. But the committee do not admit the fact, and then state that even were it so, as stated in the objection, it would not invalidate the election.

The registration books were kept open for the thirty days preceding the election, as required by law. Besides, there is no proof in this record showing that a single elector failed to register who was entitled to exercise that right under the constitution and laws of North Carolina. Indeed, there is no pretense by a single witness, so far as we have been able to find from this record, who claims that he could not register because there was no registrar or registration books.

But even had there been a failure to keep the books open for the time required by law, certainly, unless some elector was prevented from registering and was thus prevented from the exercise of the elective franchise at that election, would there be room for just complaint. The purpose of the statute was to afford ample opportunity to all electors to register.

They quote De Berry *v.* Nicholson in support of this position.

(3) Because some of the officers absented themselves from the polling place for a brief time during the election. Under the law above quoted the judges are required to "open the polls and superintend the same until the close of the election." At Buchanan precinct one judge absented himself during the counting, and at Alleys the board of officers went 200 yards to dinner, taking the boxes with them and leaving them in an adjoining room under charge of the daughter of one of their number. No fraud was alleged in either of these cases, and the committee finding everything regular and proper as to the votes, held that the objection did not constitute a reason for rejecting the returns, although in each case other mere irregularities were alleged.

(4) Because parties other than the officers handled the ballots. The committee quote Roberts *v.* Calvert (98 N. C., 580) to the effect that "if the ballots were truly counted, it would not of itself destroy the election at the particular voting place," although the practice was irregular and ought not to be encouraged. The committee find that in Buchanan precinct a person not an officer assisted in counting the ballots in some of the boxes, but not the Congressional box, and they did not think the returns should be rejected for this reason. At Wilton persons other than judges officiated for brief periods, but a majority of sworn judges were always present, and no wrong was found.

(5) The officers of election began to count some of the ballots before the polls closed at Royster and Covington precincts. The report cites Frederick *v.* Wilson and Hurd *v.* Romeis, and concludes:

This manner of counting the vote is no reason for rejecting it, notwithstanding the statute of North Carolina provides that the registrar and judges of election shall open the books and count the ballot after the close of the election. While we think this practice of thus opening the boxes and counting the ballots should be condemned, yet its having been done and the result having been correctly certified, we think the returns should not be rejected on that account. If the statute in express terms declared that the vote should not be counted except after the close of the polls, and if they were so counted that the returns from that precinct should be rejected, then the statute would be mandatory, and would be compelled to follow its provisions and reject the returns; but as the statute is simply directory we feel that no injury should result to the public in consequence of this error upon the part of the election officers.

(6) An inspector or judge of election was a candidate in Buchanan and Royster precincts, and over this a sharp division of opinion occurs between the majority and minority. Of Buchanan the report says:

It appears that some votes were cast for R. A. Chandler, one of the judges of election, for the office of constable. He was not a candidate for Congress. His candidacy for constable did not imply or even create a suspicion that it was to his interest to do anything wrong in the conduct of the election for Congress. His acting as poll holder could not in any way affect the rights of the parties to this contest. The evidence in this record establishes the fact that the election was honestly and fairly conducted and the correct result certified.

Of Royster:

At this precinct ballots were cast for James A. Bullock for the office of county surveyor. He was one of the judges of election, but told the electors on election day that he was not a candidate and would not accept the office if elected. The proof in the case shows that the fact that he was one of the judges of the election did not have any effect whatever on the result of the Congressional election. The proof is overwhelming that the election was properly conducted and the result honestly certified.

The report further intimates that had he been a candidate for Congress and also acted as judge, and had there been no proof that the election was fairly and honestly conducted, the rejection of the vote would have been justified.

The minority quote the law:

"And no person who is a candidate for any office shall be a registrar, or judge, or inspector of an election."

Here is a law plain and mandatory. The constitution and statutes of the State had thrown every safeguard that could be suggested around the ballot box; they had prescribed the qualifications of voters and made registration a prerequisite to the exercise of the elective franchise; they had compelled the elector to use due diligence in complying with the requirements, and then, to protect him from any possible interference on the part of interested persons who might be tempted to deprive him of his rights, they enacted the above statute. The laws of North Carolina disqualify any man who has a suit pending and at issue from sitting on a jury, either petit or grand, and renders any bill of indictment found by a grand jury, with even one such juror on it, liable to be quashed on motion, no matter though it may be shown that said juror did not vote on said bill when found.

How much stronger is this case where a man is sitting as judge, not only on his own case, but in that of all his political partisans and friends. It will not do to say that "no harm was done; the judge of election was not a candidate for Congress." That makes no difference; it is begging the question The law recognizes the frailty of human nature and provides that it shall not be subjected to such strong temptation.

* * * * * * *

This law of the State prohibiting candidates from acting as judges of election, if it were only directory, being so clearly in the interest of pure elections, should be respected and enforced, but we can conceive of no law more distinct in its terms or one which is from necessity more mandatory than this, and in our opinion the action of the Granville County canvassing board was right and should be sustained.

A question which the majority disregarded, because they considered that the case was decided without the aid of the testimony which it affected, arose as to the competency of the notary before whom testimony was taken in Rockingham County. It appeared that he was an infant, less than 21 years of age, and the minority discuss at length his incompetency.

The constitution of North Carolina, Article VI, section 1, declares the qualifications for an elector in the State as follows:

"Every male person born in the United States, and every male person who has been naturalized, twenty-one years old or upward, who shall have resided in the State twelve months next preceding the election, and ninety days in the county in which he offers to vote, shall be deemed an elector."

While section 4 of the same article declares that "every voter, except as hereinafter provided, shall be eligible to office."

Section 3304 of the code of North Carolina is in these words:

"The governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries, who shall hold their office for two years from and after the date of their appointment, and, on exhibiting their commission to the clerk of the supreme court of the county in which they are to act, shall be duly qualified by taking before said clerk an oath of office and the oaths furnished for officers."

It will not be questioned that the constitution prohibits a minor from holding office in the State.

It cannot be questioned that a notary is an officer. The fact that he is required to take the oath of office is alone sufficient to establish that fact. In Worthy *v.* Barrett (63 N. C., 199) it is declared that the oath to support the constitution is a test on this question. And in Piland *v.* Taylor (113 N. C., 18 S. E. Report, 70), "the office of deputy clerk is an officer provided for by law who is required to take the oath of office." In Mecham, section 47, notaries public are declared to be public officers.

In most of the States minors are prohibited from holding office.

In North Carolina the plain prohibition of the constitution has been always recognized by the supreme court. In the case of Railroad *v.* Fischer (of recent date, 109 N. C), the court declared that the qualification as to all officers is imperative that they should be 21 years of age.

In case of Golden petition (57 N. H., p. 146) the court says:

"Offices, where judgment, discretion, and experience are essentially necessary to the proper discharge of the duties they impose, can not be executed by an infant."

To the same effect we might cite any number of cases from different States. The only exception is a case from Indiana, where a minor was recognized, and in that case Judge Gresham, who delivered the opinion, says:

"Unlike most of the States, Indiana has not declared in her constitution or statutes that only those who have attained the age of 21 years are eligible to any public office."

There is no analogy between that case and the one we are considering.

The minority show that the contestee protested against the notary the first day testimony was taken, and continued to protest. The notary had never acted before this case, and it could not be claimed that he was an officer de facto.

The majority report found sitting Member entitled to the seat.

The report in this case was never debated in the House, it being postponed in the second session to the third. On February 28, 1895, an attempt was made to call it up, but the House refused to consider it.

Therefore Mr. Settle retained the seat.

1050. The California election case of English v. Hilborn in the Fifty-third Congress.

Before considering an election case the Elections Committee corrected the official plurality by including a precinct return omitted from the State canvass.

The returns being rejected and contestant having proven his vote aliunde, the returned Member, who had not proven his vote, was not allowed the residue of the poll.

Under the Australian ballot, where an officer marks the ballot for an

illiterate voter, is the ballot higher evidence than the testimony of the voter?

Ballots must be shown affirmatively to have been kept inviolate in order that a recount may be of effect.

The conduct of election officers being impeached by a return shown to be false ballots in their custody are thereby discredited.

Where election officers are discredited by a falsified return, their testimony as to their own votes is valueless as proof aliunde.

On March 22, 1894,[1] Mr. Jason B. Brown, of Indiana, from the Committee on Elections,[2] submitted a report in the California case of English *v.* Hilborn. The official election returns made to the secretary of state showed a plurality of 25 votes for sitting Member.

But connected with this official return a question arose:

> The testimony shows that at Clarksburg precinct, Yolo County, the contestant received 40 votes and the contestee received 48 votes; that the member of the election board whose duty it was to take the returns to the county clerk and retain the duplicate tally list and list of voters in his possession, as by the laws of California he was required to do, by accident retained both tally lists and did not return the original tally list to the county clerk of Yolo County until after the board of supervisors had adjourned.
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> The board of supervisors of Yolo County met at the county seat on Monday, November 14, 1892, to canvass the precinct returns. At that meeting it was found that the tally list from Clarksburg had not been received, and word was sent to that precinct. The board, not having finished canvassing the returns on November 14, adjourned to the next day, the 15th. On that day the board finished the canvassing of the returns, with the exception of Clarksburg, which made no return of the tally sheet. Thereupon the board adjourned until 1 o'clock p.m. of that day to wait for the Clarksburg tally list. At 1 o'clock, November 15, the board convened, and the Clarksburg tally list not having been returned, the board declared the result of the canvass of the other precincts, and the vote of Clarksburg precinct was not included in the official count of Yolo County certified to the secretary of state. On that day, after the adjournment of the board, the tally sheet of the Clarksburg precinct was returned and filed with the county clerk of Yolo County.
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> The statute of California on the subject of failing to return tally sheets in time is as follows:
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> "If, at the time of meeting, the returns from each precinct in the county in which polls were opened have been received, the board must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day until all of the returns are received, or until six postponements have been had." (California Election Laws, sec. 1280.)
>
> There being no question but that the Clarksburg precinct gave the contestee 8 majority, and that majority was not included in the returns made to the secretary of state, and that the foregoing provision of the statute was not complied with, the committee believes that the 8 majority given to the contestee by the Clarksburg precinct ought to be allowed to and be counted for him. This being so, the contestee's majority is increased from 25 to 33, which majority of 33 the contestant must overcome before he can maintain his contest and secure the office he seeks.

The contestant attacked this majority of 33 votes, alleging fraud in Altamont precinct, from which had been officially returned 37 votes for sitting Member and 15 votes for contestant. Suspicion was directed to this return from the fact that it was out of harmony with the previous political inclinations of the precinct, which had a population of farmers, not likely to be unsteady in their preferences. An

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[1] Second session Fifty-third Congress, House Report No. 614; Rowell's Digest, p. 486; Journal, pp. 308–310; Record, pp. 3424–3438, 3454–3456.

[2] The minority views were presented by Mr. Dan Waugh, of Indiana.

inquiry was made. Thirty-five electors of the precinct made affidavit that they had voted for contestant. The report says:

> Thereupon this contest was commenced and the testimony was taken. Forty-seven of the electors who voted at Altamont testified. Thirty-seven of them testified that they had voted for the contestant, 6 for J. L. Lyons, People's candidate, 2 for L. B. Scranton, Prohibition candidate, and 2 for no candidate at all. This left but 23 of the 70 voters of the precinct unaccounted for, and whether they voted for contestant is unknown.

This would leave contestant a plurality of 3 votes in the district if the 23 unaccounted for votes should be allowed to sitting Member. But the committee, relying on the cases of Langston *v.* Venable and Featherstone *v.* Cate, declare that votes should only be allowed as proven when returns are rejected. Therefore, counting for Altamont precinct only the proven votes, contestant would have a plurality of 26 votes in the district.

But sitting Member did not propose to allow the case to rest here and demanded a recount of the ballots, which showed 29 votes for contestant and 22 votes for sitting Member. The sitting Member admitted that the returns were unreliable, but contended that the ballots were the primary and controlling evidence, and on the strength of what they showed claimed a plurality of 4 votes in the district.

On the question as to whether or not the ballots were the primary and controlling evidence in this case, the majority and minority have the following observations. The minority say:

> When the ballots have been safely preserved, as required by law, they become the best and primary evidence as to how the elector voted, and the testimony of the voter is secondary and inadmissible. The ballots are not only a part of the election returns, but are of a higher grade of evidence than the tally papers or a summary made from them. To permit voters to come up after an election, as in this case, and swear they voted differently from what the ballots show, would open up a field of unending perjuries and frauds. If such should be the rule, every election might be tried over a second time by the oath of the voter instead of the ballots deposited in the ballot box. A mistake in the count or in tallying the vote or an impeachment of the returns or tally papers, even for fraud, do not of themselves discredit the ballots. To them the law points as the source to correct all such errors and mistakes. They commit no perjury and can not be bribed. These general principles, to which we have called attention, are fundamental, and are fully recognized and followed by the law and the decisions of the supreme court of California.

The majority of the committee suggest that the rule enunciated above ought to be relaxed under the new system of voting:

> The rule, whatever it is, on the subject of the ballots being the primary and best evidence in contested election cases, grew up and was established long before the adoption of the Australian or reform ballot law by any State of the Union. Formerly the ballots were furnished by the respective parties and distributed to the voters outside of the polling places. The illiterate voter received his ballot away from the polls, and took it to some person or persons in whom he had confidence, persons of his own selection, and had it made out according to his own direction. This was his own voluntary act. Even after his ballot had been prepared for him at his own solicitation, if he had any doubt in his mind as to it being according to his wish, he could expose it to some one else to more fully satisfy himself that it was as he desired. He took his ballot to the polling place and saw that it was deposited in the box. All this was his own voluntary action. Nothing compulsory about it. Upon such a state of facts and under such circumstances, it could be well said that he had voluntarily reduced his intention and his action to writing, and that his written expression of what he did and intended the ballot was the best evidence. It was under this system of voting that the rule of the ballot being the best evidence grew up.
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> A different system of voting exists now almost everywhere and especially in California. The political parties no longer furnish their own ballots. An official ballot is furnished. It is retained inside

the polling place; none are allowed outside. The voter must pass inside of the polling place and obtain his ballot from an official of the election board. If he is illiterate, or from any cause he is unable to make out his ballot, some member of the election board makes it out for him. He may, or he may not, have confidence in the official who prepares his ballot. The preparation of his ballot is not his free and voluntary act. It is compulsory. He must submit to having some one not of his own selection—some person who may be a stranger to him—prepare his ballot for him or he can not vote. This is especially so in California.

On this subject the law of California, at the time this election was held, was—

"Any elector who declares, under oath, to the presiding election officer that he can not read, and that by reason thereof or by reason of his physical disability he is unable to ark his ballot, shall, upon request, receive the assistance of anyone of the officers of election that he may choose in the marking thereof."

The election board from whom he selects the person to mark his ballot is not of his choosing. The law has selected it and he must choose from it or not vote.

Before he can receive this assistance he must take an oath that he can not read, or by reason of physical disability he is unable to mark his ballot. The officer who marks his ballot for him may be unknown to him. He is thrust upon him by the law. The illiterate voter in California is not a free agent in having his ballot prepared, for he has no opportunity whatever, and can have none, to ascertain whether his ballot was correctly prepared or not. He must depend entirely upon the election officer who marks it for him. Such was the condition of the illiterate voters who voted at Altamont precinct which was presided over by an election board that the proof shows and the contestee confesses made a false return.

Admitting, however, that the ballots are primary evidence, the committee say:

But it is equally well settled that before resort can be had to the ballots, as means of proof, absolute proof must be made that the ballots offered are the identical ballots cast at the election; that they had been safely kept as required by law; that they are in the same condition they were when cast; that they had not been tampered with, and that no opportunity had been had to tamper with them. (Payne on Elections, sees. 776–787; Atkisson *v.* Pendleton, Contested Election Cases of the Fifty-first Congress, p. 47.)

The burden of making this preliminary proof rests on the party who seeks to use the ballots as evidence. In this case it rests on the contestee. It is fundamental that a party desiring the introduction of certain proof, the admissibility of which depends upon some preexisting fact, must prove the existence of such fact before he can introduce his desired proof.

The issue between the majority and minority is joined on the issue as to whether or not the identity of the ballots is proven. The minority showed that the election officers at Altamont were respectable citizens, four belonging to the party of contestant, two to the party of sitting Member, and two to other parties—Independent and Prohibition. The counting of the votes, making of the returns, and signing and sealing of the ballots were done by officers other than the two belonging to sitting Member's party, and the sealed package of ballots was delivered to the county clerk by a judge who belonged to contestant's party. The minority views then relate that:

When the envelope from Altamont precinct was produced in court, it was shown that it had been securely guarded and preserved, the seals undisturbed, and in the same condition as when first sealed up. When the envelope was opened, 70 ballots were found strung upon a string. The inspectors and judges of the election at Altamont precinct—Gunn, Shaffer, Thomas, and Campbell—testified they were the same ballots cast by the electors of that precinct. Gunn and Shaffer identified their signatures or initials on the back of each ballot. The ballots were then counted in the presence of each party and their attorneys, and there were found to be 29 votes for English and 22 votes for Hilbom, which would still leave Hilborn a majority of 4. The minority are clearly of the opinion that the evidence conclusively shows that the

ballots recounted were the identical ballots cast by the voters at Altamont precinct on the day of the election. The contention that the ballots were tampered with or changed has no support other than a sheer suspicion.

The majority doubt both the integrity of the election officers and the custody of the ballots. They show that there was an election for a portion of an unexpired term to the Fifty-second Congress on the same day the same persons being candidates, and that the returns of the short term showed the same discrepancies as those for the term under consideration. And it is reasoned that if election officers would falsify the return they might also tamper with the ballots. Furthermore, the law provided for no safe custody of the ballots by the county clerk:

All the county clerk is required to do is to file the sealed cover and keep it unopened and unaltered. Where he is to keep it, or how safely and securely he is to keep it, are matters wholly within his own discretion. The law fails to direct him on this subject. In this case the sealed cover containing the ballots cast at Altamont precinct was delivered to the county clerk, and by him permitted to be carelessly thrown upon the floor, with others like it, of one of the rooms of his office. And there it remained on the floor of a room open to the public during the day and to a number of deputy clerks during the night. This is not the safe and secure keeping of such a package as is required, to allow its contents to become primary, controlling, and conclusive evidence upon the important question as to who has been elected to the House of Representatives.

There was evidence that the ballots in the open room were guarded, but the majority do not credit it entirely.

Therefore the majority rely on the testimony of the electors, assuming that the officers had falsified the return. In the debate it was pointed out by Mr. Thomas B. Reed, of Maine, that the same four officers of contestant's party, who were charged with falsifying the return were admitted to testify that they voted for contestant, and that their votes so proven were counted. In reply it was admitted that their votes should be deducted from the number proven by oath of the electors.

The majority quoted Payne and McCrary, and the cases of McDuffie *v.* Turpin, McGinnis *v.* Anderson, and Clayton *v.* Breckinridge to show that if election officers falsify a return no credit can be placed in the contents of the ballot boxes left in their hands after the election.

Therefore the majority recommended resolutions declaring sitting Member not elected, and contestant entitled to the seat.

The report was debated on April 3, and on April 4 the resolution declaring sitting Member not elected was agreed to, yeas 170, nays 13, the members of the minority party evidently not voting, to break a quorum if possible. The resolution declaring contestant elected was then agreed to, yeas 165, nays 17.

Mr. English thereupon appeared and took the oath.

1051. The Tennessee election case of Thrasher v. Enloe in the Fifty-third Congress.

Clerical errors whereby names of candidates are spelled wrong in the returns do not invalidate correct ballots.

The law requiring ballots to be rejected unless of certain dimensions, the House sustained election officers in rejecting ballots for slight variations.

The words "For President, Benjamin Harrison," over the names of electors were held to be a distinguishing mark.

Where election officers received votes without the required evidence that a poll tax had been paid, the House rejected the votes, although the tax had, in fact, been paid.

Although a State law prescribed a qualification obnoxious to the State constitution, the House held the law constitutional in deference to the decision of the State court.

The law requiring voters to be registered in order to vote, a poll whereat there was no registration was rejected.

On May 7, 1894,[1] Mr. Josiah Patterson, of Tennessee, from the Committee on Elections, submitted the report of the committee[2] in the Tennessee case of Thrasher *v.* Enloe. The contestant made no allegation of fraud, but based his case on alleged irregularities under the law and constitution of Tennessee. These alleged irregularities were of several classes:

1. The election returns from one district in Decatur County showed 36 ballots as cast for "Benjamin B. Enloe" instead of "Benjamin A. Enloe," the sitting Member, and the contestant claimed that they should be rejected. The proof, however, showed that on the ballots themselves the name was correctly printed and that they were actually cast for sitting Member. As this was a mere clerical error in making the returns, the committee held that sitting Member should not be deprived of the votes. The sitting Member alleged that similarly 199 ballots returned for "P. H. Thresher," instead of "P. H. Thrasher," had been erroneously cast for contestant. The proof also showed that this was another clerical error in the returns, and the committee say:

> These clerical errors could not affect the validity of the ballots.

2. Certain ballots cast for contestant were excluded, because they were not of the dimensions prescribed by law, and it was urged that they were improperly excluded. The committee, after noticing the necessity of an undistinguishable ballot of uniform dimensions, quotes the law of Tennessee:

> The ballots to be voted shall be of plain, white paper, 7 inches long and 3 inches wide, upon which the office to be filled, with name or names to be voted for, shall be plainly written or printed.
>
> That it shall not be lawful to print or place any picture, sign, color, mark, index, or insignia thereon, and any ballot of less or greater dimensions than as provided in the first section of this act, or any ballot upon which said picture, sign, color, mark, index, or insignia may be placed, if found in the ballot box, shall not be counted by the judges holding said election, but shall be treated as invalid.
>
> That any officer holding said election who shall knowingly receive, or the judges thereof who shall count, any ballot other than as provided in the first section of this act, shall be also guilty of a misdemeanor, and on conviction thereof shall be punished as provided in the third section of this act.

And says:

> This statute is, without question, mandatory. No language could be employed that would be more emphatic. There is no room for construction. We must follow the plain mandate of the law or refuse outright to obey it. It is insisted by counsel for contestant that while the statute may be mandatory, yet the difference between the dimensions of the ballots in question and the ballots prescribed by law is so slight that it ought not to be recognized in determining their validity. One-eighth

[1] Second session Fifty-third Congress, House Report No. 842; Rowell's Digest, p. 487; Journal, p. 474.

[2] The minority views were signed by six members of the committee.

or one-sixteenth of an inch difference in width or length, he insists, is too slight to be noticeable. The fact is the difference was material and was readily noticed by the judges.

The statute does not prescribe how nearly the ballot shall approach the dimensions of the prescribed ballot, but expressly says that "any ballot of less or greater dimensions shall not be counted." The extent of the variance is not material; it is the fact of substantial variance the law deals with. It may be conceded that the law did not contemplate a literal compliance with its mandate, but any difference which could be easily observed on comparison with the prescribed ballot would clearly fall within its meaning.

The committee say that the difference of an eighth of an inch was sufficient to enable fraud to be perpetrated, and comment on the fact that the election judges, irrespective of party, united in the rejection of the ballots.

The minority took issue with the reasoning of the majority:

The object of this provision doubtless was to preserve the secrecy of the ballot and to prevent a ballot being cast of which the size would be a distinguishing mark. But if it is to be held that the ballot must be of precisely the dimensions prescribed by the statute, then it would be a practical impossibility to secure a legal ballot with the ordinary appliances used in printing. Fine mathematical instruments would always show some infinitesimal deviation from the exact dimensions prescribed by law. We can not believe that the statute was ever intended to have such a construction. A deviation of from one-sixteenth to one-eighth of an inch would not be noticeable and would not serve to mark the ballot. The report of the majority disregards these ballots. We believe that they were substantially in compliance with the statute, that they were cast by legal voters, and that they clearly express the intention of the voter to vote for the contestant. They should therefore be counted for him.

3. The majority also justified the rejection of certain ballots cast at a precinct for contestant, when the words, "For President, Benjamin Harrison;" "For Vice-President, Whitelaw Reid," appeared on the face of the ballot. The judges of election, irrespective of party, united in rejecting these votes on the ground "that said words amounted to a sign, mark, or insignia, whereby they could be distinguished," and therefore that the votes were not allowable under the law quoted above."The ballot," say the committee, "would have been perfect without the words in question. They could only serve to distinguish these ballots from the others, and they plainly fall within the reason of the rule under which the ballots were excluded, which did not come up to the prescribed dimensions." The further point was made that such words might be used to deceive the voter by being placed over the names of electors of the opposite party.

The minority say of these ballots:

They should have been counted for the contestant. They bore his name and were cast by legally qualified voters. They bore the names of the candidates for the two highest officers for which, in effect, said voter was voting. We do not believe that the statute can fairly bear so technical a construction as would make the words named a "picture, sign, color, mark, index, or insignia." These ballots should be counted for the contestant.

4. The laws and constitution of Tennessee made certain provisions as to polltax payments.

Section 1 of Article IV of the constitution of Tennessee provides:

"There shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of election, where he appears to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the legislature shall prescribe, and at such times as may be prescribed by law, without which his vote can not be received."

Section 1 of chapter 23 of the acts of the extra session of the legislature of 1891 provides:

"That the satisfactory evidence to be furnished by the voter to the judges of the election, whether general or special, whether national, State, county, or municipal, that he has paid the poll tax contemplated by the constitution, assessed against him, if any, for the year next preceding said election, shall consist of the original poll-tax receipt, or a duly certified duplicate and copy of the same, or the duly authenticated certificate set out in section 8 when said tax has been paid to a constable and not to said trustee, properly certified by the trustee, or shall make affidavit in writing and signed by the voter that he has paid his poll tax and that his receipt is lost or misplaced, which affidavit shall be filed with the said judges and by them attached and made an exhibit to the returns of said election."

The law also enacts:

That any person voting, or any judge of any election permitting knowingly any person to vote in the same, without first having complied with the provisions of section 1 of this act, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than $50 and imprisoned in the county jail or workhouse ninety days.

The majority of the committee therefore conclude:

The recital of the provisions of the constitution and the laws enacted in pursuance of the name obviates the necessity of elaboration. The constitution is mandatory, and the statute is especially so. There is no room for doubt. Unless the evidence required by the constitution and specially prescribed by the statute is furnished to the judges the elector, liable to a poll tax, has no right to vote. It is illegal to receive his ballot and illegal to count it if it is received. The contestee has shown conclusively that the 141 electors, subject to the payment of the poll tax, who voted for him at the Conyersville precinct, in point of fact paid the tax.

The trustee certifies to a list of all persons liable to the tax in the precinct, and shows who of them paid the tax to him. The delinquents were placed on another list, which was turned over to the constable of the district. The constable himself was one of the judges of election. He had his book with him. Those who were delinquent at the trustee's office had paid him, and his book showed the fact. The judges assumed that all who were not delinquent had paid the trustee, while the constable, who was one of their number, knew the delinquents had paid him. But this was not the evidence required by law. No poll-tax receipts were exhibited to the judges, no certificates to copies, or affidavits of loss. The statute was not complied with at all, but, on the contrary, was ignored. The whole policy of the law was subverted. While it is conceded that the judges in this instance were honest, and to enforce the law will work a hardship on the contestee and deprive electors who, in point of fact, paid their poll taxes, of their ballots, yet it is better to do this than to subvert the safeguards which the State has thrown around the ballot box to prevent fraud and the evasion of the law.

To permit the judges thus to set aside the mandates of the statute with impunity opens the gate to fraudulent devices and makes elections uncertain, unfair, and dishonest. Every elector subject to a poll tax must as a condition precedent furnish the evidence prescribed, and if he fails to do it his ballot ought never to reach the ballot box, and if it does it ought never to be counted. When this is well understood, the electors will readily comply with the law, the poll taxes will be collected, and the purity and security of the elective franchise will be promoted. The contestee received 141 illegal votes at the Conyersville precinct, and the contestant 9. It follows therefore that the difference of 132 votes must be deducted from the vote of contestee.

The minority do not agree to this reasoning:

The requirements of the constitution and of the statute, taken together, would appear to be of a mandatory character, and would certainly come far within the rule followed by the House in the case of O'Neill *v.* Joy. There the contestee's majority was taken away by statutory provisions that were claimed to be mandatory. But the undersigned protested against such a strict rule of construction in that case and we protest against it now. The difficulty is that in the pending case the constitution and statutes taken together are more mandatory in character.

The essential part of the provision of the constitution is that the voters shall have paid a poll tax, of which payment the judges of election shall be satisfied. At the precinct referred to no question was raised that the voters presenting the ballots had not paid their tax. They were not asked by the

officers or by anyone at the polls to produce the evidence that they had paid it. They might have had this evidence in their pockets. They were permitted to cast their ballots unchallenged. The judges could, of their own motion, have declined to receive them—in fact, it was their duty to do so—or they would have been compelled to decline to receive them if anyone had objected.

In either case an opportunity would have been afforded the voter to produce the receipt or certified copy, or to make the affidavit provided by law. * * * The contestant claims that the legal voters should not be disfranchised and the whole poll thrown out because some of the votes were claimed to be illegal. On the whole we incline to the opinion that these ballots should be counted. * * * The fault was, primarily, with the election officers in receiving the ballots without requiring the evidence.

5. A law of Tennessee known as the "Dortsch law" prescribed an Australian ballot for cities of a certain population, one of the provisions being that the elector should have no assistance in making out his ticket, except in case of physical infirmity. Contestant insisted that the election held in the city of Jackson under this law was illegal, because the city was not in the class prescribed by law; and because the law was unconstitutional in that it prescribed an educational qualification, which the constitution forbade. The first objection was readily answered by the census, and the second by the decision of the supreme court of Tennessee, which upheld the law in the case of Cook *v.* The State. The majority consider the construction bv the State court of last resort as sufficient.

The minority say:

The constitution of Tennessee, in effect, prohibits the enactment of any statute requiring that a man shall be able to read and write in order to vote. It is clear that the Dortsch law imposes such a requirement, and it would appear to be clearly repugnant to the principles of the constitution. But the supreme court of Tennessee has decided this law to be constitutional, and we feel constrained to follow that decision in the present case, in accordance with the general rule. We are clear in our opinion, however, that this law disfranchises men who possess all the constitutional requirements of voters.

6. The law of Tennessee provided that in counties of a certain population:

Each and every voter, in addition to the regulations now required by law to entitle him to vote, shall be registered as a voter, as hereinafter provided, before he shall be allowed to exercise the elective franchise.

Sitting Member insisted that in a district of Hardin County the election was illegal and should be disregarded, because the voters were not registered as required by law. The committee say: "It is evident that a failure to open registration books under this law will defeat an election," and this was not denied by contestant or the minority. Therefore the vote in question was rejected.

The majority of the committee conclude that in view of the principles stated above sitting Member should be credited with a majority of 110 votes. Therefore they reported resolutions confirming his title to the seat.

The minority concede that he was elected by a plurality of 25 votes instead of the 118 by which he was returned.

On July 10, 1894, without debate or division, the resolutions of the majority were agreed to by the House;

1052. The Kansas election case of Moore v. Funston in the Fifty-third Congress.

Where contestant offered evidence not specified in notice of contest and the answer was not served within the legal time, the Rouse still considered all the evidence.

Discussion as to the evidence required to prove a conspiracy to commit election frauds.

Discussion as to the validity of the testimony of canvassers who have failed to find persons suspected of illegal registration.

Discussion as to the evidence required to show that persons alleged to be disqualified actually voted.

On June 26, 1894,[1] Mr. William A. Jones, of Virginia, from the Committee on Elections, submitted the report[2] of the majority in the Kansas case of Moore *v.* Funston. At the outset of this case two preliminary questions arose:

(*a*) Sitting Member objected that the notice of contest did not specify certain matters, upon which much testimony was afterwards offered, and therefore demanded that the said testimony be excluded from the case. The majority report does not deny this, but meets it in the conclusion reached as to the other preliminary question. The minority views criticise the notice as indefinite, but do not make an issue on it.

(*b*) Contestant claimed:

> That the copy of the answer and countercharge of contestee was not served within the time required by law, and that, therefore, none of the testimony offered by contestee, and printed also in the record, should be considered.
>
> The law requires that the notice of contest shall be served within thirty days after the determination of the result of the election by the officer or board of canvassers, authorized by law to determine the same, and shall state specifically the grounds upon which contestant relies in the contest. It is also required by the law that a copy of the answer of contestee shall be served upon contestant within thirty clays after service of the notice of contest. (Rev. Stat., secs. 105, 106.)
>
> It is not denied that the notice of contest was served within the time specified. The record shows (Rec., p. 6) that a true copy of the notice of contest was left at the residence of contestee in Allen County, Kans., with his wife, on December 26, 1892. It further shows (Rec., pp. 7, 985) that a copy of the notice of contest was delivered to contestee in person in the city of Washington, D.C., December 28, 1892. And a copy of contestee's answer and countercharge was left at the residence of contestant in Lawrence, Douglas County, Kans., with his wife, on January 27, 1893; and on January 28, 1893, a copy was delivered to contestant in person. (Rec., pp. 1053–54.)
>
> It will be seen, therefore, that the copy of notice of contest was left at the residence of contestee on December 26, 1892, and a copy of the answer and countercharge at the residence of contestant on January 27, 1893; and that a copy of the notice of contest was delivered to contestee on December 28, 1892, and a copy of the answer and countercharge was delivered to contestant on January 28, 1893. If service by copy, left at the residence of the person to be served, is to be regarded as the service contemplated by the statute, then the notice of contest was served on December 26, 1892, and the answer and countercharge thirty-two days later, on the 27th day of the following January. Or, if personal service be required it is found that such service of the notice of contest was made on December 28, 1892, and such service of the answer and countercharge thirty-one days later, on the 28th day of January, 1893. So, in either case, the answer was out of time.
>
> If, then, we should closely apply to the notice of contest the rule of pleading upon which contestee insists, and should apply to the answer the requirement of the law, we should find contestee without an answer, and would have but to ascertain whether, upon the grounds of contest undoubtedly specified in the notice, contestant has made good his contention that he, and not contestee, was really elected a Representative in Congress from the Second district of Kansas. If we should take this view of the matter our labors would be greatly lessened, a considerable portion of the huge record in the case would be

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[1] Second session Fifty-third Congress, House Report No. 1164; Rowell's Digest, p. 491; Journal, pp. 527, 530; Record, pp. 8088–8102, 8134.

[2] The minority views were presented by Mr. S. W. McCall, of Massachusetts. Mr. T. H. Paynter, of Kentucky, presented his individual dissent from the conclusions of the majority.

eliminated, and the finding would necessarily be in favor of contestant. We believe, however, that the real question to be determined is not so much whether this or that bit of evidence offered by contestant certainly relates to something clearly specified in his notice of contest as a ground upon which he relies, nor yet whether contestee's answer and countercharge were made in due time, but rather which of the two claimants, according to the record, was really elected and is really entitled to a seat in the House of Representatives.

As to the merits of the case the official returns gave sitting Member a plurality of 81 votes. Contestant attacked this, alleging fraud and irregularities. An examination of these allegations naturally divides itself into three branches:

1. Contestant charged that in that portion of Kansas City lying within Wyandotte County, Kans., a conspiracy was entered into on the part of members of sitting Member's party to put on the registration lists names of persons not entitled to vote, or entirely fictitious, and to stuff the ballot boxes by the use of repeaters. It was further alleged that there were about 1,991 of such fraudulent registrations, and that about 400 votes were cast for the Republican candidate. The majority of the committee, however, did not claim that there was absolute proof of over 68 votes cast for sitting Member illegally as the result of this conspiracy, but considered that 128 such votes might be established by fairly satisfactory proof.[1] The majority admit the difficulty of proving conspiracy:

All text writers and other law authorities treating of the subject recognize the difficulty of proving conspiracy by direct evidence; and, as in the case of fraud, in general, recognize also the propriety, as well as the necessity, of proving distinct facts, many of them insignificant in themselves, from all of which, however, when sufficient, a firm belief in the existence of the conspiracy or fraud may safely be deduced and the conclusion may be as safely acted upon. In many cases circumstantial evidence is the only evidence which can be obtained, and it is also not infrequently of the most satisfactory and convincing character.

In this case the officials of contestant's party, as well as officers of a club belonging to a faction of sitting Member's party, took measures to thwart a suspected conspiracy on the part of the regular organization of sitting Member's party to make fraudulent registration. Canvassers were sent out before the election, and brought in lists of names supposed to be wrongfully registered. The report says of this testimony:

A number of witnesses testify to the result of their efforts, both just before and just after the election, to find registered persons by calling and inquiring at and about the places from which they were registered. Several of those who thus testify were well acquainted in the precincts in which they severally canvassed, and as to many of the persons registered they testify that they know no such persons, never heard of their being or living in the neighborhoods from which they were registered, and upon diligent inquiry could find no one who knew of them. The testimony of these witnesses fills many pages of the record, and a perusal must convince anyone that the investigation set on foot to ascertain who had been registered improperly was honest and carried forward in a most painstaking manner. While much testimony as to what these canvassers learned or did not learn by inquiring at and about the places from which voters were registered may be regarded as hearsay, considered with reference to the actual fact of whether the persons inquired about really lived at the numbers from which they were registered, it is very easy to see how it affected persons managing the campaign for the Democratic party and the Anti-Buchan Club, and how they were led to the placing of challengers at the polls to check and prevent the voting of the registrations believed to be fraudulent.

[1] Statement of Mr. Jones in debate. Record, p. 8090.

The report further justifies the use of such testimony by quoting from McCrary:

For the purpose of showing that nonresidents have voted, witnesses are often called to testify that persons whose names appear upon the roll as having voted are not known to them as residents of the county or voting precinct, as the case may be. This kind of evidence is admissible for what it is worth, but it is manifest that its value must depend upon circumstances. If the district or territory within which the voter must reside is large or very populous and the witness has not an intimate and extensive acquaintance with the inhabitants, the evidence will be of little value, and standing alone will avail nothing. But on the other hand, if such district or territory is not large or populous, and if the witness shows that his acquaintance with the inhabitants is such that he could scarcely fail to know any person who may have resided therein long enough to become a voter, his evidence may be quite satisfactory, especially if it further appears that soon after the election the alleged nonresident voter could not be found in the district, within the limits of which all voters must reside. Proof of this character must at least be regarded sufficient to shift the burden upon the party claiming that the vote of such alleged nonresident be counted and require him to show affirmatively that he is a bona fide resident.

The minority criticised this evidence, characterizing the rule as extreme, and pointing out that it did not cover the present case, since the residents themselves were not called to testify as to people registered from their neighborhood, but the testimony of a person who went to inquire of them was taken.[1]

An issue also arose as to the proof of votes cast under this illegal registration. The law of Kansas required that when a voter was challenged his ballot should be numbered to correspond with the voter's name on the poll book, and the word "sworn" should be written at the end of his name, so that ballot could be identified as cast by him.

Persons were stationed at the polls to challenge those attempting to vote on names supposed to be registered fraudulently. The majority report the evidence as showing that when the law of procedure as to challenges was respected, so the ticket could be identified, it was found almost invariably that he had voted for sitting Member.

One challenger testified that the election judge (it appeared that election machinery was largely in the hands of sitting Member's party) who was a member of contestant's party disregarded from 40 to 45 challenges at one precinct. The majority report further finds:

The return of the officer upon the subpoenas issued at the instance of contestant for witnesses shows that he could not find these persons whose names are alleged to have been put on the registration lists fraudulently, and in whose names illegal ballots are charged to have been cast for contestee.

It is in evidence (Rec., p. 681) that the chairman of the Republican committee of Wyandotte County offered one of the challengers for the opposition $50 if he would leave the polls at which he was stationed to challenge illegal voters and prevent the voting of persons not entitled to vote.

In addition to the foregoing, the record contains enough evidence, concerning the competency of which no reasonable doubt can exist, to show that a considerable number of votes were actually cast in Kansas City, Wyandotte County, Kans., in the names of persons not entitled to register or to vote. Some of these persons were registered from vacant lots; some from churches; some were under voting age; some were in the penitentiary; some had gone away before election day; some, it would seem, never lived there.

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[1] Speech of Mr. McCall, Record, p. 8093.

The minority doubt the credibility and competency of the witnesses by which the majority reached its conclusions on this branch of the case, and also raise a question as to the method by which contestant sought to prove illegal votes:

The law of Kansas requires that one of the judges of elections shall, as each registered person votes, enter on a copy of the voting list opposite the name of such person the word "voted." Such certified copy is to be returned to the city clerk after the election and to be by him preserved. The contestant has failed to produce this legal evidence or record.

1053. The case of Moore v. Funston, continued.

Although usurpers had acted with the election officers and the ballots were stolen, the committee declined to reject the return on the ground that it would increase the harm to the injured party.

County returns informally signed and the accuracy of which was impeached by evidence were rejected by the House.

Although evidence showed that some votes were affected by intimidating acts of a policeman the House declined to reject the precinct returns.

Discussion as to the votes of certain students at college.

2. In the third precinct of Kansas City, where there was evidence of illegal registration, and where challenges were in several instances disregarded by the election officers, the report finds this state of affairs:

The law of Kansas provides for three judges at each polling place, but at this precinct there were four persons who acted in the capacity of judges of election. One of them, Mark Cromwell, who seems to have passed sometimes under another name, which the witnesses testifying about it do not recollect, was not appointed to serve as such judge, but appeared on election day and put himself on the board. It also appears from the evidence that he was a sleight-of-hand performer and juggler. During part of the time of the counting Cromwell took tickets from the box and called off from the tickets.

The evidence also shows that before the count was completed one of the clerks at this precinct became so much intoxicated that he was unable to continue at work, and an outsider—the witness Bigger, before mentioned—took his place and acted as clerk, though it does not appear that he was sworn or had any more right to so act than any other unauthorized person. During the count, too, it happened several times that the two clerks were as many as four or five votes apart in their tallies, and would get together by one arbitrarily taking the count of the other, without going to the ballots to see which was correct, or whether either was correct.

Craddock also testifies as to the number of ballots cast at this precinct with the name of contestee erased and the name of contestant written in, putting the number of such changes at from 35 to 40.

Brooks, another of the judges of election at this third precinct, testifies to the erasure of the name of contestee and the insertion of the name of contestant upon tickets voted at that precinct, putting the number at from 40 to 50.

Faust, also one of the election judges at the same precinct, called by contestee, guesses the number of such scratches at not to exceed 10. This same election judge, Faust, disregarded the challenges of voters by Rooney, and put the tickets of persons challenged into the box without marking them, thereby disregarding the law and rendering it impossible to determine by an inspection of the ballots themselves how the several challenged persons voted. Faust, it will be remembered, would dismiss a challenge by saying: "I know him; he's all right."

The return from this election is thus described:

Mr. Craddock, one of the judges of election at this precinct, testifies that he duly returned these ballots, and the pool books and tally sheets to the county clerk's office, and was paid by check from the county clerk; and he is not contradicted or impeached. The county clerk testified that if the poll books without the ballots had been returned to him he would probably have noticed it.

When testimony was being taken, these ballots were demanded of the county clerk, but he failed to find them. Later, as the clerk testified, they were found by a citizen of Kansas City at his front gate, loosely tied together and directed to the county clerk. These ballots showed but eight scratched tickets, and corresponded substantially with the original returns, which give sitting Member 310 votes and contestant 335, each one's vote being very nearly the vote of his party in the precinct.

The majority report says that the entire returns from this precinct should be rejected if the ends of justice would be promoted by so doing; but the returns gave contestant a plurality of 25 votes, and it is evident that by the actual vote this was much larger. The report does not, however, assign any definite increase to contestant in this precinct, but intimates that about 100 is the usual majority of his party in the district. Taking the whole county of Wyandotte together, which means the phases of the case included in the first and second branches, the majority arrive at this conclusion:

> That the apparent plurality in Wyandotte County of 179 votes in favor of contestee is not his real plurality, after excluding illegal votes and counting correctly votes erroneously counted for one candidate when actually cast for the other; but that the true and legal plurality of contestee in said county over contestant is very small, if, in fact, anything.

The minority do not admit the majority's position, and take the view that the alleged theft of the ballots was in the interest of contestant.

3. In Allen County the majority report advises the rejection of the official returns because of violation of the following requirement of the law of Kansas:

> SEC. 2687. On the Friday next following the election the county clerk and the commissioners of the county, or a majority of said commissioners, at ten o'clock a.m. of said day, shall meet at the office of said county clerk, and shall proceed to open the several returns which shall have been made to that office; and said commissioners shall determine the persons who have received the greatest number of votes in the county for the several county, district, and State offices and members of the senate and house of representatives, Representatives in Congress, and electors of President and Vice-President of the United States, * * * and such determination shall be reduced to writing, signed by said commissioners and attested by the clerk, and shall be annexed to the abstract of the votes given for such officers, respectively, hereinafter provided for in section forty-one of this act.

The only signature to the return was the following:

> In testimony, I have hereunto set my hand and caused this abstract to be attested by the county clerk of said county, the 11th day of November, 1892.
>
> D. D. SPICER,
> *Chairman, Board of County Commissioners of Allen County,*
> *and ex-officio Board of County Commissioners.*
> BY E. M. ECKLEY,
> *Clerk, Board of Canvassers.*

One of the commissioners testified that so far as he was aware, and he was present at the entire session, the canvassing board did not reduce the result to writing or sign it, and that he would not have signed it, because it was not completed that night after making the canvass, because they did not compare the certificates of the county clerk with the different tally sheets of the various townships, and also:

> Because of the mutilated condition of the tally sheet of Iola Township; that the board did not make any footing, purporting to be the number of votes cast for the various candidates; that witness did not give his consent to the county clerk to sign any instrument purporting to be an abstract of the votes cast in Allen County on November 8, 1892.

Also E. M. Eckley, county clerk, testified:

That he was county clerk of Allen County, Kans.; that on November 11, 1892, the board of canvassers met to canvass the vote cast at the general election of November 8, 1892; that they reduced the result to writing, but did not sign the same; that witness signed the name of the chairman of the canvassing board to the abstract of the vote; that he made out the abstract from the names and figures given him by the board; that the board did not give him authority to sign their names; that the board did not personally inspect the work nor compare it with the returns as shown by the poll books; that the members of the board could not see the names and figures witness made from where they sat; that witness did not know whether the members of the board were present when he signed the chairman's name to the abstract or not.

Witness D. D. Spicer testified (Record, p. 955) that he was chairman of the board of county commissioners and that he had authorized the county clerk to sign his name to whatever papers were necessary in making his return to the State board; that he can not state what papers they were; that he does not know when he first learned that the county clerk had signed his name to the instrument as chairman of the board of county canvassers.

The committee, after citing text writers and precedents, say:

The committee are of the opinion that in view of the explicit and mandatory provisions of the Kansas statute, already quoted, which requires that the commissioners of the county, or a majority of them shall determine the persons who have received the greatest number of votes in the county, and that such determination shall be reduced to writing, signed by said commissioners and attested by the clerk, and in deference to the well-settled rule laid down in a long line of decisions, some of which have been cited herein, the canvass of the vote of Allen County and the certification of the returns were not in accordance with the plain requirement of law, but in flagrant violation thereof, and that said returns should therefore be rejected.

The minority take issue with this determination:

The contestant asks that the vote of the whole county be rejected because each member of the board did not sign this return. There is no question but that the returns to which the clerk signed the name of the chairman were the correct returns as received from the various precincts. If no return had been made of the county as a whole, it would be competent for the committee to inquire as to what the original precinct returns were, and thus make up the vote of the county.

It is no ground for the disfranchisement of the voters of a whole county that the returning officers, on a day subsequent to the election, are guilty of an informality in attesting the returns, when the result is not in any way affected by such informality. It has even been held that a person elected to the House of Representatives should be admitted to his seat, although no return thereof was made to the secretary of state. A Representative is not to be deprived of his seat because the returning officers have neglected their duties. (McCrary on Elections, 2d ed., par. 554; Justices' Opinion, 68 Maine, 587.)

The minority also called attention during debate to the law of Kansas which provided that in an election the person having "the highest number of votes for any office" shall "receive the certificate of election, notwithstanding the provisions of law which may not have been fully complied with in noticing and conducting the election, so that the real will of the people may not be defeated by any informality of any officer," but it was answered that it had never been made to appear in a manner "satisfactory" (quoting from the statute) what the vote of Allen County was.

The returns of Allen County gave sitting Member 93 plurality, and as his plurality in the district was 81 the rejection of this return would of itself be decisive.

In addition to the three main branches of this case, minor questions arose. Contestant claimed that a colored policeman intimidated voters in the fifth precinct of Kansas City, and several witnesses swore that he threatened with arrest members of his race who were distributing tickets in the interest of contestant, and that he

forcibly took and tore up such tickets. One witness testified that he was satisfied that the presence of this policeman and his acts prevented not less than a hundred of his race from voting for contestant. The majority say that in other contests precinct returns have been thrown out on such evidence, but they do not feel warranted in following such precedents.

The minority also raise this question as to Douglas County:

> Five grounds for rejecting certain votes counted for the contestee in this county are given, the principal one being that illegal votes were cast by the students at a seminary of learning at Baldwin, Kans. There is no testimony that many of the students in question voted for Mr. Funston, unless, indeed, the fact that they were connected with a high institution of learning raises a presumption that they voted the Republican ticket. But it appears in all of the cases the student was of age, in some of the cases he was a member of the faculty; that he was not dependent upon his parents, but supported himself, and that he had no fixed determination as to the future place of his abode, unless he was intending to remain at Baldwin. All the cases come safely within the rule laid down by Mr. O'Ferrall in the case of Worthington, *v.* Wright, as follows:
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> "Where young men had entirely severed their connection with the home of their parents and were relying on their own efforts, exertions, and means, and had no fixed determination as to their future place of abode, they were legal voters at the point where these colleges were located. To hold differently would be to deprive many worthy young men of the right to vote and disfranchise them during the years they might be engaged in their laudable efforts to secure an education."

It does not appear, however, that the majority took issue on this question.

The report was debated at length on August 1, and the House rejected the propositions of the minority, declaring that contestant was not elected and that sitting Member was elected, the first by 90 yeas and 127 nays, and the second by 31 yeas and 126 nays, 13 being noted as present to make a quorum.

On August 2 the resolutions of the majority, unseating sitting Member and seating contestant, were agreed to, yeas 147, nays 86.

1054. The Georgia election case of Watson v. Black in the Fifty-third Congress.

Where the State law does not make it the duty of an officer to make a report of the votes cast, a report from that officer is not accepted as evidence of the vote.

No law preventing the use of more than one ballot box at a precinct, the use of three did not justify rejection of the poll in the absence of proof of harm therefrom.

Handling of the ballots by an unauthorized person does not invalidate the poll in the absence of evidence showing harm therefrom

Temporary absence of election officers from the poll does not invalidate the vote, no harm resulting therefrom.

Threats of an overseer to discharge employees must be supplemented by testimony of employees thus intimidated, if the House is to correct or reject the return.

On July 23, 1894,[1] Mr. Thomas G. Lawson, of Georgia, from the Committee on Elections, submitted the report of the committee in the case of Watson *v.* Black,

[1] Second session Fifty-third Congress, House Report No. 1147; Rowell's Digest, p. 489; Journal, p. 461; Record, p. 7027.

from Georgia. The committee, at the conclusion of their report, present a preliminary question of importance:

The committee has preferred to report on every point of contention in the case and upon the evidence relating to each one, though it need not have done so, for the record does not show what vote was received by either candidate in the city of Augusta, to which chief objection is made, nor does it show the number of votes received by either candidate in the district. To have allowed every contention of the contestant, the result would have been the same that we have reached.

The attorneys for contestant in the argument of the case asked the committee to accept the report of the comptroller general of the State to show the number of votes cast, and for whom cast, in this Congressional district. The law of the State, however, does not require the comptroller-general to embrace such information in his reports, nor does it make his reports competent and legal evidence in a judicial investigation without further authentication.

The consideration of the case involves a number of subjects, of which the following may be said to present fairly definite determinations of law by the committee:

1. The contestant alleged that at each of the several precincts of the city of Augusta three ballot boxes were used for the reception of ballots, whereas the law of the State permitted the use of one box only at each precinct. The committee find that it had long been the custom in the city, under the conviction that it was lawful, to use one or more ballot boxes at each precinct. The number of precincts in the city was limited by law, and additional facilities for casting votes could be obtained by using more than one ballot box. The law of Georgia provided:

No election shall be defeated for noncompliance with the requirements of the laws, if held at the proper time and place by persons qualified to hold them, if it is not shown that by that noncompliance the result is different from what it would have been had there been proper compliance.

Therefore the committee conclude:

The use of three ballot boxes at an election precinct is certainly not expressly prohibited by the laws of Georgia, nor do we think that their use is inferentially or impliedly prohibited. But on the assumption that their use is impliedly prohibited a noncompliance with the prohibition would not, under section 1334 of the code of the State, above quoted, render the election void, unless it was shown by evidence that their use did, in fact, produce a different result. That is not shown nor attempted to be shown in this case.

2. The report thus discusses an objection:

At one precinct only some unauthorized persons, who seem to have been clerks assisting in holding the election, were permitted to receive the ballots from the voter and transmit them to the superintendents. One was seen to open, unfold, and refold ballots, but his purpose in doing so is not apparent. We can not approve of such practice, but in this instance it was done in the presence of the superintendents and supervisors and we can not discover that any harm accrued.

3. Another objection is thus treated:

Three instances of this character occurred. One superintendent went into the street and received the ballot of a sick person brought there in a buggy and immediately returned to his post, and two others once or twice during the day, and for a brief period, retired to the rear of the room in which the election was held, and were seen to drink from a bottle what was thought to be beer or whisky. One said that he was advised by his physician to take whisky. The two then acting were not presiding at the same polls, were absent but a few minutes each, and were not intoxicated or affected by the stimulant. No ballots meanwhile were received at the boxes presided over by them, and the affair appears, on the whole, to be too trivial to deserve rebuke.

4. It was charged by contestant that employees in a cotton mill were intimidated by an overseer, who threatened to discharge them if they voted for contestant. There was evidence to show that such a threat was made. Of twelve members of contestant's party employed under this overseer it appeared that two or three probably voted for contestant, and there was no evidence to show how the others voted. Nor did it positively appear that anyone was discharged in consequence of the threat. The committee think "that if any of the employees of industrial institutions of the city were discharged on account of their political opinions or actions, or intimidated by threats to discharge them, the fact could have been clearly proven by the employees themselves. But none of these, if there were any, were summoned to testify." Therefore the committee do not entertain the objection.

1055. The case of Watson v. Black, continued.

Bribery being proven, the House deducted the tainted votes but did not reject the poll.

General evidence that repeaters voted is not effective unless supplemented by specific evidence as to who they were, and where and for whom they voted.

In the absence of evidence of the contrary, the election officers are presumed to have acted correctly in denying the claims of certain persons who attempted to vote.

A return not signed by the election officers as required by law is properly rejected.

A State law providing that an election shall not be defeated for mere irregularities, the House overruled the rejection of returns informal but evidently true.

5. There was testimony showing some bribery of voters, from which the committee concluded:

> With the exception of two ballots, one of which was not cast, it is not perfectly clear for whom the votes of the persons thus bribed were cast, but we assume from certain parts of the evidence that they were cast for contestee. Allowing, therefore, all that is proven, and disregarding the cumulative character of the evidence, it appears that 20 votes should be deducted from the majority of the contestee. The instances of bribery occurring at two precincts only, being participated in by different persons, and being so few in numbers compared with the very large vote polled, we are persuaded that they were not committed in pursuance of any prearranged and organized plan, but were rather the excesses of overzealous partisans.

6. There was evidence that people supposed to be repeaters voted at various wards in the city, but no one gave any definite testimony as to their number, names, or for whom they voted. The committee say:

> Why have not the alleged illegal voters been prosecuted? Why have not the ballots and the poll books been examined and both purged of the illegal votes? There was no difficulty in doing that. The law of the State expressly provides for such a contingency. In providing that the name of the voter shall be numbered on the poll book and that the same number shall be written on his ballot before it is placed in the box, and in requiring that poll books and ballots shall be preserved a sufficient time to be used as evidence in any contest, the law of Georgia makes ample provision for the detection of frauds in elections and for rejecting every illegal ballot.
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> But it was not attempted in this case to purge either the poll books or the ballot boxes. The best method of determining whether there were repeaters was neglected. There was no effort made to show

by the tax receiver's books whether or not anyone who voted was not a taxpayer or resident of the county. Your committee is therefore utterly unable to determine how many repeaters and illegal voters there were, beyond the number whose names are given by the witnesses, or how many of these votes should be deducted from the majority of the contestee. Between the minimum and maximum number testified to there is a very wide margin, and we don't know whether to accept either or some intermediate number.

7. Another objection is thus disposed of:

Some 70 or more persons offering to vote for contestant at Jewells were not permitted to do so by the superintendents of the election. It does not appear why their votes were refused, except that their names did not appear on a list in the possession of the superintendents. Tax defaulters are not qualified voters in Georgia; but whether the list mentioned was a list of those who had paid their taxes and qualified themselves to vote, we do not know. The superintendents of the election were sworn officers, and in the absence of evidence to the contrary we presumed that they discharged their duty in a lawful manner.

8. The law of Georgia provided that—

when the votes are all counted out there must be a certificate, signed by all the superintendents, stating the number of votes each person voted for received; and each list of voters and tally sheet must have placed thereon the signature of the superintendents.

The committee say:

In the ninety-eighth election district of the county the tally sheets, list of voters, and election returns were not signed by the superintendents as required by law, nor did it appear in what capacity the superintendents acted. We think that the return from this precinct was properly rejected.

In certain other precincts certain of the papers were signed, while others were not, but there was enough to show that the election was legally held and to show the number of votes cast and for whom cast. Therefore the committee overrule the action of the local canvassers in rejecting these returns and credit the contestant with his majorities, on the ground that under the Georgia statute relating to informalities, quoted above, the returns must be held sufficient.

There were other objections raised by contestant which the committee dismissed as not sustained by definite evidence, and in conclusion the committee recommended resolutions confirming the title of sitting Member to the seat.

On June 29, 1894, without debate and by a rising vote, the resolutions were agreed to, ayes 106, noes 10.

1056. The Illinois election case of Steward v. Childs, in the Fifty-third Congress.

In construing State election laws not construed by the State courts the Elections Committee should recommend such construction as to give full effect to the clear intent of the legislature.

The State law providing that ballots shall not be counted unless marked in a certain way, ballots otherwise marked should be rejected by the House.

The State law requiring rejection of the vote in the case of voters assisted in marking ballots without making an affidavit of disability, the House overruled the election officers who counted such ballots.

The State law requiring rejection of ballots not marked with initials of election officers, the House overruled the election officers who had counted such ballots.

On February, 1895,[1] Mr. Jason B. Brown, of Indiana, from the Committee on Elections, submitted a report in the Illinois case of Steward *v.* Childs. The official returns had given sitting Member a plurality of 17 votes, which the contestant had attacked because of alleged irregularities in the application of the then newly enacted Australian ballot law of Indiana. The committee say in a preliminary way:

> The first general election held under this law was the election of November 8, 1892, out of which this controversy grows, and so far as we know its provisions have not yet been construed by the courts of Illinois. In the light of the power reserved to the Members of the House of Representatives, by the Constitution of the United States, to be the judges of the election, returns, and qualifications of its own Members, and in the light of the power to prescribe the time, place, and manner of holding elections of Members to the House of Representatives reserved by the same instrument to the State legislatures, it is deemed the duty of the committee to recommend to the House such construction of these laws as will give force and effect to the clear intention of the legislature which enacted them.

In general the law provided that there should be a grouping of candidates by parties on the ballot, with spaces so that the voter might at one mark vote the whole party ticket, or might by several marks vote for candidates individually. The specific provision of the law was that the voter—

> shall prepare his ballot by marking in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by writing in the name of the candidate of his choice in a blank space on said ticket, making a cross (X) opposite thereto.

The law further provided that "any voter who may declare upon oath that he can not read the English language, or that by reason of any physical disability he is unable to mark his ballot, shall upon request be assisted in marking his ballot by two of the election officers," etc.; and also that—

> * * * No ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this act shall be counted. * * *

The committee, in view of these provisions of law, and in view of the decisions of various State courts which are cited, concluded:

> The committee find it to be the law that ballots on which the voter undertook to express his choice by marks other than the cross placed in the circle or square, as provided by the statute, are not legal and should not be counted; that ballots voted by electors who were assisted in marking their ballots without having first made the affidavit of disability, as provided by said statute, axe not legal and should not be counted; that the initials of that one of the judges of election who delivered the ballots to the voters are a part of the "official indorsement" required by the statute, and ballots not bearing such initials are not legal and should not be counted.

Applying the law as thus stated they found a net loss to contestant of 259 votes, and a net loss to sitting Member of 26 votes. Thus the plurality of sitting Member was increased, and the committee reported resolutions confirming his title to the seat.

There was no action by the House on this report, and sitting Member of course retained the seat.

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[1] Third session Fifty-third Congress, House Report No. 1741; Rowell's Digest, p. 493; Journal, p. 99.

1057. The Virginia election case of Goode v. Epes, in the Fifty-third Congress.

Discussion as to what is the best evidence when objection is made to the action of county canvassers in rejecting precinct returns.

Although service of notice of taking testimony be irregular, if the party yet is informed and appears and cross-examines, the House may consider the evidence.

Ex parte affidavits are not considered in an election case.

Where canvassing officers reject returns transmitted unsealed when the law requires them to be sealed, what evidence should the House require to overrule the canvassers?

On February 28, 1895,[1] Mr. Thomas G. Lawson, of Georgia, from the Committee on Elections, presented the report of the majority of the committee on the Virginia election case of Goode *v.* Epes. The report thus states the vote and the returns:

> The board of canvassers of the State of Virginia awarded the certificate of election to the contestee upon evidence before them that he had received a majority of 868 votes. But it appears from the record that the commissioners of election in the counties of Brunswick, Amelia, Prince Edward, Mecklenburg, Greeneville, Lunenburg, and Sussex, respectively, rejected the returns from 21 precincts and refused to canvass and count their votes, at which the contestant received a majority of 1,509 votes, or 641 votes in excess of the majority by which the contestee was declared elected.

Contestant objected to the rejection of these returns, and the case turns on this feature alone.

At the outset certain preliminary questions are discussed:

(*a*) The majority say in regard to the evidence:

> The law presumes that the board of commissioners of election in the respective counties acted in accordance with the law and the facts of each case when they rejected the returns, and in order to overthrow that presumption the best evidence relating to the invalidity of their conduct ought to be adduced. If the party who impeaches its validity does not furnish the best evidence within his reach in favor of his contention he is open to the suspicion that he is cognizant that such evidence would not avail him. Inasmuch as the action of the commissioners is impeached they are the best witnesses to the facts; they above all other persons must have known the grounds on which these returns were thrown out; they were the only persons who had any agency in their rejection, and the only persons upon whom the law imposed the duty of canvassing and counting them. All other evidence is probably hearsay.
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> The evidence in the record relates to the conduct of the commissioners of election in seven counties, in which there were 24 of these officers, yet they were examined in only two counties, and no reason is assigned why one or more of them was not examined in each county. The evidence is therefore primarily defective in quality, and after a close analysis a great deal of it fails to throw any light upon the vital issues in the case. We have, however, rejected none of it. We have labored to the extent of our power to extract the truth from it.

An example of this evidence is afforded in Amelia County where the county clerk testified, and in Mecklenburg County, where the deputy clerk testified as to the action of the commissioners. In the latter county the clerk was sent from the room before the commissioners came to their decision, and when he returned they announced to him their conclusions but not their reasons. The commissioners themselves were not called to explain their acts.

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[1] Third session Fifty-third Congress, House Report No. 1952; Rowell's Digest, p. 496; Journal, p. 169.

The minority say:

There is such a presumption in favor of public officers that they do perform their legal duties as that is required by the laws enjoining those duties.

But it is only a presumption at the most, which must yield to proof of the facts affecting the correctness of the presumption. When the facts are fairly supported by legal evidence and they appear to be in conflict with the presumption, then the presumption will, as it should, be completely overthrown. And such will appear to be the condition of this contest, which should be disposed of upon the effect of the evidence, disclosing the real state of the facts upon which the county commissioners have proceeded in rejecting the votes of a large number of precincts or districts, within the Fourth Congressional district of the State of Virginia, to which the present contest relates.

The district contained 98 precincts, besides wards of the city of Petersburg, and in the canvass made by the boards of county commissioners of eight different counties in the Fourth Congressional district of the State, they are claimed to have unlawfully rejected the entire vote of 32 districts or precincts. That circumstance of itself, so far as it has been supported, is sufficient to reasonably suggest the suspicion that these boards were, in their conduct, actuated by a motive not in consonance with an honest or legal discharge of their duties. The evidence as to the conduct of the election in the rejected precincts was largely obtained from reputable local officials, politically acting with the Democratic party, friendly to and supporting the contestee, and opposed to the contestant, who was supported by what are called third-party voters and Republicans. From the evidence of these witnesses the facts have been established to the approval of the counsel for the contestee, that the elections in the rejected precincts were orderly and carefully conducted, and the votes of none but lawful voters were received, and that in the returns made of the votes by the election officers to the county commissioners they endeavored to conform to the requirements of the laws of the State of Virginia to the best of their understanding.

The votes in all the rejected precincts, except one which gave a very small plurality for the sitting Member, were so favorable to the contestant as to wholly overcome the plurality of 868 counted in the district for the contestee, if they had been accepted and canvassed by the boards of county commissioners. And these circumstances very materially advance the presumption that there could be no proper or legal foundation for rejecting the votes of so large a part of this Congressional district as was rejected by the boards of county commissioners. Whether this presumption is in itself accurate or not, must in the end be disclosed by ascertaining from the evidence the reasons leading to the exclusion of these votes, and an examination of the evidence for that object will be made.

(*b*) The minority in their views suggest an objection of the sitting Member to certain testimony.

In Prince Edward County objection was taken on behalf of the contestee to the taking of evidence on the part of the contestant, for the reason that the notice was served by leaving it at the residence of the contestee on the 10th of February, 1893. This service could only be regularly made in case of inability to serve it on the contestee himself, or on his agent or attorney. The contestee was absent from the district and in attendance on the House of Representatives, but he had an attorney acting in the proceedings, and regularly the service should have been made on him. (Rev. Stat., sec. 108.)

But while the service was irregular, the counsel appears to have had timely information of it, for he appeared before the notary and stated his objection to the service, and then fully cross-examined the witnesses who were sworn on behalf of the contestant. The object of the notice was, therefore, fully accomplished, and the depositions so taken can not be excluded from consideration.

The majority do not mention this objection and evidently did not heed it, since they consider the evidence from this county.

(*c*) Testimony relating to the stealing of ballots in two precincts of Greeneville County and to the rejection of returns of two precincts of Prince George County, was in the nature of ex parte affidavits, which the majority evidently disregarded. The minority specifically state that this is not the evidence prescribed by the act of Congress, and do not insist on giving it effect.

The examination of the case so far as the merits go divides itself naturally into several branches:

1. The law of Virginia had the following provision:

After canvassing the votes in the manner aforesaid, the judges, before they adjourn, shall put under cover the poll books, seal the same, and direct them to the clerk of the court of the county or corporation (as the case may be) in which the election is held; and the poll books, thus sealed and directed (together with the ballots strung as aforesaid, inclosed, and sealed), shall be conveyed by one of the judges—to be determined by lot if they can not otherwise agree—to the clerk to whom they are directed, on the day following the election, there to remain for the use of the persons who may choose to inspect the same.

It appeared from the evidence that both the poll books and ballots from Rock Stone precinct were returned unsealed, and that the commissioners rejected them for this reason. The majority of the committee say:

Witnesses who were examined as to the condition of poll books and ballots that came from this precinct differ in their depositions as to the sealing of them, but one testifies as to their condition at one period of time and the other at another period of time, and this, no doubt, accounts for the discrepancy. Accepting the deposition of Lewis who describes their condition when received by the commissioners of elections, we are reluctant to say that the returns were not properly rejected. They were certainly not in the condition that the statutes of Virginia prescribe.

But as the voters at this precinct had no agency in sealing the books and ballots, and as their insecure condition can not be imputed to them, we think that they ought not to be deprived of the elective franchise without imperative reasons. We think that the poll books and ballots ought to have been examined by the commissioners of election, and, in the event nothing was found to discredit them, they ought to have been canvassed and counted.

The minority say that the returns were rejected "for what can be certainly said to be no more than a harmless deficiency."

At Wilkinson Shop precinct the poll book was not sealed, and apparently the ballots were not returned with it. The commissioners rejected the return, and the majority of the committee, "in the absence of further or explanatory evidence," conclude that they were warranted in so doing. The minority do not think the evidence proves that the ballots were not sent, and condemn the commissioners for rejecting the returns:

And the only point in this manner presented is whether the omission to seal justified the refusal to canvass the votes of this precinct. The election laws of the State of Virginia have not declared that to be a result of the omission. Section 132 does require that the books and the ballots shall be put under cover and sealed and directed to the clerk of the court of the county in which the election is held, and that they shall be conveyed by one of the judges selected for that service to the clerk to whom they are directed. It does not expressly, or by implication, forbid the clerk from receiving them or the commissioners from canvassing them if they are not sealed. It can not be seen that any actual uncertainty arose out of the omission to seal these books and votes.

It is not pretended that any change was made in the returns or the votes in their transit from the judges and clerks to the clerk of the court or that they had in any respect been interfered with. But they appear by the transcripts in the record to have been before the commissioners as they left the hands of the election officers. And under this state of the facts and the statute of the State, the commissioners could not rightly decline, as they did, to canvass these votes. The rule upon this subject, settled by well-considered authority, is that if the act omitted or the irregularity appearing is not of such a nature as to cast uncertainty on the result or to interfere with the legal expression of the will of the elector,

and it has not been made essential to the validity of the election or the statute has not declared that the vote in consequence of the act or omission shall be void or shall not be counted, there the fault or failure of the officers charged with the duty shall not be followed by an exclusion of the vote. (Bowers *v.* Smith, 111 Missouri, 45, 61–62; McCrary, on Elections, 3d ed., see. 192.)

And conformably with this principle, the vote of this precinct ought to have been accepted and canvassed by the county commissioners.

The returns from Bridgforth's Mill were rejected by the commissioners because the poll book was not sealed, but there being testimony that it was in safe custody, the majority concluded:

In point of fact, the poll book was not sealed, but it was practically protected against alteration, and was securely kept without alteration until it was delivered to the clerk or the court, who was their lawful custodian. For reasons expressed in our comments upon Rock Store precinct we think that the votes at this precinct ought to have been canvassed and counted.

In Mecklenburg County the commissioners rejected the returns of four precincts, three because the returns, while sealed, were so wrapped that they might have been taken from the wrapper at the ends. The returns of the fourth precinct were properly sealed, but in taking them to the county clerk the judge was out in the rain and the moisture partially uncealed them. The majority conclude as to the four precincts:

The evidence is of such character to raise a suspicion that these returns were improperly rejected, but we can not assume, in the absence of evidence sufficiently clear and strong to bring conviction to a mind reasonably unbiased, that the commissioners of election transcended their duty, especially as it appears (rec., p. 116) that unauthorized persons may have had access to the returns.

The minority, after reviewing the testimony, conclude that there was no evidence to show that the returns had been tampered with, and express the opinion that they were improperly rejected.

1058. The case of Goode v. Epes, continued.

When an election is moved from the prescribed place to another, should the poll be rejected or corrected with reference to the voters who did not attend?

Participation of a United States marshal in the duties of election officers, no harm being shown, did not justify rejection of the return.

Mere failure of election officers to take the oath prescribed by law does not vitiate the return.

Where the State law gives canvassing officers the authority to correct irregularities, they may not reject returns for lack of clearness.

Canvassing officers, having judicial power, may not reject the poll book as a return for the reason that theft of the ballots has prevented its verification.

2. The commissioners rejected the returns from Trotter's store, in Brunswick County, where contestant had a majority, because the election was held 1 mile from the voting place established by law. The majority justify this rejection, quoting McCrary and Brightley. The new place of election was not visible from the lawful one, and although two men were requested to remain and notify electors

of the change of place, there was no evidence that they executed the trust. The majority say:

It is true that the number of votes cast at this precinct was within 20 of the number registered, and the contestant and contestee might both be benefited by crediting them to the latter. To do so would not alter the result we have reached. But, imsmuch as the election was void, we do not think it can be thus validated. It is not known for whom these votes would have been cast, and to establish such a precedent would be mischievous.

The minority do not concur in this. They say it can not be accurately ascertained how the 20 voters who were registered but did not vote would have voted. One witness estimated that 13 would have voted for contestant and 7 for sitting Member. But the minority hold that to avoid injustice to sitting Member the whole 20 should be counted for him:

But to avoid all possible injustice to the contestee, they should all be added to his vote, which will leave a plurality in favor of the contestant of 41 votes. What the law endeavors to do is to give its appropriate effect to the will of the electors, as that may be expressed by their ballots, and not to defeat the expression of their will by giving undue prominence to irregularities productive of neither actual injury nor uncertainty. The officers did the best thing they could under the circumstances, and to still hold the election to be invalid because of the change in the building for holding the election would place the right of the electors on the contingency that the person on whose premises it should be held would permit that to be done. That surely ought not to be allowed, for it would empower one person in many cases to prevent an election from being held at all.

Reviewing the testimony of witnesses, the minority further say:

And they disclose no more than a harmless irregularity, intrenching in no degree upon the right of the voters to have due effect given to their votes and to the registered voters of the precinct. The legal principle is "that irregularities which do not tend to affect the result are not to defeat the will of the majority. The will of the majority is to be respected even when irregularity is expressed." (McCrary on Elections, 3d ed., sec. 193.)

3. The returns of Butter's precinct were rejected by the commissioners because a United States marshal, not sworn as a judge of election, had performed the duties of one of the judges for a part of the day. The majority of the committee found, however, from the testimony of one of the judges of election, that the marshal was merely permitted to hold the registration book during the voting. He did not touch the ballots in any way. Considering the testimony showing the "trifling character" of this interference, the committee conclude that the returns were wrongfully rejected.

4. The returns of Rice's precinct were rejected because the judges and clerks of election were not sworn, so far as was shown. The majority of the committee say:

The failure of the judges and clerks of election at Rice's to take the oath prescribed by law, if such was the case, did not invalidate the election. The vote can not be affected by the failure of an election officer to perform a duty that is purely ministerial and directory.

The minority say the evidence shows that the judges and clerks were sworn, "but the written oaths subscribed by judges and clerks had no signature to the jurats." This the minority consider an inadvertence merely, and say:

As long as it did not appear that these persons were not sworn, the presumption is that they were.

5. At Namozine and Spring Creek precincts the commissioners rejected the returns for the alleged reason that they did not clearly show the state of the vote.

The committee overrule this action, holding that the law of Virginia gave the commissioners authority to correct such irregularities.

6. As to Trotter's Store, in Greenville County, the majority say:

> The ballots from Trotter's Store had also been stolen. The commissioners rejected the poll book for the reason that, the ballots being stolen, they could not compare the two and verify their agreement. We think that the commissioners erred. It was evident that the ballots were stolen to prevent a fair ascertainment of the result of the election. The purpose of the spoliators should have been frustrated if possible; the poll book, though not in the condition required by law, should have been examined, and if found unaltered should have been allowed. To determine whether or not it had been altered, the commissioners were authorized by section 134 of the election laws of Virginia to summon and examine witnesses. We allow the contestant his majority at this precinct.

Various other precincts are discussed by the majority and minority, but questions of fact rather than law are involved.

The majority of the committee, correcting the returns in the light of the above decisions, found that contestant received a majority of 653 votes in precincts wrongfully rejected, and that after this was deducted from sitting Member's returned majority, the latter would have still a majority of 215 votes, and thus should retain the seat.

The minority contended that contestant was shown to have a plurality of 442, and that he should be seated.

The report was never considered in the House, having been submitted within a few days of final adjournment.

1059. The Senate election case of Ady v. Martiin, from Kansas, in the Fifty-third Congress.

A question as to what constitutes an "organization" of a State legislature within the meaning of the law providing for the election of United States Senators.

In 1893 [1] the Senate considered the case of Joseph W. Ady *v.* John Martin, of Kansas.

The credentials of Mr. Martin as a Senator from the State of Kansas being in due form, he was admitted to a seat in the Senate at the beginning of the special session of the Senate, March 4, 1893. Subsequently a memorial signed by 77 members of the Kansas legislature was presented in the Senate relating to the election of a United States Senator from the State of Kansas to fill the vacancy caused by the death of Hon. Preston B. Plumb. The memorial set out the facts from which it was claimed that the proceedings in the election of Mr. Martin to fill the vacancy aforesaid were irregular and illegal, and also set forth the subsequent election of Joseph W. Ady in a legal and formal manner. The grounds on which it was claimed that the proceedings of the legislature of Kansas in the election of Mr. Martin were illegal, are set forth in the remarks of Mr. William E. Chandler, of New Hampshire, who said in debate:

> A Kansas legislature was chosen November 8, 1892—40 senators, 125 representatives, 63 being a majority in the house and 83 a majority of the whole 165.

[1] Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 812.

On Tuesday, January 10, 1893, the members assembled at Topeka. The senate was duly organized as one body without controversy; but two houses were organized, each claiming to be lawful.

The Douglass house had 64 members holding certificates from the secretary of state. Three other members, holding certificates, afterwards appeared, making 67 members.

The Dunsmore house had 58 members holding certificates and 10 persons without certificates. These 10 claimed the places of 10 certified members who were in the Douglass house, asserting that of the latter 4 were ineligible because they were postmasters when elected, and that the rest had not been legally elected.

The senate recognized the Dunsmore house and refused to recognize the Douglass house, and so did the governor of the State.

On February 25, 1893, the Kansas supreme court decided that the Douglass house was the lawful body, and on February 28 the members of the Dunsmore house joined the lawful body and the Dunsmore house ceased to exist, none of the 10 unlawful members of that house either being admitted or claiming seats in the lawful body at any time.

On Tuesday, January 24, 1893, the senate voted for United States Senator, no person receiving a majority. The Douglass and Dunsmore houses each voted for United State Senator, Joseph W. Ady receiving a majority in the first and John Martin receiving a majority in the second body.

On Wednesday, January 25, there was a joint assembly, Lieutenant-Governor Daniels presiding. The senate roll was called; 15 senators did not vote; 24 voted for John Martin and I for M. W. Cobun.

The lieutenant-governor then directed B. C. Rich, clerk of the Dunsmore house, to call the roll. Fifty-six members of the Dunsmore house who had held certificates from the secretary of state voted for John Martin, 3 for Cobun, 1 for Mr. Close, 1 for Mr. Snyder, 1 was absent, and 1 did not vote, makin the 58.

Ten members of the Dunsmore house who did not have certificates from the secretary of state voted 9 for Martin and 1 for Hanna.

"After the call thus made had been completed 2 members of the Douglass house, Wilson and Rosenthal, asked to vote; were allowed to do so and voted for Martin."

The vote then stood: Martin, 86; Cobun, 4 Hanna; Close, 1; Snyder, 1; Hanna, 1; making 93.

Before the result of the vote was announced Senator Lucien Baker arcee, and in behalf of 15 senators and 65 representatives asked the right to vote. The lieutenant-governor refused to allow them to vote, declared the result to be as above stated, and that John Martin was elected, and then he left the chair.

Mr. HALE. Let me ask the Senator a question. I have been following the Senator's remarks. Does he mean to say that in the joint convention, where there were rival bodies, two houses of representatives, both present, that the presiding officer, after the roll call of one house had been completed, in order to get votes enough to make a quorum allowed two members of the other house, which he had not recognized, to vote, and that then, after doing that, when other members of that house requested the privilege of voting, he excluded them?

Mr. CHANDLER. The Senator correctly understands the case. That is exactly what took place, as the language I have read very clearly indicates.

Mr. HALE. Is that an undisputed fact; and if so, what followed upon that.

Mr. CHANDLER. I will show the Senator if he will listen a moment. The fact is undisputed that 24 senators voted for Martin; 1 for Cobun; that the roll was then called, and only members of the Dunsmore house voted. I again read:

"After the roll call thus made had been completed two members of the Douglass house, Wilson and Rosenthal, asked to vote; were allowed to do so, and voted for Martin."

The Senator is correct in the suggestion that it took these two votes to make in joint assembly up to that time 83, being a majority of the whole legislature. I proceed:

"The excluded senators and members continued in session, elected George L. Douglass presiding officer, and proceeded to cast their votes as follows:

"Joseph W. Ady, 77; present and not voting, 3."

And thereupon Mr. Douglass declared that there had been no election of United States Senator, and the assembly adjourned.

The total votes cast, which justify the conclusion that there was no choice, appear below, as follows:

	Votes
John Martin	86
Cobun	4
Close	1
Snyder	1
Hanna	1
J. W. Ady	77
	170
Deduct the surplus and illegal votes, being	10
Total legal votes	160
Necessary for a choice	81
Martin received	86
Deduct his illegal votes, being	9
Total legal votes cast for Martin	77

Or 4 less than were necessary for an election.

An attempt has been made to show that Martin in the assembly as cut short by the lieutenant-governor was elected without counting the 10 illegal votes, as follows:

	Votes
John Martin	77
Cobun	4
Close	1
Snyder	1
Giving in all	83

votes cast by legal members, and being exactly a majority of the whole 165 legal members of the legislature.

But to make this calculation it is necessary to count the 2 votes of Wilson and Rosenthal from the Douglass house, while excluding the 65 other members of that house and the 15 senators.

To justify taking in the 2 while excluding the 80 is impossible.

From the foregoing facts it is not difficult to reach two conclusions: First, the time had not arrived when the legislature of Kansas could lawfully elect a United States Senator. The legislature had not been organized within the meaning of the United States law, which is as follows:

"SEC. 14. The legislature of each State * * * shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress."

It is true that there was a lawful senate, and it is true, as appears from the subsequent decision of the supreme court of Kansas, that there was a lawful house. But it is also true that there was, in addition to the lawful house, an unlawful house, and that unlawful house was recognized by the senate and by the governor, while the lawful house received no recognition as such, either from the senate or from the governor.

Manifestly there was no organization of a legislature within the meaning of the national statute, so that the time began to ran at the end of which, by the national law, it was the right and the duty of the members of the legislature to elect a United States Senator. In no just sense could the legislature be said to be organized under the conditions above described. It is not contended that in all cases where a lawful senate and a lawful house are organized it must be shown that they communicate with each other and recognize each other. That fact is to be presumed in the absence of counter proof; but as soon as such counter proof appears and the anomalous condition is shown that the lawful house has made no connection with the senate, but that the senate, on the other hand; is in connection with an unlawful house, there can not be said to be in any proper sense an organization of the legislature within the meaning of the United States statute. This point I do not intend to enlarge upon. I am thoroughly convinced of its validity.

But, conceding that there was an organized legislature on Tuesday, January 10, 1893, entitled on the second Tuesday thereafter, namely, on January 24, and on the day after, the 25th, to elect a United States Senator, it seems clear that there was no lawful election. Review the facts. The members of the three houses met in one room. The voting began. A part of the senators voted, the other part omitting to vote. The members of the unlawful house voted, the members of the lawful house omitting to vote when the roll was called by the clerk of the unlawful house, whom they did not recognize as clerk. Then two members of the legal house asked to vote, and their votes were received. Next, the senators who had not voted and the members of the legal house asked to vote, but the lieutenant-governor refused to receive their votes, although he had received the two votes from the members of the legal house, and then he declared Mr. Martin elected.

Can it be by any possibility contended that the lieutenant-governor had any right so to deal with the joint assembly; to receive the votes of the members of the illegal house; to receive at his discretion the votes of two members of the legal house, and then to exclude the remaining 62 members of the legal house and 15 senators? The idea is preposterous. The case is clear. Either there was no lawful joint assembly on that day, because the legislature was not organized, or it was the duty of the lieutenant-governor to receive the votes of all the members of the two houses. To base the right of a Senator to a seat upon this floor, as Senator Martin's right is based, solely upon the assumed authority of the lieutenant-governor, as exercised in this case, to receive votes enough to elect Mr. Martin and make a majority of the legal votes of the whole legislature, and then to arbitrarily stop the balloting and declare Mr. Martin to be elected, is as dangerous and vicious a proceeding as has ever been heard of in the history of fraudulent elections.

While the matter was referred to the Committee on Privileges and Elections, no report was made and no action was taken by the Senate.

1060. The Senate election case of Davidson v. Call, from Florida, in the Fifty-second Congress.

For the election of a United States Senator the joint meeting of the legislature is a distinct and separate body with a quorum of its own.

In 1892[1] the Senate investigated the case of R. H. M. Davidson *v.* Wilkinson W, of Florida.

In April, 1891, the legislature of the State of Florida met and was duly organized at the time and place appointed by law. On the second Tuesday after such organization, being the 21st day of April, 1891, the two chambers of which it was composed held a session and voted, each separately, for the election of a United States Senator. No one was chosen at this election, and it was so declared and entered upon the journals of the respective houses. On the following day, being Wednesday, the 22d of April aforesaid, the legislature met at noon in joint assembly, and one vote was taken for Senator, which resulted in no election. And on every succeeding day, except Sundays, until the 26th day of May, 1891, they met and took one vote in the same manner, with the same result. On the 26th day of May, 1891, the joint assembly met as before, and upon a vote being taken for United States Senator it was found that Wilkinson Call had received a majority of the votes of those present and voting, the same being also a majority of all the members elected to both houses of the legislature. Thereupon Mr. Call was declared duly elected.

The validity of this election was questioned upon the ground that there was not a quorum of the State senate present and voting at the time it occurred. This objection was based upon the proposition that the joint convention or assembly

[1] Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 806; first session Fifty-second Congress, Senate Report No. 106.

in such cases is composed of the two houses as such, and that therefore a quorum of each must attend to properly form such convention.

The governor being of the opinion that this position was sound appointed Robert H. M. Davidson to be Senator from the State of Florida until the next meeting of the legislature, and issued credentials in the usual form under date of September 22, 1891, to which the secretary of state affixed the great seal of the State in obedience to a peremptory writ of mandamus issued by the supreme court of Florida, November 17, 1891.[1] The credentials of both claimants were presented to the Senate December 7, 1891. On the following day Mr. Call was sworn and his credentials, as well as those of Mr. Davidson, were referred to the Committee on Privileges and Elections. The committee reported, February 1, 1892, finding the facts set forth in the preceding paragraph, and holding that "This act [of July 25, 1866] provides that 'the members of the two houses shall convene in joint assembly,' etc. The joint assembly is thus composed not of the two houses, but of the members thereof. The joint assembly is not a junction or union of the two houses as such; it is not a merger of the two houses into one of either, but it is a body distinct and separate from either as such, and has by the words of the enactment a quorum of its own prescribed and defined, to wit, 'a majority of all the members elected to both houses,' without any reference to a quorum either of the senate or the house. * * * The term legislature in this clause is not to be construed technically with reference to the separate chambers which may exist within it, but as designating the collective number of all the persons composing it? and that therefore Mr. Call was duly elected.

February 4, 1892, the Senate considered the report of the committee and declared Mr. Call "lawfully entitled to a seat in the Senate."

1061. The Senate election case of Clagett v. Dubois, of Idaho, in the Fifty-second Congress.

As to what constitutes the "organization" of a legislature under the terms of the law relating to the election of United States Senators.

In 1892[2] the Senate investigated the case of William H. Clagett *v.* Fred. T. Dubois, of Idaho. The first legislature of the State of Idaho met, pursuant to proclamation by the governor, Monday, December 8, 1890. The house of representatives effected a permanent organization on that day. The senate, the lieutenant-governor being ex officio presiding officer, after prayer, elected a clerk pro tempore, after which the senators were sworn, a committee on rules selected, choice of seats provided for, a set of temporary rules adopted, and, finally, a committee on organization appointed. Tuesday, December 9, the permanent organization was perfected by the choice of a secretary and other officers. Tuesday, December 16, being the second Tuesday after Monday, December 8, each branch of the legislature took one ballot, acting under joint resolution, "to elect, as provided by law, United States Senators." The following day the two houses met in joint convention, and, the result of the previous day's balloting showing no choice of a Senator, proceeded to ballot. No person was elected on this day. On the

[1] 28 Fla., 441.

[2] Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 764; first session Fifty-second Congress, Senate Report No. 148.

following day, Thursday, December 18, the joint convention elected Messrs. Shoup and McConnell Senators to fill the existing vacancies, and Mr. Dubois for the term beginning March 4, 1891. Mr. Dubois's credentials were issued under date of December 18, 1890. February 6, 1891, the legislature of Idaho voted that there was "at least grave doubt" as to the validity of the election of Fred. T. Dubois and to proceed to a new election. In pursuance of this resolution a new election was held, and Mr. Clagett was declared elected February 11, 1891. The governor issued credentials, certifying that fact, under date of February 14, 1891. On the assembling of the Fifty-second Congress Mr. Dubois presented himself to take the oath as Senator. Objection was made, and the matter went over until the following day, when Mr. Dubois was sworn, and his credentials, together with a memorial of William H. Clagett, claiming the seat, were referred to the Committee on Privileges and Elections. The majority of the committee reported that "both on construction and precedent the legislature of Idaho was organized on Monday, December 8, A. D. 1890, within the meaning of the term 'organization' as used in the constitution of the State of Idaho, in the act of admission, and in the Revised Statutes" (R.S., sec. 14); that "Tuesday, the 16th day of December, was, in the judgment of [the] committee, the second Tuesday after the meeting and organization of the legislature of the State of Idaho," and that therefore Mr. Dubois was duly elected and entitled to retain his seat. Two of the committee dissented, contending that according to precedent the word "organization "meant permanent organization" that the permanent organization was not effected until Tuesday, December 9; that the proceedings which culminated in the election of Mr. Dubois did not take place on the second Tuesday thereafter, but were premature, and that therefore he was not entitled to the seat as Senator from Idaho. February 25, pending the discussion of the report of the committee, Mr. Clagett was given the right to speak in his own behalf for two hours, and on the following day the limit of time was removed. March 3 Mr. Dubois was declared entitled to retain his seat by vote of 55 yeas to 5 nays.

Chapter XXXVIII.

GENERAL ELECTION CASES, 1895 TO 1897.

1062. The Missouri election case of Van Horn v. Tarsney, in the Fifty-fourth Congress.

The returns and ballots of several precincts being tainted by a general conspiracy of election officers, the House rejected the entire returns of those precincts.

Discussion as to the wisdom of attempting to purge a poll whereof both returns and ballots axe discredited by fraud of election officers.

Instance wherein a returned Member presented as a question of privilege a proposition to reopen his election case for further testimony.

When contestee submits an affidavit to justify his request that his election case be reopened, the affidavit must be definite and specific.

Where a State law does not provide for reinspection of ballots, may they be examined under authority of the law for taking testimony in election cases?

Evidence of voters as to their votes is of doubtful validity if taken several months after election.

On December 28, 1895,[2] Mr. John C. Tarsney, of Missouri, presented as a question of privilege a resolution authorizing the reopening of the contested-election case of Van Horn *v.* Tarsney, so that additional testimony might be taken

[1] The following cases during this session are classified elsewhere:
Benoit *v.* Boatner, Louisiana. (Vol. I, secs. 337, 339.)
Beattie, *v.* Price, Louisiana. (Vol. 1, sec. 341.)
McDonald *v.* Jones, Virginia. (Vol. I, sec. 436.)
Hoge *v.* Otey, Virginia. (Vol. 1, sec. 724.)
Rosenthal *v.* Crowley, Texas. (Vol. 1, sec. 684.)
Davis *v.* Culberson, Texas. (Vol. I, sec. 755.)
Goodwyn, *v.* Cobb, Alabama. (Vol. I, sec. 720.)
Chesebrough *v.* McClellan, New York. (Vol. I, sec. 723.)
Belknap *v.* McGann, Illinois. (Vol. I, sec. 744.)
Several Mississippi cases. (Vol. I, sec. 754.)

[2] First session Fifty-fourth Congress, Journal, p. 83; Record, pp. 401, 402.

and made a part of the record in the case. Mr. Tarsney presented to the House, to show the materiality of the additional testimony, an affidavit, which was read.

Then, after debate, the resolution was referred to the Committee on Elections No. 2.

The committee did not report directly on this resolution, but on February 13, 1896,[1] Mr. Henry U. Johnson, of Indiana, reported on the whole case, and at the same time minority views were presented by Messrs. R. W. Tayler, of Ohio, and James G. Maguire, of California, wherein the real issue of the case was presented—whether or not additional testimony should be taken.

Mr. Tarsney had been returned by an official plurality of 745 votes, which the contestant attacked on the ground of fraud and illegality.

The majority of the committee analyzed the vote of only four precincts of Kansas City, finding it so tainted with fraud that it should be rejected entirely, thereby eliminating the plurality of the sitting Member and giving to the contestant a plurality of 375 votes in the district. The minority of the committee admitted fraud and conspiracy in three of the four precincts and acknowledged that if the vote of these precincts should be rejected the contestant would be shown to be elected. But the minority urged that the case should be reopened, and presented resolutions recommitting the case with imstructions—

that additional evidence be taken in said case, under such rules and in such manner as shall be adopted and prescribed therefor by the said committee, such additional evidence to be confined to the condition and custody of the ballots cast in the second, fifth, sixth, seventh, twenty-seventh, and fifty-second precincts[2] of Kansas City * * *; to the segregation of the illegal from the legal ballots in such precincts, and to the recount of the legal ballots cast in such precincts for Representative in Congress, and to include also duly certified copies of all poll books of such precincts not now in evidence.

Therefore the issue was joined on the question whether the vote of the four precincts should be entirely rejected or whether the ballots should be examined and the vote purged.

As bearing upon this issue the committee give details of an evident and acknowledged conspiracy to commit frauds led by an official known as the recorder of votes and participated in by election officials. In pursuance of this conspiracy the registration lists were padded with fraudulent names; the recommendations of contestant's party for representation on the election boards were disregarded so as to nullify the law guaranteeing representation; the challengers and witnesses which the law allowed to contestant's party were excluded from the polls. By precincts the details of the conspiracy were worked out as follows:

Fifty-second precinct: Here the returns gave Mr. Tarsney 363 votes and Mr. Van Horn 183. The testimony showed that the windows of the polling place were soaped to screen the manipulations of the election officers; that 115 ballots that had been cast for contestant's party were withdrawn and their registration and voting numbers were given to straight tickets of sitting Member's party, which were counted; that other ballots were taken from the box, and that others were burned. The names of 90 persons were found on the poll books who could not

[1] House Report No. 355; Rowell's Digest, p. 515.

[2] As reported in the minority views, this resolution included only the four precincts discussed in the report of the majority. The additional precincts were included afterwards. (Record, pp. 2131, 2234.)

be found in the precinct, and many of the names were registered from vacant lots. A witness who cast his ballot early in the morning nevertheless found that its consecutive number was 300. Another, who got a view through a clear space in the window, saw one of the judges putting votes into the ballot box when no one was voting. The committee find that—

> The poll was perfectly saturated with corruption. As a consequence of this the returns and also the ballots, which passed through corrupt hands, are so tainted with it as to be inadmissible as evidence and unworthy of credit. They can not be looked to for the purpose of purging the poll and ascertaining the honest vote cast. Indeed, the ballots are not in the record at all, nor is there before the committee any satisfactory testimony to which they can resort in order to find out the true result. They therefore cast the entire precinct out of the count.

Seventh precinct: In this precinct 270 registered persons, who were marked as having voted, could not be found, and many were registered from vacant lots, vacant houses, etc. The total vote also was swelled beyond reasonable limits. Testimony showed that ballots cast by voters were withheld by Judges and others substituted and placed in the box. The law required each voter to be numbered on the poll book in the order in which he voted, and the first 200 voters appeared to have performed the astonishing feat of coming to the polls in the alphabetical order of their names; and three men who voted immediately after the polls were opened found themselves numbered, respectively, 205, 206, 207. Of these frauds the committee say:

> Their extent baffles inquiry. It is not known at what point the corrupt officers of election stopped short in their dishonest practices. * * * The returns are tainted, the ballots are not in the record, and even if they were could not be received as evidence entitled to credit; nor is there any kind of evidence before the committee by which the poll can be purged and the honest vote be ascertained. It must therefore be thrown out entirely.

Sixth precinct: The testimony showed that 341 persons registered and marked on the poll book as voting could not be found, and many were registered from vacant lots. Persons who were marked as voting testified that they did not vote; the first 200 voters appeared as voting in alphabetical order, and the total vote of the precinct was swelled beyond reasonable limits. There was nothing in the record whereby the precinct could be purged.

Fifth precinct: The testimony showed that 400 of the persons registered as voters could not be found, many being registered from impossible places. Persons were recorded as voting in alphabetical order. There was testimony to show that large numbers of fraudulent ballots were put in the box on the night before election. The majority of the committee in this as in other cases favor throwing out the entire vote.

The entire committee substantially admitted the facts as to the frauds, but not the conclusion that the entire votes should be rejected.

The application of sitting Member for authorization to reopen the case, and the status of the ballots as evidence should the request be granted, were questions producing division.

The majority found that the affidavits of the sitting Member were too indefinite and insufficient to authorize the reopening of the case. As to the request that the ballots be inspected, the majority find that it was made too late, and that the excuse as to lack of a law of Missouri authorizing such inspection, the provisions of

State law being confined simply to inspection of ballots in contests for local offices, was not well founded. "He also cites," say the committee, "decision of the State court that even the grand jury could not inspect them in the investigation of election frauds." The Constitution of the United States, however, provides that each House shall be the judge of the elections, returns, and qualifications of its own Members, and to enable the House of Representatives the more readily to exercise this prerogative Congress passed a statute prescribing the methods to be observed in contests for a seat therein, under which statute this contest was being conducted. The Constitution and this statute enacted pursuant thereto are by the very provisions of the Constitution the supreme law of the land, and the judges in every State are bound thereby, anything in the constitution or the laws of the State to the contrary notwithstanding. The minority of the committee do not agree to this reasoning, and hold that the ballots might not have been exhibited "to any officer or commissioner other than a duly authorized representative of either of the Houses of Congress."

The majority of the committee, construing Mr. Tarsney's application for a recount to apply to 100 of the 200 alphabetical ballots in the Fifth precinct, show that the result could not be changed whatever might be shown by this limited recount. The minority deny that the application was so limited, and declare that it contemplated a general purging.

As to the admissibility of the ballots as evidence, the majority of the committee say:

> The proposition is to offer these alphabetical ballots in evidence, or what is practically the same thing, prove their contents and condition by witnesses who saw them at the time of this recount, in October, 1895. Of course it is expected that such evidence will be received and considered by the committee and the House when so taken. It is submitted, however, that such evidence is not competent and credible, and ought not to be regarded, as hereinbefore stated in this report.
>
> The ballots, like the returns, are tainted. They have passed through the hands of fraudulent and corrupt officers of election, and thus their credibility and integrity are destroyed.
>
> This principle is one laid down in all the text-books on the subject, and has found frequent recognition in the determination of contested-election cases by the House, some of which authorities have been heretofore cited in this report. Being founded in reason and experience, this principle ought not to be disregarded in this instance.

The majority further find that in addition to the original taint, the ballots had been tampered with in the office of the corrupt recorder of votes. The minority did not agree to this, but contended that the testimony failed to show that the ballots preserved by the proper officer were not the identical ballots cast and counted.

Mr. R. W. Tayler, of Ohio, who submitted individual views, showed that by the law of Missouri the ballots were all preserved, each marked with the voting number of the voter. An examination of the poll book would reveal his voting number and his ballot would be found with the corresponding number. [The majority combatted this in debate by showing that the ballot offered by the voter was sometimes changed for a different ballot, which took its number and went into the box.] But Mr. Tayler contended that the precincts could be purged satisfactorily, saying:

> We can thus, with reasonable definiteness, appraise the fraud and be relieved from the necessity of invoking the dangerous and mischievous doctrine that a poll, tainted with fraud and not purged, must be entirely disregarded. This drastic method is never to be resorted to except in case of absolute and

unavoidable necessity. The disfranchisement of honest voters thereby wrought is too grave a wrong to be permitted if, by any possibility, it can be averted. * * *

I am therefore convinced that, under these circumstances, it was the duty of the committee to take the testimony of the ballots and thereby, if the contestant was honestly elected, to say so with certainty. His title would no longer rest upon conjecture and inference, and the committee and the House would be forever relieved from the imputation of having acted in a partisan spirit.

The doctrine of throwing out entire returns by reason of fraud, while tolerable in theory and sometimes essential in practice, is, nevertheless, most vicious and unhappy in its application.

I doubt if a single instance will be found in a legislative contested-election case where a proposition to strike out an entire return, if of the substance of the case, was decided on any other than party lines.

A principle thus fostered and thus abused is not a principle to be invoked, except where the exigencies of the case absolutely demand it.

The minority report presented by Mr. Maguire conceded that the returns were discredited; but contended that the ballots were preserved as they were cast; that it was possible to separate the legal from the illegal, and purge instead of reject the votes of the precincts.

The majority of the committee also disapproved a proposition to take the testimony of voters. It might have been done immediately after the election, but "now, after the lapse of sixteen months, under changed circumstances, in a population shown to be shifting and migratory, when the facts have faded from the memory of the people, under the opportunity to commit perjury with immunity," the committee considered it useless and unwise.

On February 25, 26, and 27 [1] the report was debated at length, the issue being joined principally on the question of a recount of the ballots. On the latter day, by a vote of yeas 110, nays 163, the House disagreed to the resolution of the minority proposing a reexamination of the case; and then, without division, the resolutions of the majority declaring contestee not entitled to the seat and that contestant was elected were agreed to. Mr. Van Horn, the contestant, was then sworn in.

1063. The New York election case of Campbell v. Xiner in the Fifty-fourth Congress.

Testimony which merely raises a presumption that money was used for bribery is not sufficient to affect the determination of an election case.

The Elections Committee declined to recommend the reopening of a case for further testimony on facts not set forth in the notice or substantiated by testimony.

The ordinary provisions of the Australian ballot system for placing names of candidates on the ticket is hardly a violation of section 1, Article XIV of the Constitution., relating to equal protection of the laws.

On January 22, 1896,[2] Mr. Henry U. Johnson, of Indiana, from the Committee on Elections No. 2, submitted a report on the case of Campbell *v.* Miner, from New York.

The sitting Member received by the official returns a plurality of 954 votes, and the contestant sought to attack this plurality, alleging bribery and intimidation.

[1] Journal, pp. 243, 247, 250; Record, pp. 2131, 2172, 2214—2235.

[2] First session Fifty-fourth Congress, House Report No. 106; Rowell's Digest, p. 514.

The committee, after a careful examination of the evidence by which contestant sought to sustain the charges, found that while the testimony "raises a presumption that money was illegally used at this election to bribe the voters at one of the precincts, yet there is not sufficient evidence in the record to enable the committee to determine that it was actually so applied, or the extent to which it affected the result, and they are of the clear opinion that the contestant has wholly failed to establish any of the grounds of contest which were set out in the notice in the case."

After the reference of the case to the committee, and before the final hearing, the contestant moved the committee, under oath, for leave to reopen the case and to take further testimony therein to prove the matters alleged in his contest, and also to prove that by the act of the police commissioners of New York supplemented by a mandamus from Judge McAdams, his name had wrongfully been kept off the official ballot, and he was thereby deprived of 5,214 votes which were cast for John Simpson, whose name was placed on the ticket, and that he was prevented from proving these facts while he was taking his testimony in the case by reason of the misconduct of his attorney and his own arrest for contempt by Judge McAdams, on account of things said by him while testifying on his own behalf. This motion of the contestant was resisted by the sitting Member, who filed his affidavit in opposition thereto. The committee overruled this request, as the alleged facts were not set forth in the notice of contest; they were not substantiated by the testimony, which showed on the contrary that contestant had not improved the time allowed him by the law, and that his arrest was at a time not calculated to interfere with the preparation of his case.

One other feature of the case is thus set forth by the committee:

> The committee also report that on the final hearing of the case before them the contestant urged that the election law of New York under which said election was held was unconstitutional and void, for the reason that the provision requiring the candidate for Representative in Congress to be nominated for the office by a party convention, or petitioned for by a certain per cent of the voters before his name can be placed upon the ticket to be voted for, constitutes an abridgment of the privileges and immunities of citizens of the United States, and is a denial by the State to persons within its jurisdiction of the equal protection of the laws, as guaranteed in section I of Article XIV of the Federal Constitution. For this reason he insisted that the election was a nullity, and that the seat in controversy in this contest should be declared vacant.
>
> This provision of the New York election law, whose unconstitutionality is urged, is a conspicuous feature of what is known as the Australian ballot system, which system has been in force in a number of States of the Union for a considerable period of time, and the constitutionality of this feature has never, to the knowledge of your committee, been questioned in the courts. It is to them incredible that it should have gone so long without having been challenged if it is in contravention of the Constitution. If it is really open to this objection a large per cent of the Members now holding seats in this body are not entitled to retain the same. The committee themselves entertain no doubt of the constitutionality of the provision, but do not deem it advisable to prolong this report by giving the arguments in support of their views.

On January 21 [1] the question was considered in the House, and the resolutions declaring contestant not elected and the sitting Member entitled to the seat were agreed to without division.

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[1] Journal, p. 137.

1064. The Alabama election case of Aldrich v. Robbins in the Fifty-fourth Congress.

The specifications, of a notice of contest are required to give a reasonable degree of information but not to have the precision of pleadings in the courts.

A notary taking testimony in an election case under the Federal law has jurisdiction within the district, although State law may restrict his functions to a county.

On February 20, 1896,[1] the Committee on Elections No. 1 reported in the case of Aldrich *v.* Robbins, of Alabama. Besides the merits of the case two preliminary questions were involved:

(1) The sitting Member objected that the notice of contest given by the contestant was not a sufficient compliance with the law of 1851, and the minority of the committee supported this objection on the ground that the notice was too general, there not being "the same precision in averments as is required in other proceedings in which courts decide as to law and the facts." It did not state how many votes the contestant received nor how many the contestee received, and was deficient in allegations as to conduct of election officers.

The majority of the committee considered the allegations in the notice sufficient, citing the following as a fair sample of all:

> At precinct No. 12 in said county, commonly called "Old Town," there were actually cast at said election 35 votes. You were credited with and allowed 278 votes, and myself with none. Of the 278 votes allowed you at least 243 votes were in fact never cast, and of the 35 votes actually cast I claim and charge that I received a large portion thereof.

The majority consider that this notice did "specify particularly the grounds" even more amply than the statute required. What the law requires," says the report, "is a reasonable degree of information; and that, as to this and the other precincts, was given."

(2) The sitting Member also objected to the competency of the notary who took the testimony in Dallas and Calhoun counties, claiming that, as he was authorized by the laws of Alabama to act only in Shelby County, he had no authority to act in any other county. The minority of the committee argued in favor of this objection, denying the authority of the precedent in the case of Washburn *v.* Voorhees, and quoting decisions: American Land Company *v.* People et al. (102 Alabama), United States *v.* Curtis (107 U. S.), United States *v.* Hall (15 U. S.).

The minority conclude:

> The true test to apply to this question is: If a witness who had been sworn before this notary public were indicted for perjury or false swearing before him in this case where the oath was administered and the testimony given in Dallas or Calhoun counties, could he be convicted? He could not, in either State or Federal court.

The majority of the committee held as follows:

> It was also objected for the contestee that the notary before whom the evidence was taken was without authority to take that obtained out of the county for which he had been appointed to act under the laws of the State. But he was not acting within the restrictions imposed upon him by the laws of

[1] First session Fifty-fourth Congress, House Report No. 572; Rowell's Digest, p. 502.

the State of Alabama in taking this evidence. The laws of the United States prescribed a special mode of proceeding for this class of cases, and aside from this authority no evidence in a contested election could be taken before the officers enumerated in the statute.

An object of the statute was to point out the persons who should be empowered to take the evidence, not to exercise their functions as State, city, or county officers, but to execute the full authority created for this purpose by Congress. The notary is one of these officers, selected, however, to act under Federal, not under State, authority, and the power to act has been given to him commensurate with the object to be attained.

By the language of the statute the contestant is empowered to apply for a subpoena to any notary, etc., who may reside within the Congressional district in which the election to be contested was held. The officer is also required to issue subpoena directed to all such persons as shall be named to him, requiring their attendance at some time and place mentioned in the subpoena. And the only restriction imposed is that the witness shall not be required to attend out of the county of his residence.

As to the power of the officer, he may act anywhere within the Congressional district. His authority has been restricted to no subdivision of it whatever. He may issue subpoenas for all such witnesses as shall be named to him, and the subpoenas must be returnable before himself. As that is the mode of proceeding which has been indicated, any officer mentioned in the statute may act, and in acting has been given complete authority to act wholly and effectually. The law further provides that the witnesses who attend shall be examined on oath by the officer who issued the subpoena, unless he may be absent, etc.

From the generality of these regulations it is clear that a single officer has been empowered to issue all the subpoenas and take all the evidence. They are quite explicit, and create a system in and of themselves in no measure dependent on the laws of the State (U.S. Rev. Stat., 19, 20, secs. 110, 115, 120), and this effect was accorded to the statute in the contest of Washburn against Voorhees (2 Bartlett, 54).

1065. The case of Aldrich v. Robbins, continued.

Instance wherein the color of the voters was taken into account as creating a presumption in relation to their votes.

Where testimony showed that fewer persons went to the polls than the total of returned votes, the excess of votes was deducted from the party profiting.

Discussion as to whether a poll should be purged or rejected when the returns give the total of votes far beyond the number of voters attending.

It not being shown that the ballots had been tampered with and State law requiring their preservation, secondary evidence of the vote was not considered.

Instance wherein evidence of declarations of voters and their affidavits; as to their votes were not accepted as showing the state of the poll.

The presumption in favor of the truthfulness of official returns disappears on proof that the election officers violated the law.

As to the merits of the case, it appeared from the official returns that the sitting Member received 10,492 votes and the contestant 6,756, a majority of 3,736 for the sitting Member.

The minority of the committee conceded frauds enough proven to reduce sitting Member's majority to 559 votes. A portion of the majority, differing from their associates as to the amount to be deducted in cases of fraud, found a majority of 601 votes for the contestant, while a second portion of the majority conceived that the contestant should be credited with a majority of 1,131 as a result of the purging of the polls.

There were six counties in the district, of which the contestant carried four. A fifth county, Calhoun, was carried by the sitting Member by less than 400 majority,

far below the number necessary to overcome contestant's majority in the other counties. But the sixth county, Dallas, returned for sitting Member 5,462 votes, and for contestant 72, thus giving sitting Member a majority of 3,736 in the district.

The voting population of Dallas County was shown to be about 10,000, of which 7,500 were colored and 2,500 white. With rare exceptions the colored voters were Republicans. The white voters were divided among Democratic factions, which were not unanimous in support of the sitting Member. The county contained 28 precincts. Of these, 13 returned 221 votes for Robbins and 42 for Aldrich. So it appeared that Mr. Robbins's returned vote of 5,462 from Dallas County came largely from the other 15 precincts; and it was only in relation to these precincts that evidence was taken in this county.

The supporters of contestant, who was a Republican, had feared that their votes in this county would be counted for the Democratic party, so they generally remained away from the polls. They generally kept watch on the polls, however, and were able to afford testimony as to the total number of voters who went to the polls in the various precincts.

Thus, at the Summerfield precinct, where the official return gave Robbins 160 votes and Aldrich 2, the testimony showed that only 31 persons went to the polls. This generally was the method adopted to show the fraudulent nature of the return. As to the conclusions to be derived from such a state of fact, there was a difference among the majority members of the committee. The larger portion of them say:

> The certificate of the inspectors, therefore, can not be relied on, and since there is no evidence as to whether these persons voted after entering the polling place, or for whom the votes were cast, we are unable to count any for either candidate.

But two members considered it the safer practice to deduct from the sitting Member only 129 votes, the surplus of the returned poll over the actual number of voters who went to the polls.

This question of the amount of deduction is more fully considered in connection with the vote of the city of Selma, which was polled at one precinct. The official return gave Robbins 2,014 votes, Aldrich 5. The testimony showed that less than 800 voters went into the voting place during the election, and that there were not over 700 names on the poll list that represented qualified voters of Selma. Four members of the committee considered the return of Selma so saturated with fraud that they should throw it all out except the votes of 4 men who swore how they voted. It was urged that, although it might be shown that over 700 men entered the voting place, there was no testimony to show how many of them voted; and even if it should be assumed that all of them voted, there was no testimony to show for whom they voted. But five members of the committee considered that 767 votes should be allowed as cast, and that the surplus of 1,247 votes, evidently unlawfully added to the honest vote, should be deducted from the vote returned for the sitting Member.

As to the precincts of the Third Ward of Anniston and Montevallo, contestant made an effort to correct the official returns by introducing the testimony of citizens who swore that they voted for Aldrich. In Montevallo the return gave Robbins 208 and Aldrich 199. A witness swore that 273 persons publicly declared that they

voted for Aldrich, and the affidavits of 283 persons who swore that they voted for Aldrich were read. In the Third Ward of Anniston 14 votes were returned for Aldrich and 42 for Robbins. A witness swore that there were 85 colored voters in the ward, and that he recognized 23 of them on the poll list, all of whom were Republicans but 1. A majority of the committee held that, as the State laws required the preservation of the ballots, they should be resorted to in the first instance, and that secondary evidence could not be offered of the contents of the ballot boxes until it should be shown that they had been so tampered with as not to speak the truth. Two members of the committee, including the chairman, favored counting for the contestant the votes sworn to by uncontradicted testimony.

The sitting Member relied for his defense only on the presumption in favor of the truthfulness of the official returns. The majority say that this is only a presumption and disappears at once on proof that the election officers violated the law.

In the debate further facts in the record of the case were referred to—that the requirements of the Alabama law in relation to registration were violated; and that the contestant's party had not been treated fairly in the appointment of election inspectors.

The majority of the committee concurred in presenting resolutions declaring sitting Member not elected and the contestant elected and entitled to the seat.

On March 12 and 13,[1] the report was debated at length in the House, and on the latter day a vote was taken on a proposition of the minority to substitute resolutions declaring the sitting Member elected and entitled to the seat. This substitute was decided in the negative, yeas 58, nays 173. Then the resolutions of the committee were agreed to without division, and Mr. Aldrich was sworn in.

1066. The South Carolina election case of Moorman v. Latimer in the Fifty-fourth Congress.

A ballot is not invalidated by reason of an abbreviated designation of the office which omits the number of the Congress and the name of the State.

Where many persons are disfranchised by an unconstitutional election law, the House will not bring them into the account on the mere opinion of witnesses as to the number.

On March 4, 1896[2] Mr. Charles K. Bell, of Texas, from the Committee on Elections No. 3, submitted the report in the case of Moorman *v.* Latimer, from South Carolina.

In the first place contestant alleged that the ballots cast for Mr. Latimer were invalid. The committee say:

"The tickets voted for Latimer were printed thus: "Representative in Congress, third district, A.C. Latimer," and contestant claims that they should not have been counted for him, because they did not state that they were voted for a candidate for the third district of the State of South Carolina, nor for a Representative to the Fifty-fourth Congress. In the case of Blair *v.* Barrett a ballot headed "For Congress, Francis P. Blair," was held to have been properly counted for him. We think the ballots complained of were clearly sufficient, and that they were properly counted for contestee.

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[1] Record, pp. 2739, 2783–2800; Journal, p. 306.

[2] First session Fifty-fourth Congress, House Report No. 626; Rowell's Digest, p. 530.

Contestant alleged that at the various precincts in the district the managers of election refused to allow from 6,000 to 7,000 voters of contestant's party to cast their ballots because they did not have registration certificates, as required by the laws of South Carolina, which laws, he contended, were unconstitutional, because in conflict with the Constitution of the United States and of said State. The contestant also alleged that a number of properly registered voters, who would have voted for him, were denied the privilege by the managers of election for various reasons.

Adopting the most liberal construction of the evidence and conceding the registration laws to be invalid the committee could find only 4,578 votes lost to the contestant for the above reasons, and the addition of these to his poll would still leave the sitting Member a plurality of 215 votes.

The committee do not, however, approve the proof by which contestant attempted to establish some of his allegations, and say:

> Contestant has sought to introduce the testimony of witnesses who give their opinion as to the number of persons who would have voted for him at certain places without stating who they were or giving any other particulars, but the committee is of opinion that testimony of this character is not admissible.

The committee therefore recommended resolutions confirming the title of sitting Member to the seat, and on April 15, 1896,[1] the House concurred in the report.

1067. The Maryland election case of Booze v. Rusk, in the Fifty-fourth Congress.

The House counted the votes of persons who swore that they intended and tried to vote for contestant but were prevented because other persons had voted on their names.

The House declined to reject the poll of a precinct whereof the registration was impeached by a police census of doubtful weight.

On March 18, 1896,[2] Mr. George W. Prince, of Illinois, from the Committee on Elections No. 2, submitted the report of the committee in the case of Booze *v.* Rusk, of Maryland. On the face of the returns the sitting Member had a majority of 518.

The contestant, seeking to attack this majority, charged first that he was deprived of a large number of ballots cast for him at the election and that a number of ballots were improperly counted for sitting Member. The committee found, by a recount, a gain of 131 votes for contestant.

Secondly, contestant charged that a number of legal bona fide voters of the district who intended to vote for him at the election were refused the right by officers of the election. The committee found from the evidence of witnesses who testified that they were denied the right to vote at their respective precincts simply because some one had already voted on their names; that 40 persons were thus excluded and that they would have voted the ticket of contestant's party. So the committee credited 40 votes to him.

The committee, in respect to the third contention of the contestant, that illegal and fraudulent votes were cast for the sitting Member, found 161 such votes, and deducted them from his vote.

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[1] Journal, p. 399.

[2] First session Fifty-fourth Congress, House Report No. 849: Rowell's Digest, p. 519.

In respect to other charges of fraud and intimidation the committee found the evidence too slight to sustain them.

As to the fact that there was a difference between the registration in the fifth precinct of the Second Ward of Baltimore and the police census, the committee found that under the law of Maryland the voter, in order to be registered, had to appear before the registration board, consisting of three members, two of the majority party and one of the minority party, and make oath that he had been a resident of the State for one year and of the voting district for six months, and that he had attained the age of 21 years. There was ample opportunity, under the law, to purge the registration list by applying, first, to the board of registration; should they refuse, then to the Maryland court of appeals. This court, in the case of Langhammer *v.* Munter, had decided:

> The fact that a man's name does not appear upon the police census of registered voters is too uncertain to be entitled to much weight.

The court declined to strike names from the registration list because they did not appear on the police census returns. The committee did not consider that the vote of this precinct (against which other allegations were made but not sustained by the evidence) should be thrown out.

On March 18[1] the House concurred with the committee that the sitting Member was entitled to the seat, contestant not having proved enough to overcome the returned majority.

1068. The Alabama election case of Robinson v. Harrison in the Fifty-fourth Congress.

The House counted returns received by the State canvassers too late to be included in their summary.

Disorder before the opening of the polls and for the purpose of affecting the choice of election officers and not affecting the poll itself Was disregarded by the House.

Participation by an election judge in bribery did not justify rejection of the poll when the contaminated votes could be separated.

Friends of contestant not being represented on an election board and there being evidence of fraud in the registration and voting, the poll was rejected.

Although the boards of election officers may be constituted unfairly, the House will yet give full effect to legal votes.

On April 4, 1896,[2] Mr. Fred C. Leonard, of Pennsylvania, from the Committee on Elections No. 1, submitted a report in the case of Robinson *v.* Harrison, of Alabama. On the face of the official returns Mr. Harrison had a majority of 5,006. The contestant, Mr. Robinson, claimed that this majority was secured by intimidation of voters, bribery, illegality, and fraud; and attempted to overcome the sitting Member's majority by claiming the vote of Geneva County, which had not been included in the official canvass; and by demanding that the vote of certain precincts in other counties should be in whole or in part rejected.

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[1] Journal, p. 320.

[2] First session Fifty-fourth Congress, House Report No. 1121; Rowell's Digest, p. 505.

As to Geneva County, it was not disputed that the returns were not included in the official return of the Congressional district, for the reason that they were received too late to be canvassed. From the certificate of the probate judge the committee found that the county gave contestant 687 votes, and the sitting Member 285, a majority of 402 votes for the contestant. The committee determined that these votes should be allowed.

As to the precincts attacked by contestant, they were 10 in number, generally in the counties where colored voters predominated.

Intimidation and bribery were alleged in Opelika precinct, where 505 votes were returned for the sitting Member and 318 for the contestant. It was proved that there had been disorder at the polls, but the evidence proved—

that this occurred in the morning before the voting commenced, and the object of the disorderly demonstrations was to secure the proportionate appointment of election officers suggested in behalf of the conteste in place of those which had been selected under the authority of and by the friends of the contestant. That was finally conceded, and the disorder ceased, and the polls were opened and the election proceeded.

Therefore the committee did not find a case of loss of votes by intimidation. It was proven in this precinct, however, that one of the election officers so selected was engaged during part of the day in bribing colored voters, by handing to each a slip of paper showing that the bearer had voted as desired, and which, on presentation to a confederate outside, insured a sum of money to the bearer. The evidence showed about 25 votes bought in this way. The committee say:

It was a criminal proceeding, publicly and shamelessly carried on by the friends of the contestee. But the votes of legal voters, uninfluenced by mercenary motives, can not be lawfully sacrificed in consequence of this misconduct. It had no effect upon them, and is in no respect in conflict with their integrity. Their votes can be readily separated from those that were purchased, and land where that can be done the law demands that it shall be done.

The ballots appearing to have been counted as cast, the committee deducted from the sitting Member's vote the 25 votes obtained by bribery. With this correction the poll was counted.

In four precincts—Girard, Union Springs, Suspension, and Midway—the friends of the contestant had no representation on the election board. In two of them there was evidence of fraud, both in the registration and the poll, so that no dependence could be placed on the returns. Therefore, as no proof of votes actually given for the sitting Member was produced, the committee rejected the returns from these two precincts. In the other two precincts where the election officers were wholly of sitting Member's party, a certain number of votes appeared to have been legally thrown out, and the sitting Member was credited with his proportion of the legal votes.

The other impeached precincts were purged to the extent of the frauds shown by the testimony. But with all the purging made by the committee, there still remained a majority for the sitting Member. "It is true," say the committee, "that the conduct of the election in the controverted counties can not be otherwise than condemned, for frauds were committed, arising probably out of the discrimination in the personality of the election boards. That was a grave cause for complaint, but as the legal votes can be separated from the frauds, they are entitled to their full weight and effect."

Therefore the committee unanimously reported resolutions declaring contestant not elected and the sitting Member entitled to the seat.

On April 4 [1] the report was agreed to by the House without division or debate.

1069. The Illinois election case of Rinaker v. Downing in the Fifty-fourth Congress.

Following the supreme court of the State the House counted a ballot marked as to two party columns, one of which did not contain the name of a candidate for Congress.

In construing a State ballot law the House followed the principle enunciated by the State supreme court as to giving effect to the voter's intent.

The House declined to count as cast the vote of a person kept from the polls by a bogus telegram sent by persons unknown.

On April 21, 1896,[2] Mr. Edward D. Cooke, of Illinois, from the Committee on Elections No. 1, reported in the case of Rinaker *v.* Downing, from Illinois. In this case the sitting Member had a plurality of 40 votes. The contestant alleged errors in interpreting, counting, refusing and rejecting ballots, and illegal votes.

In examining the case the committee passed on nine questions of law and fact. On the conclusions as to six of these questions the minority of the committee made no issue. On three questions, however, the minority report, presented by Mr. William H. Moody, of Massachusetts, joined issue with the majority, and to these three questions the first hearing in the House was devoted.

For convenience the controverted questions will be examined first:

(1) The testimony showed that 30 of the Australian ballots (which had party columns) were each marked with a cross in the Republican and Independent Republican circles at the head of the party column. Upon the latter ballot was the name of only one candidate, a candidate for the office of State treasurer. The committee allowed these 30 votes to the contestant, following the decision of the supreme court of Illinois in the case of Parker *v.* Orr, wherein it was expressly decided that in such cases it was proper and lawful under the election law of Illinois "to count the ballots so cast for the person or candidate against whom no candidate appears on the opposite ticket, thereby giving effect to the obvious intention of the voters so marking their ballots."

(2) The disposition of irregularly marked ballots: The committee in performing this duty followed the precedents laid down in the case of Parker *v.* Orr, wherein the supreme court of Illinois affirmed the principle "that if the intention of the voter can be fairly ascertained from his ballot, though not in strict conformity with law, effect will be given to that intention." In cases where the principles of Parker *v.* Orr did not apply, the committee say that "the language of the statute is followed where its terms are clear and unmistakable, and in all cases of doubt the ballots have been rejected entirely, either as being probably marked contrary to law or as being cases in which the intention of the voter could not be clearly ascertained."

(3) The committee rejected certain votes ascertained to have been cast illegally.

(4) Sitting Member demanded that he be credited with the vote of a supporter who had been prevented from casting his vote by the receipt of a false or bogus

[1] Journal, p. 370; Record, p. 3574.

[2] First session Fifty-fourth Congress, House Report No. 1400; Rowell's Digest, p. 506.

telegram which summoned him to a distant place. The delivery of the telegram was proven, but as there was no testimony or circumstances to connect the act with the contestant or either political party, and as testimony to show the true purpose of the delivery of the telegram might easily have been obtained, the committee did not consider the claim of sitting Member sustained.

(5) The sitting Member claimed that 14 votes should be credited to his poll in Greene County, an error of that amount being alleged in the official return. The testimony did not satisfy the committee that such an error had been made.

1070. The case of Rinaker v. Downing, continued.

No fraud or harm being shown, the House, following the spirit of a decision of the State court, declined to reject ballots irregularly printed, although the law seemed mandatory.

May a notary, acting under the authority of the law of 1851, require the production of ballots against the injunction of the State court?

In a case wherein an unofficial and ex parte recount was relied on, because the ballots themselves could be reached officially only by the House itself, the House reopened the case for examination of the ballots.

The House declined to overrule the election officers who counted votes of electors assisted in marking without taking the required preliminary oath.

Form of resolution by which the House ordered the production of ballots as evidence in an election case.

(6) The law of Illinois provided that on the ballots "the party appelation or title shall be printed in capital letters not less than one-fourth of an inch in height," and also that "none but ballots provided in accordance with the provisions of this act shall be counted." In Cass and Pike counties the word "Independent" in the party designation "Independent Republican" was printed in letters about an eighth of an inch in height, instead of the required quarter of an inch. The throwing out of these counties would deprive sitting Member of a total plurality of 340, and give the seat to contestant; but the committee conclude, after examining the cases of Clark *v.* Robinson (88 Ill., 500) and Parker *v.* Orr, that while the law seemed not merely directory but rather mandatory, yet the court of Illinois had laid down such a liberal rule of construction of the statute as to lead the committee to conclude that—

> The supreme court of Illinois, if called upon to construe the misprinted ballots in Cass and Pike counties, would inquire whether the evidence disclosed any intention to commit a fraud upon the electors, and whether any fraudulent result would or did necessarily ensue from the misprinting of the ballots contrary to the express provision of the statute; and finding from the record in this case, as the undersigned have done, that there is no reason to infer or believe that the ballots in Cass and Pike counties were, by the officials, printed and provided with any intent whatever to perpetrate a fraud or deception upon the voters, or that any considerable number of Republican voters in this instance, by mistaking, the heading of the ballot, made the cross in the "Independent Republican" circle instead of in the "Republican" circle, that court would conclude, as the undersigned have concluded, that the votes on all those ballots were properly counted as cast, and should not now be rejected or thrown out. To now hold to the contrary would operate to disfranchise all of the voters of Cass and Pike counties, through no fault of theirs, but through the mere oversight and error of the officials whose duty it was to follow the law exactly or substantially in printing the ballots.

The correction of the returns in accordance with the decisions in the six questions just considered, did not result in any such changes as to overcome the plurality of the sitting Member; and the essential points on which the decision of the case turned, were involved in three additional questions:

(1) The law of Illinois had this provision:

In all cases of contested election the parties contesting the same shall have the right to have the package of ballots cast at such election opened, and to have all errors of the judges in counting or refusing to count any ballot corrected by the court or body trying such contest; but such ballots shall be opened only in open court, or in open session of such body, and in the presence of the officer having the custody thereof.

When subpoenas were served on behalf of the contestant on the county clerks of the counties in the district, requiring the production of the ballots voted, the clerks disobeyed the subpoenas because at the instance of the sitting Member the Illinois court had issued an injunction restraining the clerks—

from opening said ballots or permitting the same to be opened or recounted, or from removing or permitting said ballots to be removed from the place where they are now kept by the defendants until the same is ordered to be opened and recounted by a court of competent jurisdiction of the State of Illinois, or of the United States or by the House of Representatives in Congress of the United States after the 3d day of March, A. D. 1895.

As the time for taking testimony under the laws of the United States expired for the contestant on February 25, 1895, it is evident that the injunction procured by the sitting Member prevented an examination of the best possible evidence by the contestant.

Whether the subpoena of the notary acting under authority of a law of Congress might be rendered futile by the law and court of Illinois is a question discussed at length in this case. The minority of the committee, while not deeming it material to pass on the merits of the injunction, nevertheless quote Ex parte Siebolt (100 U. S., 371) as authority for the position that—

the power of Congress is paramount in respect of the manner of holding elections for Senators and Representatives where its power is exercised by legislation, yet it is clear that under the Constitution where national legislation is silent the State has the right to regulate such elections at will. It may well be argued that as Congress has not seen fit to pass any law with respect to the character of the ballot, its custody and preservation, the whole subject is left within the control of the States, and if the House of Representatives sees fit to seek the evidence of ballots cast under the authority of the State, it can only do so in accordance with the conditions prescribed in the laws of the State. Unquestionably the State has a great interest in the ballots, because they are the evidence not only of the election of Representatives in Congress, but of many State officers.

The committee cite the case of Steward *v.* Childs where in a similar case the refusal of an Illinois county clerk to produce the ballots had not been referred to. The minority denied that the injunction had suppressed the ballots as evidence, but that they were preserved intact and the House might have had them months ago. The right of the contestant to go to them was postponed, not denied.

The majority of the committee took the following view of the relations of the injunction to the Federal law:

The contestee, by his bill in chancery seeking the injunction, by direct language insists upon such a construction of the statute of Illinois regulating and restraining the opening and counting of the ballots as shall bring that statute in direct conflict with the statute of the United States, and which

latter statute plainly and clearly gives to both parties to an election contest over the seat of a Member of the House of Representatives the right to select any one of the officers mentioned in the Federal statute before whom to take the testimony, and clothes that officer, when so selected, with the full power to require the production of any paper or papers pertaining to the election, or to produce and deliver up certified or sworn copies of the same in case they may be official papers.

In view of the plenary and clear terms of the Federal statute it is the opinion of the undersigned that the statute of Illinois should be construed to mean that where the ballots cast at any election for Member of the House of Representatives are called for by a subpoena duces tecum issued by a notary public selected under sections 110, 111, and 123 of the act of Congress regulating the contests of seats in the House of Representatives the notary so selected fully represents the House of Representatives and constitutes a tribunal or body for the purpose and with the power of procuring and reducing to written form such evidence as the ballots may contain, so as to comply with the obvious intention of the State statute, inasmuch as it is obviously impossible for the ballots in a contested election case in the House of Representatives to be opened "in open session of such body and in the presence of the officer having the custody thereof."

The powers conferred by the Federal statute upon the notary public or other officers mentioned to call for and enforce the production of all the papers pertaining to the election are full and complete and render such officer to that extent a "body trying such contest," to the extent of his obtaining and recording the evidence in the case. That is plainly and clearly the meaning and effect of the act of Congress, and the State statute should be construed so as to be in harmony rather than in conflict therewith.

To construe the State statute so as to prohibit the notary or other officers taking the testimony in a Congressional election contest from obtaining the evidence contained in the ballots would be to give to the State statute the effect of repealing or nullifying the Federal law regulating Congressional election contests. Congress has the power to regulate the taking of testimony in case of the contest of the election of any Member of the House of Representatives. That power has been exercised by the enactment of the statute above quoted, and when in conflict with its provisions all conflicting State statutes or decisions to the extent to which they do conflict must be held to be nugatory and void. * * *

In the opinion of the undersigned, Congress has by statute made ample provision for an inspection, examination, and recount of the ballots far in advance of the meeting of Congress, and that it is not intended or to be tolerated that the time of the members of the Election Committee shall be consumed in the recounting of ballots covering an entire Congressional district during a session of Congress when each Member has a duty to perform in the everyday course of its proceedings; nor is it to be permitted that a device, such as that of obtaining an injunction, contrary to the act of Congress, shall operate to prolong a contest practically until near the end of the term for which the Member was elected.

The conclusion and finding of the undersigned, therefore, is that the injunction procured by the contestee prohibiting the opening and counting of the ballots in this case was illegal and wrongful, and that, as a consequence thereof, the contestant was at liberty to offer such secondary evidence of the contents of the ballots and of the facts shown by the evidence suppressed as would in a court of law be allowed in a case in which one of the parties had concealed or refused to produce legal and material evidence within his possession or control.

(2) The contestant, being kept from the best possible evidence by the injunction, proceeded to take secondary evidence in the form of a recount of the votes in Macoupin and Cass counties. In those counties contests had arisen over county officers and incident to those contests there was a recount of the votes before the county courts. During this recount Mr. L. C. Murphy, representing the contestant, was present unofficially and from a high seat overlooked the table at which the official recount for county officers was made. In Cass County Mr. E. M. Dale kept a similar tally of the Congressional vote. This unofficial count was not complete for all the precincts in either county, but showed as far as it went a deduction of 17 votes for the sitting Member in Macoupin and Cass counties and an addition of 22 votes for contestant in Macoupin County.

Both in the report and in the debate on the floor this unofficial count was assailed by those representing the minority views. It was contended that the result of the injunction did not authorize the reception of this unofficial count; that the circumstances attending the count showed that it could not have been accurate; that the ballots were shown to be in existence and carefully preserved for the whole district; that the unofficial count related to only two of the eight counties of the district, and was ex parte, the sitting Member not being represented. The minority quoted McCrary on elections to the effect that "the official acts of sworn officers are presumed to be honest and correct until the contrary is made to appear. It has accordingly been held that a return can not be set aside upon proof that a recount made by unauthorized persons, sometime after the official count has been made, showed a different result from the official count," etc.

(3) A sharp difference also arose between the minority and majority on the question of assisted voters. The law of Illinois provided:

> Chapter 46, paragraph 311, section 14, Every voter who may declare upon oath that he can not read the English language, or that by reason of any physical disability he is unable to mark his ballot, shall, upon request, be assisted in marking his ballot by two of the election officers of different political parties to be selected from the judges and clerks of the precincts in which they are to act, to be designated by the judges of election of each precinct at the opening of the polls.

It appeared that 38 Republican votes and 6 Democratic votes were cast by voters who were assisted without being sworn as the law provides. The majority of the committee considered that the election officers had acted correctly in counting these votes, thereby construing the statute as directory merely, and not mandatory. The committee say that these assisted voters were qualified voters, and it had not been attempted to be shown that any fraud was perpetrated or attempted in this regard. The minority of the committee held that the law was mandatory and that the case was res adjudicata so far as the House was concerned. Little light was thrown on the question by the older decisions, since the recently introduced Australian ballot system not only permitted but enforced secrecy. The minority then quoted decisions on similar provisions of law: People *v.* Canvassers (129 N. Y., 345); Attorney-General *v.* May (99 Mich., 538); State *v.* Gay (60 N. W. Rep. 676); Parker *v.* Orr (Illinois). The minority also cite as a case directly in point the decision of the House in the case of Steward *v.* Childs.

The majority of the committee denied the authority of these decisions as bearing on the case under discussion.

The minority recommended the adoption of the following resolution:

> *Resolved,* That the contested election case of John I. Rinaker *v.* Finis E. Downing be recommitted to the committee on Elections No. 1, with instructions either to recount such part of the vote for Representative in the Fifty-fourth Congress from the Sixteenth Congressional district of Illinois as they shall deem fairly in dispute, or to permit the parties to this contest, under such rules as the committee may prescribe, to recount such vote, and to take any action in the premises, by way of resolution or resolutions, to be reported to the House or otherwise, as they may deem necessary and proper.

On May 12 and 13 [1] the report was debated at length in the House, the two points, as to the unofficial recount and as to the assisted voters, being the only subjects. If the majority of the committee was overruled as to either of these points, the contestant would fail to overcome the sitting Member's plurality.

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[1] Journal pp. 484–488; Record pp. 5127, 5185–5208.

The question being taken to substitute the resolution of the minority for those of the majority declaring the election of the contestant, the substitute was agreed to, yeas 139, nays 35. Then the resolutions of the majority as amended by the substitute were agreed to, yeas 137, nays 13, and 33 present and not voting being noted by the Speaker to form a quorum.

On May 19, 1896,[1] the Committee on Elections No. 1 unanimously reported the following resolution, which was agreed to by the House:

Resolved, That F. J. Robinson, county clerk of the county of Cass, State of Illinois [here follows names of the other county clerks], be, and they are hereby, each ordered to be and appear before Elections Committee No. 1, of this House forthwith, then and there to testify before said committee, or such commission as shall be appointed, and the truth to speak touching any matters then to be inquired of them by said committee in the contested election case of John I. Rinaker V. Finis E. Downing, now before said committee for investigation and report; and that they, and each of them, respectively, as such county clerks, bring with them all the ballots and packages of ballots cast in each of said counties at the general election held in said counties on the 6th day of November, A. D. 1894, for the election, among other officers, a Representative in the Fifty-fourth Congress from the Sixteenth district of Illinois, now in their custody, respectively; and that they each also bring with them, respectively, in addition to said packages of ballots, all poll books and tally sheets, and such other books and papers as relate to said election in their respective counties now in their custody or under the control of either of them, respectively; that said ballots be brought in the packages in which the same now are; that said ballots, poll books, and tally sheets be examined, and said ballots counted by or under the authority of said committee on elections in said case; and to that end, that subpoenas be issued to the Sergeant-at-Arms of this House, commanding him to summon said persons to appear with said papers as witnesses in said case, and that the expenses of executing such process, including necessary subsistence and mileage of said witnesses and all other expenses of this proceeding, be paid out of the contingent fund of this House; and that said committee be, and hereby is, empowered to send for all other persons and papers as it may find necessary to the proper determination of said controversy; and also be, and it is, empowered to select one or more competent committees to take the evidence and count said ballots or votes, and report the same to this committee on elections, under such regulations as shall be prescribed for that purpose; and that the aforesaid expenses be paid on the requisition of the chairman of said committee after the auditing and allowance thereof by the said Elections Committee No. 1.

On June 4[2] the Committee on Elections No. 1, submitted a report showing that the ballots of all the counties of the district had been recounted, except the county of Morgan." "In that county" say the committee, "although the custody of the ballots has been such as to prevent any unauthorized handling, they were returned and kept in so slovenly a manner that the committee deemed it wise in that county to accept the official returns instead of the recount, although the latter differed only slightly from the returns, and not enough to affect the result."

The recount showed such gains for the contestant as to give him a plurality of five votes, if the ballots of those voters, who were assisted without taking the oath, should be counted. The report submitted by Mr. Moody, who had submitted the minority views of the first report, says:

The minority of the committee, while still adhering to the opinion that the law requires the rejection of these ballots, which was fully expressed in a former report to the House, yet believe that the House would not adopt their opinion in that respect in the absence of a controlling decision by the court of final resort in the State of Illinois.

The majority of the committee, in this report as in the preceding report, contended that the ballots of the assisted voters should be counted.

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[1] Journal pp. 507, 508; Record p. 5416.

[2] House Report No. 2247; Journal pp. 580–582; Record pp. 6168–6174.

The resolutions declaring the sitting Member not elected, and the contestant elected and entitled to the seat, were agreed to, yeas 167, nays 52.

Mr. Rinaker, the contestant, was sworn in the same day.

1071. The Virginia election case of Cornet v. Swanson in the Fifty-Fourth Congress.

Where the notice of contest does not claim sufficient to change the returns, the House does not think it necessary to examine the testimony.

Ordinarily a decision of the State supreme court that the State election law is constitutional is held conclusive by the House.

An argument that an election held under an unconstitutional State law might yet be considered by the House as an election de facto.

An argument that under certain conditions the House might be justified in overruling a State court's decision that a State election law is constitutional.

The committee did not consider it necessary to pass on the form of a notice of contest which did not relate to issues sufficient to change the result

On April 24, 1896,[1] Aft. William A. Jones, of Virginia, from the Committee on Elections No. 3, submitted the report of the majority of the committee in the case of Cornet *v.* Swanson, of Virginia. The sitting Member was returned by an official majority of 2,333 votes over the contestant.

Of the 144 precincts in the district the contestant took testimony in only 12, and the report of the majority says:

> If the contestant is given the full benefit of every claim that can be made from the testimony in this case, as well as the benefit of every doubt that can arise therefrom, and if every claim that he makes or that may be made for him by the committee is conceded to him, he will still lack more than 1,600 votes with which to overcome the returned majority of the sitting Member. If he is given every vote concerning which there is a particle of testimony, contradicted or uncontradicted, in the record tending to prove that he received, or that he would have received but for the alleged unjust law under which the election was held, or that he was deprived of by reason of the alleged improper or illegal conduct of the managers of the election or the friends of the contestee, he will still fall far short of the requisite number to overcome the contestee's majority.

Therefore it is unnecessary to go into the examination of the 12 precints, which the committee made perfunctorily. The minority of the committee in their views make no mention of these precincts, confining their arguments entirely to other questions.

These other questions were (1) as to the constitutionality of the election law of Virginia, and (2) as to the sufficiency of the notice of contest.

(1) As to the constitutionality of the election law:

The majority of the committee, after stating the fact that the supreme court of Virginia had, by a unanimous decision, affirmed the constitutionality of the law in every particular, declared that it was not necessary to pass on the question in order to reach a just conclusion in the case

> But it is not deemed necessary, for the reason stated, to enter upon any extended discussion of these legal and constitutional questions, or to inquire to what extent the decisions of a State court should be regarded by the House of Representatives or by this committee. It would not necessarily follow,

[1] First session Fifty-fourth Congress, House Report No. 1473; Rowell's Digest, p. 534

in the opinion of the committee, were it conceded that the Walton election law was unconstitutional, and therefore inoperative as to the particular features of that law here assailed, that no valid election had been held in the Fifth Congressional district of Virginia. The sections which are assailed by reason of their alleged unconstitutionality are not so essential to the operation of the law under which this election was held, or so inseparably connected with its other provisions and requirements, that even should they be thought to be inoperative this committee would be justified upon that ground in declaring that there had been no legal election.

In the course of the debate it was urged [1] that the election having been de facto, even conceding the law to be unconstitutional, the contestant must still make out a case to enable the House to seat him; and that to unseat the sitting Member would bring the House face to face with the proposition that all the Virginia Members, including at least one seated by the House, owed their seats to elections held under that law. Mr. Samuel W. McCall, of Massachusetts, in debating the case, admitted the power of the House to disregard the decision of the Virginia court as to the constitutionality of the law, but questioned the right of the House to do so.

The minority of the committee, in views presented by Mr. Henry F. Thomas, of Michigan, and subscribed to by Messrs. James A. Walker, of Virginia, and Jesse Overstreet, of Indiana, announced the following principle:

The House of Representatives having original jurisdiction as to the right of a person to a seat in its Chamber, and being a tribunal of last resort, it undoubtedly has the power to pass upon any question that it deems relevant to the issue. It has never been claimed by any political party in the history of the Republic that the power to act carries with it the right to act. On the other hand, it has been the uniform practice of the House of Representatives to base its action in all cases upon certain fundamental principles, and those principles have, and ought to have, the binding force of law. Among those principles is this:

That the decision of the supreme court of a State ought to govern in all cases, unless the constitutional rights of the citizen are clearly invaded. And it may be said that in all cases where the question is local to the State and relates purely to its domestic affairs the House of Representatives will always abide by the decision of its court of last resort. But it is clear that questions might arise in which not only the rights of the citizen but the interests of the nation at large would be involved, and in such case the House of Representatives would most certainly exercise its original jurisdiction.

For instance, suppose a State should, by its constitution, give to all illiterate persons over 21 years of age the right to vote; and suppose the legislature should provide that no elector should be permitted to know, by all customary means, the contents of his ballot (and that after it was handed to him no man should come near him, and that if any one gave him any information, either by word or sign or signal, it would be a crime), and that thereby all illiterate electors were disfranchised; and suppose the supreme court of the State should decide that such a law was constitutional, it would not, we think, be denied by any one that it would be the duty of the House of Representatives to declare such an election void, and to refuse to seat the man who had been elected by those only who could read their ballots. This would be a case of disfranchisement where an appeal would lie, so to speak, from the supreme court of a State to the House of Representatives.

The minority then proceeded to an examination of the law, concluding first that the decision of the supreme court of Virginia, not an entirely valid judgment, there being evidence that the case in issue had been collusive, and that the question of constitutionality had been incidental, and finally that the law itself was unconstitutional, for reasons summarized as follows:

Your committee is therefore of the opinion that this law is unreasonable, and therefore unconstitutional, because it withholds from the voter a timely and necessary knowledge of the arrangement

[1] By a member of the committee, Mr. John J. Jenkins, of Wisconsin, Record, p. 1495.

of the names of candidates on a mixed and consolidated ballot. It is void because it withholds from the voter all ordinary and customary means of knowledge.

Therefore the minority recommended a resolution declaring the seat vacant.

(2) As to the sufficiency of the notice:

The majority of the committee say:

The next question which presents itself for consideration is the objection raised by the contestee to the notice of contest. Without specifying the particulars in which it is insisted that this notice is defective, and without expressing any opinion as to whether or not it is wanting, as is alleged, in that particularity which is required by statute, the committee think it is not necessary, in view of the conclusion reached by them upon the merits of the case, to decide the question.

The minority give in full the portions of the notice objected to at length, and conclude that they were sufficient, saying:

While your committee recognize the rule of law that changes of fraud should be specific and certain, yet they are not of the opinion that any greater degree of certainty should be required than the nature of the case will admit, and that where the evidence of the alleged fraud is to be sought from those whose interests are adverse to the contestant a much less degree of certainty should be insisted upon than in other cases.

The case was debated at length in the House on February 3, 1897.[1] On the question of substituting the minority proposition that the seat be declared vacant, the substitute was rejected on viva voice vote, not enough Members rising to order the yeas and nays.

The resolutions confirming the title of sitting Member to the seat were then agreed to without division.

1072. The Virginia election case of Thorp v. McKenney, in the Fifty-Fourth Congress.

A general conspiracy of election officers to violate a merely directory law, combined with fraudulent acts in individual precincts, justified rejection of a series of polls.

A general disregard of a directory law as to party representation among election officers was held to constitute a reason for rejection of a series of polls.

Ballots printed in unusual style confusing to the voter may contribute to destroy confidence in the officers responsible therefore.

Instance wherein the returned Member in an election case took no testimony.

On April 29, 1896,[2] Mr. James A. Walker, of Virginia, from the Committee on Elections No. 3, submitted the report of the majority of the committee in the case of Thorp *v.* McKenney, of Virginia.

The sitting Member had received an official plurality of 864 votes; but he admitted that one precinct improperly rejected should be counted, and that the plurality should because of that be reduced to 785 votes.

In this case sitting Member took no testimony and the case was decided by the evidence produced by the contestant.

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[1] Second session Fifty-fourth Congress, Record, pp. 1483–1501.

[2] First session Fifty-fourth Congress, House Report No. 1531; Rowell's Digest, p. 537.

The majority of the committee decided that the vote of ten election precincts in the district should be rejected because of a conspiracy "clearly and fully made out" to deprive contestant of his rights. In eight other precincts strong suspicion was raised.

The law of Virginia provided for an electoral board for each county and city, and these boards had complete, entire, and unlimited control of the elections and the election machinery in their respective counties and cities. These boards had the appointment of three judges of election for each voting precinct in their respective counties and cities. The law of Virginia has only the limitation that the judges thus appointed shall be competent citizens and qualified voters, who "shall be chosen for each voting place from persons known to belong to different political parties, each of whom shall be able to read and write." As to this provision the committee say:

> The provision of law requiring judges of election to be able to read and write and selected from voters known to belong to different political parties is wise and salutary, as evidenced by its being recognized and incorporated in the election laws of all the States which claim to have honest election laws. It is a provision intended as a safeguard against fraud, and is in Virginia especially important to that end, because in this State the judges of election, after the polls are closed, and before any representatives of opposing candidates are admitted into the election room, open the ballot boxes, count the ballots to see whether they correspond with the number of names on the poll books, and if they exceed the number of electors on the poll books, withdraw enough ballots to reduce the number of ballots to the number of electors, which affords to partisan and unscrupulous judges the opportunity to substitute false ballots for true ballots.
>
> This provision might ordinarily be considered as mandatory—it is such an important safeguard against fraud—but the Virginia statute further provides that "no election shall be deemed invalid when the judges shall not belong to different political parties, or who shall not possess the above qualifications;" i.e., as we understand it, an election fairly conducted without any charge or taint of fraud shall be valid though the judges do not belong to different political parties, etc. It was intended to cover the cases of a few isolated precincts where, by accident or otherwise, all the judges happened to belong to the same political party, or a judge happened to be appointed who did not possess the necessary qualificatons, but the will of the voter was nevertheless fairly expressed and correctly and honestly returned. In such a case, there being no bad faith or intentional wrong on the part of the appointing power or the judges, the election ought to stand and the return be accepted.
>
> But this statute was not intended to apply to a case like the one before the committee. It never was intended as a shield for fraud.
>
> The charge here is that the election held at these 18 precincts by judges all of the same party was dishonestly conducted, and the returns made by these judges are false and utterly unreliable as evidence of what was the true vote cast.
>
> The Virginia statute does not say that the returns of an election where the judges do not belong to different political parties, etc., shall be accepted, nor does it say what weight shall be given to this failure to appoint such judges in considering the question of fraud; but the report of the committee in the case of McDuffie *v.* Turpin (Fifty-first Congress), quoted in the brief, does say that in itself it raises a strong suspicion, if it does not fully prove, a conspiracy to falsify the returns.
>
> The failure to comply with the law in this respect was not in a few isolated precincts.

It appeared that in 10 precincts the judges appointed were all partisans of sitting Member, although perfectly competent partisans of contestant were available to equalize the representation. In 8 other precincts the election board appointed to represent contestant's party were educationally, morally, and physically unfit to represent it or men not regarded as representative of the party, when proper men were available.

The law and decisions of Virginia further provide for a secret ballot, printed officially, which is to contain the names of all the candidates, printed in black ink, and is to be kept under seal and secret as to form, style, arrangement, etc., until opened by the judges at the voting place. But in the 18 precincts in question the tickets were printed in an unusual style, some of them in script type and others in type of different sizes and styles, so as to confuse the voter.

The majority of the committee quote authorities to show that they would be justified in holding that the election officers by these acts had destroyed all confidence in their official acts. Such a view of the case would cause the rejection of the 18 precincts and leave to contestant a plurality of 1, 115.

The committee, however, defer to the possible contention "that more specific actual fraud and further acts of illegality on the part of election officers must be shown," and review the precincts individually, showing in each of 10 of them specific acts of fraud, such as ejection of tally keepers and discrepancies in the count of votes; fraudulent manipulation of ballots by a judge of election; illegal entries on the poll books; names of persons proved to have voted for contestant omitted from poll book; refusal of election officers to assist illiterate voters, etc.

The committee therefore determined to reject entirely the vote of 10 precincts, where the election officers were all of sitting Member's party, where the ballots were printed in a style apparently intended to mislead, and where other specific acts of fraud occurred. These rejections resulted in a plurality of 571 for contestant.

The committee reviewed other precincts which in their opinion might be thrown out, but considered such action unnecessary.

In conclusion they say:

> The refusal of the electoral boards in the several counties and cities in this district to appoint Republican judges at precincts where it was possible to do so; the alternation of the names of the candidates upon the tickets, printing them in unusual type and in type of different sizes and styles; the appointment of Democratic officeholders as judges, constables, and clerks at many precincts; the appointment of illiterate, incompetent Republican judges at other precincts; the refusal of the special constables to assist illiterate voters, as the law required them to do; the illegal and arbitrary action of the judges and officers of election in driving away Republican tally keepers from the vicinity of the polls with threats of violence and imprisonment; refusing to permit a Republican to be present at the counting of the votes, and placing the name of an illiterate and obscure negro upon the tickets as a pretended candidate for Congress furnish conclusive evidence of a conspiracy on the part of the election officers to defraud the voters, which destroys the integrity of their act and taints the returns so as to render them wholly unreliable, and devolves upon the contestee the duty of proving what was the true state of the poll, which, as we have seen, he has not attempted to do.
>
> Add to these evidences of fraud and conspiracy the many proofs of error, fraud, and irregularity at the various precincts, as above set forth in this report, and it is clear that the contestant was duly elected by a majority of the legal voters cast at said election, and that the contestee was not elected.

The minority views, submitted by Mr. David A. De Armond, of Missouri, concur in the conclusion that contestant was elected, but that what is considered wrong in the conduct of the election officers may be attributed to erroneous views as to the requirements of the election law.

On May 2 [1] the House concurred in the report, and Mr. Thorp, the contestant, took the oath.

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[1] Journal, p. 447.

1073. The Colorado election case of Pearce *v.* Bell in the Fifty-fourth Congress.

A contestant giving no notice of contest as required by law and taking no testimony, the House without further examination confirmed returned Member's title.

On April 29, 1896,[1] Mr. James A. Walker, of Virginia, from the Committee on Elections No. 3, submitted a brief report in the case of Pearce *v.* Bell, from Colorado, accompanied by resolutions confirming the title of sitting Member to the seat. The resolutions were agreed to by the House on the same day.[2] The report describes the case fully:

> In this case the contestant gave no notice of contest, as required by law, and has taken no evidence to sustain the allegations of fraud and intimidation claimed by him to have been committed.
>
> The official returns show that the contestee received 47,703 votes, that Thomas M. Bowen received 42,369 votes, that W. A. Rice received 2,032 votes, and the contestant received 157 votes.

1074. The South Carolina election case of Murray v. Elliott in the) Fifty-fourth Congress.

Specifications in the notice of contest being deemed sufficiently clear and direct to put the sitting Member on a proper defense and prevent surprise were upheld.

Voters may not be deprived of their ballots by the neglect of regularly qualified managers to qualify and act.

Where a true expression of the intention of qualified voters is had at an improvised poll the votes will be counted by the House.

A general conspiracy of registration and election officers to prevent a class of electors from voting was held to justify rejection of returns in a series of precincts.

Instance wherein the color of voters contributed to a presumption as to their votes.

Conduct of unauthorized challengers supplemented by the acts of partisan election officers may contribute to taint a return.

On May 1, 1896,[3] Mr. Jesse Overstreet, of Indiana, from the Committee on Elections No. 3, submitted the report of the majority of the committee in the case of Murray *v.* Elliott, of South Carolina. The sitting Member in this case was returned by an official majority of 1,737 votes. The contestant enumerated 19 specific claims and charges, by which he sought to attack this plurality.

At the outset the sitting Member objected to certain of these specifications because of uncertainty and insufficiency. But the committee, referring to McCrary on elections, say:

> It is the opinion of the committee that the objections to certain specifications in the notice made by contestee are not well founded, inasmuch as they are sufficiently clear and direct to put the sitting Member upon a proper defense and prevent any surprise being practiced upon him.

In considering the merits of the case the committee discuss only the city of Charleston and a precinct called "Haut Gap."

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[1] First session Fifty-fourth Congress, House Report No. 1529; Rowell's Digest, p. 540.

[2] Journal, p. 438.

[3] First session Fifty-fourth Congress, House Report No. 1567; Rowell's Digest, p. 543.

(1) As to Haut Gap the report of the majority says:

It is admitted that at Haut Gap, Berkeley County, the Federal polls were not opened by reason of the failure of the managers to qualify and act. At this precinct the voters at the polls, on the morning of the election, improvised an election board, following the rules of the election law, and under the conduct of such board 217 ballots were cast for George W. Murray and none for Elliott, and 156 ballots were offered by voters qualified in all respects except they held no registration certificates.

The committee is of the opinion that voters can not be deprived of their ballots by the neglect or failure of regularly appointed managers to qualify and act; and where a true expression of the intentions of such voters can be had, and the fact of their qualifications is undisputed, such ballots should be counted, and for that reason 217 votes should be added to the vote of George W. Murray.

The 156 ballots offered for Murray, and rejected because the voters did not hold registration certificates, should be counted for Murray, under the theory that the law of registration of the State of South Carolina is unconstitutional; but as such question is not raised in this case, the committee does not consider it, and therefore does not count these 156 ballots.

The minority views, presented by Mr. W. A. Jones, of Virginia, say:

To the action of the committee in counting for Murray the 217 Haut Gap votes there is no dissent by the undersigned.

(2) As to the returns from 24 precincts in the city of Charleston, which together returned for Murray 359 votes, and for Elliott 2,720 votes, the issue arises in the case. The majority of the committee concluded from the testimony that a conspiracy existed and was carried out to commit frauds in behalf of the sitting Member in the 24 attacked precincts of Charleston. According to the law in force in this district no elector was allowed to vote until he had registered, and the presentation of the registration certificate at the polls was necessary. The testimony disclosed that impediments had been put in the way of colored voters, who were supporters of contestant, when they attempted to register; and that in many cases where such voters did register the certificates issued to them contained errors. The committee concluded from the evidence that there was no reason why contestant should not have had the support of his party, and that this party numbered in its ranks nearly all the colored voters. Discussing this and other portions of the evidence the committee find the following indications of a conspiracy:

In the absence of some reasonable explanation it would indeed be strange that in a city of 65,000 population, with 8,000 colored voters and 6,000 white voters, the proportion of white voters to colored voters should be as 10 to 1.

But a study of the record discloses a reasonable explanation; and that is that the board of supervisors fraudulently impeded and prevented the registration of colored voters, and committed intentional errors in the execution of registration certificates for illiterate voters, and that challengers, unauthorized by law, and by the sanction of the managers at the various precincts, arbitrarily passed upon the qualifications of colored voters and directed who should vote and who should not, and that in some of the precincts the dead and absent were recorded as having voted.

The board of supervisors for the city of Charleston consisted of three men, to whom each voter was required to apply for a certificate of registration. This board was an arbitrary court, before which illiterate and ignorant voters were compelled to go and in which they had a right to place full confidence. If errors were made upon the certificates, the illiterate voters would not be able to discover them, and if an error proved fatal to his certificate the voter was helpless.

A common excuse for rejection of ballots was that certificates held by the voter failed to give the number of the precinct, or the correct number of the ward in which the voter lived, or the proper number of his residence. The fact that these errors appeared always with certificates held by colored voters is significant. That the voters holding such certificates were illiterate was sufficient excuse for their ignorance of the condition of the certificates, and plainly shows that the errors were made by the super-

visor of registration, and whether intentional or not should not operate against the voter. The common character of the apparent mistakes, and their frequency, strongly and conclusively indicate that they were intentional, and made for the purpose of depriving the holders of the certificates of their ballots.

The evidence strongly shows that the supervisors of registration in Charleston threw every possible obstacle in the way of a full and fair registration. By delay in the issuing of certificates, by seeming investigations, by excuses, by favoritism, and by discrimination against the colored voters, unquestionably many hundreds were prevented from registering.

There were also disclosed further instrumentalities of the alleged conspiracy. Thus a Democratic challenger was on duty in every precinct, a privileged character, although having no standing under the law. The committee say:

In many instances the challenger was the authority of the board upon the question of qualification, and in no case where the challenge was exercised was the voter allowed a hearing or permitted to vote.

The familiarity of the challengers with the registration books and the kind of certificates held by the voters evidenced their preparation for their part in the plan, which was to point out the defects in the certificates of registration because of which the election managers rejected the ballots.

The election managers in each precinct in the city of Charleston were Democrats. No other party was recognized upon the boards. And while the law of the State is silent as to party representation, all sense of justice and right, equity and fairness, would demand such recognition. It is, of course, possible for a board composed wholly of men of one party to properly and honestly discharge the duties of such board, and the law presumes that their duties were so discharged; but in this case the managers of election became the third side in the triangle of fraud that controlled the election in the city of Charleston. By their treatment of the Democratic challenger, whereby he was made the authority upon the qualification of voters, by their refusal in many cases to expose the inside of the box before the voting began, and the conduct of a private count at the close, and in some cases by the personal misconduct of the members of the board, the presumption of law in their favor is overthrown; and, construing their action in the light of the conduct of the supervisors of registration and Democratic challengers, a conspiracy, involving them all, to defraud the colored voters of their ballots in the interest of the contestee, is reasonably inferred.

The majority further find in five precincts that certain dead or absent voters appear on the poll lists. The number of these is not large, however, but are introduced as incidents in support of the majority's final conclusion.

These instances strengthen the claim that the entire election in the city of Charleston was tainted with fraud, and that gross irregularities occurred at nearly every precinct.

The conduct of the supervisors of registration and the managers of election, and the practice of swelling poll lists with the names of the dead and absent voters, was such as to cloud the result with uncertainty and doubt.

The presence of the challenger and his conduct, although unauthorized by law, would not in itself be sufficient to invalidate the election where such officer acted, but, considered as a circumstance in connection with the known misconduct of the supervisors of registration and the manners of election and the swelling of poll lists, it becomes of great importance in determining whether or not the will of the majority of the voters at such precincts is expressed by the returns. Fraud in the conduct of an election may be shown by circumstantial evidence. (McCrary on Elections, 3d ed., sec. 540; English *v.* Peelle, Forty-eighth Congress.)

It is not necessary, in order to set aside a return for fraud, that the officers of election participated in the fraud. But if the unlawful acts of third persons are connived at by the officers the effect is the same. (McCrary on Elections, 3d ed., sec. 543.)

It is the opinion of the committee that the conduct of these officers was such as to bear the badge of fraud at each of the election precincts of Charleston, except Nos. 1 in Ward 2, 1 and 2 in Ward 6, and 1 in Ward 10, and the question then arises whether the returns shall be purged or rejected.

The authorities are clear and complete that where fraud taints a return it can not be purged, but must be rejected; but a return can be purged only by rejecting ballots illegally cast or wrongfully counted. While in this case legal ballots were unquestionably kept from the box by the illegal and

wrongful acts of persons connected with the machinery of the election, it is impossible to determine the number of these ballots, and the only logical and equitable result is to reject such returns.

In accordance with their conclusions, the majority find for the contestant a plurality of 434 votes, and report resolutions declaring him entitled to the seat.

The minority dissented entirely from these conclusions as to the precincts in Charleston. They denied that the testimony showed the alleged conspiracy, or that there was fraud either on the part of the registration or election officers. The minority urge that the testimony, when analyzed, shows that only 41 persons are shown to have been rejected as voters, though properly registered. They also urge that contestant was shown not to have been popular with his party, and that he did not receive the party strength.

In conclusion the minority say:

So that taking the most extreme case against the contestee, there were not in the entire city of Charleston more than 41 registered voters who were refused the right to vote. It would require too much space to set forth in detail the testimony as to each of the persons, but the proof shows that the majority of them were not legally registered, and that as to all persons rejected by the managers, there was proof before the managers justifying them in rejecting the elector under the law of South Carolina, although it since may have been proved in this case that the elector had the right to vote.

A careful scrutiny of the whole evidence in this case convinces us that the contestee received a substantial majority of the votes cast for Representative in Congress, and that if every vote of those who offered to vote, with or without certificates of registration, in the city of Charleston, should be counted for the contestant the majority of the contestee would not be materially reduced.

The law upon this subject is tersely stated in McCrary on Elections, third edition, section 492:

"The fact that the right to register or to vote has been denied to any person or persons duly qualified to vote, may always be shown in a case of contested election whether such denial was fraudulent or not. The effect upon the rights of electors and upon the result of the election is the same whether such denial be the result of intentional wrong on the part of the officers of the election, or of accident, or an honest mistake as to the law. And if the number of voters whose rights have thus been denied is large enough to materially affect the result such denial will vitiate the election"

Upon the general subject of the impeachment of returns for fraud or illegal voting, attention is called to the following passages, also taken from McCrary on Elections:

"The return must stand until such facts are proven as to clearly show that it is not true. When shown to be fraudulent or false it must fall to the ground. This ruling is well settled by numerous authorities, including the following: Blair *v.* Barrett, I Bart., 308; Knox *v.* Blair, 1 Bart., 521; Howard *v.* Cooper, supra; Washburn *v.* Voorhees, 2 Bart., 54; State *v.* Commissioners, 35 Kans., 640."

The following remarks concerning the dangers which may attend the application of this rule are here quoted, with emphatic approval, from the report of the Committee on Elections in the House of Representatives in Washburn *v.* Voorhees:

"In adopting this rule the committee do not lose sight, however, of the danger which may attend its application. Wholesome and salutary, not less than necessary in its proper use, it is extremely liable to abuse. Heated partisanship and blind prejudice, as well as indifferent investigation, May, under its cover, work great injustice. It is not to be adopted if it can be avoided.

"No investigation should be spared that would reach the truth without a resort to it, but it is not to be forgotten or omitted if the case calls for its application. If the fraud be clearly shown to exist to such an extent as to satisfy the mind that the return does not show the truth, and no evidence is furnished by either party to a contest, and no investigation of the committee enable them to deduce the truth therefrom, then no alternative is left but to reject such a return. To use it under such a state of facts is to use as true what is shown to be false. (Sec. 536.)

"But misconduct which does not amount to fraud, and by which no one is injured, does not vitiate the poll." (Sec. 540.)

Unless the presumption is indulged that every man who has a dark skin is a Republican and votes the Republican ticket at all times and under all conditions and circumstances, even when he swears that he voted otherwise, it will be impossible to give to the contestant the seat which he claims.

The case was debated on June 3,[1] and on June 4[2] the substitute resolution of the minority, declaring sitting Member entitled to the seat was disagreed to, yeas 48, nays 144. The resolutions of the majority, declaring contestant elected and entitled to the seat, were then agreed to, yeas 153, nays 33.

Thereupon Mr. Murray, the contestant, appeared and took the oath.

1075. The South Carolina election case of Wilson v. McLaurin in the Fifty-fourth Congress.

An intelligible written notice of contest, in the hands of returned Member within the prescribed time, is sufficient, although served informally.

The House will count the votes of electors denied their right of suffrage by a registration law which it deems unconstitutional and not passed on by the State courts.

Where an unconstitutional State law disfranchises a large class, the House prefers to measure the wrong rather than declare a vacancy.

The House counts lists of wrongfully disfranchised qualified voters when sustained by other evidence that the voters were present near the polls to vote and would have voted for the party claiming had they not been prevented.

On May 1, 1896,[3] Mr. James H. Codding, of Pennsylvania, from the Committee on Elections No. 3, submitted a report in the case of Wilson *v.* McLaurin, from South Carolina.

A preliminary question was raised by the objections in the nature of a demurrer of sitting Member to the service of the notice of contest. The committee dispose of this objection as follows:

> It is admitted that the notice was in writing and was addressed by registered mail to the contestee, one copy to his "home office" at Bennettsville, S. C., and the other copy to Washington, D. C. It is not denied that both copies were received by Mr. McLaurin within the statutory thirty days, nor is it alleged that he has been placed at any disadvantage by the manner of service. That the notice was in writing and that it reached the proper party are sufficient for this committee to hold the contestee to the necessity of his answer and proofs. In all such cases the rules as to service may naturally be somewhat flexible, according to the circumstances, provided that no clear right be thereby denied or infringed. An intelligent and intelligible notice in writing, actually in the hands of a contestee within the thirty days established by statute ought to be sufficient.

As to the merits of the case, the committee consider two charges made by the contestant:

(1) That he had been deprived of a large number of votes by the action of election officers in drawing votes cast for the contestant from the boxes and destroying the same, under color of a section of the election law relating to purging the boxes in cases where the number of ballots found therein exceeded the number upon the poll lists. The committee did not find that the ballots so withdrawn were in quantities affecting the final result.

(2) Contestant in several specifications charged that voters were prevented from casting their ballots for him. Several means were alleged to have been

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[1] Record, pp. 6072–6078; Appendix, p. 445.

[2] Journal, P. 571

[3] First session Fifty-fourth Congress, House Report No. 1566; Rowell's Digest, p. 541.

employed, but this was accomplished principally by the operation of a so-called registration law of South Carolina passed in 1882, and in force at the time of this election, whereby the various election officers of the district were enabled to reject the votes of several thousand voters.

The committee therefore proceed (*a*) to a consideration of the constitutionality of the law and the attitude of the House toward it; (*b*) to a determination of the method for correcting the wrong; and (*c*) to the application of a rule of evidence to the testimony and the ascertainment of a result. As follows:

(*a*) As to the registration law the report says:

A casual examination of the testimony discloses the fact that if the contestant is to overcome the majority returned against him his chief reliance must rest in being allowed to reverse the results of the registration law of 1882 and to ally with his certified vote the aggregate of such votes as were rejected under that law.

In taking up this question some surprise is not unnatural that during its career of more than twelve years the constitutionality of this law has not been urged to a decision before the highest tribunals. Disfranchising, it is alleged, many thousands of voters, the law appears before this House for construction at a period when it is approaching, or has reached through other legislation, a practical death in the State of its adoption. Under these circumstances no labored or extended argument will be attempted in this report. That law, by its specific terms, extended the period of residence required by the constitution of South Carolina. It placed in the hands of a supervisor of registration, an official holding by executive appointment, a power practically absolute of judging the rights of voters, and the testimony is abundant that the power was unsparingly used for the exclusion of at least one class. It is equally true that the same power so molded the details of many registration certificates that officers conducting elections were able, or assumed to be, to reject many voters on account of trivial or pretended defects in their certificates. Against the sweeping disfranchisement of this law the average voter was powerless when he tendered his ballot. Under color of law his exclusion was complete.

A majority of this committee has reached the conclusion that the voters of the district now in consideration who were qualified under the constitution of South Carolina and who were rejected under color of the enforcement of the registration law are entitled to be heard in this contest.

In this conclusion no violence is done to the doctrine that "where the proper authorities of a State have given a construction to their own statutes that construction will be followed by the Federal authorities." While the supreme court of South Carolina has not passed decisively upon the statute in question the people themselves, the highest authority in that State, have decreed its disappearance from the statute book.

(*b*) As to the correction of the wrong, the committee say:

From this standpoint we look for the course to be followed. Shall the election be set aside and the seat in question vacated? Under the authorities we think not.

Beyond doubt the usual formalities of an election were for the most part observed. No substantial miscount of votes actually cast is alleged. There are no charges of violence or intimidation seriously affecting the result which have been verified. If fraud be alleged, under sanction of legislative enactment, it was a general fraud, and the returns are in general unchallenged for correctness. The votes actually cast are not in controversy; the votes not cast are the ones presented for computation.

The report then quotes McCrary on Elections as follows:

The election is only to be set aside when it is impossible from any evidence within reach to ascertain the true result—when neither from the returns, nor from other proof, nor from all together can the truth be determined. * * * Nothing short of the impossibility of ascertaining for whom the majority of votes were given ought to vacate an election.

The report then says:

It is a matter of serious import and precedent to introduce into an election the count of a large disfranchised class. But if the principle is good as to 4 or 40 or 400 it should certainly be no less available for a larger number; or, briefly, the number is immaterial if capable of correct computation.

Therefore the committee determine to follow the doctrine laid down in the case of Waddill *v.* Wise: [1]

If the fraudulent exclusion of votes would, if successful, secure to the party of the wrongdoer a temporary seat in Congress, and the only penalty for detection in the wrong would be merely a new election, giving another chance for the exercise of similar tactics, such practices would be at a great premium and an election indefinitely prevented. But if where such acts are done the votes are counted upon clear proof aliunde the wrong is at once corrected in this House and no encouragement is given to such dangerous and disgraceful methods.

(*c*) The contestant presented the names of several thousand alleged voters, whose votes he claimed should be counted for him although they were not actually cast. These names were generally presented in lists, drawn up in the form of petitions made in most of the election precincts on election day. One of these petitions would be addressed to the Congress, would represent that each of the subscribers was a citizen of South Carolina, over 21 years of age, a male resident of the county and election precinct, and qualified to register and vote; that on the election day in question the subscriber presented himself at the voting precinct, desiring and intending to vote for Joshua E. Wilson (the contestant) for Member of Congress, but that he was denied the right to vote; and that he had made every reasonable effort to become qualified to vote according to the registration law of the State, but had been denied an equal chance and the same opportunity to register as was accorded to other fellow-citizens.

These petitions were not generally verified by affidavit, but were usually supplemented by testimony of those who had them in charge, with such explanations and corroborations as the witnesses could give.

The report states the disposition made of these petitions:

It is considered by a majority of this committee that these lists are not per se evidence in the pending contest. They are declarations, important parts of which should be proven in accordance with usual legal forms. It is not impossible so to do, and consequently we think it is necessary for reaching trustworthy results.

Under the authority of Vallandigham *v.* Campbell (1 Bartlett, p. 31) these declarations might serve a use beyond a mere list for verification, for it was there held "the law is settled that the declaration of a voter as to how he voted or intended to vote, made at the time, is competent testimony on the point."

We propose to compute the ballots of those who were entitled to cast them, and there is ample support in a line of authorities and precedents. A few only are selected.

Delano *v.* Morgan (2 Bartlett, 170), Hogan *v.* Pile (2 Bartlett, 285), Niblack *v.* Walls (Forty-second Congress, 104, January, 1873), Bell *v.* Snyder (Smith's Rep., 251), are uniformly for "the rule, which is well settled, that where a legal voter offers to vote for a particular candidate, and uses due diligence in endeavoring to do so, and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote shall be counted."

In Bisbee, Jr., *v.* Finley (Forty-seventh Congress) it was stated, "as a question of law we do not understand it to be controverted that a vote offered by an elector and illegally rejected should be counted as if cast."

In Waddill *v.* Wise (supra) the same doctrine was elaborately discussed and a further step taken by holding "that the ability to reach the window and actually tender the ticket to the judges is not essential in all cases to constitute a good offer to vote."

Referring to the evidence given in connection with the lists in this record, it seems proper to adopt some general principles as a standard for the examination, and the following have been used as suitable and in accord with the precedents quoted:

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[1] See section 1026 of this volume.

First. The evidence should establish that the persons named in the lists as excluded voters were voters according to the requisites of the constitution of South Carolina.

Second. The proof should show that said persons were present at or near the Congressional voting place of their respective precincts, for the purpose of voting, and would have voted but for unlawful rejection or obstruction.

Third. That said excluded voters would have voted for the contestant.

Using the greatest liberality in computing according to the above principles, the committee could find but 3,124 votes which should be added to contestant's returned vote of 2,455. This would make a total of 5,579 votes for contestant, not sufficient to overcome sitting Member's certified vote of 8,171.

Therefore the committee reported resolutions confirming the title of sitting Member to the seat, and the same were agreed to by the House on May 1.[1]

1076. The Texas election case of Rearby v. Abbott, in the Fifty-fourth Congress.

As to the use of red ink for writing a name on a ballot when a mandatory State law requires black ink.

The mere fact of a slight discrepancy between the returns and the check list does not, in the absence of fraud, invalidate the election.

Neglect of election officers to place ballots, poll lists, and tally sheets in a fastened box, as required by law, does not, in the absence of fraud, invalidate the return.

Returns of a precinct not being questioned, failure to carry out the law as to preservation of other election papers does not justify rejection of the returns.

Where State officers estimated a return from the tally sheets, there being no formal returns, as required by a directory State law, the House did not require a recount of the ballots, there being no charge that the tally sheets were incorrect.

On May 4, 1896,[2] Mr. Charles K. Bell, of Texas, from the Committee on Elections No. 3, submitted a report in the case of Kearby *v.* Abbott, of Texas. The official returns gave to sitting Member a plurality of 344 votes, which contestant attacked on the ground of various illegalities and informalities. The examination and decision of the committee touched the following questions:

(1) In Morgan precinct, where the ballots had been preserved-as required by law, a recount showed that sitting Member had been credited improperly with one vote, and that four ballots had been rejected by the officers of election because the name of the contestant had been written in red ink, while the law of the State required that the name of the person voted for should be written or printed with black ink or a black pencil. The committee say:

The law of the State provides that no ballots not in accordance with the requirements of the statutes shall be counted, but as it is not necessary to a correct decision of this case, the committee does not decide the question as to whether the fact that this law is not complied with would justify the managers of election in refusing to count a ballot.

(2) In the county of Dallas, where the contestant had alleged that the returns in several precincts did not represent the state of the ballots, a recount was made, and

[1] Journal, p. 443.

[2] First session Fifty-fourth Congress, House Report No. 1596; Rowell's Digest, p. 546.

the contestant, according to his contention, gained 139 votes. Some questions arose as to this recount, but the committee did not consider it necessary to go into them, and were willing to credit contestant with the 139 votes plus 5 at Morgan precinct, or 144 votes in all.

(3) At Pleasant Valley precinct one vote more was found in the ballot box than the poll list showed had been voted. The committee did not conceive that this circumstance raised any suspicion of fraudulent conduct on the part of the election officers, quoting Paine on Elections:

> The mere fact that the number of votes returned exceeds the number of names checked on the voting list does not, in the absence of fraud or of a change in the result, affect the validity of the election.

(4) "As to contestant's complaint," says the report, "that the presiding officers at certain precincts in Kaufman County neglected to place the ballots as voted at said precincts, together with the poll lists and tally sheets, in a box, and securely fasten it as required by law, we find that in the absence of fraud, or, for that matter, of claim of injury, such failure, even if it had been established, would constitute no ground for rejecting the votes cast." In fact, however, the proof showed appearance of irregularity in only one precinct. About two months after election an examination of the ballot boxes—then in the custody of the county clerk—showed that the box of Pleasant Grove precinct was not shut tight, it being in fact an old cigar box, and that only one ballot remained in it. But the committee found that the returns from this precinct had been signed by an election officer representing contestant's party, that they were not in any way questioned, and that no effort was made to show that the vote was not actually as certified. The committee quote Paine:

> Accidental loss of the ballots cast and affidavits used at a particular precinct before the county canvass affords no ground for the rejection of the entire returns of the precinct.

And McCrary:

> The rule is that the evidence must stand until impeached, i. e., until shown to be worthless as evidence—so worthless that the truth can not be deduced from it. * * * The return is only to be set aside, as we have seen, when it is so tainted with fraud or misconduct of election officers that the truth can not be deduced from it.

The committee therefore decline to reject the returns from this precinct.

(5) At Terrell precinct some of the tickets of contestant's party were destroyed before they were voted; but the testimony did not disclose that contestant had been deprived of any votes thereby. In fact it indicated the contrary. There was some testimony as to improper influence at this precinct for sitting Member, but the committee conclude that there was nothing in the evidence to warrant the rejection of the returns, it not being contended that the election officers were guilty of any breach of propriety or fraudulent conduct.

(6) From certain precincts—where the plurality of sitting Member was about 300 votes and which if rejected would, with previous deductions, be decisive in favor of contestant—no formal returns were made in accordance with the statutes of the State of Texas, which required the managers of election to make out triplicate returns of the same, certified to be correct and signed by them officially, showing the number of votes polled for each candidate, one of which returns, together with the poll list and tally sheet, was required to be sealed up in an envelope and

delivered by the managers of election to the county judge of the county. Another similar package was required to be delivered to the clerk of the county court, and a third to be kept by the presiding officer of the election for twelve months.

But while the formal returns were not made, the poll lists and tally sheets were returned as required by law, and from the poll lists and tally sheets the county commissioners' court, which is a returning board, estimated the vote of the precincts.

The contestant alleged that this action was erroneous, although he did not allege and made no effort to show by evidence, that as a matter fact the vote as estimated was not exactly in accordance with the vote as cast.

The committee admit that the law of Texas provides that no election returns shall be opened or estimated unless the same have been returned in accordance with the provisions of the law. But they quote Fowler *v.* State (68 Texas) to show that this statute is directory. "It is true," says the supreme court in that case, "that our present statute says that election returns shall not be opened or estimated unless the same have been returned in accordance with its provisions (Article 1706), but this applies to the opening and estimate provided for in the previous section to be made by the county judge. It does not prevent the district court from arriving at the true sense of the electors in a proceeding to test the title to an office. The county judge deals with returns only, but in a suit for the recovery of the office the district court may disregard any unimportant informality in making them, or set them aside altogether when they do not speak the truth as to the state of the ballot."

The committee quote McCrary:

> The election is only to be set aside when it is impossible from any evidence within reach to ascertain the true result; when neither from the returns, nor from other proof, nor from all together can the truth be determined.

The committee then say:

> The contestee took the testimony of one or more officers of each of the election precincts from which no returns were made, and it was proved that the failure to make the returns in each instance was occasioned by the fact that no blanks upon which returns should have been made were furnished; but as to each precinct proof was made from the tally sheet and from the memory of the officers of election exactly what the vote actually polled for each candidate was.
>
> It was not contended by the contestant and no effort was made to prove that the vote was in any instance different from that shown by the tally sheet and as testified to by the witnesses. But he contends that it was necessary that there should have been a recount of the ballots cast at each of the voting precincts. Upon this point the committee are agreed that if the contestant had alleged that the vote at any of the precincts from which there were no formal returns was different from that shown by the tally sheet, or if he had charged that there was any fraud on the part of the election officers it would have been necessary for the ballots cast at such precincts to have been recounted, as they were in the precincts concerning which he made such charges, but it is to be observed that no such contention was made by the contestant, and no suspicion was raised as to the correctness of the vote as estimated by the commissioner's courts of the different counties and as proved by the contestee.

The committee quote Paine on Elections as to the application of the general rule requiring the production of the best evidence, cite Howard *v.* Shields (16 Ohio) to the effect that—

> the tally sheet kept by the officers of the election was competent evidence in an election contest to show the true state of the vote, and that it was good until impeached,

with the explanation by McCrary that—

the rule stated presupposes that tally sheets are required to be kept by law, and where they are not required by law to be kept by the managers of the election they would not be admissible.

The committee call attention to the fact that in this case the tally sheets were required to be kept by law.

The committee concluded, in accordance with the above decisions, that the sitting Member was entitled to the seat, and reported resolutions in accordance therewith.

On May 4 [1] the House concurred in the report.

1077. The Virginia election case of Yost v. Tucker, in the Fifty-fourth Congress.

Where the intention of the voter is clear the ballot will not be rejected for faulty marking by the voter unless a law undoubtedly mandatory so prescribes.

Where a voter inadvertently or ignorantly erases the designation of the office in marking, the character of the ballot as an official ballot is not destroyed.

Instance where blotted or blurred ballots were disposed of by agreement of parties.

Although contestent claimed in his notice that blurred ballots should not be counted for contestee, and did not ask that they be counted for himself, the committee counted them for both.

On May 6, 1896,[2] Mr. Samuel W. McCall, of Massachusetts, presented the report of Elections Committee No. 3 in the case of Yost *v.* Tucker, from Virginia. The sitting Member had been returned by an official plurality of 892 votes over the contestant.

The case involved construction of the newly enacted Australian ballot law of Virginia, and a review of the conduct of election officers under it. This law, besides describing the ballot and providing for its printing so that its form and arrangement should not be disclosed until presented to the voter, has this provision:

SEC. 11. Every elector qualified to vote at a precinct shall, when he so demands, be furnished with an official ballot by one of the judges of election selected for that duty by a majority of the judges present. The said elector shall then take the said official ballot and retire to said voting booth. He shall then draw a line with a pen or pencil through the names of the candidates he does not wish to vote for, leaving the name or names of the candidate or candidates he does wish to vote for unscratched. No name shall be considered scratched unless the pen or pencil mark extend through three-fourths of the length of said name; and no ballot save an official ballot above provided for shall be counted for any person. When, as to any office, more than one name remains unscratched, the ballot for that particular office shall be void, but the ballot as to any other office for which only one name remain unscratched shall be valid. He shall fold said ballot with the names of the candidates on the inside and hand the same to the judge of election, who shall place the same in the ballot box without any inspection further than to assure himself that the ballot is a genuine ballot, for which purpose he may, without looking at the printed inside of said ballot, inspect the official seal upon the back thereof: *Provided,* It shall be lawful for any voter to erase any or all names printed upon said official ballot and substitute therein in writing the name of any person or persons for any office for which he may desire to vote.

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[1] Journal, p. 448.

[2] First session Fifty-fourth Congress, House Report No. 1636; Rowell's Digest, p. 547.

After the election, at the instance of the contestant, a recount of the ballots was had in all the cities and counties of the district. It also appeared that 1,021 ballots had been destroyed, and over these ballots arose one of the principal issues of the case.

It will be convenient to notice, first, the questions arising over the ballots recounted, and second, those arising over the destroyed ballots.

(1) The questions arising over recounted ballots.

(*a*) The election law of Virginia provided:

SEC. 3. The ballot shall be a white paper ticket containing the names of the persons who have complied with the provisions of this act, as hereinafter provided, and the title of the office printed or written as hereinafter provided. None other shall be a legal ballot.

At the election in question candidates for only one office were voted for, and the following question arose:

Upon 1,169 ballots cast for Yost and 114 cast for Tucker the name of the office as well as the names of all other candidates except Yost or Tucker, respectively, were erased. What disposition shall be made of these ballots? The general rule, doubtless, is to count those ballots which clearly express the intention of the voter, but the intention must be expressed as provided by law. We do not suppose it would be contended, in view of the requirement of this statute for an official ballot and an express prohibition against counting any other ballot, that a ballot provided by the voter himself and deposited by him should be counted, although it expressed his intention beyond all doubt. The question here is not one which rests on a supposed ambiguity of the ballot, but it is a question of what the laws of Virginia require.

The intention of the voter, if it can be clearly ascertained from the ballot, will generally be given effect to, and when it is not expressed according to the strict requirements of a statute, such requirements will often be regarded as merely directory, unless a failure to comply with them is declared to be fatal to the ballot. But where the statute itself provides that a certain thing shall be done by the voter or his vote shall not be counted, then there can be no question that a provision of that character is Mandatory, and that a failure to comply with it fatal to the ballot.

In the present case there is no question of the intention of the voter. There was only one office to be filled, and it is hardly conceivable that more than 1,200 voters in this district should have left their homes, gone to the polls, entered the booths, and gone through the act of voting with the intention of voting to fill no office whatever. This was the first election at which the Walton law was applied in Virginia, and undoubtedly the caption was marked out by reason of the failure on the part of the voter to understand this novel system. Unless clearly required to reject these ballots by the Virginia laws, the committee believes they should be counted.

The words "none other shall be a legal ballot" in section 3 refer to the Australian ballot provided for at the public expense, and the words in section 11 of the act, "no ballot save an official ballot above provided for shall be counted for any person," were in the opinion of the committee intended only as a prohibition of the counting of any other than the ballot provided for by the first sections of the act. The erasure of the caption did not destroy the character of the ballot as an official ballot, and since there could be no ambiguity or doubt as to what office the voter intended his candidate to fill, since only one office was named on the ticket, the committee is of the opinion that these so-called "caption-marked" ballots—114 for Tucker and 1,169 for Yost—should be counted.

(*b*) Certain ballots were blotted or blurred. The most difficult question was one of fact as to whether they were "scratched" within the meaning of the law quoted above or simply "blurred." The committee say:

This question is settled by agreement of the contestant and contestee. It is conceded that they were all properly marked, and in folding them before the ink was dry an impression was made on the names not marked. This is purely accidental, and not to be deemed the marking or scratching contemplated by the statute, which is to be done by drawing a line "with a pen or pencil" through the names of the candidates for whom the voter does not wish to vote. The contestant's notice of contest contends

that similar ballots cast for the contestee should not be counted, and does not claim that such ballots should be counted for himself. The committee are of opinion, however, that they should be counted—14 for Tucker, and 54 for Yost—as appears by the record.

1078. The case of Yost v. Tucker, continued.

Where the State law specifically required rejection of a ballot whereof the scratching of a name failed to mark two-thirds thereof, the House approved rejection.

Although the intent of the voter be entirely plain the House will follow a State law, arbitrary but mandatory, which requires rejection of the ballot.

Is the House, in its function of judging elections, to be precluded by an arbitrary State law from determining the intent of the voter?

Where the State prescribes the manner of election, may the House disregard an arbitrary State law which denies expression to the voter's intent?

Discussion of the distinction between directory and mandatory election laws.

(*c*) As to imperfectly marked ballots a sharp division arose in the committee and on the floor of the House. As shown by the extracts of law already given no name was to be considered scratched unless the pen or pencil mark extended through three-fourths of the length of the name, and it was further provided that "when, as to any office, more than one name remains unscratched, the ballot for that particular office shall be void." The majority of the committee say:

> It appears very clear that unless a name is marked through three-fourths of its length it is not, within the meaning of the law, to be considered as scratched at all, and therefore more than one name in the so-called "imperfectly marked" ballots remains unscratched upon the ticket, and the law expressly provides that in such a case the ballot shall be void. It is not for the committee to decide whether the provision as to the marking of the ballot is a wise or reasonable one or not. The voter has failed to express his will by the so-called "imperfectly marked" ballot, according to the requirement of the statute, and, failing in that, the statute declares that the ballot is void. In the judgment of the committee, therefore, these "imperfectly marked" ballots can not be counted.

The minority[1] contended strongly that these ballots, which if counted would, the minority contended, give contestant a plurality of 22 votes, were marked sufficiently to show the intent of the voter, and should be counted. The minority views cite legal authorities, including the Illinois case of Parker *v.* Orr (41 N. E. Reporter), and express surprise that there should be doubt as to so well an established principle that a ballot should be counted if it expressed the intention of the voter beyond a reasonable doubt.

In the debate this view was enforced on the floor, especially by the argument[2] of Mr. Charles Daniels, of New York, who contended that the Constitution, in making the House the judge of the elections, returns, and qualifications of its own Members, excluded any State from tying the House down to any arbitrary principle or rule in determining from the evidence the voter's intention. Mr. Daniels

[1] Views presented by Mr. James A. Walker, of Virginia, and concurred in by Mr. Henry F. Thomas, of Michigan.

[2] Second session Fifty-fourth Congress, Record, pp. 998, 1000.

drew a distinction between this case, where the mark "had a natural and reasonable significance," and those cases where the law of the State required what might be called an arbitrary mark, a cross before or after the name, and not naturally of significance. In reply [1] Mr. David A. De Armond, of Missouri, called attention to the clause of the Constitution under which the State prescribed the "times, places, and manner" of holding elections, and held that the law of Virginia, as to how the elections should be conducted, the returns ascertained, and the result declared, was the law of Congress, which the House might not, under the Constitution, disregard. The question was not as to the intention of the voter, but whether in fact the name was scratched. When a constitutional statute said that unless three-fourths of the name was marked through it was not scratched, the question was not as to what the voter intended, but as to what he did. And Mr. McCall, in concluding the case, dwelt [2] upon the fact—as he claimed—that the Virginia statute (sec. 11, quoted above) was clearly mandatory, and quoted McCrary and Paine on Elections, especially the following paragraph from the latter:

> Statutes expressly declaring specified acts or omissions fatal to the validity of an election, or expressly prohibiting the performance or omission of specified acts, are mandatory. While statutory provisions prescribing acts which are in their nature absolutely essential to the validity of the election may be mandatory, in whatever phraseology expressed, the most unimportant requirements may be made mandatory by a clear expression of the legislative will.

Referring to the case of Parker *v.* Orr, Mr. McCall noted the fact that the court held, on the particular provision of the law it was considering, that it was not intended by the legislature to be mandatory, and he cited from that decision the following:

> Wherever our statutes do not expressly declare that particular informalities do not avoid the ballot, it would seem best to consider their requirements as directory only.

1079. The election case of Yost v. Tucker, continued.

An illegal destruction of ballots, but apparently done in good faith, was not held as evidence contributing to a charge of conspiracy.

Rejected ballots being illegally destroyed by election officers who were partisans of contestee, and against protest, contestant was held entitled to the advantage of every doubt.

Ballots improperly rejected by election officers, and then illegally destroyed, were proven aliunde and counted.

Electors being at the polls a long time, and prevented from voting by obstructive challenges of others, their votes were counted by the House.

To count votes tendered but not cast, it is necessary to establish obstruction by election officers and due diligence on part of the elector.

Serious irregularities by election officers, the rejection of an undue proportion of ballots for imperfect marking, and illegal destruction of rejected ballots, vitiated the return.

(2) The questions arising over the 1,021 burned or otherwise destroyed ballots: It appeared that a former law of Virginia had provided for burning ballots, but that the law under which this election was held—in use for the first time—had no

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[1] Record, p. 1020.

[2] Record, pp. 1037, 1038.

provision authorizing the burning of rejected ballots. In debate Mr. McCall stated that the precincts where the rejected ballots were burned numbered about 15 out of 175 in the whole district.

At the outset an issue arose as to the burned ballots. The majority or the committee took a view which allowed to be credited to contestant only such of those ballots as he could prove to have been properly cast for him and which threw out the entire vote of only such precincts as could be successfully attacked individually. The majority say:

> With reference to these ballots, generally, it may be said, in most instances, that the Republican judges at the precincts where they were cast concurred with the other judges in treating them as absolutely void, and agreed that they should be burned or otherwise destroyed. At a few precincts the Republican or Populist judges objected to their destruction, but the record shows that in almost every case these judges agreed to the count and concurred in the conclusion of the other judges that these ballots were not marked, as required by the statute, and could not be counted.
>
> While the committee is of the opinion that in no case should the defective ballots have been destroyed, yet it is of the opinion that in nearly all of the precincts their destruction was made in entire good faith, and that such destruction in most of the precincts does not prove an intention to commit fraud on the part of the election judges. The contestant attempts to prove that some of these ballots were intended for him and as by their destruction he was prevented from having a recount of them, it is clearly his right to prove by the testimony of the judges, or of any witness, the exact condition of the ballots, and he is entitled to the benefit of any that he can show were cast for him.

The minority take issue with this position. They find 2,711 defective ballots, burned and unburned, which could be counted for no one, and declare that these defective ballots were "the result of an illegal and fraudulent conspiracy, entered into by sworn officers of the law for the sole benefit of this contestee." The Minority say:

> In violation of law, the election was practically in the hands of one political party. It is shown by the record that only 15 per cent of the election officers were Republicans. It is shown that at many precincts Republican had no representation whatever among the election officers, and that competent Republicans could have been appointed. It is conceded that the defective ballots were cast by illiterate electors. It is proven that in every instance the officer designated by law to assist the illiterate was a Democrat, and in many instances so partisan that no member of the opposite party had confidence in him. It is proven that, in violation of law, as construed by the supreme court of Virginia, special constables refused to mark the ballots for illiterates who were opposed to them. A willing and cheerful service was rendered to their political friends. To such an extent was this carried that it was practically impossible for an illiterate Democrat, with the eye of a jealous party friend upon him, to cast a defective ballot, and it was almost impossible, at many precincts, for an illiterate Republican to cast a perfect ballot.
>
> It is proven that in order to qualify themselves for the discharge of their duty as suffragans, the illiterate Republicans diligently sought to familiarize themselves with the printed name of the candidate of their choice—that many of them had so mastered the letters contained in the name "J. Yost" as to enable them to recognize it when printed in plain roman. That the Republican committee had widely circulated a pamphlet giving extracts from the election laws and detailing the method of voting. They advised that at each precinct an intelligent Republican should vote early, carefully inspect the ballot, and after voting explain to the illiterates who had not voted the location of Yost's name on the ballot. With this information and his ability to recognize the name of "J. Yost," the illiterate voter could have properly marked and cast his ballot. Knowing this, the Democratic officials, in utter disregard of law, entered into a conspiracy to dupe and deceive the opposing illiterate voter by alternating the names on the official ballot, printing the ballot in German text and other type illegible to a man who could only read plain roman, instructing special constables not to assist the illiterates, a6nd in other ways sought to so confuse and mystify the voter as to render his ballot defective. Their object was accomplished. The fraud they planned and executed was consummated.

Is it a wonder that under these circumstances thousands of ballots cast by honest men were thrown out as defective? The very guardians of the law became its violators; men sworn to render assistance to the illiterates considered it their duty to defraud that voter of his suffrage, and did defraud him. And this House is asked to put the seal of its approval upon such work.

If this contestant were given the same proportion of these 2,711 unconsidered defective ballots as he received of the 1,086, which were distributed upon recount and proof, his plurality would be over 2,000. His proportion of the 1,086 was 669 on recount and 292 on burned ballots proven, a total of 961, or over 88 per cent.

This proportionate distribution of the 2,711 ballots would give Yost 2,385; Tucker 326. Yost's plurality, 2,059.

The majority of the committee, proceeding on the basis announced, examined the various precincts. In the following cases they took action involving new principles:

(*a*) At Curdsville precinct there were returned 38 votes for Tucker, 54 for Yost, and 2 for Cocke, and 111 votes were rejected, of which 107 were destroyed. The testimony indicated that 90 destroyed ballots were intended for Yost. The majority say:

The burning of the ballots was illegal. It was done by the act of judges representing the contestee and against the protest of the judge representing the contestant. In view of the great number of ballots destroyed, of the clear proof that this number contained ballots which were legal, and further, that the evidence was destroyed by partisans of the contestee, the contestant is entitled to the benefit of every doubt in the situation, and the committee is of opinion that the contestant should be credited with his claim here of a gain of 90 votes.

Also at New Canton, under similar circumstances, the contestant proved 100 votes by the best evidence the case would admit and was credited with that number.

(*b*) At Court House precinct the contestant called 36 voters who testified that they were in line waiting and desired to vote for contestant and would have voted for him had they had the opportunity to do so. No question was raised as to their qualification as voters, nor as to their intention to vote for the contestant, but the testimony did not show how long the voters were in line. The committee intimate that, in view of the fact that the record did not show obstruction by election officers or whether the voters stood in line a reasonable time, there were doubts about counting the votes, and content themselves with saying that these votes would not affect the final result. But as to Jackson River precinct the majority say:

At this precinct 13 voters testify that they were at the polls during a considerable portion of election day, were in line and desired to vote, and would have voted for the contestant. There is also evidence showing that a supporter of the contestee, a Federal officeholder, was actively engaged in challenging Republican voters, and that he consumed a large part of the day in asking questions, and thus delayed the voting. It appears from the testimony of the contestee's witnesses that there were not sufficient voting facilities for all who wished to vote. According to the rule laid down in the case of Waddell *v.* Wise, and McCrary on Elections (3d edition, sec. 523), the contestant should be credited with 13 votes at this precinct.

At this precinct the contestant also proves (pp. 202 and 204 of the record) that Thadeus Jones, a legally qualified voter, offered to vote for him, but was illegally prevented by the judges of election. This vote should be counted for the contestant.

(c) At Brown's Church precinct, where the returns gave Tucker 131 votes, Yost 51, and Cocke 13, it appeared that 234 ballots were rejected and burned.

Two officers of elections were shown to have been drinking, and two judges and a partisan of contestee, who was not an election officer, kept account of the votes. The judges did not agree as to the result reported. The report says:

1080. The case of Yost v. Tucker continued.

Misconduct of the officer who assists illiterates to mark their ballots justifies correction but not rejection of the poll

The presumption arising from the fact of registration is not overthrown by the simple proof that the voters are students.

The House favored purging rather than rejecting the return of an entire county wherein a partisan county electoral board had so printed the ballot as to confuse voters.

Because the officer who assists illiterates to mark their ballots takes a narrow and technical view of his duties under the law does not justify rejection of the poll.

B. W. L. Blanton, the Democratic precinct chairman, was present at the count, and the judges apparently followed his directions as to which ballots should be counted. Blanton was the one who suggested that the ballots should be burned. He admits that the alternating of the names upon the ballot was done at his order. He also admits that he caused the initial "J "to be separated from the name "Yost" by a blank space of 2 inches for the charitable purpose of giving Yost "the same rights and privileges on that ticket that the rest of the candidates had." The irregularities at this precinct were of the most serious character, and these irregularities, taken in connection with the gross disproportion of the ballots rejected to the ballots counted and their destruction, are sufficient to destroy all faith in the official acts of the officers and to require the rejection of the returns.

(*d*) As to Milner's precinct the majority find:

The evidence is pretty strong that the constable at this precinct did not perform his full duty in aiding illiterate voters. He admitted that the Democratic county chairman had instructed him as to his duty in marking the ballots. Misconduct of this officer would not be sufficient to warrant the rejection of the whole poll and the disfranchisement of all the voters there, because its effect can reasonably be limited to the number of illegally marked ballots, of which there were 23. The evidence does not show such irregularity or fraudulent conduct on the part of the judges as would destroy the value of the returns as evidence. If the contestant were credited with the rejected ballots, his vote at this precinct would be increased by 23.

(*e*) In Lexington precinct 11 students voted, and the contestant claimed the deduction of these votes. The committee say:

These votes were cast by students of the university located there, and the contestant contends that they were nonresidents. McCrary on Elections, section 41, says:

"The question whether or not the student at college is a bona fide resident of the place where the college is located must in each case depend upon the facts. He may be a resident and he may not be; whether he is not depends upon the answer which may be given to a variety of questions, such as follows: Is he of age? Is he fully emancipated from his parents' control? Does he regard the place where the college is situated as his home, or has he a home elsewhere to which he expects to go and at which he expects to reside?"

The contestant furnishes evidence upon few, if any, of these important issues.

The presumption, from the fact of registration, is that these 11 students were voters at this precinct, and this presumption is not overthrown by the simple proof that they were students. Moreover, there is no evidence that they voted for the contestee. These votes, therefore, should not be deducted from the vote of the contestee.

The minority say:

In regard to the 11 student votes at Lexington, the testimony of R. A. Fulwider, a fellow student, shows:

"Q. 12. Are these students residents of Lexington in the Lexington precinct, or are they merely here from other sections of the State as students?—A. They are all entered upon the catalogue as being residents of other States except the two Mitchells, who are from Brownsburg, Rockbridge County, Va.

"Q. 13. Please state the politics of these students and for whom they voted at the last election—A. They all claim to be Democrats, and I know that personally, and I believe they cast their votes for Mr. Tucker."

Not one of these students was placed on the stand by the contestee. The majority presumes "from the fact of registration" that these students were voters at that precinct, and this presumption is supposed to overweigh the positive testimony that these students appeared on the college roll and were recognized as residents of other States. It would have been an easy matter for contestee to have put these students on the stand and thus met evidence with evidence.

A leading issue in this case arose over the claim of the contestant that the entire votes of the counties of Amherst and Appomattox should be rejected. The minority give as reasons for rejecting the vote of Amherst County—

That the electoral board consisted entirely of members of sitting member's party, and that one of them was also the chairman of the county committee of the same party. This partisan, after appointing the special constables for each of the precincts, called them together and, as chairman of the county committee of his party, instructed them as to their duties in assisting illiterate voters. The electoral board failed to give contestant's party proper representation on the precinct boards, although such representation might have been allowed. The partisan chairman, who instructed the constables as to how to assist in marking the ballots, also as member of the county electoral board, had the official ballots printed, and he admitted that he alternated the names and used different styles of type, producing about seventy-five different kinds of ballots. In view of these facts the minority claim that the entire vote of the county should be rejected, saying:

It would indeed be an unfortunate precedent to hold that the crooked ways resorted to by the Democratic election officers in that county were legal and valid. It is admitted that at nearly one-half of the precincts in the county none of the judges were Republicans, contrary to the express provision of the statute; that the ballots were printed partly in German and partly in Roman text; that the names of the candidates were alternated; that the secretary of the electoral board instructed the special constables not to mark the ballots for the illiterate voters unless they were blind or physically unable to mark for themselves. It is proved that constables at many precincts in the county refused to give aid to Republican voters who requested them to do so.

For similar reasons the minority argued that the vote of Appomattox County should be rejected.

The majority of the committee condemn the action of the county board, but say:

If the officers guilty of such conduct had charge of the making up of the returns in the various precincts they would need to be scrutinized with the gravest suspicion, and they certainly would not be entitled to that weight and effect as evidence which are due to uncontaminated returns. But the elections were in charge of the election judges at the different precincts and, while the fact that these judges were appointed by the county electoral boards is a circumstance which would invite the most careful scrutiny of their conduct, it would be a daring conclusion to infer that the credibility of the returns at all the precincts in this county was destroyed and that all the voters should be disfranchised because the precinct officers had been appointed by a central county board which alternated the names on the ballot. Such a wholesale exclusion of votes would not be warranted; but the evidence of each

precinct should be considered separately, as it has been by the committee in the preceding portions of this report.

The committee is also under the necessity of considering whether and how much the contestant's vote suffered on account of this method of printing. There were 349 defective ballots in Amherst County out of a total of 2,705 (p. 124 of the record), a percentage not materially greater than the percentage of defective ballots throughout the whole district; and the relative strength of the parties, as shown at previous elections, appears to have been fairly maintained in this election.

Substantially the same observations may be made as to Appomattox County, where there were 153 defective ballots out of a total of 1,431, and the contestee received a plurality of 49. The committee is of the opinion that the evidence will not warrant the rejection of the votes of these two counties.

The minority of the committee also contended that the entire vote of the First Ward of Staunton should be rejected "because of the confessed violation of law by Constable J. Frank West."

The law of Virginia as construed by the supreme court was:

It is the duty of the special constable to render him who is blind, or unable by defective education to read, every assistance asked for and required by the elector to aid him in preparing his ballot.

Constable West testified that he told the voters he did not want to know how they intended to vote, but pointed out the names and let the voters mark them. He declined to mark the ballots for the voters, considering that he had no right to do so. The minority claimed that West's illegal construction, and the illegal acts committed under cover of that construction, rendered the returns from the precinct unworthy of credit.

The majority concluded, however—

A careful examination of the evidence in this precinct fails signally to show any actual fraud. One of the judges was a Republican, and he is not called to testify by the contestant, and the only evidence tending to show any misconduct is directed to the action of the special constable. The evidence does not show that he committed any fraudulent acts, but does show that he performed his duties, under the law, as he understood it. The constable took a narrow and technical view of his duty, but there is no primary or direct evidence to show that he failed to sufficiently assist any voter. He himself declares:

"In no instance where in elector, whenever it was lawful for me to assist, told me for whom he wanted to vote did I allow his ticket to be deposited unless it properly registered his vote for the candidate he had told me he wanted to vote for."

As appears from the recount, out of a total of 663 ballots cast in this ward, 76 were rejected as defective, which is a very little larger percentage of the total votes cast than the rejected ballots of Ward 2 were of the total number of votes in that ward, where the returns are not attacked; and doubtless a considerable number attempted to mark their own ballots without asking assistance. The evidence fails to disclose any ground for rejecting the whole vote of this poll and throwing out the returns themselves, the reliability of which is not assailed in the slightest degree. The principle on which returns are usually rejected is that when the officers of election have been guilty of such frauds or irregularities as to destroy the value of the returns as evidence the returns can not be relied upon to prove the result and must be disregarded. There is no evidence that the returns at this poll did not correctly show the result, and to throw out the whole poll would be to ruthlessly disfranchise honest voters. Including the so-called "caption-marked" ballots, the committee finds, upon the basis of the agreement between the parties, that the contestant received 227 votes at this precinct and the contestee 335.

In conclusion, the majority of the committee found that after all deductions there remained to sitting Member 161 plurality. The minority found for contestant 736 plurality.

On January 20 and 21[1] the report was debated in the House with much learning and at great length. The question being taken, the proposition of the minority, declaring contestant entitled to the seat, was decided in the negative, yeas 119, nays 127. A motion to reconsider this vote was laid on the table, yeas 120, nays 104. Then the question recurred on agreeing to the resolutions of the majority of the committee confirming the title of sitting Member to the seat, and there appeared, yeas 119, nays 47, answering present 15. A quorum responding, the resolutions of the majority of the committee were agreed to.

1081. The North Carolina election case of Thompson v. Shaw, in the Fifty-fourth Congress.

Irregularities in the conduct of an election do not in themselves justify rejection of a poll.

On May 6, 1896,[2] Mr. Warren W. Miller, of West Virginia, submitted the report of the Committee on Elections No. 2 in the case of Thompson *v.* Shaw, of North Carolina. The sitting Member had on the face of the returns a majority of 994 votes.

The county canvassers in three counties had rejected the vote of certain precincts, which had given a total of 371 for contestant and 254 for sitting Member; it having been admitted by both parties to the contest that the action of the canvassers was wrong, and therefore the committee counted the rejected vote. This reduced the majority of sitting Member to 877.

Contestant claimed that the whole vote of Cross Creek precinct, where the return was 1,120 votes for sitting Member and 15 for contestant, should be rejected for frauds committed and unlawful acts done by the partisans of sitting Member. The committee, while believing that there were irregularities in the conduct of the election and that perhaps illegal votes were cast and counted for sitting Member, yet did not feel warranted, upon the facts proved, in disregarding the whole of the votes cast at the precinct.

In conclusion the committee found that, conceding to contestant the benefit of every reasonable doubt and all legitimate presumptions, he fell far short of a sufficient number to elect him legally.

Therefore the committee recommended resolutions declaring Mr. Thompson not elected and Mr. Shaw entitled to the seat. On May 6,1896,[3] the House concurred in the report of the committee.

1082. The Louisiana election case of Coleman v. Buck, in the Fifty-Fourth Congress.

Although violence, intimidation, and fraud were extensive in a district, yet, as it did not appear that the result was affected by these means, the returned Member was confirmed.

On March 12, 1896,[4] Mr. Warren W. Miller, of West Virginia, from the Committee on Elections No. 2, submitted the report of that committee on the case of Coleman *v.* Buck, of Louisiana. The sitting Member received on the face of the official returns a majority of 7,653 over the contestant.

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[1] Second session Fifty-fourth Congress. Journal pp. 98, 100, 101; Record pp. 980–1001, 1019–1042.

[2] First session Fifty-fourth Congress, House Report No. 1636; Rowell's Digest, p. 520.

[3] Journal, p. 460.

[4] First session Fifty-fourth Congress, House Report No. 758; Rowell's Digest, p. 518.

The contestant attacked the returns from various precincts and parishes, in substance as follows:

That the Democratic officials had violated the election law in the appointment of election officers, registrars, and other persons; that any legal voters, who would have voted for contestant, were prevented from registering by acts of violence committed by Democrats; that hundreds of Republican who were entitled to vote, and who would have voted for contestant, were prevented from so doing by intimidation and other unlawful means used by Democrats in the interest of the contestee; that by means of murder, arson, false registration, the issuance of thousands of fraudulent registration certificates, ballot-box stuffing, forged returns, and destruction of ballots voted by Republican for contestant, the Democrats, in the interest of contestee, inaugurated and maintained before and at the time of said election such a reign of terror and committed such acts of lawlessness, with the knowledge and consent of the authorities, that no legal or fair election could be or was held in said district.

The committee, after explaining the election law of Louisiana, thus summarize their conclusions:

The record in this case shows a willful disregard by the Democratic officers of every one of the provisions of the election law above cited in the conduct of said election, except in the said parish of Orleans.

In Jefferson Pariah the watchers appointed by the Republicans were refused admission to the polling places by the Democrats. Republicans, mostly colored men and legal voters, who would have voted for contestant, were refused the right of suffrage; tally sheets, lists of voters, and poll books were altered and forged; ballot boxes were stuffed with fraudulent ballots and many other illegal acts done in the interest of contestee and against contestant.

For the foregoing reasons the vote of said parish of Jefferson must be thrown out and wholly rejected.

For like reasons the vote returned from the First, Second, and Fifth wards, respectively, of St. Charles Parish are also wholly rejected.

It is shown by the record that in the said wards in the city of New Orleans, in the parish of Orleans, large numbers of Republican voters were refused registration; that numerous unlawful assaults were made, and acts of violence committed upon colored Republicans who attempted to register as the law required; that mob violence prevailed in said wards of said city and parish before and at the time of said election, with the knowledge and, as the committee believe, with the assent of the authorities; that much fraudulent voting was done in favor of contestee, and that many of the colored Republicans were denied the equal protection of the law on account of their race and political opinions.

The committee is further of opinion that many Republicans who were entitled to vote, and who would have voted for contestant, were intimidated, and thus kept from voting; that some of the illegal votes cast for contestee in said wards of said city could be segregated and deducted from the number of votes returned and certified for him as aforesaid; but it does not appear that a sufficient number of legal voters who would have voted for contestant were refused the right of suffrage to change the general result of such election, as certified, after such correction should be made.

Neither is it shown that fraud, unfairness, violence, or intimidation prevailed in said election to such an extent as would warrant the committee in throwing out and rejecting the total vote of said wards in said city and parish of Orleans.

Unless this be done the contestee yet has a majority after deducting from his vote, as certified, the votes cast for him in the parish of Jefferson and wards 1, 2, and 5 in the parish of St. Charles as aforesaid, and any other illegal votes cast for him or legal votes rejected in his interest in the said wards in the city and parish of Orleans.

Therefore the committee reported resolutions declaring the sitting Member entitled to his seat, and the contestant not elected. On March 12, 1896,[1] the House concurred in the report without division.

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[1] Journal, p. 301.

1083. The North Carolina election case of Cheatham v. Woodard, in the Fifty-fourth Congress.

A contestant must sustain by evidence his claim that he was elected.

On May 14, 1896,[1] the Committee on Elections No. 2 submitted the report in the case of Cheatham *v.* Woodard, from North Carolina. The official returns from the district gave to Mr. Woodard 14,721 votes, Mr. Cheatham 9,413, and Mr. H.F. Freeman 5,314. The contestant alleged various objections to the returns, and contended that the colored voters in the district were in the majority and were for him. The committee did not find this or any of the other allegations sustained, and reported resolutions confirming sitting Member in his seat. On May 14[2] the House concurred in the report of the committee.

1084. The Georgia election case of Felton v. Maddox, in the Fifty-fourth Congress.

Where contestant's case did not overcome returned Member's majority the House did not consider the returned Member's counter charges.

Failure of county officers to verify formally a registration list did not invalidate the election, no voter being deprived of any right.

Where an unauthorized but not fraudulent erasure of names occurred on a registration list the House counted votes of electors harmed by this erasure.

Failure of registrar to appear when summoned to explain charges of illegal registration does not prove the charges.

An election is not affected by the fact that the registration lists are in writing when the law requires them to be in printing.

On May 11, 1896,[3] Mr. Charles Daniels, of New York, from the Committee on Elections No. 1, submitted the unanimous report of the committee in the case of Felton *v.* Maddox, of Georgia. The contestant challenged the election in three counties, and the sitting Member in reply challenged the result in three other counties, which were favorable to the contestant.

The official return gave the sitting Member a majority of 1,562 votes. As the committee found from contestant's testimony that this majority could not be reduced by more than 350 votes, they did not find it necessary to consider the counter charges by the sitting Member, since the only effect would be to increase the sitting Member's majority—an unnecessary result.

The charges of the contestant related to several features of the election:

(1) Irregularities in the registration, whereby in some cases voters were deprived of their votes:

(*a*) In Bartow County the law required the registry list to be verified by the county commissioners. They failed as a board to verify the list, allowing that to be done by one of the members. The committee say:

> This was an irregularity, but as long as it did not deprive the voters of their right to vote it did not invalidate the election in this county.

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[1] First session Fifty-fourth Congress, House Report No. 1809; Rowell's Digest, p. 521.

[2] Journal, p. 490.

[3] First session Fifty-fourth Congress, House Report No. 1743; Rowell's Digest, p. 510.

(*b*) In Bartow County, after the October election and before the election in November, 1894—the election in question—the tax collector erased, apparently without authority, 175 names from the registered list of voters which he, under the law, had made as collector. The committee found that they were made in good faith, and that it would be sufficient to allow to contestant the votes of 9 of his supporters who had in fact paid their taxes, but whose votes were refused because their names had been erased.

(*c*) In Cobb County it was charged that the registration list contained the names of fictitious and unqualified persons, and the register, when subpoenaed to attend and give his evidence for the contestant, failed to do so. But the committee found that his absence did not prove the truth of the charge, and testimony given failed to prove that names added were of unqualified persons.

(*d*) The law directed that the registration lists sent to the election managers should be printed, but in Cobb County were written. The report says:

> This was an irregularity, but it was not proven to have influenced in any manner the vote of any person or to have permitted any person to vote who was not entitled to do so. Accordingly, under the well-settled principle of the law, as well as of a positive enactment of the State of Georgia, this omission to print the lists can not be allowed to affect the result of the election, which seems to have been the same as though the lists had been printed.

(*e*) In Floyd County three persons were irregularly registered by their firm names, but as it did not appear for whom these persons voted, no special consideration was given the matter.

1085. The election case of Felton v. Maddox continued.

Returns are not vitiated simply because election officers lack certain qualifications required by law.

Failure of election officers to subscribe their names in full to their affidavits and returns does not vitiate the returns.

Election officers who have not taken the required oath are still de facto officers and their acts are valid.

It not being shown for whom a few paupers voted, the Elections Committee did not give the charge consideration.

Ballots deposited by error in a ballot box other than the Congressional box, and in charge of other officers, should be counted as if deposited aright.

The election for Congressman, being lawfully held, is not vitiated by another election on a local matter held unlawfully at the same place.

The entire poll may not be rejected because an unascertained number of electors were corruptly influenced by tickets to a barbecue.

(2) Irregularities as to qualifications or acts of election officers in these instances:

(*a*) In Cobb County the qualifications of certain superintendents of elections were alleged not to be in accordance with the requirements of the law of the State. It was also charged that they had failed to subscribe their names in full to their affidavits and returns. The committee found, however, that these were no more than "irregularities, not in fact changing or affecting in the least degree the election or its results, and the returns can not be set aside or disregarded because of these defects. They were of no materiality, and the statute prescribing them was in no respect mandatory."

(*b*) In Livingston district the report says "the managers may not have taken the oath prescribed for them by law; but if they did not, they were still de facto officers without taking the oath, and their acts are legal," quoting Paine and McCrary on Elections in support of this doctrine.

(3) As to illegal and informal votes in the following instances:

(*a*) In Floyd County 5 or 6 inmates of the almshouse were permitted to vote; but as it did not appear for whom the votes were cast, the committee gave the question no special consideration.

(*b*) In Livingston district a local county election was held at the same time, there being two boxes differently labeled and different election managers. At the close of the election a few Congressional votes were found in the local issue box. "But says the committee, "the fact that they were mistakenly so deposited did not legally deprive the candidate of those votes. They should still have been counted as they appeared by the managers of the Congressional election. But the failure to count them seems to have deprived the contestant of no more than one vote over those in the same box for the contestee."

(4) In Livingston precinct the committee found that "the failure to deliver a package of * * * votes, as they should have been, was a breach of confidence, but there is no reliable evidence that the contestant in the end lost any votes by that circumstance."

(5) At the same time and places that the Congressional election was held in Floyd County there was also an election to authorize an issue of county bonds. For that reason the election in this county was objected to as illegal. The committee say:

> But as the election for Members of the Fifty-fourth Congress was most certainly lawfully held it could not be deprived of that character because another election for another object held at the same time and place was held without authority. Each could well be held without the one interfering in the least degree with the other. As a matter of fact the bond (county) election was authorized by the law of the State, and it was represented by a manager and box different from that of the Congressional election box. the boxes were differently labeled and voters were required to state for which election their votes were offered.

(6) In Floyd County a barbecue was held to promote the county election on the bond question, and contestant charged that tickets to the barbecue were used to induce colored voters to vote for sitting Member. The committee found no sure means of determining how many votes were thus influenced, and that the evidence would in no way justify the rejection of the entire vote of the county.

The committee, in accordance with their findings, reported resolutions declaring contestant not elected and sitting Member entitled to the seat.

On May 11[1] the resolutions were agreed to by the House without debate or division.

1086. The New York election case of Mitchell v. Walsh in the Fifty-fourth Congress.

Testimony in an election case being taken before a person who had ceased to be a notary, but none of the parties or witnesses being aware of this until nearly all the evidence was in, the House considered it.

As to the evidence required to show a conspiracy to bribe.

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[1] Journal, pp. 475, 476; Record, p. 5088.

Where a conspiracy to bribe is shown, and an indefinite number of tainted votes are cast, the entire poll is rejected.

Where a conspiracy to bribe for the benefit of one party causes rejection of the return, should the innocent opposing party be credited with his unimpeached vote?

Discussion of the value in proving bribery of testimony as to statements of voters after they have voted.

On May 15, 1896,[1] Mr. Chester I. Long, of Kansas, from the Committee on Elections No. 2, submitted the report of the majority of the committee in the case of Mitchell *v.* Walsh, from New York.

At the outset of this case a preliminary question of importance was passed upon. The law of Congress provides that a contestant may apply for a subpoena to any notary public—among others—who may reside in the Congressional district in which the contested election was held. It is also provided that all witnesses who attend the examination shall be examined under oath. William A. Hoar, the notary before whom the testimony in this case was taken, was in 1893 a resident of Kings County, N. Y., and, as a resident of that county, was appointed a notary public. The statutes of New York provide that a notary public, appointed for the county of Kings—as well as for some other counties—upon filing a certified copy of his appointment, etc., in the clerk's office of New York County, may exercise all the functions of his office in that county, as well as in the "county in which he resides and for which he was appointed." In compliance with this provision Hoar filed a certified copy of his appointment in the clerk's office of New York County.

Prior to the taking of testimony in this case Hoar removed from Kings County and took up his residence in the Congressional district in which this contested election was held, which is in the city and county of New York. The law of New York provided that an office shall become vacant when an incumbent, if he is a local officer, ceases to be an inhabitant of the political subdivision of which he is required to be a resident when chosen. The courts of New York have held that a notary public is an officer within the meaning of the statute. The sitting Member made no objection to the qualifications of the notary until the taking of testimony in rebuttal began. The majority of the committee conclude as follows:

> We are of opinion that the testimony taken before William A. Hoar ought to be considered by the committee and the House, for the reasons following:
>
> 1. Because it is too late for the contestee to be permitted to object on this ground. He knew, or, what is the same in legal effect, he was charged with knowledge of the fact as to whether Hoar was a notary authorized to administer oaths. He knew that the notary was described in the notice as residing in the Eighth Congressional district, and in his signatures to the transcript of testimony as notary of Kings County, with certificate filed in New York County. To say the least, he was put upon inquiry.
>
> The contestee is in the same position as if he and the contestant had agreed that the testimony might be taken before a person who was not, by any law, authorized to administer oaths. It is true that such an agreement might not be recognized by the House of Representatives. It might abrogate that, as it might any other agreement between parties. But it does not lie in the mouth of either party who has, either in fact or constructively, so agreed to object to the validity of testimony so taken.
>
> 2. But we are constrained to put our conclusion on still broader grounds. The House of Representatives, with its broad and, indeed, limitless powers respecting the settlement of contested election cases,

[1] First session Fifty-fourth Congress, House Report No. 1849; Rowell's Digest, p. 521.

is only desirous of arriving at the truth. While it will not depart from wise and well-settled rules of law, it will not hedge itself about with technical rules which do manifest wrong.

In this case it is apparent that the parties to the contest, their attorneys, and every witness who was summoned, supposed that Hoar was a notary public, with full power to administer oaths, and that a prosecution for perjury could as certainly be based upon a false statement before him as upon a false statement made on oath in a court of justice. We have therefore considered the evidence.

The minority did not dissent from the law and facts as stated by the majority; but declined to assent "to the proposition that, under any circumstances, unsworn statements of persons called as witnesses can be substituted for evidence taken under oath duly administered as required by laws governing contested elections. Such a course of procedure, whether agreed to by the parties or not, would reduce the taking of testimony in contested election cases to a farce." The minority further argue:

We can not assent to the proposition that, under any circumstances, unsworn statements of persons called as witnesses can be substituted for evidence taken under oath duly administered as required by laws governing contested elections. Such a course of procedure, whether agreed to by the parties or not, would reduce the taking of testimony in contested election cases to a farce unworthy of a moment's consideration in the determination of an election contest. * * *

We think the acceptance and consideration of testimony so taken without the sanction of an oath would be an exceedingly dangerous precedent in contested election cases. The temptation to perjury, exaggeration, and evasion for partisan purposes, or through more unworthy motives, is already great enough in such cases without adding the encouragement of the assurance that Congress will accept and consider testimony taken by persons not authorized to administer oaths, in the giving of which the witnesses are assured of their absolute immunity from punishment for perjury. If the contestant and his witnesses, knowing, as stated, that Mr. Hoar was a notary public for Kings County and that he had changed his residence from Kings County to New York County, were ignorant of the legal effect of those facts, it may be a hardship upon him to exclude from consideration the testimony taken on his behalf before Mr. Hoar, but it is a misfortune for which he alone is responsible, and it is a misfortune for which no relief can be given at this time without causing a public injury infinitely greater than the private injury which might thereby be avoided.

Contestant had a remedy for his mistake in taking the testimony in question before an unauthorized person to which he might have resorted after discovering Mr. Hoar's incapacity.

He might have applied to the House or to this committee for leave to retake the testimony before an authorized person, and such a request, if made in reasonable time and in apparent good faith, would certainly have been granted.

The testimony being admitted, the merits of the case were considered. The sitting Member had been returned by an official majority of 367. All the portions of the Congressional district except the second assembly district gave contestant a majority of 1,328, while the second assembly district gave sitting Member 1,695 majority. Contestant attacked five election districts in this second assembly district. These five districts gave sitting Member 729 votes on the official return, and 286 to contestant.

The majority of the committee were satisfied from the evidence that a well organized system of bribery was carried on in the five districts on behalf of the sitting Member by the Tammany organization (of which sitting Member was a vice-president), in collusion with the keepers of lodging houses. After quoting the testimony of certain witnesses, the report says:

Contestee attempted to discredit the testimony of the above witnesses by showing that they had been entertained by contestant and his attorneys, and for this reason were unworthy of belief.

They were not impeached in any instance, and we believe that, taking into consideration the surrounding circumstances, they are entitled to credence.

Fraud can rarely, if ever, be proven by direct evidence, and the rule is that whenever a sufficient number of independent circumstances which point to its existence are clearly established a prima facie case of its existence is made, and if this case is not met with explanation or contradiction it becomes conclusive.

In Paine on Elections the following rule is announced: "When evidence of bribery by an active supporter of the respondent is shown, the court will draw unfavorable conclusions from the neglect or refusal of the person so charged to explain his conduct in the witness box."

Contestee did not introduce any evidence to disprove the charges of bribery. Not a Tammany captain on whom the bribery was fastented by the testimony was put upon the stand to contradict the statements made by the witnesses, nor to assert his innocence, nor to disprove what the testimony so clearly proves—namely, the existence of a conspiracy to procure votes by bribery.

The majority of the committee then go on to say that—

It is impossible to determine the number of bribed voters or the names of the voters. These five election districts were thoroughly saturated with fraud and corruption. The case of Platt *v.* Goode furnishes the only rule that can safely be followed in this case. In that case, where it was shown that 500 voters who had been bribed voted in three precincts which polled in the aggregate 1,619 votes, the whole returns of those precincts were rejected upon the ground that when the record showed that illegal votes had been cast, and furnished no method for their elimination, the vote of the entire precinct should be rejected.

Contestant insists that only the vote of the contestee in these five districts should be rejected, for the reason that there is no evidence of bribery in the interest of contestant. This is true. It is not necessary in the decision of this case to determine which rule should be adopted, and we do not decide which is correct. The result is the same whichever is followed. If the vote of contestee only in these five districts is rejected, contestant will be elected by 362. If the entire vote in these five districts is rejected contestant will be elected by 76.

Contestee insists that he should only lose those votes where individual instances of bribery are proven. We can not accept this theory of the law when the evidence shows the existence of a conspiracy to corrupt voters by bribery. The case of Noyes *v.* Rockwell clearly establishes the doctrine that where a conspiracy to corrupt voters by bribery is shown to exist, and it is established that one voter of a class was bribed, that the votes of all persons belonging to the class who cast similar ballots should be rejected.

In this case the existence of the conspiracy is clearly shown in these five election districts, and as it is impossible to determine the number of votes affected, and also impossible to eliminate the bribed votes from the legal, we have reached the conclusion that the vote from these five districts should be eliminated from the count.

Therefore the majority submitted resolutions declaring that sitting Member was not elected, and that contestant was elected.

The minority in views submitted by Mr. James G. Maguire, of California, denied the sufficiency of the testimony to justify the conclusions of the majority. They criticized the testimony as insufficient, as corrupt, and as hearsay. In respect to the latter class of testimony they say:

Nearly all of the testimony relied upon by contestant to prove bribery and corruption * * * consists of statements made by alleged voters to the witnesses after having voted. Such testimony is as worthless in an election contest as in any other judicial proceeding, and must be disregarded. In the case of Ingersoll *v.* Naylor, in which extensive frauds were alleged to have been committed, the committee refused to consider hearsay evidence much like that introduced in this case.

The minority also quote on this point Dodge *v.* Brooks, Cessna *v.* Myers, Gooding *v.* Wilson, and Littell *v.* Robbins.

On June 2, 1896,[1] the report was debated in the House. Without division the resolution of the minority declaring sitting Member entitled to the seat was dis-

[1] Journal, p. 563; Record, pp. 6012–6021.

agreed to. The question then recurring on the resolutions of the majority, they were agreed to, yeas 162, nays 39. Thereupon Mr. John Murray Mitchell, the contestant, appeared and took the oath.

1087. The Kentucky election case of Denny, jr., v. Owens, in the Fifty-fourth Congress.

The House declined to count the votes of witnesses who failed to show that they were illegally refused registration or that they had tried to vote.

It is as important that the registration be kept free from disqualified persons as that every legal voter shall be registered.

The House confirmed a canvass made by a local board later than the date prescribed by law, the explanation of the delay being sufficient.

The House may canvass the returns and declare the result although the required State canvass may not have been made.

On May 19,1896,[1] Mr. S. S. Turner, of Virginia, from the Committee on Elections No. 1, submitted the report of the committee in the case of Denny, jr., *v.* Owens, of Kentucky. There were four candidates, two of whom received small votes. Mr. Owens's plurality over Mr. Denny was officially returned at 101 votes. The notice of contest and answer thereto alleged frauds and irregularities.

The committee found considerable irregularity, but it appeared in general to affect both parties so as not to influence the result. The following questions were particularly considered:

(1) In Fayette County contestant alleged that he was deprived of between 200 and 300 votes for the reason that voters to that number were illegally refused registration. He produced 117 witnesses who swore that they were refused registration, and that they were legal voters and should have been registered. Another witness swore that 328 persons reported to him that they had been refused registration, and that 212 of them gave their streets and the numbers of their homes. The committee say:

> There is no evidence, except in two or three instances, tending to show that any of these persons went to the polls on election day and offered to vote and were refused. In each instance when a person was refused registration it was done so on the ground that the person seeking to be registered was unknown to the registration officers or for the reason that the registration officers entertained doubts as to the right of such person to register. The person was required to produce some one who could identify him and swear that he was a legal voter of the precinct where he sought registration.

The report quotes the Kentucky statute:

> If the officers of registration entertain any doubt as to whether or not any person offering for registration is entitled to such registration, or if anyone's right to register is challenged, citizens may be called in not exceeding three in number, who shall be examined touching the qualifications of such persons who offer to register.

"In no case where a person was refused registration" say the committee, "did he offer to produce three citizens by which to establish his right to register. Neither did the registration officers refuse to hear such citizens if they were produced. It is not made evident to us but what the officers refusing registration in each case had doubts about the right of such person to register. It is impossible for us to say,

[1] First session Fifty-fourth Congress, House Report No. 1877; Rowell's Digest, p. 511.

therefore, that these persons were wrongfully refused registration. The officers of registration may have applied the rule very strictly in many cases, but this alone would not be sufficient to establish a wrongful refusal." The committee conclude:

It is just as important that the registration lists be kept free from the names of persons which are not entitled to be there as it is that every legal voter shall be registered when he makes such application. In order that registration lists be kept pure the officers of registration are required to take the precaution prescribed by these sections, and they can not be charged with wrongdoing if they do this, though it may put legal voters to inconvenience.

(2) Contestant asked the rejection of the entire returns of Franklin County for the reason that they were not canvassed on the day prescribed by law. The report explains that

Under the Kentucky statute, the judge of the county, the clerk thereof, and the sheriff constitute the canvassing board. Any two of them may constitute such board, but if either one of the three is a candidate he shall have no voice in the decision of his case. If it should happen that two of them can not act in whole or in part in such canvass, their places shall be supplied by two justices of the peace, who may reside near the county seat. It happened that in Franklin County the judge, the clerk, and the sheriff were candidates for election. They therefore were not authorized to canvass the returns. Disregarding the provisions of the statute, these officers did canvass the returns one day earlier than the law prescribed. A few days after this two justices of the peace, residing nearest the county seat, also canvassed the returns of the county, and the result of their canvass was certified to the Secretary of State. This canvass, however, was had some days later than the one designated by law.

It is admitted by both parties that the first board had no authority to canvass the returns of the county.

Contestant, while admitting that the second board was properly constituted, maintains that as its canvass was had on a day not designated by law, it was illegal and void.

We can not agree with him in this contention. We think that the proper board could be compelled to make this canvass by a mandate from any court of competent jurisdiction. If this be true, then the board may do the same thing without the mandate to a court. The mandate does not give the right to canvass the returns, but requires it to be done; because, as a matter of right, it ought to be done. Certainly it would be a good return to the alternative writ if the board were to say they had already done what the court was asking them to do.

Aside from this, we are of the opinion that we would have the right to canvass the returns in this contest and declare the result, though there had never been a canvass.

1088. The case of Denny, Jr., v. Owens, continued.

The House made no correction for a limited number of persons registered at an illegal time, there being no proof of how they voted.

It being impossible to determine for whom informal ballots (issued because the regular ones had failed) had been cast, the House did not correct the return.

There being no evidence that either party had suffered especial harm, the House did not count votes excluded by closing the polls, although negligence of election officers was alleged.

The State law prohibiting rejection of a ballot for a technical error which did not obscure voter's intent, the House counted ballots marked with a pencil instead of a stencil.

The House rejected ballots marked publicly in presence of the election officers.

(3) The committee found that in one precinct 15 persons were allowed to vote who had registered on election day or the day prior. Such registration was wholly unauthorized; but the proof did not satisfy the committee as to how the unauthorized persons voted.

(4) In some precincts the ballots gave out before all persons had voted. In some of these cases ballots from other precincts were borrowed and used. In other cases blanks on which to make return of the votes were used. The committee considered it unnecessary to determine whether such devices were legal or otherwise, for the reason that they could not tell for whom such irregular ballots were cast.

(5) In one precinct the hour for closing the election arrived before all the voters had had an opportunity to cast their ballots. Contestant claimed that this occurred on account of the negligence of the election officers and that he lost many votes by reason of it. The committee left the vote to stand, as the testimony did not indicate to them that the contestant lost more votes for this reason than did the sitting Member.

(6) Certain ballots were not counted by the canvassers for the reason that the cross mark was made with a lead pencil instead of a stencil, as the statute required. The committee say:

> We are inclined to think, but without definitely deciding it, that these ballots ought to have been counted, for in section 1471 of the Kentucky statutes we find the following provision: "No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice." We have made a computation of these ballots and find that 31 were rejected which should have been counted for Mr. Denny, and 3 that should have been counted for Mr. Owens. The committee accordingly made the correction.

(7) Two voters stamped their ballots publicly in the presence of the election officers. They voted for Mr. Owens and the ballots were deposited and counted for him The committee found that they should not have been deposited or counted, and deducted them from Mr. Owens's vote.

(8) Various other irregularities were found by the committee; but they benefited both parties, and as they neutralized one another, were not taken into account by the committee.

The result of the committee's conclusions were to reduce sitting Member's plurality to 61 votes. So sitting Member was still entitled to retain his seat, and the committee recommended resolutions to this effect.

On May 19 [1] the report of the committee was concurred in by the House without debate or division.

1089. The North Carolina election case of Martin v. Lockhart, in the Fifty-fourth Congress.

Both the registration and election being permeated with irregularities, fraud, and intimidation, the returns of the precinct affected were rejected.

A presumption arising from the previous good character of election officers is destroyed by uncontradicted and positive testimony as to their fraudulent conduct at the election.

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[1] Journal, p. 508; Record, p. 5416.

Where election officers purposely put ballots in the wrong box and then rejected them, and did other illegal acts, the House rejected the poll.

Where a voter offered his tickets in a bundle and lawfully requested that the election officers deposit them in the proper boxes, the House rejected the poll because the election officers declined so to do.

On May 26, 1896,[1] Air. Jesse B. Strode, of Nebraska, from the Committee on Elections No. 2, submitted the report of the majority of the committee in the case of Martin *v.* Lockhart, of North Carolina. The official returns showed a majority of 444 for the sitting Member. The contestant's charges were summarized by the committee as follows:

> That the contestant, Charles H. Martin, was unlawfully deprived of a large number of votes to which he was entitled; that these votes were fraudulently rejected upon the pretense of irregularities in the registration; that the voters were not in fault with regard to such irregularities, but that they were committed by the election officers; that the votes of a large number of voters who would have voted for contestant were rejected by the poll holders on frivolous challenges; that the poll holders in many voting precincts purposely placed votes cast for contestant in the wrong boxes and afterwards rejected them because they were deposited in the wrong boxes; that poll holders in many voting precincts refused to put the ballots of voters in the ballot boxes, and that many voters who could not read and who cast their votes for contestant were compelled to deposit their own ballots and by mistake deposited them in the wrong boxes, and that they were rejected by the poll holders, when counting the vote, because they were found in the wrong boxes; that ballots for contestant were rejected because they were not printed, the regularly printed tickets of contestant having been stolen; that boxes were not used in some of the precincts as repositories for the ballots, as the law required; that the ballot boxes in some of the precincts were not labeled with roman letters, as the law required; that poll holders in some of the precincts purposely changed the positions of ballot boxes so as to disarrange them in their order, in order to entrap unlettered Republicans and Populists who desired to vote for contestant into putting their tickets in the wrong boxes; that at one voting place the election officers refused to count the ballots or make any returns of the election, where the contestant claims to have received a large majority of the votes cast; that many who were unlawful electors cast their ballots and they were counted for contestee.

The sitting Member also alleged irregularities and illegalities by which the official returns of contestant's vote had been increased. Among these was the alleged erroneous rejection of votes cast for sitting Member in the county of Columbus.

The committee examined the poll in the light of the evidences rejecting the vote of certain precincts, and in others purging the poll.

(1) Rejected precincts.

(*a*) Stewartsville precinct returned 295 votes for sitting Member and 14 for contestant. All the election officers but one were of sitting Member's party, and that one was not of those recommended by the opposition. The Constitution of the State provided that there should be a registration of voters, and that "no person shall be allowed to vote without registration." And the law required the registration to specify certain things in order to be valid. It was admitted by one of the election officers in this precinct, a partisan of sitting Member, that during the registration he allowed ignorant voters to give defective particulars, not such as the law required, and wrote those particulars as given, when he knew that by registering them in such a way he was giving an excuse for the rejection of their votes when challenged. Thus, an ignorant voter, when asked his residence, would give the name of the plantation where he was employed instead of the township.

[1] First session Fifty-fourth Congress, House Report No. 2002; Rowell's Digest, p. 524.

The registrar knowingly recorded this defective description. In this precinct 307 white men and 414 colored men were registered, and of these, the votes of 1 white man and 167 colored men were rejected, some on grounds absolutely frivolous. According to the law and usage in North Carolina there was a ballot box for each class of officers, and the law provided that "each box shall be labeled in plain and distinct roman letters, with the name of the office or offices to be voted for," etc. The evidence showed that the markings on the boxes were changed from the plain letters required by law to indistinct letters. The only election officer opposed to sitting Member's party was put in charge of the box in which votes for constable were received. The room where the boxes were placed was partitioned off into what was called a "bull pen," and marshals, partisans of sitting Member, kept strict guard and discouraged by intimidation those citizens who were disposed to protest at the conduct of the election. There was evidence of other intimidation, and also that bribery was carried on by partisans of sitting Member in presence of the election officers. The majority of the committee conclude:

> It is impossible to ascertain what would have been the true vote of this precinct had a fair and honest election been held. Contestee's counsel, in their brief, call attention to the fact that the contestant's witnesses testified to the good character of the registrar and judges of election. But the past good character of these election officers is not sufficient to overcome, wipe out, and destroy the positive and uncontradicted testimony of numerous witnesses, which shows that this election was barnacled with fraud and corruption. The ballots were destroyed as soon as they were counted, so that no examination of them could have been made after the returns were made up. It is impossible to ascertain with certainty the true vote of this precinct. The conduct of the election officers was such as to destroy the integrity of their returns. The entire vote of this precinct should be thrown out. This deducts 295 from contestee and 14 from contestant.

The minority views, presented by Mr. Joseph W. Bailey, of Texas, held that the rejection of this vote was an injustice to more than 300 voters whose votes were properly cast and counted; that there was no evidence of fraud and intimidation, and that the errors in registration were not chargeable to the registrar."The supreme court of North Carolina, say the minority, "has declared, in construing the law, that if the registrar read over these headings [indicating questions to be asked] in the form of an interrogatory to the candidate for registration this was a sufficient compliance with the law, and if the voter did not give the proper answers the fault was his, and if proper answer was not given the person should not be allowed to vote." The minority were convinced that the registrar went only so far as the court allowed him to go. The minority also note that contestant did not introduce the rejected voters to prove that they endeavored to register properly, or to contradict the registrar, or to explain their conduct, or show that they were entitled to vote.

(*b*) Alfordsville precinct, where the returns gave sitting Member 98 votes and contestant 44, was entirely rejected, because it was impossible to ascertain with certainty the true vote, for the following reasons: The election board was not satisfactory, one of the two representatives of contestant's party being a person of doubtful politics who had been once in the penitentiary and pardoned therefrom; the undoubted representative of contestant's party was placed at the box wherein were placed votes for constable, an office for which there was but one candidate; poll holders of sitting Member's party placed the tickets of a large number of con-

testant's party in wrong boxes and then for that reason refused to count them; contestant's party kept a list of those who claimed to have voted the ticket of that party, and there were 169 names on the list; about 190 ballots were thrown out because in the wrong boxes, and no ticket of sitting Member's party was among them; the name of contestant appeared on all the tickets thrown out because deposited in wrong ballot boxes; the poll book showed that 239 voted, while the return accounted for only 142 of these. The majority of the committee concluded that the conduct of the election officers was such as to destroy the integrity of their returns.

(*c*) Maxton precinct, which returned 160 votes for sitting Member and 15 for contestant, was thrown out entirely. The election officers were all of contestant's party, although the law of the State evidently contemplated a representation of both parties; and no representative of contestant's party was allowed to assist in the voting or the count. The voting was done in a closely guarded room, with darkened windows. Unsworn partisans of sitting Member assisted in the count. The voters of contestant's party tendered their ballots to the poll holders and requested that each ticket be deposited in the proper box. This request being refused, because the voters would not select them and present them one at a time, the ballots were laid on the table and afterwards brushed to the floor. The law of the State provided that the voter "shall hand in his ballot to the judges, who shall carefully deposit the ballots in the ballot boxes," and again that the ballot "shall be put into the proper box or boxes by said voter or by the judges at the request of the voter." The majority of the committee held that the voters were not compelled to select and deliver their ballots to the poll holders separately. The minority considered that the partisans of contestant were unreasonable, and that the offering of the ballots in bundles was not a proper tender of them. The partisans of contestant at this polling place kept a list of those who took the tickets of their party and went into the polling place to cast them. Most of these persons afterwards returned and declared that they had voted the tickets. The persons who issued the tickets and kept the lists were sworn as witnesses, and their lists were produced, identified, and incorporated in the evidence. More than 200 names appeared on the list. About 25 of them appear to have been challenged; but there is nothing to show how many challenges were sustained.

The majority of the committee concluded that the return from this precinct was so tainted with fraud and the misconduct of the election officers that the truth could not be deduced from it.

1090. The case of Martin v. Lockhart, continued.

The House counted lawful ballots rejected by election officers on frivolous and technical challenges.

The House counted lawful votes rejected by election officers because deposited in wrong boxes through confusion created by election officers.

As to the use of tin buckets instead of the "ballot boxes" prescribed by law.

The House counted votes rejected by election officers because the initials instead of the full name of the candidate were written thereon, there being no doubt of the voter's intent.

Where the tally list was kept by an unsworn person not an election officer and the poll list and testimony as to the tally list showed discrepancies, the return was rejected.

(2) Precincts in which the returns were corrected.

(*a*) In Rockingham precinct contestant was credited with 70 votes wrongfully rejected because of frivolous challenges, or challenges based on technicalities arising from imperfect registration similar to that described in Stewartsville precinct.

(*b*) In Lumberton precinct the contestant is credited with the addition of 111 votes rejected by the election officers because deposited in the wrong box. In this precinct there were six ballot boxes, and the poll holders were two representing sitting Member's party and two representing contestant's party. But the two latter (both colored) were made to keep the constable's box, where only, one candidate was voted for, while their associates managed the other boxes. One of the colored poll holders refused to serve, and his place was filled by a partisan of sitting Member. The poll holders refused to receive the tickets of contestant's supporters and deposit them in the proper boxes, unless the electors first selected the tickets and designated the box into which each was to be put. But the votes of partisans of sitting Member were taken and placed in the proper boxes readily. No votes for sitting Member were rejected because placed in the wrong box. The majority of the committee considered that the fraudulent action of these election officers might justify the rejection of this entire precinct; but that those who honestly cast their ballots might not be disfranchised, recommended that the 111 votes definitely proven to have been cast for the contestant and rejected be counted.

(*c*) In Lilesville precinct the majority of the committee increases contestant's vote by adding 40 votes alleged to have been rejected because not deposited in the right boxes. In this precinct contestant's party was denied representation on the board of election officers. Tin buckets were used instead of the "ballot boxes" specified in the law, but it also appeared that buckets had been used for boxes for many years in this precinct. They were not, however, labelled plainly as directed by the law. The minority denied that the testimony warranted the conclusion reached by the majority.

(*d*) In Ansonville precinct the majority of the committee add 53 votes to the return of the contestant. The printed ballots for contestant having disappeared, written ballots were used, and were written "C. H. Martin, for Congress," instead of "Charles H. Martin, for Congress." These were rejected to the number of 53, although there was no other man named Martin running for Congress. The law of the State provided that ballots "shall be on white paper, and may be printed or written." The majority had no doubt that these votes were intended to be cast for contestant and the minority conceded that they should be counted for him.

(*e*) At Red Springs precinct the returns gave sitting Member 143 votes and contestant 110. The majority of the committee considered that these returns were impeached by the fact that the poll books showed that 275 persons voted, while the total for contestant and contestee was but 269; that two uncontradicted witnesses who counted and made a memorandum of the Congressional tally sheet found it gave contestant 126 votes instead of 110; and that 143 voters were shown to have called for the full ticket of contestant's party and to have entered the polling

place. A regular election officer was poll holder at the Congressional box, and he read the tickets as they were taken out of the box, while the tally sheet was kept by one not an election officer and not sworn. Therefore the majority of the committee found that the return could not be said to have been made by an officer of election, and that it was impeached. So they added 16 votes to contestant's returns.

(*f*) At Blue Springs, Lanesboro, and Wadesboro precincts there were irregularities, but the proof was not of such a nature as to enable the committee to make any substantial change in the official returns.

(3) At Thompson's Township, in Robeson County, the election officers, after receiving votes all day, abandoned the count and the ballots and refused to make any returns. The testimony indicated that the partisans of contestant had carried the election, and although riotous conduct by partisans of contestant was alleged, the majority of the committee concluded that the count had been abandoned without sufficient reason. "But," concludes the committee, "as there is no way of ascertaining the exact number of votes cast in this precinct for the parties to this contest, and because it is not necessary to do so to determine this contest, we do not make any finding as to the number of votes cast for either of the parties at this township."

As to the allegations of sitting Member in regard to the return of Columbus County, the majority of the committee make no mention in their return. The minority consider that 54 legal votes should be added to sitting Member's return in this county.

In conclusion the majority found that as a result of the corrections there was a majority of 330 for contestant, and accordingly reported the resolutions to perfect his title to the seat.

The report was debated June 4 and 5,[1] and on the latter day the minority substitute declaring sitting Member elected was disagreed to, yeas 57, nays 156. After a motion to recommit had been disagreed to the resolutions of the majority were agreed to, ayes 113, noes 5.

Mr. Martin then appeared and took the oath.

1091. The Alabama election case of Aldrich v. Underwood, in the Fifty-fourth Congress.

A report sustained by a vote of a majority of the committee is not impeached by the fact that a less number sign it.

A contestant was found to be an actual inhabitant of the State and district, although for sufficient reason his family resided in another State.

Where the law required the voter's mark to be placed before the candidate's name, the House sustained a rejection of ballots whereon it was placed after.

A voter having written his own name under the name of the candidate on the Australian ballot, the House counted the ballot in the absence of a State law making it illegal.

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[1] Journal, pp. 575, 579, 580; Record, pp. 6112, 6166–6168.

On May 26, 1896,[1] Mr. Charles Daniels, of New York, from the Committee on Elections No. 1, submitted a report in the case of Aldrich *v.* Underwood, of Alabama.

The minority, in their views, called attention to the fact that the report was signed by only four members of the committee, and that this number was not a majority of the committee, which consisted of nine members. In debate it was explained that four members voted for the report in committee, and three against, while two did not vote. One of these two, Mr. Romulus Z. Linney, of North Carolina, spoke for the report in debate.

The majority, in their report, find this preliminary fact:

> That the contestant at the time of the election on the 6th day of November, 1894, was an actual inhabitant of the Ninth Congressional district of the State of Alabama, although his family, on account of the inability of his wife to reside in Alabama, resided in the State of Ohio.

The official returns gave the sitting Member 1,166 votes. Frauds and intimidation were alleged, and as a result of the examination of the vote of 23 precincts, the majority so purged the poll as to leave a majority of 220 votes for the contestant. The minority of the committee, dissenting from the conclusions of the majority, found for returned Member a majority of 1,038 votes, Mr. Charles L. Bartlett, of Georgia, presenting the views.

Before proceeding to an examination of the ground on which the sitting Member's vote was reduced, notice may be made of two precincts in Blount County where votes for the contestant were wrongfully rejected by the official canvassers. In Remlap, beat precinct the returns were not canvassed, because the inspectors of election failed to sign their certificate of the vote. Therefore the committee, credit sitting Member with his majority of 15 in this precinct. In Blountsville precinct certain votes improperly marked had been rejected by the canvassers. As to 5 of these, where the voter placed his mark after the name of the candidate the rejection was upheld, since the law required the mark to be placed before the name. Other rejected ballots were counted, one affording a case where the voter had written his own name under the name of the candidate, which was properly marked. "This, under the Alabama election law," says the report, "did not affect the legality of the ballot."

1092. The case of Aldrich v. Underwood, continued.

Where returns showed a large vote for contestee and a merely nominal vote for contestant, the House deducted from contestee where persons recorded on the poll list testified that they did not vote.

Where many votes were returned for contestee and one or two for contestant, and the total was larger than the number of persons shown to have entered the polling place, the excess was deducted from contestee.

Where election officers were all of contestee's party and certain electors voted twice, the excess was deducted from contestee.

In a rural precinct from which one vote was returned for contestant, and wherein names not known to old residents were found on the poll list, deduction was made from contestee's poll.

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[1] First session Fifty-fourth Congress, House Report No. 2006; Rowell's Digest, p. 509.

The poll being virtually under control of contestee's friends, who acted fraudulently, the committee rejected contestee's vote, but apparently not contestant's.

In 21 precincts the report makes a reduction or completely throws out the vote of the sitting Member, or increases the vote of the contestant.

(1) As to precincts where the vote of sitting Member was reduced. In twelve precincts the vote of the sitting Member was reduced for the following causes:

(*a*) The poll lists of several precincts, Cunningham, Walthole, Gallion, Pope's, etc., showed the names of men as voting who testified that they did not vote at. all. In these precincts, as a general rule, the returns showed a large vote for sitting Member and no votes, or a merely nominal number, 1, 3, 5, etc., for contestant. The majority report reduces the poll of sitting Member by the number of citizens proven to have been recorded as voting when they did not vote.

(*b*) In certain precincts, as Greensboro, Gallion, Newbern, Evans, Cedarville, etc., where the returns showed large votes for sitting Member and few or none for contestant, witnesses testified that they had watched the polls and counted the number of persons who entered the polling places during the day. The majority of the committee deducted from the poll of sitting Member all votes in excess of the number who entered the polling places.

(*c*) In Havana precinct, where all the election inspectors belonged to the party of the sitting Member, two persons were found recorded on the poll list as having voted twice each. The majority of the committee deducted 2 votes from poll of sitting Member on the ground that it was not probable that the election officers would have allowed double voting to the opposition.

(*d*) For the same reason, at Hollow Square precinct, where the election board was similarly partisan, the votes of 2 strangers were recorded on the poll. These 2 votes were deducted from the poll of sitting Member.

(*e*) On the poll list of Whitsitt precinct, where sitting Member received 70 votes and contestant 1 according to the return, and where 7 persons on the poll list swore that they did not vote, there were found on the poll list 38 persons unknown to old residents who were acquainted with the people of the precinct. One of the witnesses also went through the precinct four times and could not find any of the 38 persons. The majority of the committee considered that these facts justified a reduction of 45 votes from sitting Member's poll.

1093. The case of Aldrich v. Underwood, continued.

Testimony that a certain man belonged to a certain club and a certain party was held insufficient proof aliunde of his vote.

The poll list containing the names of dead and absent persons, and the returns not showing votes presumed to have been cast, the returns were rejected.

The House added to contestant's return rejected lawful votes, on the testimony of persons who saw the votes rejected and knew the political preferences of the electors.

Where electors were intimidated by local officers, the House counted votes thus prevented, on testimony establishing a "strong probability" as to the number.

(2) As to precincts where the vote of sitting Member was entirely rejected.

(*a*) In Marion precinct, where the returned vote was 257 for sitting Member and 45 for contestant the committee found that the election officers had violated the law of Alabama by arranging the booths in one room and the ballot box in another. The voter, after marking his ballot, delivered it to an election officer who was supposed to place it in the ballot box. But the voter could not see him do this, and there was testimony impeaching the integrity of this officer, who did not deny the impeachment. Contestant was allowed one inspector, an ignorant man who was not the choice of contestant's friends. While admitting that in all cases the presumption is against crime and misconduct, yet the majority considered the infraction of law by the election officers such that—

> Both the secrecy and integrity of the ballots were so far impaired that no one can certainly say that the ballots of the voters, unless it may be the 45 just mentioned (for contestant) ever went into the ballot box. The election and the returns in this precinct are beyond that deprived of every source of confidence, and the 257 votes returned for contestee must be deducted.

The sitting Member had endeavored to prove a portion of the returned vote, but the majority of the committee did not consider the testimony adequate, as it consisted of testimony that certain men belonged to a certain club and a certain party.

(*b*) In Uniontown precinct, where the returned vote was 177 for sitting Member and none for contestant, the majority of the committee found the poll list false in several particulars. Persons dead, absent and not known to reside in the precinct were recorded as voting. Twelve colored persons, supposed to be friendly to contestant, entered the voting place; but no votes were returned for contestant. The majority of the committee concluded that no reliance could be placed on the poll list, and rejected the entire vote.

(3) Votes added to the poll of the contestant.

(*a*) At Elyton precinct, where the returned vote was 190 for sitting Member to 68 for contestant, the evidence convinced the majority of the committee that votes of colored men who intended to vote for contestant were refused unless voters were identified by white men or "boss" men, the law requiring no such identification. Testimony of each individual whose vote was so refused was not resorted to; but sundry persons who saw men refused testified as to the number of such men and that they were supporters of contestant. The majority for the committee considered that there was no justification for excluding the whole vote; but added nineteen votes to the poll of the contestant.

(*b*) In two precincts of Birmingham the majority of the committee found that deputy sheriffs intimidated colored voters by arrests not justifiable. In one of these precincts there was not sufficient testimony to show how many of contestant's voters were intimidated, but in the other the majority of the committee considered that the testimony established a "strong probability" (words emphasized by the minority) that 69 voters were prevented from casting votes for contestant, and so added that number to his vote.

1094. The case of Aldrich v. Underwood, continued.

Official ballots being destroyed in furtherance of a conspiracy of election officers, the House corrected the return on testimony of witnesses who estimated the amount of resulting injury.

Instance wherein the House took into account the votes of electors not actually at the polls.

Official returns may be impeached successfully by testimony of voters as to how they cast their ballots.

Where polls are not opened, even on frivolous excuses, it is difficult to correct the wrong.

(*c*) In Bessemer the night before election all but 127 of the ballots were stolen and burned. The election officers were of sitting Member's party, except one, who was not the choice of friends of contestant. It was also in evidence that the friends of sitting Member were notified to be on hand early to vote and that when the ballots had given out a deputy sheriff advised voters to go home. From 8.30 a. m. to 2.20 p. m. there were no ballots. There were also causeless challenges of voters. The majority of the committee were convinced that there was a conspiracy on the part of friends of sitting Member to deprive friends of contestant of their votes. The evidence satisfied the majority that 365 votes were in this manner kept from the contestant and added that number to his poll. The testimony on this point was not of those actually prevented from voting, but of various persons who saw and heard the persons turned away.

(*d*) At Five-mile precinct, for some unexplained reason, the ballots gave out at 1 p. m. The election officers were all of sitting Member's party, and when the tickets gave out one of them announced that there would be no more voting. The testimony convinced the majority of the committee that 32 supporters of contestant were thus deprived of their votes and added that number to contestant's poll. It does not appear that all the 32 were actually at the polls. A portion appear to have refrained from coming after starting, hearing that the ballots had given out. Eight persons testified that they would have voted for contestant.

(*e*) At Carthage the official return gave contestant 32 votes, but 76 witnesses testified that they voted for him. Therefore the majority of the committee added 44 votes to contestant's poll. There was some evidence that some of contestant's friends might have been misled into marking their ballots wrong, but the committee did not consider that this should reduce the allowance to contestant. Also at Dover precinct the evidence proved that 4 votes were cast for contestant where only 2 were allowed him. Therefore 2 were added to contestant's poll.

Furthermore, at Hillman precinct the polls were not opened and no election was held. The precinct, which had a small vote, usually gave a majority for contestant's party. Although the only excuse for not opening the polls was that the day was cold and there were no facilities for a fire, the committee concluded that no addition to the poll of contestant could be made, as they had no means of knowing what his majority might have been.

The minority views declined to give credence to the testimony adduced in the several precincts.

The report was debated at length on June 9[1] (legislative day of June 6), and the resolution declaring sitting Member not elected was agreed to, yeas 119, nays 98. The resolution declaring contestant elected was then agreed to, yeas 116, nays 107; and then the contestant, Mr. Trueman H. Aldrich, was sworn in.

[1] Journal, pp. 594–596; Record, pp. 6329–6354.

1095. The Kentucky election case of Hopkins v. Kendall in the Fifty-fourth Congress.

Instance wherein the House extended the time of taking testimony in an election case.

Form of resolution for extending the time of taking testimony in an election case.

A county official having, with intent to deceive voters, changed the party emblems on the official ballot, the House overruled its committee and rejected the entire returns.

In estimating harm done by fraud of officers, judicial cognizance was taken of the general prevalence of certain political sentiments.

The House, in judging the harm done by a fraudulent ballot, took account of the opinions of witnesses.

Discussion as to the mandatory or directory nature of a law providing that a ballot prepared in a certain way, and no other, shall be used.

The House purged the poll rather than to declare a vacancy when a fraudulent ballot was used in a decisive county.

On June 6, 1896[1] (calendar day of June 10), Mr. William H. Moody, of Massachusetts, from the Committee on Elections No. 1, reported the following resolution relating to the Kentucky election case of Hopkins *v.* Kendall:

Resolved, That the parties in the contested election case of N. T. Hopkins v. J. M. Kendall be permitted to take additional testimony touching the election in Clark County up to the 1st day of August, 1896, according to the rules for taking testimony in contested election cases prescribed in the Statutes of the United States, said testimony to be confined to the issues made by the notices of contest and the answer thereto.

On June 11[2] the time was extended from August 1 to November 1, 1896, by resolution agreed to by the House.

On February 5, 1897,[3] Mr. Charles Daniels, of New York, submitted the report of the committee, and at the same time Mr. L. W. Royse, of Indiana, on behalf of himself and Mr. Romulus Z. Linney, of North Carolina, submitted minority views.

The statement of facts shows that the result of the election depended on the disposition of illegal and fraudulent ballots used in Clark County, which returned for the sitting Member a plurality of 253 votes. In the other counties of the district, except Clark, the contestant had a plurality of the votes.

The difference between the majority and minority of the committee arose as to the effect which should be given to the fraudulent ballots; whether the vote of the whole county should be rejected, or whether the contestant should simply be credited with the number of votes actually shown to have been lost to him by the fraud. The majority of the committee found that 79 votes were lost to the contestant; and as this number was not sufficient to overcome the returned plurality of the sitting Member the majority concluded that the sitting Member was entitled to his seat. The minority contended for the rejection of the entire vote of the county.

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[1] First session Fifty-fourth Congress, Journal, p. 600; Record, p. 6395.

[2] Journal, p. 611; Record, pp. 6447, 6448.

[3] Second session Fifty-fourth Congress, Howe Report No. 2809; Rowell's Digest, p. 512.

The ballot for Clark County, as required by the law of Kentucky, was prepared by the county clerk in the Australian form. By law the clerk was required to place over each party column the party emblem prescribed by the party convention. In Kentucky the Democratic convention had selected as its emblem the rooster; the Republican convention an eagle, described as "the eagle about to fly." The clerk of the county placed over the Democratic column the emblem required by law, but willfully and knowingly placed over the Republican column the picture of a raccoon. The eagle symbol was placed over an independent ticket for local county officers, nominated by petition. The name of the contestant did not appear on this ticket at all. The minority call attention to the additional fact that this independent ticket was not legally entitled to a place on the ballot at all, since it was a requirement of law that no petitioner should be counted to make up the required number of 100 unless his residence and post-office address should be designated. Only 94 of the 104 petitioners for the independent ticket were designated by residence or address.

Both majority and minority of the committee agreed that the action of the county clerk in making up the ballot was illegal and fraudulent, done with the motive of deceiving supporters of the contestant.

A difference of opinion arose as to the method of measuring the extent of the wrong resulting from the fraud.

The majority of the committee found that there was no provision of Kentucky law providing for the rejection of ballots because of the displacement of party emblems; and that this displacement was the extent of the wrong done. To rectify the act required no more than to transpose the 79 votes under the device of the eagle to the ticket headed by the raccoon. The majority found that this would correct the fraud of the clerk, and that there was "no justification in going further, and by way of penalty on all the legal voters who voted the first ticket [the rooster ticket] to deprive them of their votes. To do that would be no less than to impose a punishment on innocent persons for no wrong of theirs, but for the misconduct of the county official." In the course of the debate [1] Mr. Daniels cited in support of this view the case of People *v.* Wood, 148 N. Y. The majority were satisfied that beyond the 79 votes no votes were lost to the contestant, this view being especially fortified by the fact that, compared with other years, the vote for contestant, was the normal Republican strength.

The minority of the committee dissented thus:

> We do not think that the injuries which flow from a wrong of this kind are capable of anything like an accurate measurement. Such injuries are not capable of being weighed, and if they were we would not feel justified in using apothecary's scales for such purpose. From such a bold and unscrupulous transaction the presumption must flow that a grievous wrong has been done, resulting in serious injury to contestant.
>
> Contestant is the innocent victim of this fraud of the clerk of Clark County. We do not believe it right to throw upon him the burden of making an accurate measurement of the extent of his injuries. Even if we should require him to furnish any evidence upon this subject it should only be slight, and then shift the burden of proof upon him who has received the benefit of this fraud.

[1] Record, P. 1958.

The minority found that the corrected returns for Clark County gave sitting Member only 203 plurality, not a large amount to overcome. While not pretending to prove absolutely the loss of this number of votes to the contestant as a result of the fraud, they found facts indicating such an effect

1. An uncontradicted witness declared that contestant lost between 300 and 400 votes by the fraud, because Republicans left the polls without voting when they found the ticket fraudulent. One party leader testified that he so advised 75 or 100 voters. In a precinct where there was a registration, only 64 out of 104 of contestant's party voted.

2. In every county of the district except Clark the vote of contestant's party increased in comparison with previous years; and had the ratio of increase prevailed also in Clark contestant would indisputably have been elected. Furthermore, the minority thought it proper to take judicial cognizance of the fact that all over the nation, except in Clark County, Ky., contestant's party was the recipient of an increased vote.

The minority furthermore insisted that the clerk of the county had violated a mandatory provision of the Kentucky ballot law, and therefore that the vote of the county should be rejected. The Kentucky constitution provided that "all elections by the people shall be by secret official ballot, furnished by public authorities to the voters at the polls, and then and there deposited," and directed the legislature to enact the necessary laws. Accordingly the legislature enacted that "the voting shall be by secret official ballots, printed and distributed as hereinafter provided, and no other ballots shall be used." The law then went on to provide how the ballots should be prepared, and the county clerk had no authority outside that law. And as he had willfully and corruptly disregarded that law the ticket he produced was not legal and not the official ticket. It was not the ticket prescribed by the constitution. Laws might be held merely directory, but constitutional provisions were mandatory. But the minority held also that the statute was mandatory, quoting Paine on Elections.

> Statutory provisions prescribing acts which are in their nature absolutely essential to the validity of an election may be mandatory in whatever language expressed. The language of the law was that "no other ballots shall be used."

The counting of a ballot was as much its use as the casting of it. The old law of Kentucky did not provide for voting by ballot. The new statute was a remedial one, and it was well settled that such laws should be construed broadly. The statute, also, in express language, provided that "this chapter shall be liberally construed, so as to prevent any evasion of its prohibitions and penalties by shift or device." The minority consider that this removes all doubt as to what the construction of the law should be, and that the ballot voted in Clark County was void and should be thrown out. The minority quoted several authorities, including Field *v.* Osborn, 21 Atl. Rept. (Conn.), 1070.

Therefore the minority reported resolutions declaring Mr. Hopkins, the contestant, elected and entitled to the seat.

The report was debated on February 17 and 18, 1897,[1] and on the latter date the resolutions of the minority were substituted for those of the majority by a vote

[1] Journal, pp. 187, 191; Record, pp. 1956, 1969–1982.

of 197 yeas to 91 nays. Then the resolution of the majority as amended was agreed to without division; and Mr. Hopkins, the contestant, appeared at the bar and was sworn in.

1096. The Georgia election case of Watson v. Black, in the Fiftyfourth Congress.

No law preventing the use of more than one ballot box at a precinct, the use of several did not justify rejection of the poll in the absence of proof of harm therefrom.

On December 8, 1896,[1] the Clerk transmitted by letter to the House the evidence in the contested election case of Watson *v.* Black, from Georgia. The communication was referred to the Committee on Elections No. 1, and on February 11, 1897,[2] Mr. Charles L. Bartlett, of Georgia, submitted the report of the committee.

In the election in question the sitting Member received on the face of the returns a majority of 1,556 votes. Contestant alleged fraud in both registration and voting in various portions of the district, but his attorney admitted that he could not overcome sitting Member's majority unless the entire vote of the city of Augusta and Richmond County should be thrown out. Therefore the committee did not consider at length the objections to other portions of the district. It did appear, however, that both parties were represented on the registration boards, and that there was not evidence to show the illegality charged.

As to Richmond County and the city of Augusta, on which the result hinged, the committee failed to find evidence sufficient to justify the throwing out of the whole vote. On the boards of election and registration officers both parties were represented, and there was no satisfactory evidence to sustain the contestant's charges of bribery, fraudulent counting, and illegal registration and voting.

The claim of the contestant that the votes of four wards of Augusta should be rejected because two ballot boxes were used at each voting place, and of a fifth ward because three ballot boxes were used at a voting place, was examined at greater length, and was settled on the basis of the report on a contest between the same individuals in the preceding congress.[3] The committee found no evidence to show that fraud resulted from the use of the additional boxes, and that such use was not prohibited by law. Therefore they found that the vote of those wards should not be rejected.

On March 2, 1897,[4] the report favorable to the sitting Member was agreed to by the House without division.

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[1] Second session Fifty-fourth Congress, Journal, p. 15; Record, p. 35.

[2] House Report, No. 2892; Rowell's Digest, p. 513.

[3] See sections 1054, 1055 of this volume.

[4] Journal, p. 234.

Chapter XXXIX.

GENERAL ELECTION CASES, 1898 TO 1901.

1097. The Alabama election case of Aldrich v. Plowman, in the Fifty-fifth Congress.

There being a general fraudulent conspiracy of election officers extending over a whole county, the entire county return was rejected, including precincts not specifically attacked by evidence.

In proving the vote aliunde, the Elections Committee rejected hearsay testimony and conjecture, and required the evidence of the voter or the marker.

The returns giving contestant much fewer votes than were proven to have been cast for him, the return of the precinct was rejected.

Where election officers procured incorrect markings for illiterate voters, so that the ballots were rejected, the House corrected but did not reject the vote.

Where certain electors testified that they were bribed to vote for contestee, the House subtracted their votes from his poll, but did not reject the entire poll.

On January 27, 1898,[3] Mr. R. W. Tayler, of Ohio, from the Committee on Elections No. 1, submitted the report of a majority of the committee[4] in the Alabama case of

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[1] Other cases in the Fifty-fifth Congress are classified in different chapters:
Davis *v.* Gilbert, Kentucky. (Vol. I, sec. 313.)
Brigham H. Roberts, Utah. (Vol. I, secs. 474–480.)
Wilcox, Hawaii. (Vol. I, sec. 526.)

[2] Other cases in the Fifty-sixth Congress are classified elsewhere:
Hudson *v.* McAleer, Pennsylvania. (Vol. I, sec. 722.)
Cromer *v.* Clayton, Alabama. (Vol. I, sec. 745.)
Clark *v.* Stallings, Alabama. (Vol. I, sec. 747.)
Hunter *v.* Rhea, Kentucky. (Vol. I, sec. 746.)
Willis *v.* Handy, Delaware. (Vol. 1, sec. 748.)

[3] Second session Fifty-fifth Congress, House Report No. 284; Rowell's Digest, p. 554; Journal, pp. 181, 186, 187; Record, pp. 1546, 1589–1603.

[4] Minority views were presented by Mr. Charles L. Bartlett, of Georgia.

Aldrich *v.* Plowman. The official returns gave sitting Member a plurality of 2,967. The case divides itself into two branches, one relating to an alleged general conspiracy to defraud contestant in the county of Dallas, and the other to individual cases of fraud in the county of Talladega. In Dallas County the population by the census of 1890 was 2,146 white people, and 8,531 colored. In Talladega there was a preponderance of whites. The contestant was originally the nominee of a bolting Republican convention and of the Populists; but before the close of the campaign he was recognized as the regular and only Republican nominee. It was claimed on behalf of the sitting Member that contestant had much opposition in his own party; but this argument did not bear on the legal questions involved.

The majority of the committee begin the discussion with a description of the Australian ballot used in the election, wherein the names of the candidates for each office were arranged alphabetically. The report says:

On this ballot there are five different electoral tickets arranged, not according to parties, but alphabetically.

In view of the provision of section 43, which makes it a misdemeanor for one to have in his possession a copy of the ballot, it becomes a curious subject of inquiry how anyone can vote without the aid of a marker.

(*a*) The majority of the committee proposed to reject as untrustworthy the entire returns of the county of Dallas on the ground that they were fatally tainted by a fraudulent conspiracy. The report thus outlines the alleged conspiracy:

The machinery was simple and effective. Fortunately, it has been discovered and the details of its operation laid bare.

The law of Alabama, as already indicated, provided for the appointment, by certain county officers, of three inspectors of election for each voting precinct in the county, and two of these inspectors must be members of opposing political parties, if practicable.

In Dallas County the appointing officers were all Democrats. Notwithstanding the statutory requirement, they did not appoint a single Republican or Populist inspector of election. Lists were submitted to them of suitable men in each precinct; one by the so-called regular Republican nominee for Congress, and one joined in by the chairman of the People's Party of Dallas County, the chairman of the Republican party of Dallas County, the chairman of the Aldrich campaign committee, the member of the Republican executive committee for the Fourth district, and Mr. Aldrich himself.

Except in two or three instances where by mistake a Democrat's name was given in a list of three or four, not a single person was appointed inspector out of about two hundred names thus proposed by the opposition to Democracy. At the opening of the polls the friends of contestant at the several polling places submitted, in accordance with the law, names of suitable persons for markers and clerks. In a few instances a marker was appointed and in one precinct a clerk.

Some pretense was made, here and there, of appointing opposition inspectors, clerks, and markers by naming persons recommended by one Crocheron, a venal negro, who admitted his depravity, and worked for Plowman, or by appointing so-called representatives of the Gold Democratic candidate. But as only 111 votes were polled for other candidates than Plowman and Aldrich the pretense is apparent.

The fact is, and is constantly in evidence, that the machinery of election, in practically every precinct of Dallas County, was organized against the Republicans and Populists, and was so organized in pursuance of a conspiracy to absolutely control the casting, counting, and returns of the votes. It was successful. It was only because the necessities of the case seemed to be fully met that the cupidity of the Democratic managers was satisfied by returning a majority of 3,089, out of a vote of a little over 5,000, in a county where the colored vote outnumbered the white vote four to one.

Let us examine the methods by which this was done. Only representative instances will be taken. Fraud is everywhere; not lurking or secret, but bold and insolent. It is chiefly of five kinds.

1. Fraudulently padding the poll list with names of persons not registered; sometimes of fictitious persons and sometimes of persons who did not live in the precinct.

2. By padding the poll list with names of persons on the registration list who did not vote.

3. By imposing on illiterate voters who desired to vote for Aldrich, but whose tickets, against their will and without their knowledge, were marked for Plowman.

4. By the old-fashioned method of falsely recording votes cast for Aldrich, and certifying them as having been cast for Plowman.

5. By refusing to hold any election at all in certain strong Republican precincts. This was especially true in precincts 5 and 32, Dallas County, where for trivial and transparent reasons the inspectors failed to open the polls.

The report then goes on to review 7 precincts of Dallas County, showing the evidence of fraud from the poll lists, registration lists, and from testimony, and reaches this conclusion:

The result of our investigation is the conclusion that every precinct in Dallas County in which a contest is made is so fatally tainted with fraud that the returns therefrom must be entirely disregarded, and that we can count only such votes as the testimony in the case shows were actually cast. In doing so we considered as proved only those which were shown by direct testimony to have been cast, as when the voter himself, or a marker, testified. We have counted none which depend upon hearsay testimony or conjecture.

The minority, in their views, while apparently admitting some of the frauds charged in Dallas County, deny that contestant's party was denied representation on the election boards, and combat the principle on which the returns of the whole county are rejected:

The demand of the majority report that because the testimony concerning 8 of the precincts in Dallas County would seem to them to justify the exclusion or rejection of the returns therefrom as unreliable, but leaving all of the remaining 23 precincts unchallenged, the returns as a whole from Dallas County must be rejected, is absolutely untenable and unprecedented. There are no charges, nor is there any evidence, tending to show anything that would indicate that the returns from the 23 uncontested precincts are not entitled to full confidence and all the prima facies given them by the law. The official returns of Dallas County, therefore, should not and ought not to be rejected as a whole, but each precinct should be judged by its own acts and stand upon its own merits. Such an act is unwarranted by law, and such is not the course of procedure justified by the authorities or by the precedents in Congressional cases. The only just and proper course in this case is to deal with the returns by precincts, and where it is shown by competent and sufficient evidence that the returns from a precinct are overturned by proof of fraud, then the correct rule is to permit proof aliunde of the vote cast.

We shall endeavor to show the true result of the evidence as regards the precincts contested in Dallas County, and shall take it for granted that the House will not follow the recommendations of the majority of the committee in excluding the whole county returns, because of their claim that the returns are impeached in 8 of the precincts out of the 31 in that county. For the information of the House it is stated that there are only 31 precincts in Dallas County, there being no precincts of the numbers from 17 to 21, inclusive. We contend that the returns from the 23 precincts uncontested should stand as returned, the only charge against these 23 precincts being the general charge that inspectors were not appointed as required, unsupported by any proof of actual or other fraud.

(*b*) In Talladega County no general conspiracy was alleged and in only one precinct, Munford, was there a refusal to appoint an inspector to represent the opposition to sitting Member's party. The majority find that the official returns of that precinct give contestant 68 votes, while the evidence shows that 114 votes were cast for him. Therefore the majority conclude that the returns are so unreliable that no credit can be given them, and reject them. Contestant is allowed the 114 votes proved aliunde, and the sitting Member 7 votes similarly proven. The returns had given sitting Member 149.

In Childersburg precinct, where there was proper party representation on the election board, the majority of the committee purge the poll for the following reason:

Boaz, the leading Democratic inspector, seemed to be in charge of the election, and directed the markers, from time to time, to mark on the ballots exactly what the voter wished. If he said "Aldrich," without giving the Christian name or initials, the marker was instructed to write the name; and so, where the colored man, in pronouncing the name Aldrich in a manner not entirely suited to Mr. Boaz's sense of euphony, the marker was instructed to spell the name phonetically—as, for instance, "Alldridge," "Alldige"—Mr. Boaz insisted that there was no such name on the ticket as "Aldrich," or the two just given, and, therefore, there was no place where a cross mark could be put. None of these ballots were counted.

Boaz admits that there were 15 or 20 of them, and the inspector, Coleman, says there were 25. They ought to be counted for contestant. Other outrages against suffrage were committed by Boaz, but we do not feel that they ought to invalidate the poll, and we can not appraise their extent.

In another precinct the majority purged the poll for bribery:

In box 1, precinct 5, Talladega County, where the returned vote was 382 for Plowman and 19 for Aldrich, we find indubitable evidence of bribery on behalf of the contestee. It is probable that justice and precedent require the exclusion of the entire poll, but in view of the other evidence in the case and the general conclusion arrived at we prefer to base that conclusion on other grounds. "We must, however, subtract from contestee's votes in that precinct 10 votes of persons who testify that they were bribed to vote for Plowman.

The report was fully debated in the House on February 8 and 9, 1898, and on the latter day the resolutions of the minority confirming the title of sitting Member to the seat were disagreed to—yeas, 124; nays, 144.

Then the resolution declaring sitting Member not elected was agreed to—ayes, 129; noes, 114, by a rising vote. The resolution seating contestant was agreed to—yeas, 143; nays, 112.

Thereupon Mr. Aldrich appeared and was sworn in.

1098. The Virginia election case of Thorp v. Epes, in the Fifty-fifth Congress.

The House counted as if cast the votes of electors who, after using due diligence, were prevented from voting by the delays of election officers.

In proving votes not cast the House required that each elector should testify as to the facts which entitled him to vote and have his vote counted.

When the registration list was not conclusive as to the right to vote the House admitted parol evidence as to voter's qualification.

On February 10, 1898,[1] Mr. James A. Walker, of Virginia, from the Committee on Elections No. 3, submitted the report of the majority of the committee[2] in the Virginia case of R. T. Thorp *v.* Epes. The official return was as follows, showing a plurality of 2,621 for sitting Member:

For Sydney P. Epes	12,894
For R. T. Thorp	10,273
For J. L. Thorp	491
For others	25

[1] Second session Fifty-fifth Congress, House Report No. 428; Rowell's Digest, p. 565; Journal, pp. 363, 369, 370; Record, pp. 3099, 3140–3151.

[2] The minority views were presented by Mr. R. W. Miers, of Indiana.

Sitting Member conceded that his plurality should be reduced to 2,488 votes by the rejection of votes in various counties.

The majority of the committee, before proceeding to examine the election in detail, call attention to certain general conditions, viz, that the district in previous elections had shown a strong predisposition in favor of contestant's party; that the supporters of contestant were united while there was division among their opponents; that the negro population of the district was in excess of the white population; that the election machinery was entirely in the hands of sitting Members's party; that the law operated to the disadvantage of the illiterate voter by commanding that the ballot be kept a secret as to arrangement and form until the time when it should be put into the voter's hand; and finally that an obscure and ignorant person, named J. L. Thorp, had, through the agency of an election officer, petitioned to have his name put on the official ballot as a candidate for Congress. It was shown that this action was taken to delude ignorant voters and diminish the vote for contestant.

The majority of the committee, as a result of their examination, found a plurality of 812 votes for contestant. These changes resulted from the following conditions: (1) the addition to contestant's vote of 623 votes on account of that number of voters who were at the polls in seven precincts but could not vote; (2) the rejection of the returns from nineteen precincts where the election officers, all of whom were of sitting Member's party, were alleged to have done certain specific illegal and fraudulent acts as such election officers; and (3) the rejection of the returns from six precincts where unfit judges were appointed to represent contestant's party, and where frauds were proved.

1099. The Virginia election case of Thorp v. Epes, continued.

As to the counting of votes not cast, and the relation thereto of a repealed section of the Federal election law.

Although a mandatory State law provided for counting no ballot but the official one, the House righted a wrong by counting votes not cast.

Discussion as to the act of tendering a vote under the old and new ballot laws.

Although the State law declares that no election shall be invalid by failure to have party representation on boards of election officers, the House will reject the returns where fraud accompanies the irregularity.

(1) In regard to the votes of voters who did not succeed after proper effort in casting their ballots, a sharp controversy arose between the majority and minority [1] of the committee. The majority, after quoting the opinions of McCrary and Paine, and citing the cases of Ball *v.* Snyder, Wallace *v.* McKinley, Wise *v.* Waddell, Featherstone *v.* Cate, Mudd *v.* Compton, Sessinghaus, *v.* Frost, Yates *v.* Martin, and Yost *v.* Tucker, takes the ground that in this case, where the testimony showed that voters were in line waiting to cast their votes, and where there were delays for which the election officers were responsible, the tendered votes should be counted. In the course of the debate [2] Mr. Walker stated that in the district over 1,000 votes were in this way excluded, but that the committee had counted only 623, because each one of those 623 voters was put on the witness stand during the proceedings

[1] The minority views were presented by Mr. Robert W. Miers, of Indiana.

[2] Record, p. 3100.

in the contest and proved the facts which entitled him to vote and have his ballot counted. In cases where the names of such voters had been kept on tally lists, or where the voter had given a certificate of the fact to some one at the polls, the votes had not been counted. As to a question whether the testimony of the voter should be accepted as to his qualification, the report says:

It is contended, however, by the contestee that the votes excluded can not be counted in this case because the contestant has failed to prove that these voters were registered as required by law. This objection is based upon the idea that the registration book is primary evidence as to whether a voter is registered or not, and that no other proof of that fact can be received.

The registration books in Virginia are not public records to which verity can be attached. In fact they are only prima facie evidence that a man is a voter and may be attacked by parole evidence in many ways. It is true they are the best evidence as to whether a voter's name is on the registration book, but the fact that it is on the book is not conclusive evidence that he is a registered voter, and the fact that his name is not on the book is not conclusive evidence that he is not a registered voter.

The question in this case is whether the excluded person is a legally qualified voter at the precinct at which he offers to vote, and not the question whether his name is on the registration list or not. A citizen applying to vote whose name is not found upon the registration book may vote upon a transfer from another precinct in the same district, or he may prove that he was a duly registered voter at that precinct and that his name had been, by fraud or by accident, left off or erased from the list of registration. If the registration books are destroyed, the voters whose names were on them are still registered voters. The act of registration makes the voter a registered voter. The registration lists are only the subsequent memorial of the fact made by the registrar. Again, a voter whose name appears upon the registration book may not be a duly qualified elector for various reasons.

He may have removed from the election district more than ten days before he offers to vote; or he may have been convicted of some criminal offense; or he may have fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, or knowingly conveyed a challenge, or aided or assisted anyone in fighting a duel; or he may prove that his disabilities have been removed by a pardon or by an act of the legislature; or it may be shown that he is an idiot or a lunatic; or he may prove that in purging the polls as provided by the statute his name was improperly stricken from the list of voters.

All these cases for or against the right of a citizen to vote can be proved by parole evidence; and the question as to whether the name is upon the registration book or not is not the real issue, but whether the party offering to vote is entitled to vote at that election and at that precinct.

This question can be decided only by oral evidence furnished by the affidavit of the voter himself, by the evidence of other witnesses who know the facts, or by the records of the court. The fact that his name is on the registration book is only prima facie evidence that it is legally entitled to be there, and its failure to appear upon the book is only prima facie evidence that he is not a registered voter. The distinction lies between what constitutes a registered voter and what the poll books show. A duly registered voter who has not forfeited his title to be a registered voter at the precinct where he is registered is nevertheless a registered voter, although his name does not appear upon the books.

In this case it appears that no exception was made at the time in many instances to the testimony of the witnesses proving that they were duly registered voters.

The minority, in their views, combatted the proposition of the majority:

Votes not cast can not be counted as a matter of law generally. No contrary opinion can be cited from the adjudged cases of the ordinary courts of any of the States of this Union. This was a uniform rule of the House of Representatives until 1873, some time after the adoption of section 2007, et seq., Revised Statutes of the United States (adopted May 31, 1870). This section was repealed by act of February 8, 1894, and whatever influence it may have had is thereby removed.

The minority cite the cases of Biddle and Richard *v.* Wing, Whyte *v.* Harris, Morris *v.* Handley, Niblack *v.* Walls, Frost *v.* Metcalf, Bradley *v.* Slemons, Bisbee *v.* Finley, Sessinghaus *v.* Frost, and Waddill *v.* Wise, as well as passages from Cooley's Constitutional Limitations, Wold *v.* Hanson (87 Wis., 179), Pennington *v.* Hare

(60 Minn., 147), Hartt *v.* Harvey (19 Howard, N. Y., 252), Webster *v.* Byrne (34 Cal., 276), etc., in support of the general proposition, and then give special reasons why such votes should not be counted under the Virginia law, which provides for the official ballot and declares that "no ballot save an official ballot above provided for shall be counted for any person." The minority furthermore show that where a ballot is wrongly marked the intention of the voter does not save it from rejection, and say:

If, therefore, under the Australian system we can not in such cases resort to the intention of an actual voter, what possible justification can there be in accepting the intentions of individuals as to whom we have no evidence or means of knowing how they intended to express their subsequently declared intentions?

It will not be forgotten, moreover, that all of the cases relied on in the majority report for the counting of votes not cast were decided under the old system of individual or party tickets, and the peculiar difference in the two systems was an important factor in the former cases.

In Frost *v.* Metcalf the ballots must have been offered at the polling place.

In Bisbee *v.* Finley and in Waddill *v.* Wise the identical ballots were filed.

In Sessinghaus *v.* Frost the ballot must have been actually offered, i. e., the clearly expressed intentions of the voter must have been declared at the time in the form prescribed by law.

The broadest statement of the doctrine sought to be enforced by contestant is that of Niblack *v.* Walls, so often quoted as the language of Paine, 518:

"When a legal voter offers to vote for a particular candidate and uses due diligence in endeavoring to do so, and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote should be counted."

It is unnecessary to call attention again to the fact that this decision was prior to the adoption of the Australian system.

Furthermore, as to the qualification of such voters, the minority state:

Legal registration is an essential prerequisite for voting in Virginia.

By express statute the officers of election themselves can not take parol evidence of this fact, but the name must be found on the registration books (Idem).

This circumstance of legal qualification is essential to the doctrine stated above, and in contested elections the party desiring to invoke its application should furnish proof of equal dignity with that which the officers of election must have required. The registration books are the best evidence of the qualification of a voter, and, being in existence, are the only competent evidence on this subject.

After citing authorities, the minority state that due exception was taken by sitting Member to parol evidence on this subject and the contestant was challenged to produce the registration books.

In the debate [1] Mr. Walker replied to the contention that the Virginia law prevented the counting of excluded votes, saying it was admitted that when a voter put a ballot in the box it must be an official ballot in order to be counted; but in this case the question was not as to the counting of an illegal ballot, but as to the exclusion of a voter by fraudulent methods from voting. It was also denied that the right to count such votes depended on the former Federal statute. It existed independently of it.[2]

The evidence presented by the majority showed not only the fact that the supporters of contestant used due diligence, being long in line waiting to vote, but that they were prevented by illegal, arbitrary, or fraudulent acts of the election

[1] Record, p. 3101. Also see p. 3115, argument of Mr. Edgar D. Crumpacker, of Indiana.

[2] Argument of Mr. Edgar D. Crumpacker, of Indiana; Record, p. 3113.

officers tending to make delays or put contestant's supporters at a disadvantage in getting to the ballot box.

(2) As to the 19 precincts where the officers of election were all of sitting Member's party; and the six precincts "where judges were appointed to represent the Republican party, who were educationally unfit to be judges, or who were not recognized by the party as Republicans," the majority report gives the law:

> The statute law of Virginia, as before shown, requires that wherever it is possible judges of election "shall be chosen for each voting place from persons known to belong to different political parties, each of whom shall be able to read and write."
>
> It further requires that the judges of election shall designate one of their number "whose duty it shall be, at the request of any elector who may be physically or educationally unable to prepare his ballot, to enter the booth with said elector and render him assistance in preparing his ballot by reading the names and offices to be voted for on the ballot and pointing out which name or names the said elector may wish to strike out, or otherwise aid him in preparing his ballot."

The report cites the cases of Thorp *v.* McKenney, English *v.* Peelle, Threet *v.* Clark, McDuffie *v.* Turpin, in support of the doctrine that where the testimony shows frauds in conjunction with a disregard of the law providing for representation of different parties on the boards of election officers, the returns should be rejected even though the law of the State may provide, as did the Virginia law in this case, that "no election shall be deemed invalid when the judges shall not belong to different political parties." Such a law did not apply to an election dishonestly conducted.

Concluding as to this point, and also as to the appointment of incompetent members of contestant's party, the report says:

> It can not be contended that the electoral boards failed by inadvertence to comply with this law, for their attention was called to its importance both by the report in the last-named case and by the Republican county chairman.
>
> We are constrained, therefore, to conclude that it was designedly done for the sole purpose of enabling partisan election officers to defeat the will of the voters as declared at the polls. If any doubt existed as to this design, it would disappear before the evidence in this case, which, as before shown, discloses that frauds, illegalities, and irregularities were perpetrated by these Democratic election officers at every precinct where this law was disregarded.
>
> All that is here said with reference to the refusal of the Democratic electoral boards to comply with the law requiring the selection of judges known to belong to different political parties applies with as much force to those precincts where these boards, in pretending to comply with the law, selected as representatives of the Republican party men who were not recognized by that party as Republicans or were educationally or morally unfit to be judges of election.
>
> That the statute requiring the judge selected for that purpose to enter the booth with the illiterate voter "and render him assistance in preparing his ballot by reading the names and offices to be voted for, and pointing out which name or names the said elector may wish to strike out, or otherwise aid him in preparing his ballot," is clearly mandatory is plain, not only from the language itself, but by a decision of the supreme court of appeals of Virginia. (Pearson et al *v.* Board of Supervisors of Brunswick Co., 91 Va., 322.)
>
> In the case last cited it was held to be the duty of the judge to render to the voter whatever assistance he might request in the preparation of his ballot. It is the duty of such judge, when requested to do so, to mark the ballot of the illiterate voter in such a manner as to make it a legal ballot for the candidates of his choice. As before shown, at many of the precincts the judges refused to render this assistance to the illiterate Republican voters, thus violating a mandatory requirement of the law. Paine on Elections, section 497, says:
>
> "A violation by electors or officers of a mandatory requirement of law, which changes or materially affects the result, is, even in the absence of fraud, a sufficient ground for rejecting an entire poll when it can not be purged."

That this assistance was almost universally requested can hardly be questioned in the light of the evidence in this case. Illiterate Republican voters were instructed by public speeches and by handbills not to rely on themselves, but to ask the judges to mark their ballots so as to enable them "to vote for McKinley, Hobart, and R.T. Thorp," the Republican candidates. Yet it is not denied that in this district 3,607 ballots cast by duly qualified voters were never computed or accounted for in the returns of votes cast for Congressional candidates, and that 491 votes were returned for J.L. Thorp, showing, practically, that over 4,000 ballots cast by qualified voters were improperly prepared. When it is remembered that at many precincts the election was held entirely by Democratic officials, and that in all the election was under the control of such officials, it is not reasonable to assume that any considerable number of these mismarked ballots were cast by voters who intended to vote for the Democratic candidate.

The majority of the committee review at length the testimony as to each of the rejected precincts, showing the inconsistencies in the returns and illegal and fraudulent acts of the partisan election boards.

The minority deny that the testimony had the effect claimed by the majority, and after analyzing the precedents cited by the majority, say:

From the foregoing analysis of the authorities relied on in Thorp *v.* McKenney it will be seen that there is little weight of authority to sustain an imputation against the verity of sworn returns by reason of the simple fact that officers of election are all of the same political party. It will be recollected, also, in addition, that the legislature of Virginia has added to the directory provisions of the statute the mandatory clause—

"But no election shall be deemed invalid when the judges shall not belong to different political parties or who shall not possess the above qualifications."

The report was debated at length on March 22 and 23, 1898, and on the latter day the House, by a vote of yeas 131, nays 151, rejected the resolutions of the minority in favor of the sitting Member, and then, by a vote of 151 yeas to 130 nays, agreed to resolutions declaring sitting Member not elected and that contestant was elected.

Thereupon Mr. Thorp took the oath of office.

1100. The Oregon election case of Vanderburg v. Tongue, in the Fifty-fifth Congress.

A contestant must put in evidence the returns of the district as a basis for showing the effect of his charges.

A contestant having failed to show reasonable diligence, his request for time to take further testimony was denied.

On February 14, 1898,[1] Mr. Lemuel W. Royse, of Indian , from the Committee on Elections No. 2, submitted a report on the case of Vanderburg *v.* Tongue, from Oregon. The contestant, in his notice of contest, had charged frauds and irregularities; and the contestee in his answer had admitted certain of the charges as to Clackamas County, but denied all others. The contestant took testimony only as to Coledo precinct, in Coos County. This evidence, in the opinion of the committee, clearly showed that several persons, not over 25, voted who were not qualified electors. It was reasonably clear from the evidence that five of these persons voted for the contestant. The committee concluded:

We are unable to determine from the record how the others voted on Representative for Congress, but should we conclude that they voted for contestant, we would still be unable to tell how it would affect the result, since we have not been furnished with the election returns of the district. Several

[1] Second session Fifty-fifth Congress, House Report No. 437; Rowell's Digest, p. 5,59; Journal, p. 198.

irregularities and violations of the law occurred in the conduct of the election held in this precinct, but we are satisfied that these were all brought about through the ignorance and unskillfulness of the officers of election. We believe that these officers were trying to hold an honest and fair election, and that the irregularities occurred through their want of a clear understanding of their duties as provided by law. There is no evidence which shows that these acts were committed or suffered to be done in the interest of any particular candidate. Some of the officers who participated in these acts were the friends and political adherents of the contestant, and there is nothing in the evidence tending to show that they would have been engaged in, or would have permitted, any thing detrimental to his interests. We therefore think that the vote of this precinct should stand as returned; but should the vote of this precinct be cast aside it would avail nothing, for, as stated before, it does not appear from the evidence that the exclusion of the vote of the precinct would change the result of the election.

The committee also say:

Contestant appeared before us by his attorney, and asked to reopen the case for the purpose of taking further testimony to sustain the charges in his notice of contest. But as he failed to show that he had been reasonably diligent in his effort to procure such testimony in the time allowed him by the statute, we recommend that his application be denied.

The House, without debate or division, agreed to resolutions confirming sitting Member's title to his seat.

1101. The Alabama election case of Crowe v. Underwood, in the Fifty-fifth Congress.

Although extensive frauds and irregularities were shown, the failure to show that the official return was overcome caused the House to confirm contestee's title.

On March 2, 1898[1] Mr. Romulus Z. Linney, of North Carolina, from the Committee on Elections No. 1, submitted a report in the case of Crowe *v.* Underwood, from Alabama. The statement of the case is sufficiently embodied in the following from the report endorsed by the majority members of the committee:

The committee examined the evidence taken in the cause and find that according to the official returns the contestee received at said election 13,499 votes, contestant received 5,618 votes. The Hon. Archibald Lawson, Gold Democrat, received 2,318 votes; that the contestee received a majority over all candidates of 5,565 votes and a plurality over contestant of 7,881 votes.

The committee considered these returns as being prima facie true, and examined the evidence in the case in order to determine whether the fraud and other wrongs alleged and upon which contestant claimed that evidence had been offered had been established by a preponderance of the evidence to the extent of vitiating the returns. The committee find that there were many irregularities and much fraud practiced by the officers of the said election. The ticket voted at said election contained 57 names arranged in alphabetical order, with no device or other means of determining the politics of any candidate voted for. An illiterate man voter, in fact the most intelligent voter, would find it difficult to vote said ticket in the time allowed by law for an elector to be at the polls.

The laws of Alabama provide for the presence of a fixer at the polls to mark the ballots of illiterate voters, as directed by said voters, as to the candidate for whom he desired to vote. This ticket alone made it necessary that the fixers of each party should be intelligent. An ignorant or illiterate man could not have performed the functions of said office of fixer.

The entire absence of fixers or other officers to represent the illiterate voter would, in the opinion of the committee, strongly suggest fraud if it were confined to one party while the other party had no representation, and it appears on page 30 of the record that the chairman of the Populist party presented a list of names for inspectors of election for 42 beats in Jefferson County, but as no list as to the inspectors actually appointed appears the matter is left without proof as to how it was, and the official returns pre-

[1] Second session Fifty-fifth Congress, House Report No. 597; Rowell's Digest, p. 557; Journal, pp. 270,271.

vail. In Perry and Hale counties the evidence tends to show that the Populists and Republicans did not have an equal share of fixers as provided by the statute. Out of 48 inspectors of election in Perry County 40 are Democrats and only 8 Republicans and Populists, and in Cleveland beat, Perry County, all the inspectors and markers were organized Democrats. (See pp. 168–169 of the record.) The irregularities in said beat were so glaring and the fraud so clearly established that the contestee at the hearing admitted that the returns from that beat were successfully assailed, and that beat should be thrown out. When we consider the evidence as to Hale County, it is shown by the evidence to have about 4,000 registered voters, and about 1,150 of this number are white, the balance negroes. The opinion of a witness, Adison Wimbs, on page 196 of the record, which appears to have been given without objection, puts the vote of Hale County, so far as the negro vote is concerned, at 2,800 for Lawson, and that Underwood's vote at a fair election would not have been more than 850 or 900 votes, whereas the official returns put the vote of Hale County, Underwood, 2,458; Crowe, 152, and Lawson, 965. Mr. Wimbs further says that at Greensboro beat, Hale County, the Republicans and goldbug Democrats presented a list of fixers, each presenting six names, and none were appointed at that beat, and the returns show that Greensboro beat gave Underwood 467, Crowe 17, and Lawson 359 votes. This evidence tends strongly to show that the election in Hale County was unfair and that the Gold Democrats became the victims of the frauds of the organized Democracy to a greater extent than Crowe, the Populist and Republican candidate, but as it is founded chiefly on the opinion of a witness and the lack of a fair representation of inspectors and fixers at the polls the committee concluded that it was not sufficient to destroy the legal force of the official returns, although it is highly probable that the grossest frauds were practiced by the organized Democracy of Hale County in said election against both the contestant and the Gold Democratic candidate, A. Lawson, but more against Mr. Lawson than Mr. Crowe, the Republicans in this county having indorsed Lawson, the goldbug candidate. (See testimony of Adison Wimbs.) The contestant, on page 33 of his brief, claims that 40 votes should be added to contestant's vote, but it is admitted in contestant's brief that there is the absence of effective proof of the irregularities and frauds in said county at Centerville. The want of that effective proof of fraud as to Bibb County leaves the official returns in force. As to the counties of Bibb and Blount, we failed to find evidence sufficient to overthrow the returns.

The committee unanimously recommended resolutions confirming the title of contestant to the seat, inasmuch as sufficient fraud and irregularities to overcome his majority were not proven.

The House, without debate or division, agreed to the resolutions.

1102. The Virginia election case of Wise v. Young, in the Fifty-fifth Congress.

Where returns are falsified by election officers they have no prima facie effect, and the parties may be credited only with such votes as may be proven aliunde.

Where election markers fraudulently mark the ballots of illiterate voters, the returns may be impeached by the testimony of the voters as to the ballots they intended to vote.

Discussion of the weight of testimony of election officers as to their own acts when impeached by the evidence of illiterate voters.

Where returns are rejected because of fraudulent act of election officers friendly to contestee, the contestant yet loses his returned vote as well as contestee.

On March 21,1898,[1] Mr. W.S. Mesick, of Michigan, from the Committee on Elections No. 3, submitted the report of a majority of the committee[2] in the

[1] Second session Fifty-fifth Congress, House Report No. 772; Rowell's Digest, p. 569; Journal, pp. 492, 497, 498; Record, pp. 4250, 4279–4287; Appendix, p. 342.

[2] Minority views presented by Mr. Robert E. Burke, of Texas.

Virginia case of Wise *v.* Young. The official returns for the district gave to sitting Member a plurality of 2,399 votes.

The contestant charged frauds and irregularities, and presented a large mass of testimony to overcome the official plurality.

At the outset a question was raised and discussed as to the election law, of Virginia. The committee review at length the provisions of this law, which provided for the Australian ballot, but had several features which the majority of the committee considered as especially favorable to fraudulent acts. The electoral machinery was all in the hands of one political party, and while it provided that the precinct judges should be of different political parties it also provided that the election should not be vitiated if this provision should be neglected. The form and arrangement of the ballot were kept from the voter until the time came to mark it, and he was allowed two and a half minutes for this act. The ballot was marked by drawing a line through the names of the candidates whom the elector did not wish to vote for, and no name was to be considered scratched unless the mark extended through three-fourths of the name. In case a voter was physically or mentally incapable of marking the ballot, a judge was to accompany him to the booth and point out the names "or otherwise aid him in preparing the ballot." The Virginia court of appeals declared this law constitutional, and that its provisions in regard to persons who marked their own ballots were reasonable. As to the provision for illiterate voters, it said that very great power was placed in the hands of the judge who assisted the voter, and commented on the fact that such confidence was liable to abuse. The majority of the committee, after quoting from the message of the governor of the State condemning the law, say:

> From this statement of a governor in full political sympathy with the framers of the law we turn to the undisputed fact that in the election which is the subject of our examination, the poll books at 88 precincts in this district, exclusive of the county of Norfolk, show that 32,277 voters deposited ballots, and of these but 25,433 were returned for anybody for Congressman, and but 22,758 were returned for Presidential electors. Thus nearly one-sixth of the entire vote cast for Congressmen were thrown out as defective, and one-fourth of the entire vote cast for Presidential electors.
>
> The law is plainly too intricate for illiterates to protect themselves and the trouble undoubtedly springs from errors or frauds committed by the election officers. Turning to the evidence to solve this last inquiry we find that the contestant has taken an immense amount of testimony on this point and taken it with much care and observances of legal requirements.

The minority, after showing that the law is valid, take the ground that all such irregularities as may be supposed to result from its intricacies or from ignorant misconception of it are removed from the category of fraudulent practices such as destroy the value of returns.

The minority further say:

> The highest court in the State of Virginia having upheld the validity of this law, and declared its provisions reasonable, we are bound by that decision, and in considering the evidence here we must endeavor to ascertain whether this election was conducted in accordance with the provisions of that law. If we find it so, the contestee is entitled to retain his seat. If we find that any of the provisions of this law were disregarded in the conduct of this election, we should further ascertain whether such disregard of the law was with fraudulent intent or through ignorance or misinterpretation of the law. If done with fraudulent intent, the value of the returns as evidence is destroyed, and the returns may be rejected; but if done through ignorance or misconstruction of the law, while the votes may be illegal, that fact will not affect the election or render it void, unless the number of such illegal

votes is great enough to affect the general result; and where it is shown that illegal votes have been cast for a candidate they should be deducted from his vote. This is the common leaning of the profession on this subject.

The distinction is between mere illegality and fraud in the conduct of elections. The first does not deprive the candidate of any votes save those proven to have been illegally cast for him; the second, by destroying the value of the returns as evidence, causes the rejection of the entire poll and deprives the candidates of all the votes cast for them, as well the legal as the illegal ones, unless otherwise proved. * * *

Fraud, however, is never presumed, and "nothing but the most positive, credible, and unequivocal evidence should be permitted to destroy the credit of official returns. It is not sufficient to cast suspicion upon them." * * *

A fortiori mere opportunities for fraud should not be taken for proof of fraud. Reference to these fundamental principles of evidence is made necessary by the very general disregard of them by the majority in treating the evidence in its report. Instead of waiting for "positive, credible, and unequivocal evidence (of fraud) to destroy the credit of official returns," as the law requires, the majority seems to have started out with a presumption of fraud against the conduct of the officers of this election, and to have accepted trivial circumstances, uncertain and equivocal testimony as conclusive proof to sustain that presumption. For it must be remembered that the great majority-4ndeed, nearly all-of the witnesses whose testimony is relied on to prove fraud are ignorant, uneducated, unintelligent negroes; that the testimony of large numbers of them who testified that they voted for contestant, when subjected to cross-examination, shows that at the time of the election they did not know the contestant by name or that he was a candidate for Congress; that others, in large numbers, at the time of their examination as witnesses could not remember, when subjected to cross-examination, who they voted for Congress; that there was great defection from the contestant in his own party and that many negroes were opposed to. him. * * * The evidence of fraud on the part of the judges who assisted the illiterates consists almost entirely of the evidence of these illiterates themselves as to acts which, in the nature of the case, must have occurred only in the presence of two persons (i. e., the judge and the illiterate voter), both of whom testify in direct contradiction to each other; in which conflict of testimony the majority accept as true the statement of the ignorant, unintelligent, bow-ridden negro, characterizing the testimony of the judges as "perjury."

After this preliminary view of the law, the majority and minority proceed to consider the returns of 10 precincts, which the majority propose to reject entirely because of overwhelming evidence of fraud in each. The fraudulent acts in all 10 precincts fall under a class fully illustrated by the case of Longview, in Isle of Wright County, of which the majority say:

In this precinct 162 votes were cast and 127 returned; 102 for Young and 25 for Vise. Contestant examined 75 voters (pp. 569 to 605), whose names appeared on the poll book, all of whom swore that they voted for him, and only 6 of these prepared their own ballots. The others swore the judges helped them, and most of them swore that the judges themselves marked their ballots; thus contestant examined all but 87 of the men who voted, and the return gives Young 102 votes. Warren, a voter (p. 571), swore he saw the judge mark his ballot in a zigzag line. Jordan (p. 576) swore the judge marked his ballot from top to bottom in a straight line. Stewart (p. 581) swears he saw the judge mark his ballot by making the letter X on each name. All the judges and clerks for this precinct were Democrats. It was proved that of the 162 voters 78 were white and 84 colored. The return of the contestee gave him 24 more votes than the white voters, and gave McKinley, for President, but 16 votes, where 84 colored men had voted, and Bryan 98, where but 78 white men had voted.

The political complexion of the colored men as voters was admitted. The contestee examined nobody but the judges and the clerks. One of the judges (C. C. Brock, p. 31–18) swore he allowed voters to vote improperly marked ballots, when he knew them to be so marked. Another judge (Coulter, p. 3122), in answer to the question asked if he ever read the election laws of Virginia, replied: "Part of it—a very small part; I don't believe in law nohow." The registrar also was a Democrat (p. 603), and 11 duly qualified voters (pp. 584 to 604) swore that he refused to register them, and that if he had done so they would have voted for contestant.

The majority report goes on to quote the case of Clayton *v.* Breckinridge: "When returns are impeached they can not be received for any purpose, and only those proved aliunde can be counted." "If the returns have been falsified by the election officers," continue the majority in their review of Longview precinct, "it is a well-settled rule of law that they cease to have any prima facie effect, and each party can only be credited with such votes at the box in question as each may show by other evidence."

The minority minimize the effect of the testimony as to this precinct, and deny that it should have the effect of throwing out the entire precinct, since the judges testified that they rendered all the assistance asked for by illiterate voters, while the registrar testified that he never refused to register any man who presented to him a legal and proper transfer certificate. The clerks of the election further testified to the fairness of the conduct of the election."There is no reason," say the minority, in comparing the legal weight of testimony, "why these men should not be believed as readily as the ignorant, unintelligent, illiterate voter, who testifies against them, and they have the advantage of the presumption in their favor growing out of the fact that they are public officers acting under the sanction of their official oaths."

One other precinct of the 10 may be noticed because of the view which the minority take. The majority, in their report, say of Creed's Bridge precinct:

> The poll book showed 160 men voting. All the election officers were Democrats. The ballot box was nearly covered from sight by a curtain and the house darkened by bagging. The return gave Young 123 votes and Wise 16.
>
> Contestant put 54 voters on the stand. Twenty-five of these prepared their own ballots, and 29 were prepared by the Democratic judges. Only one mentions any other ballot fixer than Midgett. Young could by no possibility have received exceeding 105 votes—the return gave him 123—if every voter who marked his own ballot marked it wrong. Midgett, the judge, marked 28 ballots for Wise, and he received a return of but 16. The contestee's own witness said it was the smallest Republican vote he ever knew of. The details of the fraud at this precinct are too long to embody in this report.

The minority make this concession:

> There is no direct testimony of fraud in this precinct except some conflict of testimony as to whether the ballot box was in full view of the voters or not. But, if not, the provision requiring it to be so is simply directory, and its violation would not of itself invalidate the election. The judges, too, are men of good character, as the evidence shows (William A. White, postmaster, p. 3184). Yet the testimony here as to the vote cast and that returned is totally irreconcilable, and we think the entire poll should be rejected for uncertainty as to the vote cast. The contestee loses 123 votes in this precinct.

Reviewing the 10 precincts, the majority say:

> The aggregate vote returned for contestee from these 10 precincts was 1,517. He must lose this much, for he made no effort whatever to set up, aliunde, his vote, and he must have seen the utter worthlessness of these returns.
>
> The contestant would also lose his vote in these precincts if he had not set it up by evidence aliunde. His vote from these 10 precincts as returned was but 565, but in the fast 9 precincts, where but 425 votes were returned for him, he examined personally 805 witnesses, who swore they voted for him. His poll at these precincts and his increased vote, as established by his proofs, appears in a later statement. The contestee loses, therefore, on these 10 precincts, 1,517 votes.

1103. The case of Wise v. Young, continued.

Certificates of voters, stating how they had voted and given at the time of voting to a person who sustained them by testimony, were admitted as evidence against the return.

Discussion of the doctrine of res gestse as applied to certificates made by voters at the time of voting.

Where electors were present, ready to vote, and were prevented by dilatory acts of election officers, the House counted the votes as if cast.

In an election case allegations as to the means by which a person became a candidate are not properly considered.

Although the fraud in a district may be extensive, the House prefers to purge the return rather than declare the seat vacant.

The committee then take up 44 other precincts where the methods of proving the fraud were essentially the same, and where the majority recommend that the entire return be rejected. The majority say:

It will be seen that he has introduced nearly 5,000 witnesses in person to prove their votes for him at these precincts, when he received a return of but 3,729. It will be further seen that in 16 of these precincts, marked in the table with a star, he has introduced certificates or the rolls of his tally keepers, which, if they are admitted, will sustain his claim that he received at least 6,086 votes where but 3,729 were returned for him. In our view of the matter, it is unimportant to the contestant whether we count the votes proved by tally lists and certificates by him or not. His majority is already established, and the admission of the tally lists and certificates only swells that majority.

After citing the cases of Wallace *v.* McKinley, Sullivan *v.* Felton, Smith *v.* Jackson, and McDuffie *v.* Turpin, the report argues from the principles there laid down that the contestant in this case should be allowed the benefit of the certificates of the voters and the tally rolls. Thus, in Isle of Wright County, 102 voters swore that they voted for contestant, although but 31 votes were returned for him. Furthermore, in this precinct, says the report—

contestant placed upon the stand Goodwin, who swore that 121 voters, whose names appeared on the poll books, came to him at the time they voted, and stated to him that they voted the Republican ticket, and that he kept the tally and put their names down. He produced and identified and filed his book. Of these 121, 102 appeared and testified. It was in the nature of the case impossible to procure the attendance of all, and the question is whether the unimpeached testimony of Goodwin entitles the contestant to the other 19 votes of persons not personally examined.

The next phase of this is presented by the returns from Stone House precinct, which are impeached and rejected. There 109 men appeared in person and falsified the return so that it has been rejected. These 109 men had given certificates. (See p. 2666.) They were part of 113 voters, who, on the day of the election and just after voting, gave to contestant's representatives on the ground certificates that they had voted for him, in the form which appears on page 2666. The other four men were dead or absent, but their certificates were produced by the persons to whom they were given.

Shall the production of such certificates, completely identified by the party who took them, entitle the contestant to the vote of these absentees? This question becomes important when we reach a precinct like Walls Bridge, Surry County, where 254 certificates were given, and from press of time and inability to reach the witnesses only 176 were produced. We are disposed, on the authorities above cited and upon the facts proved in this case, to admit these certificates and the evidence of these tally keepers

The testimony shows that the Republican managers had no confidence in the Democratic judges; that this distrust was communicated everywhere to the Republican voters; that they were instructed not to attempt, where ignorant, to fix their own ballots. The danger of their attempting to fix their ballots was foreseen. They were supplied with yellow slips which they took to the judges, in writing,

requesting them to prepare the ballots for them. They were also supplied with these printed certificates as to how they had voted, which, immediately after voting, they voluntarily took to the tally keepers of the election and gave to them. That the Democrats understood what they were doing, and why they were doing it, is amply proved, and in many precincts the attempt was made to intimidate the voters from presenting the printed. slips asking the assistance of the judges, and to drive away the representatives of the contestant who were there to take the statements of Republican voters and the certificates of how they voted.

When a voter, thus suspecting the integrity of the election judges, seeks to protect himself by a contemporaneous statement to a competent and unimpeached representative of his party, we believe that the unimpeached testimony of the representative is admissible evidence concerning the vote. The transaction was certainly part of the res gestae, and after the poll has been impeached, the evidence of such a tally keeper and such certificates is the best evidence obtainable; for the judges of election are no longer credible, and the voters are in many instances inaccessible. We therefore think that the contestant is entitled to the excess of votes proved at these precincts, not only by the testimony of the voters themselves, but by the proofs of these certificates and these tally lists, and so we add to the poll of contestant 2,357 votes at these 43 precincts, that being the number proved in excess of the return for him.

The contestee's counsel argued that we ought not to count these votes, because even if we believe the statements of the witnesses that they voted, non constat that the ballots were correctly made out. We can not assent to this. On the evidence it is clear that if the judges had done their duty by these illiterates the returns would not have been so easily impeached. But they are impeached, and the contestant is trying to establish his vote by evidence aliunde. When witnesses swear that they voted for him, the presumption is that the ballots were correctly made out. The burden in every such case would be on the other party to show that it was not. If we err in admitting it, we err on the side of an expression of the popular will untrammeled by technicalities.

The minority do not admit that the proof is sufficient to allow contestant the votes claimed to be proven, and argue that votes may not be proven by certificates:

We can not agree with the majority that these certificates could be counted as proven votes. They seem to us the barest kind of hearsay. And while it is true that it often occurs that what would other wise be regarded as hearsay testimony becomes admissible as a part of res gestae, this is true only where the admission of such testimony would not contravene some well-established principle of law or be against public policy. In this case both of these reasons apply against their admission. The State of Virginia has passed a law for the conduct of elections in which, according to the opinion of her highest court, the dominant purpose is to "secure the independence of the voter by secluding him within an isolated booth;" "to free him from all solicitations and annoyance." (Pearson *v.* Supervisors, 91 Va., 331.)

But how is this independence to be secured if the voter is permitted to be escorted to the polls by his political bosses, instructed or even given to understand by his political overseers that he is expected to disclose his vote after depositing it, and knows that he will be spotted as a political traitor if he refuses to do so? To permit such practices is to continue the very evil the law was enacted to cure, to destroy the independence of the voter, and to make a delusion of the secrecy of the ballot. Such considerations overcome the mere rule of evidence that testimony otherwise hearsay may be admitted as part of res gestae. The contestant should not be allowed these additional votes.

The majority of the committee next consider the contention of the contestant that he should have counted for him 1,989 votes of "duly qualified voters who were hindered delayed, obstructed, and prevented from voting for him in 29 precincts." Of these excluded voters, 717 were in precincts where the conduct of the judges was such that the returns had already been rejected. The committee had no doubt that if the election had been properly conducted, all these votes might have been received. As to other precincts the report says:

The mass of testimony at every one of these is overwhelming to show delays in opening the polls, dilatory questioning of voters, waste of time, and wrangles with Republican representatives, recesses

for meals, failure to supply adequate voting booths, and every kind of device to delay the vote. While this course was pursued toward the Republicans, equally plain discrimination was made at all points in favor of receiving the white vote.

The voters, contrary to law, were ranged in lines of whites and blacks. White men were voted in preference to blacks. Where the blacks were very numerous and the whites very few, at many of these points, ropes were stretched to keep off voters, but white men never had any difficulty whatever in passing under the ropes or coming up and voting directly. The discrimination was palpable everywhere and the result all in favor of the contestee. In fact, in the whole district but two men went on the stand to declare that they had lost their votes for him.

The minority denied that the testimony showed the improper exclusion of this vote, and combated the doctrine of counting excluded votes, quoting the cases of Biddle and Richard *v.* Wing, Whyte *v.* Harris, Frost *v.* Metcalf, and the following from Judge Cooley:

An exclusion of legal voters, not fraudulently, but through error in judgment, will not defeat an election, notwithstanding the error in such a case is one which there was no mode of correcting, even by the aid of the courts, since it can not be known with certainty afterwards how the excluded electors would have voted, and it would obviously be dangerous to receive and rely upon their subsequent statements as to their intentions after it is ascertained precisely what effect their votes would have upon the result. (Cooley, Const. Lim., p. 781.)

As we have seen that no evidence is admissible as to how parties intended to vote who were wrongfully excluded from so doing, such a case is one of wrong without remedy, so far as the candidates are concerned. (Idem, p. 789.)

The majority note that sitting Member has presented no countervailing proof to meet the issues raised by the contestant and sum up to show that the plurality of contestant is in reality 5,119.

Before closing their report the majority say:

The contestee introduced much in his answer and something in his testimony concerning the manner of the contestant's nomination. Now, in the case of Lowry *v.* White (Mobley, vol. 7, p. 622) it was well said:

"In contested cases it is improper to consider allegations in the testimony intended to show simply by what means the person became a candidate."

And so we dispose of that question.

The contestee raised a question about the legality of the electoral board of Norfolk County. His counsel did not seriously press the question, nor do we think there was anything in it; but if we should throw out the whole returns from Norfolk County, it would not affect the result.

Where fraud is rampant in an election, as it is admitted to have been in this district, it is sometimes decided to remand the election, but we do not think that rule should apply to the present case.

As was said in the case of Waddill *v.* Wise (Rowell, 1889–1891, pp. 203 and 204):

"If the fraudulent exclusion of votes, if successful, secured to the party of the wrongdoer a temporary seat in Congress, and the only penalty for detection in the wrong would be merely a new election, giving another chance for the exercise of the same tactics, such practices would be at a great premium and an election indefinitely prevented * * * but if * * * the wrong is at once corrected in this House, no encouragement is given to such dangerous and disgraceful methods."

The report was debated at length in the House on April 25 and 26, and on the latter day a motion to recommit the case with instructions to examine the ballots was defeated, yeas 110, nays 147. The resolution submitted by the minority, proposing to confirm the title of sitting Member to the seat, was then disagreed to, yeas 107, nays 147. The resolutions of the majority, seating contestant, were then agreed to without division, and Mr. Wise appeared and took the oath.

1104. The Tennessee election case of Patterson v. Carmack, in the Fifty-fifth Congress.

Instance wherein conditions of a district as to party and racial lines were considered in an election case.

Discussion as to appointment of election officers of one party only as prima facie evidence of fraud.

Discussion as to the sufficiency of tally lists kept by watchers at the polls to impeach the returns of the officers.

On March 31, 1898,[1] Mr. W. S. Kirkpatrick, of Pennsylvania, from the Committee on Elections No. 3, submitted a report of the majority in the Tennessee case of Patterson *v.* Carmack.[2]

The sitting Member had been returned by a majority of 365, which contestant sought to impeach by charging fraudulent conspiracy on the part of sitting Member's supporters in one county, and other frauds in two precincts of another county. Sitting Member also made certain counter charges, the principal of which related to use of poll-tax receipts by contestant's friends. Certain general conditions were considered as of influence in this case. Both sitting Member and contestant were Democrats, there having arisen a division in the party in the district over the money question. Contestant had been indorsed by the Republicans. The majority in their report exhibit tables showing analysis of the vote, from which it is concluded:

> It will be seen that in these 10 contested districts the contestee overcame a hostile majority in the rest of the Congressional district of 1,207, and converted it into a majority in the entire Congressional district of 365. The total vote of these 10 contested districts is 2,170. It will be found from the evidence that of these 950 were white and 1,120 colored. A very short calculation will prove that in order to secure the vote returned for him, contestee must have received the entire white vote and three-fourths of the colored vote in these contested districts.

The election law of Tennessee provided as follows:

> The sheriff, and if he is a candidate, the coroner, shall hold all elections. (M. and V. Code, sec. 1044.)
>
> The county court shall appoint three judges for each voting place, who shall be of different political parties. If the court fail to make the appointment, the sheriff, with the advice of three justices of the peace, or, if none be present, three respectable freeholders, shall appoint said judges. (M. and V. Code, secs. 1047 to 1049.)
>
> If the sheriff or other officer whose duty it is to attend the particular place of voting fail to attend, any justice of the peace present, or if no justice is present, any three freeholders, may perform these duties, or in case of necessity may act as officers or inspectors. (M. and V. Code, sec. 1050.)
>
> When the election is finished, the returning officers and judges shall, in the presence of such of the electors as may choose to attend, open the box and read aloud the names of the persons which shall appear on each ballot. (M. and V. Code, sec. 1068.)

The case as presented naturally divides itself into three branches: (1) A charge of conspiracy in Fayette County, which was effective in eight voting districts, and a charge of fraud in two districts in Tipton County; (2) the propriety of counting

[1] Second session Fifty-fifth Congress, House Report No. 895; Rowell's Digest, p. 574; Journal, pp. 481, 484, 485; Record, pp. 4167, 4182–4200; Appendix, p. 422.

[2] The minority views were presented by Mr. Stephen Brundidge, jr., of Arkansas, and concurred in by Messrs. R. E. Burke, of Texas, and R. W. Miers, of Indiana.

returns from ballot boxes extemporized in opposition to the regular poll; and (3) the use of tax receipts as an inducement to voters.

(1) As to the charge of conspiracy in Fayette County, the evidence showed that the opposition to sitting Member failed generally to procure from the sheriff of Fayette County proper representation on the boards of officers holding the elections in the various districts of the county. The majority, after citing from the cases of Threet *v.* Clark, Thorp *v.* McKenney, and English *v.* Peele, say:

> According to the foregoing citations, the appointment on the election boards to represent one of the opposing parties of persons not in sympathy with or objectionable to that party, or of persons unable to read and write and without the necessary mental capacity to enable them to serve intelligently, should of itself be regarded as evidence of conspiracy to defraud on the part of the election officials, and that the appointment of such persons was prima facie evidence of fraud and misconduct on the part of those charged with the constitution of these boards and the conduct of the election, where it was possible to appoint competent and well-known representatives of the complaining party to act as judges or inspectors of election. This presumption is still more emphatic where, as in this case, these appointments were strongly objected to by the friends of the contestant in the several districts complained of, and where timely application was made for proper representatives and the attention of the appointing parties called to a number of proper and unobjectionable persons for such place on the boards.
>
> The record shows that in every single voting precinct in Fayette County, against whose election returns contestant brings the charge of fraud, all the judges were Carmack supporters, or the Republican representative to whom the law intrusted the duty of protecting the interest of his party was an ignorant negro, unable to read and write, and of a very low grade of intelligence.
>
> There is no pretense that it was not possible to have selected persons who could read and write, the proof showing that there were many such persons in all these districts who were Republicans. Therefore, according to the rule laid down in the cases above cited, this one fact is a very strong circumstance, sufficient in itself, unless explained, to prove a conspiracy to defraud, and even making out, according to the holding in Thorp *v.* McKenney, a prima facie case of fraud and misconduct on the part of the officials charged with the conduct of the election.

The minority thus meet the charge of conspiracy:

> Manifestly if there is any force whatever in the claim of "conspiracy" it is that the alleged conspiracy operated against the contestant individually. So far from this being true, the face of the returns shows that contestant received 613 more votes than the Republican electors, and that contestee's majority was only 365 as returned, whereas the admittedly lawful and actual Democratic majority in the district is over 2,000. Moreover, it is charged that the alleged conspiracy had its chief operation in Fayette County, whereas it is shown by the record that in this county contestant received and had returned for him majorities at five of the election precincts. These returns absolutely destroy all possibility that there was any conspiracy by showing that it did not exist in that portion of the county at least. There is, in our opinion, absolutely no foundation in fact for the claim of the contestant that a conspiracy existed, having for its object his defeat by fraudulent methods.

The attitude of the colored vote in the county of Fayette was a matter of dispute, the minority contending that it was hostile to contestant personally for remarks he had made about the race, while the majority cited the returns of adjoining precincts in the county to show that such a general cause evidently did not operate.

The majority and minority join issue in the various contested precincts of the county to determine whether or not the testimony rebuts or sustains the presumption of conspiracy which the majority alleged had been raised by the action of the sheriff.

In general the testimony relied on to show the alleged fraudulent acts of the election officers was of two classes:

(*a*) The ballot not being secret, at several polling places friends of contestant kept lists of names of persons voting for contestant. In some cases the persons keeping the lists handed the ballots to the voters and saw them deposited. In addition to this, testimony was produced to show that the election officers refused to permit witnesses to be present at the count in spite of the fact that the law made a provision to that effect. When, under these conditions, the return showed for contestant fewer votes than were shown by proof aliunde, the discrepancy being material, the majority ruled that no confidence should be placed in the return, and that it should be rejected. The minority combated this proposition by showing the bad character of those keeping the lists, some of them having a record as "ballot-box stuffers," and by impeaching the verity of the lists kept by them through witnesses who testified that they did not vote, although their names were on the lists. Evidence was also introduced to show the unpopularity of contestant among those naturally expected to support him. And also the minority rely on testimony as to the good character of the election officers.

In Mason district, in Tipton County, the watcher at the polls did not preserve the names of those voting for contestant, but simply a tally of the number of Republican votes he saw cast, which he submitted with his deposition. The minority thus assail this testimony:

> No list of names was kept by them or by any other persons at or near the polls, making them a part of the "res gestse," but one of the witnesses says he kept a "tally list"—that is, made a mark on a piece of paper as each man voted; but he gives no names of such voters, and none of the witnesses are able to swear that any single particular man did vote for Patterson.
>
> We submit that such a dangerous precedent has never yet been set by the House of Representatives, and should never be, as to accept such incompetent evidence to impeach returns of a precinct.

As to the charge that the election officers had refused to allow the counting to be witnessed, the minority minimized it by endeavoring to show that the demands were not made in a proper way and in good faith.

(*b*) In one precinct contestant took the testimony of intelligent voters as to how they voted, and proved 36 votes, although the official returns credited him with only 10 votes. Therefore the majority proposed that the returns be rejected. The minority strove to impeach this evidence by showing that it was collected by a notorious "ballot-box stuffer" who had previously tried to corrupt the officers of election, and also by showing that the witnesses might have been mistaken, since some Republican tickets used did not have contestant's name, while a person who claimed to distribute Republican tickets that day did actually distribute Democratic tickets.

1105. The case of Patterson v. Carmack, continued.

Discussion as to the disposition of rival polls caused by a division among election officers.

Discussion of the theory that State election laws are Federal laws for Congressional elections, and that constructions by State courts must yield to the precedents of the House if there be conflict.

Discussion as to the validity of outside polls.

Discussion of the legality of a vote cast by an elector whose qualifications as to poll-tax payment have been perfected at the expense of other persons.

2. In three districts outside polls were instituted. These districts were Galloway and Oakland, in Fayette County, and Tabernacle, in Tipton County.

At Galloway the opening of the polls was delayed for two hours under pretense, as the majority find, of trying to find a Republican judge. The majority claim that then the judge in charge, Braden, publicly announced that there would be no election; whereupon, as the report says:

> Immediately after this public announcement, and before Braden had left, Squire L. E. Griffin announced publicly that if Braden did not hold an election he would.
>
> This was his right, under the laws of Tennessee, as we understand them, he being a justice present and vested with the power of holding the election if the officer appointed to this duty failed to attend, or, having come, refused to perform that duty.
>
> Griffin, in accordance with the law, called in three freeholders, appointed judges and clerks, swore them in, and then these persons legally opened and held the election, Braden and his appointees having refused to act and having left the polls, as already stated.
>
> After the poll was thus opened and a number of voters had registered their votes Braden returned and opened another poll, selecting two of the judges who had been appointed in the first instance and one other person, and also proceeded to hold an election.

The majority also find that Braden had openly declared before the election that he was going to count Patterson out. The majority recommended that the Griffin poll be counted and that the Braden poll be rejected, as held in violation of law, citing the case of McDuffie *v.* Davidson as a precedent. The committee justify this act because:

> Griffin swears positively that he stayed at the place where his election was being held until after the voting began and then went up the street, passing the place where the Braden election was held, and that when he passed no one was there and no election was then being held.
>
> It further appears from the testimony that the persons holding the Griffin election actually went into the room where Braden subsequently held his election and took out the table which they used at their polling place. No one was in the room when the table was so removed.
>
> We are fully satisfied from the evidence that Braden had refused to hold the election, and, from all his conduct and the attending circumstances, that he expected thereby to defeat the holding of any election after being checked in his plans to commit a fraud on the clear Republican majority in this precinct.
>
> We also find from the great preponderance of the evidence that the Griffin poll was opened and underway before Braden changed his mind and concluded to open his polling place.

The minority deny that contestant shows by preponderance of evidence that the sheriff did refuse to hold the election and abandoned the place, and cite testimony and circumstances to prove that the election held by Braden was the regular election.

At Oakland the supporters of contestant became apprehensive that they would be defrauded at the regular poll, and opened another box, holding an election whereat contestant received 154 votes, which were not counted by the sheriff, however. The majority feel satisfied from the testimony that the officers intended to commit fraud, and, in fact, find the integrity of the regular box impeached by the testimony and not sustained by testimony to repel the presumption of fraud. As to counting the votes cast at the outside poll, they say:

> It is true that there are cases in some of the States which hold that the purpose to commit a fraud on the part of the election officers in charge, however clearly evidenced, is not of itself sufficient to authorize electors who fear to cast their votes at such polling place, however reasonable that apprehension may be, to set up and hold another election.

No case, however, was cited from Tennessee, and in view of the very liberal provisions of the statutes of that State and the still more liberal interpretation placed upon those statutes by its courts in construing and overlooking irregularities in the interest of a fair and free expression of the popular will, there is room for doubt as to whether this poll might not be sustained.

But in judging "of the elections, returns, and qualifications of its own Members" under the grant of the Constitution, this House exercises judicial power, and is a court of competent and exclusive jurisdiction.[1] In passing upon these returns and elections, even if no Federal statute is in existence regulating the elections of its Members, it interprets and construes the State election laws which, for the purposes of such election, are to be regarded as having the quality of Federal legislation, and the opinions of State judges are only to be adopted so far as they commend themselves by the intrinsic force of their reasoning; and where such decisions are in conflict with its own determinations, the precedents established by Congress are the expression of the law, and must control that court with the same force and effect that its own prior deliberate rulings guide and control any other court.

It has been decided in numerous cases by Congress that it is its privilege and its duty in the exercise of its constitutional right to pass upon the election and qualifications of its own Members, to award the seat in Congress to the candidate who is ascertained to be the choice of the majority of the legal voters of his district, even though slight technicalities are required, in doing so, to be overlooked and disregarded. This power may be regarded as implied in the constitutional grant, and to that extent and thereby State legislation, so far as it relates to and regulates the elections of Members of Congress, supplemented and modified by that Constitution as the supreme law of the land.

After quoting the case of McDuffie *v.* Turpin, the majority say:

As already stated, an adherence to strict technical rules would seem to necessitate the rejection of the returns received from this precinct. However, as this would involve for the contestee a greater loss than would follow the counting of both, and as the contestant in his brief expresses a willingness that both should be counted, while recommending that the precedent set by the case of McDuffie *v.* Turpin be followed and that the vote cast in the box held by the supporters of contestant be counted under the authority of that case, we also recommend that the vote cast in box No. 1 be counted, especially as contestant does not insist that it should be rejected.

We are entirely satisfied that the recommendations made in the case of McDuffie *v.* Turpin as to a strict performance of all legal requirements were followed in this case, and that all persons who voted for contestant at box No. 2 were legal and qualified voters. Counting both returns, the vote from this district would be: For contestant, 159; for contestee, 241.

The minority do not agree that the outside poll should be counted:

We are of the opinion that the poll opened by Griffin at the brick house where these votes were cast were the outside polls, and that the returns thereof can not be counted, and we are strengthened in this opinion by the fact that the contestant, in his notice of contest, seeks to have these 247 votes counted, because, he says, "they were legal voters and their votes ought not to be lost simply because they were badly advised as to which of the boxes they should vote at."

At Tabernacle there was a conflict of authority between the sheriff in charge and election officers appointed by the county court, and two boxes were opened. The sheriff counted both boxes. The minority considered the outside poll illegal, and the majority apparently consider the sheriff poll illegal. This precinct is not discussed at length, as it did not affect the result.

3. As to the poll-tax receipts. Sitting Member charged that a large number of votes were cast for contestant upon poll-tax receipts which had been paid for by contestant's political friends, and that the votes so cast were illegal. The

[1] This point was debated on April 25, 1898, during consideration of another case. Record, second session Fifty-fifth Congress, pp. 4252–4254. Also Appendix, p. 427.

majority found no sufficient ground in this respect to modify the conclusions already arrived at. They say:

We are of the opinion that when the voters accepted the poll-tax receipts for taxes paid by others for them, they ratified the payment so made for their benefit, and they thus constituted the parties so paying the taxes their agents in that behalf. Nor was it necessary that the voters should offer or bind themselves to repay such taxes to the person so paying them in order to constitute it a payment by the voter or a ratification thereof. The acceptance by the taxpayer of the receipt is in itself a sufficient adoption of the payment by another for him, and it makes no difference how or by whom the payment was made, the State's demand is fully satisfied by the payment and the delivery of the receipt to the voter, and his acceptance thereof is a final payment and appropriation.

Besides, according to a proper construction of the Tennessee statute, a voter who has any one of the evidences named in the statute that he paid his poll tax is entitled to cast his vote and have it counted upon exhibiting such statutory evidence, whether he paid his tax in person or some other person paid it for him, provided he adopts the act by availing himself of such receipt, even though such payment was by a political committee for the purpose of qualifying him to cast his vote.

After citing the case of Re Griffith (1 Kulp, Pa., 157) and Massey *v.* Wise, they say:

Nor is the mere furnishing and acceptance of such receipt a corrupt act or proof of bribery. It must appear that such payment of a tax by another than the voter and delivery to him of the receipt therefor was done as an inducement or consideration for the vote or for the purpose of influencing the choice of the voter. The evidence utterly fails to establish these elements, or even to identify any sufficient number of voters voting on such tax receipts to affect the result. Indeed, there is no adequate or competent proof that such voters for whom poll taxes were paid actually voted for contestant, or to what extent their votes were included in the returns.

The majority further cite the case of United States *v.* Foster (6 Fed. Rep., 248).

The minority fully recognize the doctrine "that one's poll tax may be legally paid by another, provided the voter shall properly ratify the act afterwards, but we do not think the mere taking of the receipt and voting on the same is such a ratification as the law contemplates. We think the better and sounder doctrine is that the voter should not only accept the receipt, but he should recognize the act the more substantial way, by repaying or promising to repay the amount." Humphrey *v.* Kingman (Mass., 5 Metcalf, 162) was cited in support of this contention.

The minority further say:

The evidence also discloses the further fact that a great many of these poll-tax receipts were issued in blank, and were delivered to the friends and agents of the contestant, who carried them to the polls on the day of the election and issued them out to those persons who would agree to vote the Republican ticket, and especially for the contestant.

That a great many of them were given out in this manner is sufficiently shown from the evidence. It also appears that at the time these poll-tax receipts were issued there was an agreement and understanding made with the officer issuing them, that all those not used could be returned and pay would only be exacted for such as were not returned; and many of them, in fact, were returned.

This practice does not meet with our approval. The laws of the State make the poll tax a charge and burden against the voter, and it is not a tax against a campaign committee or a certain candidate, and neither of them should be permitted to use them for the purpose of bribing voters.

It is held in 12 Phil., page 626 that where a poll tax is paid by an agent of another, not previously authorized to do so, credit must be given to the individual for whom payment is made by the collector at the time of receiving the money; otherwise there was no valid payment of the poll tax. No such credit was given in this case, nor was such a thing ever contended for. But, upon the contrary, the

the proof shows that at least $150 of this poll-tax money was not paid until some eighteen days after the election. This being so, there can be no question but what 75 of these votes were illegal and, as the testimony shows, they were cast for the contestant. We think that this number should be deducted from his vote.

The majority say:

We are disposed to hold that unless the fact of such actual nonpayment was known to the voter, his acceptance of the receipt in good faith constituted his discharge as between him and the taxing authority and under the law the liability of the collector to account for the tax became fixed.

The voter thereupon became qualified to cast his vote upon exhibiting his receipt, and the acceptance thereof by the election officers was an adjudication of his right which could not be afterwards collaterally set aside, especially after he had lost his opportunity to perfect his right had it been questioned before casting the vote.

The report was debated fully on April 21 and 22, and on the latter day the question was taken on amending the resolutions of the majority by substituting resolutions proposed by the minority declaring setting Member elected and contestant not elected. There appeared yeas 138, nays 120, so the motion to amend was agreed to. The original resolutions as amended were then agreed to, yeas 136, nays 118. So the contention of the majority of the committee was overruled, and the title of sitting Member to the seat was confirmed.

1106. The New York election case of Fairchild v. Ward, in the Fifty-fifth Congress.

Although contestee's name may have been unlawfully placed on the ballot, yet in the absence of deception, the ballot might be used to express the honest and intelligent wish of the voter.

A decision by a State court after the election that contestant's name, which had appeared in the independent column, was entitled to place in the regular party column, was held not to affect the election, no deception of the voters having occurred.

On March 23, 1898,[1] Mr. Lemuel W. Royse, of Indiana, from the Committee on Elections No. 2, submitted a report[2] in the New York case of Fairchild *v.* Ward. The facts in relation to the election and the ground of the contest are set forth in the report:

At the election held for Representative in Congress in this district on the 3d day of November, 1896, there were five candidates for the office, viz: William L. Ward, the regular Republican nominee; Eugene B. Travis, Democrat; James V. Lawrence, National Democrat; Lucien Sanial, Socialist; Ben L. L. Fairchild, Independent Republican.

The certified returns from this election show the following results:

	Votes.
For William L. Ward	30,709
For Eugene B. Travis	23,450
For James V. Lawrence	1,697
For Lucien Sanial	1,299
For Ben L. Fairchild	770

William L. Ward therefore received the certificate of election, by virtue of which he now holds a seat in this House.

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[1] Second session Fifty-fifth Congress, House Report No. 798; Rowell's Digest, p. 559; Journal, p. 442; Record, pp. 3709–3720.

[2] Minority reviews were filed by Mr. John W. Gaines, of Tennessee.

In due time, after the result of the election was declared, the contestant served upon the contestee his notice of contest, in which he charges that before the election he had been regularly nominated by the Republican party of the district as its candidate for Representative in Congress, and that therefore his name as such candidate should have been placed upon the official ballot in the Republican column; that the contestee, by tricks, devices, and abuse of the process of the courts, wrongfully and fraudulently procured his name to be placed upon the official ballot in the Republican column as a candidate for Representative in the Fifty-fifth Congress instead of contestant's name.

The contestee, in his answer to contestant's notice, denies all the charges contained therein, and asserts that he was the regular nominee of the Republican party, and that his name was rightfully placed upon the official ballot in the Republican column.

The law of New York, under which the election was held, is fashioned after the Australian system. It provides that the names of candidates nominated by a party organization shall appear upon the official ballot in a separate column and under a device chosen by said party. No other person's name can legally appear in such column. The voter, by making a cross in a circle at the head of this column, votes for all the candidates appearing in such column.

It appears that the Republican district convention of 1894, held for the purpose of nominating a candidate for Congress, appointed a committee to call the next Congressional convention. In the spring of 1896 this committee called a convention of the Republicans of the district to select delegates to the national convention. This latter convention, before adjourning, appointed a committee to call the next Congressional convention. So there were two committees charged with the duty of calling the Congressional convention of 1896. The result was two conventions, the first of which nominated sitting Member, while the second nominated contestant. Each candidate, complying with the law, filed with the secretary of state his nomination paper, and that official, after a hearing, decided in favor of the contestant. A State law allowed an appeal, and the report, after quoting the statute, says:

Under the provisions of this statute the contestee brought proceedings before Judge Edwards, a justice of the supreme court of the third judicial district, to review the decision of the secretary of state.

It will be observed that the act is silent as to who should be made parties to the proceeding for review. It does provide, however, that notice shall be served upon the officer whose decision is sought to be reviewed. No other notice seems to be required. It appeared in the first instance the secretary of state and the contestee were the only parties to the proceedings. The contestant, however, asked to intervene as a party. Over the objections of the contestee, Justice Edwards granted this request, and accordingly contestant was admitted as a party. Contestant thereupon moved to dismiss the cause for want of jurisdiction in Justice Edwards. This motion was overruled by Justice Edwards, and he proceeded to hear the review. At its conclusion he reversed the decision of the secretary of state and decided that the contestee was the regular nominee of the Republican party, and that his name as such should go upon the official ballot.

Contestant appealed from this decision to the appellate division of the supreme court of the third judicial department, and upon hearing of this appeal the decision of Justice Edwards was affirmed. Thereupon the secretary of state directed the printing of the name of the contestee upon the official ballot as the regular nominee of the Republican party. He also directed that the name of contestant be printed upon the ballot in a column by itself, in obedience to a petition filed with him by the contestant. The ballot was framed in accordance with these directions, and as so framed was voted at the election. After the election contestant perfected an appeal of the cause to the court of appeals of the State of New York. In January, 1897, the court of appeals reversed the decision of the supreme court and that of Justice Edwards.

The court of appeals held: First. That the proceedings to review the decision of the secretary of state should have been brought in the second judicial district, where the complainant resides and in which the district is located for which the nomination is made, and that therefore Justice Edwards

had no jurisdiction to hear such review. This necessarily required a reversal of the decision of the supreme court and that of Justice Edwards. Ordinarily this would have ended the case, but the court said that it regarded the questions of sufficient importance to warrant it in going further and passing upon the merits of the case in order "to prevent other complications that may arise out of the existing state of affairs and prevent embarrassment in the future administration of the law."

On the consideration of this phase of the case the court held that Mr. Fairchild was the regular nominee of the Republican party, and that his name, therefore, should have appeared upon the official ballot in the column of that party.

In the debate considerable was said about an alleged unfair act of sitting Member's attorney in delaying the filing of the order in favor of his client to such an extent as to deprive the contestant of a decision on appeal before election day, but this delay was reduced to a few hours when analyzed by a member of the committee. The committee—and all the members of the committee signed the report except Mr. John W. Gaines, of Tennessee, who presented minority views—deny that the court of appeals could by its decision affect the election already held, and state that it did not go into the original merits of the controversy, but deferred to the action of the State convention in seating Fairchild delegates, the controversy having been carried into the primaries selecting delegates to that convention. The committee also dissents from the position of the court of appeals in holding that Justice Edwards did not have jurisdiction. The report says:

The question of jurisdiction does not appear to have been argued before the court of appeals, and it does not appear that the court's attention was called to the fact that Mr. Fairchild had voluntarily appeared as a party to the proceedings in the court below, nor does it appear from the transcript of the record in the court of appeals, which is before us, that contestant did appear voluntarily. We therefore think that Justice Edwards had jurisdiction over the proceedings to review and over all the parties thereto and possessed full power and authority to make the order issued by him. It must follow that the order so made was binding on the contestant, the contestee, and the secretary of state.

The ballot was printed in accordance with this adjudication, and was therefore valid; at least so long as the adjudication remained in force. It did remain in force until after the election was held and the result declared. It seems to us that any reversal of it afterwards could not affect the election. We are strongly impressed that the legislature which enacted the law under which this election was held intended that all controversies as to who was the regular nominee of a party should be settled before the day of election.

The committee, however, do not admit that these preliminary questions are necessary to the decision of the case, and they consider it unnecessary "to decide which one of these parties was entitled to have his name on the ballot under the Republican emblem," for—

There was no deception practiced upon the Republican electors in the district. There is no proof but that all that had been done with reference to the printing of the ballot was fully known to all of them. The mean of obtaining this information was ample and within their reach.

It must therefore be presumed, in the absence of evidence to the contrary, that when they went into the polling places to vote they knew Mr. Ward's name was on the ballot as the regular nominee of the Republican party, and that if they voted the straight Republican ticket their votes would be counted for him. The evidence of several of these voters is in the record. They all say that, while they would have preferred to vote for Mr. Fairchild, yet they knew that Mr. Ward's name was on the ballot in the Republican column, that they supposed that the decision of Justice Edwards and the supreme court had settled that Mr. Ward was the regular nominee of the Republican party, and they voted for him accordingly.

If we were to assume that contestant was the regular nominee of his party, and that he had been deprived of the right to have his name go upon the official ballot in the Republican column by a decision

that was void, because of the want of jurisdiction in the justice of the supreme court who made the same, still we do not believe that we would be authorized to count for him the votes cast for Mr. Ward; nor do we think we could declare the election void.

It must be borne in mind that the order of Justice Edwards, after it was affirmed by the supreme court, was obeyed by the secretary of state, and that Mr. Ward's name went upon the ballot in the Republican column at the direction of this official. Information of this action was generally circulated throughout the district prior to the election. On several occasions the contestant, both in public and private talks to the Republican voters in the district, advised them to vote the straight Republican ticket, as it was then framed, with Mr. Ward's name upon it as a candidate for Congress.

Although the placing of Mr. Ward's name on the ballot might have been an unlawful act, yet it did not follow that such a ballot could not be used to express the honest and intelligent wish of the voter. The case of People ex rel. Hirsch *v.* Wood et al. (148 N. Y., 142) is quoted in support of this view, wherein it was held—

That while the action of the county clerk in inserting in the local party column the names of candidates who had not been nominated and certified by that party was, under the election law as amended in 1895 (chap. 810, Laws of 1895), unauthorized and without right, it was a latent defect and did not disfranchise qualified and innocent voters who had used the official ballots so furnished them; and that, where the local party column had been duly crossed by voters to express their choice, the county board of canvassers should not be required to reject the ballots from the count for candidates so improperly included in that column.

The report was debated at length in the House on April 11, and on that day, by a rising vote of ayes 162, noes 30, the House decided that contestant was not elected; and, by a vote of ayes 138, noes 42, it was decided that sitting Member was elected and entitled to the seat.

1107. The New York election case of Ryan v. Brewster, in the Fifty-fifth Congress.

Specifications in contestant's notice of contest criticised as too general.

Contestant's case should be limited to the allegations of his notice of contest.

Instance wherein the Elections, Committee examined a contest on the merits, although the pleadings were too imperfect to support a decision for contestant.

As to the use of a voting machine in one city of a district.

On March 30, 1898,[1] Mr. James G. Maguire, of California, from the Committee on Elections No. 2, submitted the report of the committee in the New York case of Ryan *v.* Brewster:

Contestant and contestee were the Democratic and Republican nominees, respectively, for Representative in Congress from the Thirty-first Congressional district of the State of New York at the general election held on November 3, 1890.

According to the official returns, 44,600 votes were cast at the election for Member of Congress, of which contestant, Ryan, received 17,109 and contestee, Brewster, received 25,399, giving contestee an apparent plurality of 8,280 votes.

The only question, so far as the merits of the case was concerned, was as to the legality of the use of the Myers voting machine in the city of Rochester; but a considerable portion of the report is occupied by discussion of an incidental question

[1] Second session Fifty-fifth Congress, House Report No. 892; Rowell's Digest, p. 563; Journal, p. 401.

relating to the notice of contest. The first two specifications of the reasons for contest were:

I. Because you were not the duly and legally elected Representative from said district to said Congress.

Il. Because I am the duly and legally elected Representative from said district to said Congress.

The report criticises the notices in this and other respects as follows:

The first and second allegations of the notice are too general to constitute specific statements of grounds of contest within the meaning of the United States statute requiring contestant to specifically state in his notice the grounds of contest; but in so far as testimony has been taken, without objection, concerning the number of votes cast for either of the parties, it will be considered.

All other issues made by the pleadings of the parties relate to the legality of the record of votes made by the Myers ballot machines, which it is alleged and admitted were used exclusively at all of the voting precincts in the city of Rochester as a substitute for tickets printed on paper.

There is no allegation in the notice of contest that contestant was deprived of any votes that were legally cast for him; nor that the exclusion of the votes alleged to have been unlawfully cast through the Myers ballot machines in the city of Rochester, and unlawfully counted, would, either alone or in connection with other facts, change the result of the election; nor that any of the electors of the city of Rochester, if they had been permitted to vote legally, would have cast their votes for contestant; nor that any elector of the city of Rochester, who would have voted for contestant or for any other person than contestee, sought to cast a legal ballot at such election, or to vote otherwise than through the Myers ballot machine.

It not only does not appear from the allegations of the notice of contest that contestee was, either directly or indirectly, guilty of any wrongful act in connection with the election in question, but it does not appear from such allegations that contestant was in any way injured or deprived of any votes; nor that contestee derived any advantage of any kind whatever by reason of all or any of the matters complained of.

In all contested election cases the notice of contest must show prima facie that the acts and conditions complained of were not only wrongful or unlawful, but that the elimination of the effects of the acts and conditions complained of would change the result of the election in question. In the absence of such prima facie showing, the notice of contest is insufficient to support a decision either that contestant was elected or that contestee was not elected.

The general rule is that a contestant's case is limited to the allegations of his notice of contest. While he may establish his case by proving less than he has alleged, he can not make a case by proving more than he has alleged. (McCrary on Elections, sec. 394; Paine on the Law of Elections, sec. 824.)

If, therefore, the evidence fails to establish either the first or the second allegation of contestant's notice-that is to say, either that contestant received a plurality of the votes actually cast, or that contestee did not receive a plurality of such votes—the contest should be dismissed because of the insufficiency of the remaining allegations (if conceded to be true) to constitute a cause of contest.

As to the merits of the case, the report points out that if all the votes cast in the city of Rochester should be held illegal, the sitting Member would still be elected by the votes of the remainder of the district. But it was in evidence that the law permitting the use of the voting machine, also provided paper ballots in case the electors should choose to use them. There had been a defect in the working of the machines, and there was a discrepancy of 1,696 votes between the total number of electors voting in the city of Rochester and the number recorded by the machine as voting for Representative in Congress, but there was no evidence to show that this discrepancy was caused by the failure of the machine. Had there been such evidence, the result of the election would not be changed by the discrepancy.

Therefore the committee concluded unanimously that sitting Member was entitled to his seat, and reported resolutions to that effect.

The case was not acted on by the House, sitting Member of course retaining the seat.

1108. The Virginia election case of Brown v. Swanson, in the Fifty-fifth Congress.

A return should not be rejected because the signatures of the election judges, by their direction and in their presence, were made by the clerk.

A slight discrepancy between the poll list and the ballots found does not justify its rejection.

The fact that a voter displays his Australian ballot to an election officer, no improper purpose being shown, is not necessarily a violation of the law of secrecy.

A ballot should not be rejected because an official marker has failed to mark it properly.

On April 13, 1898,[1] Mr. Edgar D. Crumpacker, of Indiana, from the Committee on Elections No. 3, submitted a report in the Virginia case of Brown *v.* Swanson. The sitting Member had been returned by a majority of 551 votes, and contestant attacked this majority, alleging fraud and irregularities. The report of the committee in this case was signed by only four of the nine members, and there was a question as to its presentation. The paper representing the opposition view actually represented a majority of the committee, and was entitled "Views of the majority." This paper is summed in the following extract:

> After listening to exhaustive arguments in this case, four members of the committee have filed a report in which they recommend that contestant be given a majority of 372 votes. They also direct attention to 147 other votes which, in their opinion, might justly be counted for contestant, making his majority 519.
>
> The undersigned agree with the conclusions of the said report, except so far as they relate to the so-called excluded vote at Stokesland, Ringgold, and Design precincts, and the 147 votes aforesaid, which we do not think should be counted for contestant.
>
> After a careful examination of the cases and authorities cited by contestant and a rigid analysis of the evidence contained in the record relating to these three precincts, we are constrained to conclude that, while the law is correctly stated by contestant, the facts, as disclosed in the record, do not warrant the counting for contestant of the 495 excluded votes.

As the decision of the case turned on the excluded vote of the three precincts, Stokesland, Ringgold, and Design, it is evident that the actual majority of the committee were opposed to the contestant, although the committee as a whole agreed as to the law applicable to the three precincts, and also as to the law and facts in regard to the other precincts treated in Mr. Crumpacker's report.

1. As to the precincts wherein the whole committee agreed, the issues were determined by the Australian-ballot law of Virginia. Under that law no sample ballots were allowed, and the voter knew little of the form and arrangement of the ballot until he attempted to vote. At the election in question the ballot was printed in a single column without emblems or party lines, and contained the names

[1] Second session Fifty-fifth Congress, House Report No. 1070; Rowell's Digest, p. 578; Journal, second session, p. 450, third session, pp. 87, 194.

of sixty-six candidates for various offices. The whole election machinery was controlled by sitting Member's party, but in making up the local boards of election judges they did not in this district generally disregard the provision of law allowing minority representation. In nearly every instance, however, the judge selected to assist illiterate voters was a member of sitting Member's party. Of the functions of this assisting judge the report says:

A voter who requires assistance in preparing his ballot is not permitted to select the judge he desires to assist him, but is bound to accept assistance from the judge selected by the board for that purpose. A large percentage of the voting population of Virginia is illiterate and the act of voting is surrounded with so many obstacles that all the illiterates require assistance in preparing their ballots. The judge selected to assist illiterates, as a rule, can perpetrate fraud with impunity, for the voter, by lack of education, is unable to know whether his ballot is marked so as to express his will or not. The only safeguard for the honesty of elections in this particular is the capacity and personal integrity of the assisting judge.

The instances of irregularities or fraud on which the committee reached a conclusion without differences fall under two heads:

(*a*) Returns improperly rejected by the board of canvassers and which should be counted. In Patrick County the board of canvassers rejected returns from three precincts which had given contestant an aggregate majority of 146.

At Court-House precinct two of the three judges were political supporters of sitting Member, one of the judges was not sworn, and this was the only irregularity. Counsel for sitting Member admitted that this return was improperly rejected.

At the second precinct the report concludes:

At Gates Store the return was in due form, but the signatures of the judges thereto were written by one of the clerks. The signatures were so written in the presence of and at the request of the judges. Two of the judges were Democrats and supporters of contestee and the other was a Republican and a supporter of contestant. There was no evidence that any fraud or irregularity occurred prejudicial to the interests of contestee, but the return was rejected on the sole ground that the signatures of the judges were written by the clerk. That was clearly an insufficient reason for rejecting the return. The rights of the innocent voters of the precinct should not suffer on account of such a slight irregularity, if it were an irregularity at all. The signature of each judge was written in his presence and at his request, and was, in the sense of the law, his own signature. An attorney in fact has no authority to sign the name of an election judge to official papers, it is true, for such signing would relieve the judge of some of the responsibilities of his trust, but in this case the signature was not by an attorney in fact, but by the judge himself, because it was made under the direction of his will. Each of the judges so signing the return could be prosecuted under the law for making a false return as fully as if he had written the signature with his own hand. The law requires the signature to be the act of the officer, but it does not prescribe the instrumentality he shall employ in making it.

Therefore the report concludes that contestant's majority in this precinct should be counted for him.

Of the third precinct the report says:

At Kings Store 177 ballots were found in the box and only 175 names appeared on the poll books, and for that reason the return was rejected. There was no other evidence of fraud or irregularity submitted, and two of the three judges were political friends and supporters of contestee. It was the duty of the election officers under the law to count the ballots without unfolding them as soon as the polls were closed, to ascertain whether the number of ballots was the same as the number of names on the poll books. If there were more ballots than names one of the officers should be blindfolded and draw the excess from the box. That seems not to have been done at this precinct. The board of county canvassers notified the election judges to appear during the canvass of the vote of the county and purge

the poll in accordance with the law, but they declined to do so. There were only 170 votes cast for candidates for Congress, so the number of Congressional ballots was 5 less than the number of names on the poll books. However, that slight discrepancy, in the absence of other evidence impeaching the poll, would not be sufficient to warrant its rejection. The possibility of an omission on the part of the clerks to record all of the names, or the possibility of voting a double ballot through inadvertence, may account for the discrepancy consistently with honest conduct.

Moreover, the vote at the precinct was proven by evidence aliunde. One of the election judges who assisted in canvassing the ballots testified that contestant received 113 votes and contestee received 57 votes. The testimony was based upon an actual inspection and count of the ballots, and it stands in the record wholly uncontradicted. The conclusion of the undersigned members of the committee is that the majority of 146 for contestant at the three precincts in Patrick County should be counted for him.

(*b*) Irregularities or frauds on the part of local election boards.

At Ridgeway precinct, in Henry County, 55 boots improperly marked for President were rejected altogether on that account and were burned at the close of the canvass, but it was proved without dispute that 48 of them were correctly marked for contestant and 5 for contestee. The election law expressly declared that ballots correctly marked for one candidate should be counted for him, although improperly marked for candidates for other offices. The board of officers was composed of two Democrats and one Republican. But sitting Member insisted that the whole poll should be rejected because of alleged fraud in another respect:

The evidence shows that a number of voters, after having their ballots marked, ready to be deposited in the box, showed them to the Republican judge. That is the only evidence of fraud at that precinct appearing in the record. It was not shown that the voters so displayed their ballots for improper purposes. The judge who assisted illiterate voters was a Democrat, and there was some solicitude on the part of the voters about the manner in which their ballots were being prepared. The Virginia law provides for secret voting, but the secrecy is for the protection of the voter and is not compulsory as to him. There is nothing in the law prohibiting the voter from displaying his ballot to the election officers after it has been prepared, provided he does not do it for corrupt purposes.

The law provided that the voter should fold his ballot after marking it and hand it to the judge of election, but legal opinion had been given by sixteen reputable lawyers before election and scattered broadcast over the State to the effect that the law did not require the voter to fold his ballot until he had left the booth, and that before folding it he might expose it to any person near enough to see its contents, and that such exposure was a legal method for the detection of possible fraud. "There can be no doubt." says the report, "under the Virginia law, that it is not improper for a voter to show his ballot to the election officers when he does it for proper purposes." Therefore the report counts the ballots proven.

At Hurt's store Election Judge East, who assisted illiterate voters a portion of the day, testified that he ignorantly mismarked ballots, 14 for contestant and 1 for sitting Member. All these ballots were rejected. The report says:

It is manifest that those votes should be counted. There is no dispute upon the facts, and it is well settled that an elector can not lose his right to vote by the mistake of one of the election officers. If the voter himself made the mistake the ballot should not be counted, but where he depends upon an officer whose duty it is to assist him in the preparation of his ballot and the officer, through ignorance or design, fails to mark the ballot properly it should be counted. Contestant should be credited with 14 and contestee with 1 vote at that precinct.

1109. The case of Brown v. Swanson, continued.

Returns impeached by the testimony of the voters themselves, and by an unofficial tally, were rejected.

In proving votes aliunde the testimony of the voters themselves was preferred to an unofficial tally.

Where a marking judge refused assistance to voters, the House did not reject the returns, but added votes proven aluinde.

In an inconclusive case the committee agreed that voters shown by parol proof to be qualified and to have attempted to vote should have their votes counted as if cast.

At Dry Forks contestant was credited in the returns with only 46 votes. A tally was kept of the Republican vote and the tally keeper testified that 116 Republicans voted. The depositions of 98 witnesses who voted, and whose names were on the poll books, proved 98 votes for contestant. The election judges tried to prevent the tally being kept, and the evidence showed that the judge who assisted voters was a man of bad reputation. Therefore the report concludes that the returns are vitiated by palpable fraud and should be rejected. In counting the votes proved aliunde the report allows the 98 proved by the voters themselves, and does not accept the tally as a "main reliance."

In a similar manner, by the testimony of voters, the returns of Mount Airy were impeached, and it was further shown that the election officers, all of whom were of sitting Member's party, had whisky during the day; that at noon they adjourned and took the ballot box to another room out of view of the voters and kept it there an hour. There was also evidence to show that the marking judge marked ballots wrong, and one of the judges was heard to declare that they intended to count contestee in. Therefore the return was rejected.

At Dickinson, where contestant received 58 votes and 45 were rejected, while 147 were returned for sitting Member, it was shown that the marking judge declined to furnish voters the necessary assistance. As 95 voters testified that they voted for contestant the report adds 37 to contestant's vote, although they intimate that the returns might be rejected altogether. This is evidently the precinct somewhat inaccurately referred to in the views of the opposing members of the committee.

(2) The above decisions in themselves were not sufficient to overcome the majority of the sitting Member, and an issue of fact, rather than law, was joined as to the precincts of Stokesland, Ringgold, and Design, in Pittsylvania County. The report asserts that 494 legally qualified voters went to the polls in those precincts on election day and made diligent and persistent efforts to vote, but were unable to do so. The report thus states the facts and law:

The total registered vote at Stokesland was 888, of which 173 were white and 715 were colored. The vote polled was 326, contestant receiving 200, contestee 116, and 10 were not counted. It is the duty of county courts in Virginia to establish voting precincts, and after they are once established those courts, upon the petition of 15 voters of a precinct, are authorized to change the boundaries and create new precincts if the convenience of the people seems to demand it. In September, 1895, 32 voters of Stokesland petitioned the county court to divide that precinct and create a new one, on the ground that there were too many voters for one. The petition was continued from term to term, and finally refused in September, 1896.

The total registration at Ringgold was 470 white and 362 colored. There were 504 votes cast, contestant receiving 87 and contestee receiving 316, and 101 ballots were rejected. The registration books were purged about ten days before the election and 95 names were stricken off, leaving the number as above noted. The judges and clerks were all Democrats at that precinct. At Design there was a registered vote of 530, of which 164 were white and 366 were colored. The number polled was 332, distributed as follows: Contestant received 165, contestee 141, and 16 were rejected.

There were 526 who testified that they attempted to vote at those three precincts and failed, and the undersigned members of the committee carefully examined the testimony of each witness and disallowed a number because of their failure to show satisfactorily their right to vote or that they were refused the privilege of voting. All that there was any question about were eliminated from consideration, leaving 494 who proved that they were registered voters of the precincts and made due effort to vote and failed, and that they would have voted for contestant.

The purpose of elections is to register the will of a majority of the voters, and it is the duty of the officers of the law to afford every qualified voter a reasonable opportunity to exercise the important right of suffrage. If that opportunity is afforded and the voter fails to avail himself of it, or if by some fault of his own he violates some regulation in attempting to exercise the right and thereby loses his vote, he can have no just cause of complaint. But if conditions exist, for which the voter is not responsible, that operate to defeat the rights of a substantial number of electors to vote, so that it can not be said that the result at a particular poll reflects the will of a majority of the voters, it discredits the entire poll.

After quoting McCrary on this point, the report goes on to say that it would aggravate the wrong to exclude the poll, and that the excluded votes should be counted for the candidate who would have received them. The case of Thorp *v.* Epes was cited in support of this contention. The report also asserts that the election officers were proven to have resorted to methods the purpose and effect of which was to discriminate against contestant's party and favor the party supporting sitting Member, while if they had honestly cooperated to facilitate voting, all voters could have had an opportunity.

The report further discusses parol evidence as competent to prove registration. Quoting McCrary and Thorp *v.* Epes, it says further:

Registration is designed to prevent fraud and to determine disputed questions that might otherwise arise at elections in advance, so as to avoid confusion and delay. Election boards do not have the time nor opportunity on election day to investigate critically questions that may arise respecting the qualifications of voters, and for the purposes of election the registration books are primary evidence; but when questions arise, as they do here, before a tribunal fully equipped to investigate for the truth, the qualifications, including the registration of voters, may be proved by parol.

Registration does not create the right to vote, but it is an official memorandum of an existing right, and parol evidence is as near the fact as the books. In fact, the books are made from parol evidence, and they are never regarded as more than prima facie evidence of the right to vote. In most of the States laws exist requiring a record to be made of marriages, but the record does not constitute the marriage; it is only an official memorandum of it; and in all the States marriage may be proven by parol evidence notwithstanding the record. A very liberal policy has always been followed in election cases respecting the admissibility of evidence. McCrary, in his work on elections, at section 467, says:

"It is undoubtedly the policy of the law not to throw too many obstacles in the way of investigating the correctness and bona fides of election returns. On this point the court in Reed *v.* Kneass very justly observe:

" 'The true policy to maintain and perpetuate the vote by ballot is found in jealously guarding its purity, in placing no fine-drawn metaphysical obstructions in the way of testing election returns charged as false and fraudulent, and in assuring to the people by a jealous, vigilant, and determined investigation of election frauds that there is a saving spirit in the public tribunals charged with such investigations, ready to do them justice if their suffrages have been tampered with by fraud or misapprehended through error.[3]

"It is in the spirit of this rule that questions respecting evidence in contested election cases should be solved."

In the recent case of Thorp *v.* Epes this House decided that parol evidence is admissible to prove registration, and that decision is in harmony with the best expression of writers and courts on the subject.

Under the long-settled practice of the House there is no doubt that the 494 votes excluded at the three precincts in Pittsylvania, County should be counted for contestant.

This report was never discussed in the House. On January 9, 1899, when it was called up, the House declined to consider it, yeas 79, nays 143. Again on February 23, when it was called up a second time, the House refused to consider, yeas 101, nays 133.

The sitting Member therefore retained the seat.

1110. The Louisiana election cases of Gazin and Romain v. Xeyer, in the Fifty-fifth Congress.

The fact that votes proven to have been cast by testimony of the voters do not appear in the count does not vitiate an election when not numerous enough to affect the result appreciably.

A question as to whether a candidate nominated by nomination papers may suggest the names of election officers under a law giving that function to the "nominating body."

The mere delay in the appointment of election officers does not vitiate an election held by them.

An election is not vitiated by unavoidable delay beyond the legal limit in arranging voting districts.

The premature opening of official ballots and failure to post cards of instruction at the polls do not vitiate an election held properly in other respects.

On June 6,1898,[1] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted the report of the committee in the Louisiana case of Gazin *v.* Meyer, from the First Congressional district. The report gives the conditions of the election as follows:

The election law of the State of Louisiana, under which the Congressional election in 1896 was held, is patterned after what is known as the Australian system. Upon the official ballot used on that occasion there appeared the names of four Congressional candidates, viz: Joseph Gazin, People's Party; A. E. Livaudais, Republican; Adolph Meyer, Democrat; Armand G. Romain, Independent Republican.

From the returns, as certified, it appears that the said candidates received, respectively, the following votes, viz:

Gazin	113
Livaudais	401
Meyer	10,776
Romain	4,022
Scattering	6

Adolph Meyer, having received a large majority of all t.ie votes cast, was returned as elected, and by virtue of such return now holds a seat in this House.

[1] Second session Fifty-fifth Congress, House Report No. 1520; Rowell's Digest, p. 564; Journal, p. 608.

Mr. Gazin in due time served notice of contest, relying upon the following grounds:

First. That the votes cast for me at various precincts in the city of New Orleans were not counted and returned by the commissioners of election as cast.

Second. That the commissioners of election, in violation of their oath of office, counted votes in your favor that were cast for me.

In support of the first proposition the contestant produced 31 witnesses who testified that they voted for him or attempted to do so, in various parts of the city. In some cases the votes of these witnesses appear to have been counted. But the committee found that 15 witnesses in various parts of the city testified that they voted for contestant, while the returns from the several precincts fail to show any votes counted for him. There is evidence that in some of these precincts votes were thrown out because improperly marked, but it was generally impossible to say whether any of the ballots so thrown out were those in which the voter had attempted or intended to vote for the contestant. In one precinct three or four ballots bearing contestant's name were thrown out because other names on the ballots were improperly marked; but the committee think this was the result of an honest mistake.

The committee conclude that contestant did not show over 20 votes cast or attempted to be cast for him, which were not counted for him.

The second proposition of the notice was found entirely unsupported by evidence. Therefore the committee recommended resolutions confirming the title of sitting Member to the seat, and these were agreed to without debate or division.

Also on June 6, 1898,[1] Mr. Olmsted, of Pennsylvania, presented the report of the committee in the case of Romain *v.* Meyer, from the same district and relating to the same election. The contestant's notice contained several specifications, which the committee consider at length:

(1) Contestant claimed that he was not personally permitted representation at the polls in the parish of Orleans, on the board of commissioners appointed to preside over the election at each polling precinct, in accordance with this provision of State law:

SEC. 12. *Be it further enacted, etc.,* That in the parish of Orleans it shall be the duty of the board of supervisors, at least thirty days prior to any election, to appoint six commissioners and two clerks to preside over the election at each polling precinct. Said commissioners shall be qualified voters in the ward of which such polling precinct forms a part, and shall be appointed from lists to contain not less than six names, furnished by each of the several political parties and nominating bodies. The commissioners shall be so apportioned as to equally represent all of the political parties or nominating bodies authorized under this act to make nominations, in so far as practicable.

The committee therefore consider whether Mr. Romain was the candidate of a political party or nominating body. The State law as to nominations provided:

SEC. 48. Any convention of delegates and any nominating body, and any caucus or meeting of qualified voters as hereinafter defined, and individual voters to the number and in the manner herein specified, may nominate candidates for public office, whose names shall be placed upon the ballots to be furnished as hereinafter provided.

SEC. 49. Any convention of delegates representing a political party or other nominating body which at the general election next preceding the holding of such convention polled at least 10 per cent

[1] House Report No. 1521; Journal, p. 608.

of the entire vote cast in the election district for which said convention is held, or any convention of delegates who have been selected in caucuses called and held in accordance with the provisions of this act, and any caucus so called and held in any such electoral district or division, may, for the State, or for the district or division for which the convention or caucus is held, as the case may be, by causing a certificate of nomination to be duly fled, making therein one such nomination for each office to be filled at the election. Every such certificate of nomination shall state such facts as may be hereinafter required for its acceptance, shall be signed by the presiding officer and by the secretary of the convention or caucus, who shall add thereto their places of residence, and shall add thereto their affidavit that the affiants were such officers and that said certificate is true to the best of their knowledge and belief.

SEC. 50. Nominations of candidates for electoral districts of the State, or for municipal or for parish or ward offices, may be made by nomination papers, signed for each candidate by qualified voters of such district or division, to the number of at least one thousand for any officers to be voted for by the electors of the State at large; one hundred for parish or municipal officers, members of the legislature or Congress, and twenty-five for ward officers.

The committee found that Mr. Livaudais was nominated at the convention of the Republican party, and that Mr. Romain was nominated by individuals who signed nomination papers as an "Independent Republican," a designation not belonging to a party that had polled the 10 per cent vote required by the law to give it convention standing. The committee therefore conclude:

The "nominating body," if it may be so called, which placed Mr. Romain in nomination, did not submit any list of names whatever nor claim representation in the appointment of election commissioners, nor did said body authorize Mr. Romain to submit any list on its behalf.

Furthermore, it will be noted that the list submitted by Mr. Romain was of citizens of "Republican faith" and to be selected as "Republican commissioners." Mr. Livaudais was at that time the candidate of the Republican party. Mr. Romain had no authority to represent it in any way, having been nominated as an Independent Republican in opposition to Mr. Livaudais, the regular Republican candidate. It is true that after the submission of this list by Mr. Romain, and before the selection of the election commissioners, Mr. Livaudais had practically retired from the field as a candidate, although he does not seem to have officially withdrawn, as provided by the election statute in section 57, otherwise his name would not have been printed on the official ballot, but that fact did not, and could not, change the status of Mr. Romain's claim to representation. As already stated, the act did not confer the right of representation upon each candidate, but only upon "each of the several political parties and nominating bodies." Candidates for other offices were as much interested in the election and in the selection of election officers as were the candidates for Congress.

Thomas A. Cage, as chairman of the executive committee of the Republican party, submitted to the board of supervisors a list of names as required by section 12. After the practical withdrawal of Mr. Livaudais the real contest was whether the executive committee or the candidate nominated by the Independent Republicans, but to whom the regularly nominated Republican candidate had given way, should be considered as representing the Republican party. The board of supervisors made their selections of Republican commissioners from the list submitted by Mr. Cage, and not from the list submitted by Mr. Romain. Your committee is unable to find that Mr. Romain was personally entitled to submit lists of commissioners, or that the board of supervisors committed any fraudulent or illegal act in recognizing the executive committee as the proper representative of the Republican party for the purpose of submitting such lists.

(2) The second objection considered by the committee is set forth in the report as follows:

It is further objected by contestant that some of these election commissioners were not selected as long as thirty days prior to the election, as required by the statute. The evidence shows that most of them were so appointed. But it is true that, owing to some omissions in Mr. Cage's original list, a supplemental list had to be furnished, causing some little delay, and a comparatively small number of the commissioners were appointed within thirty days of the election. Delay in appointing commissioners or inspectors does not vitiate an election held by them; otherwise it would be in the power of the board of supervisors to defeat every election by delaying such appointments. "Mandamus will

lie to compel the appointment after the time designated, which appointments, when made, will be as valid as if made at the proper time." (McCreary on Elections, 253.) There is no evidence that the delay in the appointment of the inspectors was the result of any fraudulent intent or purpose, nor that contestant was injured thereby.

(3) The Louisiana law of July 9, 1896, in its fortieth section provided for redistricting the city of New Orleans into a larger number of precincts through the agency of the city government, and further provided that "the boundaries and precincts to be fixed as above [are] not to be changed within three months prior to any general election." This statute of July 9 was promulgated July 25, 1896, and became operative twenty days thereafter. The time required for the arrangement of the precincts was so great that it was not fully accomplished until about one month prior to the election of 1896. Contestant's counsel contended that this delay was in violation of the statute and must be presumed to have been done with fraudulent intent. The report notes that no such charge was made in the notice of contest, and that the objection was not well taken in any event. The committee note that the purposes of the statute were good, as the multiplication of precincts was an important means of securing freedom of elections and providing against fraud. The new law, says the committee—

Repealed "all laws or parts of laws contrary to or in conflict with this act." If the city had not been redistricted it might well be held that the election of 1896 had been held in violation of the requirements of the statute.

Some inconvenience was doubtless caused by the redistricting of all the wards in the city and the multiplication of election precincts, and a few voters may have failed to deposit their ballots on that account. There is no evidence, however, from which we can determine the number, nor is there any evidence that in this regard the supporters of the contestant fared worse than those of the contestee, or that the result would have been in any way changed had every vote been cast.

(4) The contestant claimed that when the official ballots were sent out some of them were not sealed as the law directed, and also that many packages were delivered to the election officers before the day of election, although the law provided—

That the board of supervisors shall "send to the commissioners of each voting place, before the opening of the polls on the day of the election, cards of instruction, tally sheets, blank forms, and one set of ballots, sealed and marked by the secretary of state, for such voting place.

Objection was also made that in some voting places the cards of instruction were not posted as required. The committee found no substantial foundation for the charge that ballots were sent out unsealed. As to the other two charges, they say that in the absence of any evidence that votes were lost to contestant or the election in any way affected by the sending out of ballots earlier than the morning of election and the neglect to post the cards, these informalities could not tend to establish the election of Mr. Romain or invalidate the election. It was proven that one official ballot was passed about before election, contrary to law, but the report says:

Section 42 of the statute, read in connection with section 44, makes it an offense punishable by fine or imprisonment for any person charged with the duty of compiling, making up, or printing the official ballot to permit any person not so engaged to have access to or give any information with regard to the said official ballot or the form thereof, except as provided in the act. In the absence of evidence that any official ballot, fraudulently or otherwise obtained prior to the day of election, was voted or attempted to be voted, it can not be held that the existence of such outstanding ballots in any way affected the result of the election.

(5) Under the law of Louisiana one registration, for which the person registered receives a certificate, is good as long as the voter remains in the precinct. When he removes or dies there is no surrender of the certificate, although the registration lists are from time to time purged. As a result, upward of 14,000 names were stricken from the poll list of New Orleans, leaving that number of certificates outstanding. Contestant claimed that about 7,000 votes should be deducted from sitting Member's plurality on account of fraudulent voting on such outstanding certificates. The committee, however, found no evidence to support this contention, and deemed the charge improbable. A few other charges of fraud were likewise found wanting in proof.

The committee point out that the white population is largely predominant numerically in the district, that sitting Member's party was united, while contestant's was divided, and conclude to report resolutions confirming the title of sitting Member to the seat.

These resolutions were agreed to, without debate or division.

1111. The Virginia election case of Wise v. Young, in the Fifty-sixth Congress.

A general scheme to defraud being shown in all the precincts of a city, the entire return from the city was rejected.

Where election officers returned 12 votes for contestant and 17 electors swore they voted for him, the House rejected the entire return.

Instance wherein depositions given by voters at the time of voting were admitted in proof aliunde.

On February 1, 1900,[1] Mr. Edgar Weeks, of Michigan, from the Committee on Elections No. 3, presented the report of the majority[2] in the Virginia case of Wise *v.* Young. The returns are thus described in the minority views:

> The certificate of the secretary of the Commonwealth of Virginia shows that at the election held in November, 1898, for Representative in Congress, Contestant Wise received 6,204 votes, and Contestee Young received 12,183 votes, and W. S. Holland received 3,445 votes. Young was the nominee of the Democratic party in that district, and both Wise and Holland were Republicans, each claiming to be the regular nominee of the Republican party in the district.

This case divides itself naturally into two branches—one concerning the city of Norfolk and other relating to other portions of the district.

(*a*) As to the city of Norfolk, the majority reported in favor of casting out the entire vote, considering that frauds proven fatally impeached the returns of all the eleven precincts. The report, after calling attention to what is alleged to be an abnormal vote for contestee, says in regard to the frauds:

> The similarity of method with which it was put into effect in every precinct in Norfolk shows planning, forethought, and deliberation. It was in brief thus: To accept all votes offered, to make return of few defective ballots, and to add to the list of actual voters on the poll books of the several precincts enough names of fictitious voters to enable the judges to return for the contestee a false vote so large that the majority returned for him could not be overcome.
>
> If this scheme had been worked adroitly it might have rendered the fraud practiced difficult of detection. The party thus defrauded does not complete his task by producing proof of the vote actually

[1] First session Fifty-sixth Congress, House Report No. 186; Rowell's Digest, p. 611; Journal, pp. 325, 338–340; Record, pp. 2686, 2741, 2786–2797.

[2] Minority views were presented by Mr. Robert E. Burke, of Texas.

cast for him; the burden is still upon him to show that the vote returned for his adversary is false. Where the fictitious names copied from the registration list onto the poll book are those of his political adversaries whom he can not approach, his difficulty in getting at the proof that they did not vote is great. But the friends of the contestee practiced the fraud so bunglingly in Norfolk that their own work convicts them. It has neither the merit of novelty nor clever execution. The contestee admits, touching two precincts of the Fifth Ward of Norfolk, from which nearly 1,000 of his 3,600 votes from Norfolk were returned, that the returns are unworthy of belief. The admission was unnecessary, for contestant proved it. He kept tally of the votes cast and proved that the returns made were absurdly large. He then proved who were the last voters at these precincts, and that being proved, the poll books show that these sworn officers, both before and after the voting ceased, added hundreds of fictitious names to those of genuine voters on the list and returned them as cast for the contestee.

The Democratic registrars were summoned for many precincts, and admitted that many of the names appearing on the poll books were not even upon the registration lists. Many persons appearing in those poll lists, some of them Democrats, came forward and testified that they had not voted. The names thus fraudulently placed on the poll lists were so inartificially made up that they are evidence of crime. They show numbers of persons whose names begin with A voting together, followed by numbers whose names begin with B and C, and so on throughout the alphabet. Dead men were voted, and men known to be absent in the service of the United States. Prominent citizens, about whom the judges could pretend no ignorance, were written down on these lists as having voted. Where the frauds permeated every precinct, and the evidence leaves no doubt of conspiracy, and the returns are absurdly large, and poll books forged, it seems idle to go into the details of these returns from Norfolk, precinct by precinct. Suffice it to say that we dismiss the returns from Norfolk as evidence of nothing but an organized effort to return a fraudulent vote for contestee.

In the course of his impeachment of the returns in Norfolk the contestant proved 437 votes to which he is entitled.

The minority, while admitting that the returns of two precincts which credited to sitting Member over 900 votes, should be entirely thrown out because evidently corrupted, contended that the extent of fraud shown in the other wards was not sufficient to cause the rejection of the entire returns. Their position as to the Sixth Ward is illustrative of their argument:

Sixth Ward.—Three hundred and eighteen votes were cast at this box, 22 being illegal ballots. We still believe that it would be fair and just both to the candidates and to the people that these 22 illegal ballots should be deducted from contestee's vote, it being more than probable they were cast for him, rather than to exclude the entire box. This being done would leave Young 225 votes and Wise 45 votes.

(b) As to the portions of the district outside the city of Norfolk, the principle on which the majority proceeded is illustrated by their decision in regard to the precinct of Longview, in Isle of Wight County:

The proofs from Longview present succinctly a point raised by the contestee, involving a principle which this committee must settle for its guidance.

It is admitted that the returns showed 99 votes cast, and that 4 were rejected, 12 returned for Wise, 60 for Young, and 23 for Holland. Contestant put upon the stand in due form 17 witnesses who swore they voted for him at Longview (pp. 66 and 72), and proved and filed the certificate of another voter (p. 66) and by another witness (p. 67), the father of an absentee, proved his son, who was then absent engaged in the business of oystering, voted for contestant.

We have concluded not to consider the evidence of two other voters at this precinct taken after contestant's forty days expired. To make the issue more pointed, we will confine it to the 17 voters at this precinct examined within the forty days. We consider every one of these votes well proved for contestant, and while certificates of the character of the one produced are admissible beyond question as proof of votes cast, let us ignore it also for the purpose of decision. If contestant received 17 of the 99 votes, the return is plainly false as to him. It is also demonstrably false as to 83 votes returned for Young and Hol-

land, for only 82 votes were in the box. Can the return stand? Is it any more possible to hold that a return stating that 82 men could cast 83 votes shall stand than it would be if a smaller number of men were returned as having cast that many? If the return is impossible can it be reconciled at all because it is nearly possible?

Therefore the majority proposed to reject the vote of Longview and leave to contestant the vote proven aliunde.

The minority say:

The contestant took the testimony of 17 witnesses who swore they voted for him. This gave him an excess of 5 over the returns. All 17 of these gave their depositions with their marks. They could not read, yet 6 of them, William Sheppard (p. 67), Wm. Newby (p. 68), John Kines (p. 69), Wm. Kelly (p. 70), Jos. A. Graves (p. 70), and Walter Glover (p. 71) prepared their own ballots. The ballots rejected because improperly prepared were 4, leaving an excess of 1 vote, claimed to have been proved over the returns, for contestant. Instead of rejecting the vote in this precinct it should stand, Young 60 as returned, Wise 12 as returned; Young lost in correction 1, Wise gained in correction 1—Young's true vote 59, Wise's true vote 13.

The majority contended that the certificates (papers "given by voters who came out of the polling booth, went to some partisan on the outside, and took an oath that they voted for Wise," in the language of a Member[1] who argued for the minority) were admissible in evidence; and they appear numerously in the proofs adduced to impeach the returns of various precincts. The minority argued that they were inadmissible to contradict the regular returns, and made the point that those giving them were not examined as witnesses.

The minority conceded that the returns of certain precincts were unworthy of credence. Thus, in Stonehouse, in James City County, the returns gave contestant but 29 votes, while he proved 86. No objection was made to rejecting the returns and giving contestant the vote he proved. In other precincts the majority and minority were at variance. Thus, of Suffolk, Nansemond County, the majority say:

At this precinct the poll book shows that 451 votes were cast, yet but 405 are returned. This is no return at all. Such a return is of itself a badge of fraud where but one office is voted for. Ten per cent of the vote cast is simply ignored.

Contestant proved 130 votes cast for him at this precinct. Contestee made no effort to account for the discrepancy of 46 votes cast or to show why the return was silent concerning them. He only examined two or three witnesses concerning the general good character of the judges. The committee think such a return worthless and allows contestant the vote he proved there.

While the minority say:

Contestant has examined 130 witnesses who say they voted for him. One hundred and fourteen votes were returned for him. There were, however, 106 ballots rejected as imperfectly marked. This large number of defective ballots was accounted for by the large number of ignorant voters who undertook to prepare their own ballots. This vote as returned, in our opinion, should stand: Young, 208; Wise, 114.

Thus, running through the district, the majority proposed the rejection of returns showing such discrepancies, while the minority contended for a correction merely.

The minority by their process reduced the majority of Young over Wise from the 5,979 given by the official returns to 3,735, if certificates were to be disregarded, or to 2,954, if certificates were to be accepted as valid proof. They contended that

[1] Record, p. 2787, speech of Mr. Hay, of Virginia.

even admitting the majority's rejection of Norfolk city entire the sitting Member would yet have 897 majority over contestant.

The majority, rejecting the returns entirely where they found the returns tainted fatally, in their opinion, and treating the certificates as valid in contestant's proof aliunde, found that contestant had a plurality of 2,434 over sitting Member in the district, and reported resolutions giving him the seat.

The report was fully debated on March 8, 10, and 12, 1900, and on the latter day a resolution of the minority declaring sitting Member duly elected was rejected when moved as a substitute—yeas 128, nays 132. Then a resolution declaring sitting Member not elected was agreed to—yeas 132, nays 127. A second resolution declaring contestant elected was then agreed to—yeas 131, nays 125. Mr. Wise then appeared and took the oath.

1112. The North Carolina election ease of Pearson v. Crawford, in the Fifty-sixth Congress.

The arrest of a witness for contestant on charge of perjury in testifying as to a precinct of a city does not justify, on the plea of intimidation, the rejection of the entire vote of the city.

In a report barely sustained by the House it was held that the making of a registration in disregard of the terms of law justified rejection of the returns.

Where the law requiring the ballot box to be empty at the beginning of the election was disregarded the House rejected the returns.

As to effect on the return of participation by an illegally appointed election officer.

On February 5, 1900,[1] Mr. Ernest W. Roberts, of Massachusetts, from Elections Committee No. 3, submitted the report of the majority of the committee[2] in the case of Pearson *v.* Crawford, of North Carolina. The official returns, after the correction of certain obvious errors, showed a plurality of 218 votes for the sitting Member. The contestant attacked this plurality on the ground of organized intimidation, fraud, forgery, and bribery. The majority of the committee intimate that, were there not more specific grounds, the House might be justified in declaring the seat vacant because of intimidation, mob violence, and the circulation of forged letters injurious to the contestant's cause. The minority strenuously denied the general charges, and the case may be said to turn entirely on specific rather than general conditions.

The majority, in their report, proposed to reject the entire vote of the city of Asheville, which gave sitting Member a plurality of 163 votes; but when the case was taken up the announcement was made that this portion of the report might be considered as withdrawn. The reasons for throwing out Asheville arose from the arrest for perjury, at the instigation of attorney for contestee, of a witness named Harrison, who had testified as to an alleged attempt at bribery on the part of the said attorney in one precinct of the city. The majority conceived that this

[1] First session Fifty-sixth Congress, House Report No. 199; Rowell's Digest, p. 608; Journal, pp. 555, 561, 562; Record, pp. 5328, 5381–5396.

[2] Minority views were presented by Mr. Robert W. Miers, of Indiana.

arrest was made to intimidate other witnesses who had been summoned, and, on the strength of the precedent in the case of Featherstone *v.* Cate, decided that the vote of the entire city should be thrown out. They say that in the case of Featherstone *v.* Cate there was nothing to show that other witnesses were to be examined on the same point, and conclude:

> This shows that the case now under consideration is much stronger for the contestant, as it appears from the statement of the notary that other witnesses to prove the same allegation were not only under subpoena but were personally present when contestant's first witness was arrested, and that these other witnesses, when called next morning, failed to appear, and the inference is irresistible that these men had been intimidated by the arrest and incarceration of the first witness. It is also worthy of note in this case of Featherstone *v.* Cate that the majority report rejecting the entire vote of Independence Township—and on this point the whole case turned—was supported by many distinguished Representatives who are still members of this body.

The minority criticised this proposition as follows:

> The testimony of Harrison charges Murphy with an indictable offense, and, if Murphy is to be believed, he had a right to have Harrison arrested, as he was guilty of a felony, and no just inference could be drawn that the purpose was to intimidate witnesses. Witnesses who testify in contested election cases do so under regulations of law, as in other cases, and men who rely upon the testimony of such witnesses have no right to have them protected in the violation of law. It does not appear that a single witness whose name was called, or any other witness, was absent on account of the arrest of Harrison, or that any effort was subsequently made to examine them or anyone else in Buncombe County or the city of Asheville.
>
> The facts do not put this case even in the neighborhood of Featherstone *v.* Cate. In that case the returns were impeached, and the contestant was proving the votes cast, and the witness (Powell) was arrested on the charge of perjury by attorney of contestee after swearing that he saw 92 ballots cast for contestant; and the attorney threatened to arrest all other witnesses he thought were swearing falsely. Contestant in that case proved by a number of witnesses that the threats deterred other witnesses from testifying, and the committee held in that case that strict and technical proof is not required where testimony has been suppressed, and the evidence of Powell was sufficient to establish the number of votes received. He was not contradicted by the attorney and no votes were proven for contestee.
>
> In the Featherstone case the committee applied the rule as to Powell's testimony to only one voting precinct, but in the pending case the majority of the committee reject not only the precinct No. 2, about which all those witnesses were to testify, but reject eight other precincts about which there can be no contention. We submit that this is the most sweeping and monstrous proposition ever submitted to the House of Representatives.

The debate indicates that the abandonment of the majority's contention in regard to Asheville was occasioned by a strong sentiment in the House against it.

One of the main issues of the case was joined over the precincts of Montezuma, South Waynesville, and Marble, where the majority held that the entire vote should be rejected because of defective registration. The report cites the statute of the State:

> The language of the North Carolina statute on this point is as follows (sec. 8):
>
> *"Provided,* That no registration shall be had except at the times and places hereinafter provided."
>
> And in section 9:
>
> "And such registrars shall also, between the hours of 9 o'clock a. m. and 4 o'clock p. m., for four consecutive Saturdays, and between the hours of 9 a. m. and 12 o'clock m. on the second Saturday preceding the election, at the voting place of said precinct, keep open said book for the registration of any electors residing in such precinct, etc."

The majority contend that this statute is mandatory, and that, as the registration in the precincts named was held at places other than the voting places, the vote should be rejected in each. In support of this contention the committee say:

It appears from the case of Eaves and Lambert *v.* Southern and Kerley, a contested election case in the general assembly of North Carolina, at the session of 1899, that that body construed the election law in force in North Carolina in 1898, and decided that the regulations as to time and place of registration were mandatory provisions; and for a violation of these provisions in this respect that body unseated two Republican senators and awarded the seats to two Democrats. Contestee says in his brief (p. 47):

"It will appear, by reference to the citation made by contestant from the minority report, submitted by Mr. Campbell, that the question passed upon was the effect of registration on days other than the Saturdays prescribed by law."

In the oral argument before this committee contestee's counsel admitted that the law of North Carolina was equally mandatory both as to time and place of registration; so that, if we admit contestee's demand that Montezuma be rejected on the ground that a mandatory provision of the statute was violated, we must reject both South Waynesville and Marble on the same ground.

The case of Quinn *v.* Lattimore (120 N. C., 426), which contestee cites in his brief, is not applicable to the law under which this election was held, for the reason that the election law construed in Quinn *v.* Lattimore was repealed by the act of 1895; and the only construction of this last act which we have been able to ascertain is the construction given by the legislature in 1899, in the case of Eaves and Lambert *v.* Souther and Kerley, declaring in effect that the provisions in respect of time and place of registration are mandatory. This interpretation made by the general assembly of North Carolina in the case above cited is in accord with a long and unbroken line of decisions in the national House of Representatives enunciating the same rule of construction. (Covode *v.* Foster, 2 Bart., p. 602; Coffroth *v.* Koontz, idem, p. 32.)

The minority views challenge the accuracy of the precedent of the North Carolina legislature, as cited by the majority, and say:

The report submitted by the majority erroneously states that the contestee's counsel admitted on the oral argument before the committee that the law heretofore quoted is "mandatory as to time and place." We positively deny that counsel made any such admission. On the contrary, the burden of their argument was to the effect that the statute is directory. They did admit that the same rule of construction would apply to time and place, repeatedly declaring that these statutory regulations are directory. In any view, the House will judicially determine for itself the proper construction of this statute.

The contention of the majority as to contestee's demanding that Montezuma precinct should be thrown out, on the ground that the statute is mandatory, is, to say the least, absurd. No such demand is made. The contestee simply set up a charge against this precinct in the nature of a counterclaim or set-off and only in the event that the charges against South Waynesville and Marble should first be sustained does he claim that any vote should be thrown out. This the majority do not seem to appreciate, from a legal standpoint, but is permissible under the statute.

The only warrant for rejecting South Waynesville on account of the irregular registration is the suggestion in the legislative minority report above cited. There is not even a hint that the precinct should be thrown out and innocent, legally qualified voters disfranchised, but only rejects the individual votes of those who were not registered on the days prescribed by law, and the burden was on the contestant to prove the illegal votes. Contestant has not put himself in a position to derive any benefit from the doctrine laid down in this purported report. Both of the registrars at South Waynesville precinct were on the stand, and were not, as it appears from the testimony, asked to produce the registration book and point out the names of those who were registered away from the polling place.

While the doctrine which may be inferred from the meager and unauthenticated statement of Mr. Campbell does not in the least support the recommendation of the majority to reject the entire precincts of South Waynesville and Marble, yet we do not approve the doctrine that even individual ballots should be rejected, after being cast, on the ground of inequalities in registration when the voters are otherwise qualified.

The minority cite, in support of their contention, these cases: Newsom *v.* Earnheart (86 N. C., 391), Quinn *v.* Lattimore (120 N. C.), People *v.* Wilson (62 N. Y., 186), State *v.* Wood (38 Wisconsin), and the cases of Smith *v.* Jackson and Foster *v.* Cavocle in the House of Representatives.

The majority of the committee furthermore attack the returns of South Waynesboro and Marble on other grounds. Evidence tended to show that the ballot box at Marble was stuffed, although the minority denied the effect of this testimony, pointing out that it did not apply to the Congressional box. As to South Waynesboro, a question arose over the findings of old ballots in the box after the election began, although the State law required the judges, before the opening of the polls, to examine the ballot boxes and see that there be nothing in them. The majority also impeached the legality of the appointment of one Stringfield as an election officer. The minority contended: "He was an officer de jure, but in any view certainly de facto," having been appointed by the board to take the place of a judge who was called away. The majority say:

> In addition to all this, Stringfield counted the ballots at this precinct, though he was neither judge, nor registrar, and, by the express terms of the law, no one but a judge or registrar is permitted to count the ballots.
>
> The provision of law requiring ballots to be deposited in empty boxes is in its nature just as mandatory as a provision requiring that the ballots shall be on white paper and without device. Under such a law a ticket printed on red paper, or containing a device, is void; and, by parity of reasoning, ballots deposited in a box one-third full of tickets at the opening of the polls, resulting in an incorrect count, as in this case, must vitiate the returns. It is axiomatic that laws designed to secure the accuracy of the count are mandatory. So the returns from this precinct must be rejected, whether we decide that the law in respect of time and place of registration be mandatory or directory.

The minority contended that the provision of law relating to examination of ballot boxes before the election, to see that there was nothing in them, was directory, not mandatory, and give the state of the returns of other boxes at this precinct to show that the Congressional vote was not affected by the old ballots, which were said to have been removed when discovered.

1113. The case of Pearson v. Crawford, continued.

An election officer being shown guilty of fraud at one ballot box no confidence was placed in another to which he had access at the same election.

Discussion as to what is valid testimony in rebuttal.

Instance wherein an entire precinct return was rejected because a few votes were proven to have been bribed.

Instance of rejection of a precinct return because of violation of an alleged mandatory law requiring ballots to be counted before adjournment of the election.

The majority reject Black Mountain precinct's vote because one of the judges, one of sitting Member's party, was shown by testimony to have stuffed one of the ballot boxes. The minority, while considering this testimony incredible, point out that it relates to the box in which the votes for county officers were received. But other testimony showed that the judge in question had assisted in counting the

vote from the Congressional box, although he testified that he did not. The majority say:

In Spencer *v.* Morey, the following text from McCrary is quoted, with approval:

"If, for example, an election officer having charge of a ballot box prior to or during its canvass is caught in the act of abstracting ballots and substituting others, although the number shown to have been abstracted is not sufficient to change the result, yet no confidence can be placed in the contents of the ballot box which has been in his custody."

This rule discredits all the acts of Martin, although he swears that he did not count the ballots in the Congressional box. His Democratic associate, T.P. Sutton, as well as other witnesses, swear positively that Martin did count some of the ballots in the Congressional box, and, of course, their testimony outweighs the testimony of Martin.

The effort of the contestee's counsel to show that the box which Martin was caught in the act of stuffing was the county box is of no avail, because it is clear that he stuffed one of the boxes and that he handled part of the tickets from the Congressional box, so that his touch tainted the entire returns, and they must be rejected.

At Old Fort precinct the committee found "nine distinct varieties of fraud and irregularity," the return being false, the number of ballots exceeding the number of voters, and the poll list introduced by contestee being forged. Also one of the judges of election, belonging to sitting Member's party, confessed that he was drunk on quinine. The report says:

Contestee makes no attempt to defend the false poll sheet, but claims that the proof in regard to its falsity was not strictly in rebuttal. After the taking of testimony at this precinct was concluded and contestant's witnesses had been discharged and had gone home this fictitious poll list was introduced in evidence by contestee's attorney; and, although contestee took no further testimony in the county of McDowell, the introduction of this poll list, which, if genuine, would have contradicted contestant's witnesses, had the same effect as the examination of witnesses in behalf of contestee, and would have justified contestant in offering evidence in rebuttal The testimony taken by contestant in rebuttal at this precinct was confined solely to the genuineness or falsity of this poll list.

The minority dispute the validity of this testimony in rebuttal, and say:

Such circumstances in a report is unjustifiable. What the remaining frauds and irregularities mentioned in the report are, it does not appear.

Contestant failed to allege or introduce testimony tending to show that he was in any way deprived of a single legal vote, or that contestee had the benefit of a single illegal vote, or that there was an illegal vote cast at this precinct, and we submit that to reject this precinct will violate every recognized principle of law pertaining to elections.

In Limestone and Ivy precincts the majority reject the whole returns because of bribery. Of Limestone, they say:

The returns from this precinct must be rejected, because the proof of bribery is clear and conclusive and taints the whole poll, so that it is impossible to purge the poll of the illegal votes. The testimony of J.H. Sumner, James Webb, and Paton Durham, of which extracts are given below, make this perfectly clear.

The minority say:

The evidence (p. 110 et seq.) shows that contestant examined twelve witnesses at this precinct and proved that 2 votes were bribed. The utmost that contestant can rightfully claim is the rejection of these 2 votes. The claim that the whole precinct should be rejected and 242 honest voters be disfranchised because James Webb received $1.50 from an unnamed man and Paton Durham, who had the promise by a Democrat of a steady job to "vote the Republican ticket," voted the Democratic ticket and got the job, violates every sentiment of fairness and is without precedent or authority. It is noticed that the majority cite no authority for their recommendation to reject this precinct.

In Ivy precinct the proof as to bribery and the criticism of the minority is similar. In addition, the majority found defective registration at this precinct and that false letters, injurious to contestant, had been distributed.

In the precinct of Herrell's, where the return gave contestant a plurality, there was a violation of the law claimed by the majority to be mandatory, requiring the ballots to be counted before adjournment of the election. The majority intimate that the ballots might be recounted as evidence aliunde, and the minority deny this. But, in fact, the majority reject the evidence aliunde and reject the Herrell's returns.

Before the abandonment of the proposition to reject the vote of Asheville the majority found a plurality of 318 for contestant as a result of their conclusions. But the abandonment of the Asheville proposition reduced this by 163 votes.

The report was fully debated on May 9 and 10, 1900, and on the latter day the resolutions of the minority confirming the title of sitting Member to the seat were disagreed to—yeas 127, nays 128. Then the resolutions of the majority, unseating the sitting Member and seating contestant, were agreed to—yeas 129, nays 127.

1114. The Kentucky election case of Evans v. Turner, in the Fifty-sixth Congress.

Circulation of a general circular proposing bribery, but of which contestee was not cognizant, did not vitiate an election although accompanied by acts of bribery.

On February 5, 1900, Mr. Romulus R. Linney, of North Carolina, from the Committee on Elections No. 1, submitted a report [1] in the Kentucky case of Evans *v.* Turner. The grounds of the contest alleged by the contestant were fraud and bribery, the specifications of which were denied by the sitting Member. The sitting Member had been returned by a pluralty of 568 votes, and the committee decided that contestant had not successfully attacked that vote, as it was not shown that enough votes were vitiated:

> The evidence offered by the contestant tends to prove the allegations of fraud and bribery, and much of it discloses the resort to methods that were disreputable. Among other things it is in evidence that on the morning of the election a circular was issued and generally distributed in the city of Louisville among the political workers of the contestant, printed on the paper of the Congressional campaign committee, on that date, and containing a proposition to place $100 in each precinct, and requesting captains of each ward, if they do not get the money by 6.30 on the morning of the election, to come to headquarters. This circular was issued by enemies of contestant. This is a novel method in the history of political struggles in the United States, and in the opinion of the committee demands the unqualified condemnation of the committee. This, with the evidence tending to prove fraud and bribery in other respects, in our opinion, tends strongly to establish the contention of contestant, but does not show that contestee was a party to such fraud.
>
> There is no evidence tending to show that the contestee had anything to do with this fake circular, and there is much evidence offered by the contestee tending to show that the propositions of bribery came from persons who had organized for the purpose of obtaining money from some one-Anyone from whom they could obtain it. Upon a careful consideration the committee is unable to determine the exact number of votes tainted and vitiated by fraud and bribery.

On February 5, 1900,[2] without debate or division, the House agreed to the resolutions confirming the title of sitting Member to the seat.

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[1] First session Fifty-sixth Congress, House Report, No. 198; Rowell's Digest, p. 596.

[2] Journal, p. 232.

1115. The Alabama election case of Aldrich v. Robbins, in the Fifty-sixth Congress.

Where a particular election board denies representation to the opposing party, the returns being impeached by evidence, are rejected.

Where voters of one party are compelled to remain away from the polls to thwart organized fraud, the other party is not permitted to avail himself of votes proven aliunde after returns are rejected.

On February 14, 1900,[1] Mr. James R. Mann, of Illinois, presented from the Committee on Elections No. 1, the report of the majority of that committee[2] in the Alabama case of Aldrich *v.* Robbins. The district in this case was composed of five counties. In four counties the white population predominated, and in three of the four the vote of contestant exceeded that of sitting Member. In the fifth county, Dallas, where the census of 1890 showed 8,531 colored population and 2,146 white population, the returned vote was 2,438 for Robbins and 392 for Aldrich, the Republican and Populist candidate. The official returns gave Robbins a majority of 1,230 over Aldrich.

The contest rested solely on claims of fraud in Dallas County, on the vote of which the sitting Member relied wholly for his majority.

After quoting the portions of the constitution and laws of Alabama relating to elections, the majority of the committee lay down the conditions governing the case:

> It will be noticed that the Alabama law provides that the judge of probate, the sheriff, and the clerk of the circuit court must, at least thirty days before the holding of any election in their county, appoint three inspectors for each place of voting, two of whom shall be members of opposing parties, if practicable, and that it shall be the duty of the sheriff to notify such inspectors of their appointment within ten days after such appointment.
>
> The three county officers of Dallas County who constituted this appointing board were all Democrats, and supported Mr. Robbins at the election.
>
> It appears by the report of the committee in the Fifty-fifth Congress that in the Congressional election of 1896 the appointing board was composed wholly of Democrats, and that, although at that time lists were submitted to them of suitable men in each precinct by the Republican and Populist managers for Mr. Aldrich, they did not appoint a single Republican or Populist inspector of election.
>
> There are 31 election precincts in Dallas County. In 1898, at the proper time, a request was submitted to the probate judge, sheriff, and circuit clerk of Dallas County by the chairman of the People's Party of Dallas County, the chairman of the Republican party of Dallas County, the chairman of the Aldrich campaign committee, and by Mr. Aldrich himself, all joining in the one request, asking for the appointment of a citizen named in the request for each of the precincts as an inspector to represent the Republican party and People's Party. In 20 of the precincts the respective inspectors asked for by the Republican committee were named by the appointing board. In 11 of the precincts, without any satisfactory reason or explanation, the persons requested by the Republican party managers were not appointed, but either some lame or illiterate person or Democrat appointed in their stead.
>
> Of the 20 precincts in which the regular Republican inspectors were appointed, your committee has followed the official returns in all but 3. In the 11 precincts in which the persons regularly presented for Republican inspectors were unreasonably rejected, your committee finds sufficient fraud in 7 precincts to warrant the rejection of the official returns. In 2 other of these 11 precincts no election was held. As to 1 other, your committee disregards the evidence of fraud because offered as rebuttal and not as direct testimony.

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[1] First session Fifty-sixth Congress, House Report, No. 327; Rowell's Digest, p. 597; Journal, pp. 304, 316, 323, 324; Record, pp. 2490, 2594, 2665–2681.

[2] Minority views were presented by Mr. Charles L. Bartlett, of Georgia.

But not only did the appointing board refuse to give proper representation to Mr. Aldrich in the election officials, in 11 precincts, but they also neglected and refused to give him information prior to election day as to what election officers had been selected for any of the precincts. The chairman of Mr. Aldrich's campaign committee, by a registered letter, made application to the probate judge of Dallas County for a certified copy of the names of the inspectors and returning officers, and offered to pay the legal fees in order to get such copy. The only answer he could obtain from the appointing board was the ordinary postal-card receipt returned to the sender in cases of registered mail, and which in this case was signed by the probate judge.

The provision of law requiring the sheriff to notify the persons appointed inspectors within ten days of their appointment was generally disregarded. Mr. Aldrich and his campaign managers did not know, and had no way of ascertaining, who were to be the election officials in the various precincts prior to the day of election, and they did not know, and had no way of ascertaining, which of the names suggested by them for inspectors had been selected by the appointing board.

The majority of the committee conclude that "no just election is intended to be had where the appointing board selecting the election officials denies representation to the opposing party," and lay down a principle which was the subject of much contention during consideration of the case:

Although we do not find it necessary to rest our conclusion in this case upon the following proposition, yet we still affirm, as a matter of proper statement:

"That in view of past experience in Dallas County elections, Mr. Aldrich was entitled at the election of 1898 to notify his supporters to remain away from the polls at all precincts where he was not given representation among the election officers. To request his supporters to vote at such precincts would be only to increase the vote of his opponent. If his voters remained away from the polls and counted the persons who went inside of the polls, they had a check on the number of votes which could be returned for his opponent, but if they voted themselves, they would only add to the vote counted to the opponent without any satisfactory method of preventing the fraud. And in those precincts where Mr. Aldrich was entitled to request his supporters to remain away from the polls, because of proper and well-grounded expectation of intended fraud, we further think that it would be a travesty upon justice to permit his opponent to be allowed the votes which were cast at the election in his favor.

"It is the duty of this House to give some incentive to just elections in such districts (or rather in this district, because it has no equal), and the only way to give the incentive to fair elections in Dallas County is to compel the officers there to allow official representation to both parties, or to disregard the returns from such precincts in those cases where the Aldrich supporters, for sufficient reason, remained away from the polls."

For these reasons we think the official returns from Orrville precinct No. 8, Lexington precinct No. 9, Marion Junction precinct No. 28, and Kings precinct No. 30 should be entirely disregarded, because, without any excuse or without any reason, except the intention to commit fraud, the proper request of Aldrich for representation in the election officers was coolly disregarded by the appointing board; and we do not think that the contestee should be entitled to reap any active benefit from such fraud committed in his interest.

The minority of the committee in their report, and Members on the floor, contended that the sitting Member should be given the benefit of the votes which, by proof aliunde, he had shown to have been cast for him in the above-mentioned precincts; that legal, honest voters should not be deprived of their suffrages through alleged faults of election officers, etc. In reply a distinction was drawn between precincts where the contestant had felt constrained to keep his supporters from the polls and those where he had not.

In Orrville precinct the report shows the bad character of the election officers, they being in large part the same who had officiated in previous elections wherein fraud had been shown in the returns; also that these officers had disregarded the

provisions of law for the appointment of clerks of election, so that none had been appointed. It also appears (from the minority views) that there was testimony tending to show fraud in the return. From the evidence the majority considered that the vote in the precinct should be entirely disregarded; and they do not count the 5 votes for Aldrich and 75 for Robbins which were proven aliunde.

In the same way and for the same reasons, the majority reject entirely the election in Lexington, Marion, and King's precincts.

1116. The case of Aldrich v. Robbins, continued.

Where an election is not held, although there be no sufficient excuse for the failure, the House is reluctant to allow votes for either party.

Where the voters of one party left the polls for no just cause, the House counted the returns of the election held by the other party.

Evidence in chief taken in time of rebuttal evidence is not considered in an election case.

Failure to give one party lawful representation among election officers, accompanied by proof of fraud, justifies rejection of the returns.

In River and Pine Flat precincts no election was held. The reasons given for this were conflicting. The committee, while thinking that no sufficient reason had been given for not holding an election, found no sufficient evidence for allowing votes for either party. In Dublin precinct, however, where a dispute caused the Republicans to leave the polls in a body, and where later the polls were opened by the other party and an election held, the committee found that the vote should be counted as returned, the action of contestant's supporters not being justified.

In Smyley's precinct the committee find:

> The evidence in the record as to this precinct is sufficient to cause the returns to be disregarded if the evidence is to be considered at all. But this evidence which should have been offered in chief was offered for the first time in rebuttal, and we feel that it ought not to be considered. Hence we find that the vote should be counted as returned.

There remain six precincts wherein the majority of the committee found frauds sufficient to justify the rejection of the returns, leaving the vote to be proven aliunde by the parties.

In Valley Creek precinct representation on the board of inspectors was denied contestant's party, a portion of the officials had officiated in previous elections where frauds had been found, and there was evidence of fraud in the count. In the precinct 141 witnesses personally swore that they voted for Aldrich, "and the testimony showed that other voters had also voted for Aldrich." So the majority credit Aldrich with 152 votes and Robbins with 51. In Cahaba precinct the conditions as to appointment and character of election officers were similar, and there was evidence of fraud, besides the fact that a Republican election clerk was ordered from the polls during the count. In Union, Pence's, and Burnsville precincts evidence of fraud caused the rejection of the returns.

In the city of Selma, where contestant was allowed the appointment of an inspector whom he named, but where Republican clerks and markers were not appointed, and where there was violation of the law of Alabama providing that no

one could legally vote who had not been registered, the majority of the committee discarded the official return for the following reasons:

First. Because the poll list shows that more than 80 illegal votes were cast by unregistered persons.

Second. Because it is shown that a much larger vote was cast in favor of Mr. Aldrich than was returned by the inspectors.

Third. Because a number of the persons voting obtained their ballots illegally from various persons and at various places, contrary to the positive provisions of the law.

Fourth. Because several persons appear to have voted whose names are not on the poll list, and several persons whose names are on the poll list appear not to have voted, though we do not lay great stress upon this reason.

Fifth. Because, in absolute violation of the law, the inspectors of election refused to appoint a Republican clerk of election from the written list which was submitted according to the provisions of the statute. If there had been an intention to hold an honest election there could have been no objection to complying with this positive provision of the Alabama statute.

The contestee proved by witnesses 627 votes in this precinct, but there should be deducted from this number 28 votes which were proven, but which were illegal because the names of the voters were not on the registration lists. There should also be deducted 35 votes of persons who obtained their ballots illegally from various persons who were not entitled to handle them and at various places where the ballots were not entitled to be. The Australian ballot law should not be made a screaming farce.

The minority of the committee contend with much argument that the failure to appoint the clerk was a failure to perform a merely directory duty imposed by statute, and such failure could not vitiate the poll. Decisions in support of this doctrine are cited.

The majority of the committee, following out their conclusions, found that contestant had been elected by a majority of 206, and in accordance with this finding reported the proper resolutions.

The report was debated at length in the House on March 2, 6, and 8, 1900. On the latter day the proposition of the minority, to confirm the title of sitting Member to the seat, was rejected, yeas 134, nays 138. Then the resolutions of the majority were agreed to, yeas 141, nays 135; and the oath was administered to Mr. Aldrich.

1117. The Kentucky election case of White v. Boreing, in the Fifty-sixth Congress.

No surprise being practiced on the voters, who were free to vote for whom they pleased, alleged irregularities in placing a name under a party emblem do not vitiate the election.

Discussion as to use of proxies at meetings of political executive committees.

On March 29,1900,[1] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted a report in the Kentucky contest of White *v.* Boreing. The sitting Member in this case had received by the official returns a plurality of 4,462 over the contestant, who was his next highest competitor, and a clear majority of 1,021 votes over all opposing candidates. While there were various charges and countercharges, the only issue considered finally by the committee was the allegation that the Republican party of the district had failed to nominate Mr. Boreing lawfully; that therefore he was not entitled to the use of the party emblem (the log

[1] First session Fifty-sixth Congress, House Report No. 876; Rowell's Digest, p. 606; Journal, p. 417.

cabin) on the Australian ballot, and hence not being entitled to the votes which the people were deluded into giving him there was either no election or contestant was elected.

The committee, after explaining the ballot law of Kentucky and the use of party emblems, state that contestant was a "Free Republican," whose name was printed under his own emblem on the ballot, and who had not sought the regular Republican nomination. The law of Kentucky recognized three methods of placing a name on the ballot: (1) nomination by convention, (2) nomination at a primary election of the people, (3) nomination by petition.

The requirement of law in regard to primary election was as follows:

Whenever it shall be desired by the committee or governing authority of any political party to hold a primary election under the provisions of this article, said committee or governing authority shall, at least forty days prior to such primary election, give public notice thereof by posting such notice at the court-house door and at least twenty other public places in the county or district. Such notice shall state the date of such proposed primary election, the hours between which it will be held, the offices for which candidates am to be nominated, and the places at which polls will be opened at such primary elections.

The rules of the Republican party left it optional with the committee to call either a convention or primary election, except that on petition of 51 per cent of the votes cast at the last preceding election, if presented not less than twenty days prior to the time fixed for the convention, if a convention has been called, a primary election must be held.

The statute provides that the committee or governing authority of the political party holding the primaries may provide the manner in which the expenses of holding the same, the pay of officers, the cost of publishing and circulating notices of election, etc., shall be defrayed, and section 1561 enacts that any person who shall not have notified the committee or governing authority not later than fifteen days next preceding the primary election of the fact that he is a candidate, "and any person who has not given such notice to the committee or governing authority, or who has not complied with the conditions prescribed by the committee or governing authority for the government of candidates, shall not have his name printed on the ballots used in such primary election."

On June 14, 1898, the Republican district committee met and passed resolutions providing for a primary election on August 11, 1898, in accordance with the law, and providing:

That each of the candidates pay to the chairman of the district committee the amount assessed against him, to defray the expenses of the primary, not later than fifteen days next preceding the holding said primary election.

That in the event of there being no more than one candidate complying with the requirements herein, and upon notice of that fact by the chairman of the committee, the committee shall meet in the town of London on August 5, 1898, and declare the said candidate complying with the above requirements the Republican nominee for a seat in the Fifty-sixth Congress of the Eleventh Congressional district of Kentucky.

Mr. Boreing was the only person who qualified himself as a candidate within the time limit, so on August 5, 1898, in pursuance of a call of the chairman, the district committee met and passed a resolution declaring Mr. Boreing the nominee, since he was the only person announcing his candidacy and complying with the conditions, and directing the chairman and secretary to certify this fact to the several county clerks in the district, which was done.

The committee showed that the practice of dispensing with a primary election in such cases was well established in both parties in Kentucky, and was considered proper and legal. The report goes on:

Contestant claims, however, that the committee meetings of June 14 and August 5 were both illegal or at least irregular, because a number of those present and acting as members of the committee were not original members, but held proxies from original members, there not being enough original members actually present to constitute a quorum; or, in other words, if the proxies were thrown out there were not enough members present at either meeting to constitute a quorum. We are referred to rule No. 29 of the Republican organization of Kentucky, which is said to read as follows:

"No delegate elected to a State or district Republican convention shall be permitted to cast a vote by proxy."

This was not, however, a State or district Republican convention, and the parties present did not attend as delegates elected to said convention, but as members of the district committee of the Eleventh Congressional district of Kentucky, a standing committee. As this district committee or governing authority is recognized by statute, and is authorized in the case of a tie vote or contest at a primary election to hear and determine such contest and decide who shall be entitled to the nomination, the argument is made on behalf of contestant that its members are public officers and can not delegate their powers. But even as to public officers the distinction is always drawn between duties of a judicial nature and those which are purely ministerial. The evidence shows that not only in the State central committee, but also in the district committees of the Republican party the use of proxies is quite common.

Mr. White was not a candidate for the Republican nomination. He did not seek to become a candidate of that party. He obtained his own place upon the ballot, in his own column, and under his own picture, by petition signed by 400 or more persons as prescribed by the act of assembly. The committee meetings of June 14 and August 5 were held after due public notice. The action taken at each of said meetings was matter of public notoriety. The question of no quorum was not raised at either of said meetings, no objection was made by anybody to representation by proxy, and although it was publicly known at the meeting of August 5 Mr. Boreing was declared the nominee, and the chairman and secretary of the committee were directed to certify his nomination to the clerks of the several counties for the purpose of having his name printed upon the ballot, no effort whatever was made by Mr. White, or any other parties, to prevent such certification, or to prevent the clerks of the several counties in the district from printing Mr. Boreing's name upon the ballot in the Republican column and under the log cabin. If there was such gross irregularity or illegality as claimed, a restraining order or injunction might undoubtedly have been obtained from the court preventing the printing of Mr. Boreing's name upon the ballot until his right to have it so printed could be inquired into. But his name having been permitted to go upon the ballot without legal objection and be submitted to the people, who thereupon cast a majority of their votes in his favor, it would seem to be a case where any irregularity in the pleading must be considered as cured by the verdict.

The committee proceed to distinguish this case from that of Fairchild *v.* Ward, showing that a far stronger case was made out for Ward, who was nevertheless not seated.

The committee go on to show that no fact had been adduced to prove that the voters cast their ballots for Mr. Boreing simply because his name was under the log cabin emblem; and it was furthermore to be remembered that each person desiring to vote the party ticket might nevertheless write the name of another candidate for Congress in a blank space provided on the ballot. The committee quote the law of Kentucky, "No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice," and conclude:

In order to sustain the contestant's position we should have to squarely reverse the decision of the House in Fairchild *v.* Ward, and go even much further in the opposite direction. We have here no difficulty whatever in determining the choice of a majority of the voters in the Eleventh Congressional district of Kentucky, and we are unable to find any irregularity of sufficient importance to warrant us in reversing that choice or even in setting it aside.

The House, following the recommendation of the committee, sustained the title of the sitting Member to his seat without debate or division.

1118. The Virginia election case of Walker v. Rhea, in the Fifty-sixth Congress.

The mere existence of frauds and irregularities does not vitiate an election if not shown to be sufficient to change the result.

On January 30, 1901,[1] Mr. R. W. Tayler, of Ohio, from the Committee on Elections No. 1, presented the report in the case of Walker *v.* Rhea, from Virginia. The sitting Member had received a vote of 17,344 according to the returns, and the contestant a vote of 16,595. The total population of the district was 166,699. The committee found:

> The conclusion arrived at as a consequence of the committee's investigation is that while the evidence shows that there were frauds and irregularities practiced, chiefly in the interest of the contestee, they fall very far short of being sufficient to justify a change in the result of the election.

Therefore they reported resolutions confirming the title of the sitting Member to the seat. There was no action by the House.

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[1] Second session Fifty-sixth Congress, House Report No. 2566; Rowell's Digest, p. 606; Journal, p. 175.

Chapter XL.

GENERAL ELECTION CASES, 1902 TO 1906.

1119. The Alabama election case of Spears v. Burnett, in the Fifty-seventh Congress.

Unfair conduct on the part of election officers and suspicious circumstances do not justify overturning a majority not destroyed by testimony.

On February 28, 1902,[4] the Committee on Elections No. I reported in the case of Spears *v.* Burnett, of Alabama. The committee reported the sitting Member entitled to the seat, saying:

On the face of the returns the contestee, Burnett, appears to have been elected by a plurality of 747. The contestant disputed the validity of these returns, claiming that in certain precincts in the district he was denied proper representation, and that at many of the precincts fraud and bribery were resorted to its accomplish the return of the contestee.

Your committee have given full and careful attention to all of the claims made by the contestee and to the testimony in the case. The contestant appears to have been the regularly nominated Republican candidate for Congress, and in the main received the support of his party. While in some of the

[1] Additional cases in the Fifty-seventh Congress are classified in other chapters:
Wagoner *v.* Butler, Missouri. (Vol. I, sec. 713.)
Walker *v.* Rhea, Virginia. (Vol. I, sec. 737.)

[2] Other cases in the Fifty-eighth Congress:
Reynolds *v.* Butler, Missouri. (Vol. I, sec. 730.)
Kahn *v.* Livernash, California. (Vol. I, sec. 731.)
Cross *v.* McGuire, Oklahoma. (Vol. I, sec. 732.)
Moody *v.* Gudger, North Carolina. (Vol. I, sec. 739.)
Duborrow *v.* Lorimer, Illinois. (Vol. I, sec. 740.)
Edwards and White *v.* Hunter, Kentucky. (Vol. I, sec. 741.)
Bonynge *v.* Shafroth, Colorado. (Vol. I, sec. 742.)

[3] Other cases in the Fifty-ninth Congress:
Michalek, Illinois. (Vol. I, sec. 426.)
Iaukea *v.* Kalanianaole, Hawaii. (Vol. I, sec. 527.)
Houston *v.* Broocks, Texas. (Vol. I, sec. 643.)
Jackson *v.* Smith, Maryland. (Vol. 1, sec. 711.)
Coudrey *v.* Wood, Missouri. (Vol. I, sec. 715.)

[4] First session Fifty-seventh Congress, House Report No. 624.

precincts, concerning which complaint is made, there is evidence of unfair treatment on the part of the Democratic managers and some circumstances appear raising at least a suspicion of fraud, there was certainly no general conspiracy to dishonestly deprive him of votes in the precincts of which complaint is made and concerning which proof is presented to us, and there is not sufficient ground of criticism to seriously affect the return majority of 747 votes.

On March 22[1] the House, without division, agreed to the report of the committee.

1120. The Kentucky election case of Moss 42v. Rhea, in the Fifty-seventh Congress.

A technically informal ballot having been illegally received by a judge of election was counted, the voter being guiltless of collusion in the illegal act.

The failure of an election judge to detach a stub from a ballot, as he was required to do by law, did not justify the rejection of a ballot cast in good faith.

As to what is a sufficient return of rejected ballots under the Kentucky election law.

On February 28, 1902,[2] the Committee on Elections No. 1 reported in the case of Moss *v.* Rhea, of Kentucky, that the sitting Member was not entitled to the seat and that the contestant was elected and was entitled to the seat.

The official returns gave to Rhea a plurality of 156 votes. The majority of the committee added to the official return "the number of undoubted votes received by each of the two candidates upon the ballots which were rejected and not counted in the various precincts in the district" as follows: For Rhea, 135; for Moss, 312; leaving for contestant a plurality of 21.

The minority denied this conclusion, and joined issue with the majority on two general points:

(1) As to the proper identification of the rejected ballots, in order to determine whether they had or had not been already counted in the original return.

(2) As to what irregularities in the ballots should be sufficient to sanction rejection.

The Australian ballot law of Kentucky, in providing generally for the count of the ballots, provides:

> That if there are any ballots cast and counted or left uncounted, concerning the legality or regularity of which there is any doubt or difference of opinion in the minds of the judges of election, said ballots shall not be destroyed, but sealed up and returned to the clerk of the county court with the returns of the election for such judicial or other investigation as may be necessary, with a true statement as to whether they have or have not been counted, and if counted, what part and for whom.

The minority contended that under the judicial decisions of Kentucky each of the rejected ballots should be accompanied by a statement signed by all the election officers of the precinct. And it was further urged that under the provisions of the Constitution the House was bound by the law of Kentucky as construed by the Kentucky courts.

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[1] Journal, p. 396; Record, p. 2236.

[2] First session Fifty-seventh Congress, House Report No. 625.

The majority of the committee denied that the courts of Kentucky had construed the statute in the way declared by the minority.

From the general return the rejected ballots were sufficiently identified in the opinion of the majority:

> The certificate of the election officers states the whole number of ballots voted, the number counted as valid, and the number questioned or rejected. It seems to us quite evident that if, for instance, the precinct election officers, in their certificate of election, state that the number of ballots cast was 400, that the number counted as valid was 300, and that the number questioned or rejected was 100, that this is a sufficient statement to show that there are 100 rejected ballots not counted. And if in such case the election officers have returned in proper form and in the proper envelope just 100 ballots as questioned or rejected ballots to the county court clerk, then it seems to us this establishes clearly that these 100 ballots were not counted by the precinct election officers, but were ballots rejected by them in making the count.
>
> "In such case we can not conceive of any reason why there should be any other or further certificate made by the precinct election officers. If, on the other band, we take a case where we find the election officers returned 400 ballots as cast, 350 ballots counted as valid, and 100 ballots returned as questioned or rejected, then it is very evident that, without a further identification of the questioned ballots which have been counted and the rejected ballots which have not been counted, it is impossible to determine which of the ballots returned as questioned and rejected can be counted where contest is made."

As to the second point—the irregularities in the ballots themselves—the majority and minority joined issue on several points:

(*a*) A considerable number of ballots were cast without the indorsement of the clerk of election, required by the following provision of law:

> No judge or other officer of the election shall deposit any ballot on which the facsimile signature of the county clerk and the name of the election clerk do not appear.

The minority contended that these ballots should not be counted, and had been properly thrown out by the election officers. (Case of Slaymaker *v.* Phillips, 5 Wyoming 453, cited.) The majority held that in a case of this kind the ballot should be counted if received, referring for authority to the Missouri case of Heyl 42**v.** Guion, 55 Southwestern Reporter, page 1036.

1121. The case of Moss v. Rhea, continued.

An evidently accidental ink blot on a ballot, or blot of stencil mark caused by folding is not a distinguishing mark and the ballot should not be rejected if the intent of the voter is apparent.

Faint pencil marks, evidently not of utility in identifying ballots, and appearing under circumstances suggesting fraud, were held not to be such distinguishing marks as to justify the rejection of ballots.

Where the intent of the voter was not in doubt the House followed the rule of the Kentucky court and declined to reject a ballot because not marked strictly within the square required by the State ballot law.

A voter having marked above two tickets on an Australian ballot, the counting of a vote for Congressman was considered of doubtful propriety, even in view of the fact that one ticket contained no candidate for Congress.

The question raised as to the right of the House to determine the rule as to evidence it will receive, even though State law and decisions are alleged to prescribe a rule.

(*b*) A large number of ballots were blotted in folding so that the stencil mark made by the voter, as provided by law, was reproduced with greater or less distinctness on another portion of the ballot. In some cases this blotting was so extensive as to make a doubt as to which, of two tickets on the ballot, the voter had marked. The election officers threw out not only those where there appeared a real doubt, but also many where the fact that the second mark was a mere blot, appeared so evident that the majority of the committee, after careful inspection, decided that they should be counted. The Kentucky law provides that when the voter has made on his ballot any distinguishing mark to show to another how he has voted, the vote shall not be counted; but the majority of the committee could not find that these blots were such distinguishing marks.

(*c*) Certain ballots, some for sitting Member and some for contestant, had been rejected by the election officers because of a faint, barely distinguishable pencil mark, usually on the upper right-hand corner of the ballot. The evidence, though not conclusive, tended to show that the mark had been put on the ballots by an election clerk who was a partisan of the sitting Member. The majority of the committee decided that, as inspection made evident, these pencilings were not distinguishing marks within the meaning of the law.

(*d*) Certain ballots were thrown out because of the negligence of an election judge, who was required to detach a stub from the ballots before they were deposited in the ballot box, and did not perform this duty. The majority of the committee decided that these ballots should be counted, the voter not having anything to do with the detachment of the stub.

(*e*) Certain ballots were rejected because they were found marked in both the Republican and Socialist-Labor circles, and others in both the Democratic and Socialist-Democratic circles. As there was no candidate for Congress on either the Socialist-Labor or Socialist-Democratic tickets, the claim was made that the doubly marked tickets should be counted for the only candidate for Congress appearing on the two. The majority of the committee cite Parker *v.* Orr (158 Ill., 618) in support of this view, but consider it doubtful whether such votes should be counted and do not include them in the list of counted votes, according to which the election of contestant is shown. The minority contended that such ballots were neutralized, and should not be counted, citing the case of McMahon *v.* Polk (10 S. Dak., 296).

(*f*) On the Kentucky official ballot there is a blank space on which the voter may, under the statute, write the name of his choice if he does not wish to vote for the regular candidate. Under the law the voter marks the ballot in a circle above the party ticket, or in a square opposite the name of the particular candidate. On certain ballots the voter marked in the square opposite the blank space below the name of the candidate, and on others in the blank space itself. The majority of the committee contended that, under the decision of the Kentucky courts and under the following provisions of law, the intent of the voter was plain and the ballots should not be rejected.

Should any elector desire to vote for each and every candidate of one party he shall make a cross making the large square [changed to circle] embracing the device and preceding the title under which the candidates of said party are printed, and the votes shall then be counted for all the candidates under that title: *Provided, however,* That if a cross mark be made in the large square including the device of such

party, and a cross mark be also marked in the square after the name of one or more candidates of a different party or parties, the vote shall be counted for the candidate so marked, and not for the candidate for the same office of the party so marked; but the vote shall be counted for the other candidates under such party name or designation.

The minority, quoting as authority 17 R. I., 812, and 18 R. I., 822, contended that votes marked as above were not votes for any persons.

The case was considered by the House on March 22, 24, and 25.[1] During this debate especial stress was laid by those speaking on behalf of the sitting Member that the laws and judicial decisions of Kentucky were binding on the House in the decision of the case. Mr. George F. Burgess, of Texas, expressed the contention as follows:

The right to vote is not a matter guaranteed to any citizen in this country by the Constitution of the United States or any act of Congress. It is a State privilege. The only provision of the Constitution which could attach to an election in one of the States is that which has reference to the color line, and that is not involved in the remotest degree in this contest now before the House.

The Constitution also provides that the Members of the House of Representatives "in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." That provision is not involved at all in this case. The Constitution also further provides that "times, places, and manner of holding elections for Senators and Representatives shall be prescribed by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators." That provision is not involved in this contest.

Mr. Tucker, in his work, tersely and completely states this whole contention in the sentence when he says: "Suffrage is a State privilege belonging to State citizenship, and is exclusively under State jurisdiction."

The minority report says: "The State of Kentucky has fixed the qualification of electors and has prescribed the time, places, and manner of holding elections for Representatives in Congress. Although perfectly competent to do so, Congress has not at any time made such regulations or altered those made by the State of Kentucky."

Hence it follows this House is bound by the laws of the State of Kentucky and the decisions of her supreme court thereunder, and it is therefore perfectly obvious that the gentleman from Illinois admits the legal situation when he says this House is bound by the statutes and decisions of the State of Kentucky touching upon the manner and conduct of her elections, Congressional or otherwise.

The majority report, drawn by Mr. James R. Mann, of Illinois, did not combat this proposition, for the reason that the decisions of the Kentucky courts did not, in the opinion of the majority, lay down the rules which the minority claimed that they did.

Mr. Walter I. Smith, of Iowa, while agreeing with the majority of the committee in their construction of the Kentucky decisions, also took the position that the rejected ballots were admissible without the individual certificates of the election officers, "even in defiance of the statute and in defiance of the decision of the supreme court of Kentucky. I propose," he said—

to put it on both grounds, and I feel that it may be well to read even to our Democratic friends the provisions of the Constitution of the United States upon this subject. "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof."

Does that provide that the legislature of any State can prescribe the rules of evidence which shall govern this judicial body in sitting and trying contested-election cases? Does the Constitution, when it says—"That the times, places, and manner of holding elections for Senators and Representatives shall be

[1] Record, pp. 3158, 3204, 3247–3255.

prescribed in each State by the legislature thereof," confer authority to enact rules of evidence for the government of this judicial tribunal?

"Each House shall be the judge of the elections, returns, and qualifications of its own Members."

Is this House, sitting in the exercise of its high judicial functions, to be bound and limited by rules of evidence derogatory of the common law enacted by the legislature of the Commonwealth of Kentucky?

Mr. Smith quoted the contested election case of Norris *v.* Handley in support of his contention.

The House sustained the report of the majority of the committee, unseating Mr. Rhea and seating Mr. Moss.

The vote on the motion to substitute the minority resolutions, favorable to Mr. Rhea, for the majority resolutions, favorable to Mr. Moss, was yeas 124, nays 136.

The majority resolutions, declaring Mr. Rhea not entitled to the seat, and Mr. Moss entitled to it, were then agreed to without division.

1122. The Missouri election case of Horton 42v. Butler, in the Fifty-seventh Congress.

The contestant is not limited as to the number of places in which he will take testimony at the same time.

A certified copy of a public record was admitted in an election case, although presented in the time for taking rebuttal testimony.

Discussion as to the extent to which the House is bound by the technical law as to taking evidence in an election case.

On April 5, 1902,[1] Mr. Robert W. Tayler, of Ohio, from the Committee on Elections No. 1, submitted a report in the case of Horton *v.* Butler, from Missouri.

Two preliminary questions were considered by the committee before proceeding to the merits of the case.

(*a*) In relation to the taking of testimony the majority of the committee say:

No important questions of practice are raised respecting any relevant testimony, although, in view of the fact that strenuous objection was made to the fact that during a period covered by the taking of testimony witnesses were examined for the contestant at several different places at the same time, we deem it proper to state our views in relation to the subject.

We see no objection to such practice, especially in such a case as this, where about a thousand witnesses were examined, many of them on matters of great importance and at considerable length. To deny the right to take such testimony at as many places as the necessities of the case may require is to deny the right of the contestant to make out his case at all.

Instances have occurred in our experience where a contestee by frivolous and unnecessary cross examination has so consumed time as to seriously interfere with the orderly and just progress of the investigation.

(*b*) In relation to rebuttal testimony the majority of the committee say:

The contestant having consumed forty days in taking his testimony in chief rested his case. The contestee examined no witnesses. After the expiration of the time allowed to contestee for that purpose the contestant, having given due notice thereof, proceeded, on March 26, to examine E. A. McBurney, and his testimony then taken appears at pages 2199–2204.

The contestee did not appear either in person or by counsel, but on May 1 presented his objection to the consideration of this testimony to the Clerk of the House of Representatives, for the following reasons:

"First. It is rebuttal when no testimony was taken for the contestee, and therefore nothing to rebut.

"Second. It was taken after the time for taking testimony had expired."

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[1] First session Fifty-seventh Congress, House Report No. 1423.

The testimony of McBurney at this time was of two classes:

First. Certified lists from the Director of the Census giving the name, address, color, and age of the males 21 years of age and over in the Fourth, Fifth, Sixth, Fourteenth, Fifteenth, and Twenty-third wards of the city of St. Louis as returned by the census enumerators engaged in compiling the United States census of the year 1900.

Second. Comparative tabulated statements made up from the registration lists, the recount of the ballots, the poll books, the McBurney canvass (all of which had been offered in evidence within the first forty days), and the certified census lists referred to above.

As to the matter embraced under the second head, it is apparent that it is not testimony at all, but only a consolidation, tabulation, and rearrangement of the testimony formerly introduced. It is valuable if correctly consolidated, tabulated, and arranged, and in so far as it has been found to be, or is believed to be, correctly done it has been of service to us in considering the case.

The sole question remaining, therefore, is, Must we disregard the certified census lists?

We see no reason whatever for so doing.

1. It is a public record, and such testimony is always competent. If it had been offered when the case came on for hearing before the committee, it would have been received. If, in the opinion of the committee, its reception at that time would find the contestee unprepared to meet and answer any inferences which might be drawn from it, he would have been given ample time to suitably respond, either by rebutting testimony or by such an examination of it as he might need.

2. In the case cited by contestee as showing the ground why this testimony should not be considered in the case the rule is held to apply only to "ordinary cases" and "without any cause whatever being shown therefor."

The case under consideration is far from being an "ordinary case," and excellent reasons appear why the course followed should have been adopted.

We agree that in ordinary cases the letter of the law should be followed; but after all the serious question always is, Has the party been diligent, and more important still, has the opposing party been prejudiced and has he had opportunity to make answer to the testimony taken out of time? No wrong has been done the contestee by the introduction of these lists.

Counsel for contestee closed his argument with an eloquent panegyric of technicalities and their value in art, science, and jurisprudence. What he so well says in that relation may be freely admitted to be sound. In a certain sense it may be said to have some application to contests in the House of Representatives. But if it be true that courts must sometimes be compelled to confess themselves powerless in the face of rigid rules and precise "technicalities" such is not the unhappy state of the House of Representatives. There is no power lodged anywhere which limits its discretion and authority, except the Constitution and its sense of right. Partisan prejudice may color its judgments and want of wisdom may make its decrees unsound, but it is never without power to do the right within the limits of its wide jurisdiction.

1123. The case of Horton v. Butler, continued.

Where fraud so permeated a large part of the district as to prevent a full, free, and fair expression of the voters' will, the seat was declared vacant.

The degree and kind of testimony required to show a registration to be fraudulent, in connection with a conspiracy.

As to the validity of census returns and a canvass in proving a registration to be fraudulent.

As to hearsay evidence of persons participating in a fraudulent registration.

The kind and degree of evidence required to establish a conspiracy to defraud in a district.

As to the merits of the case, the majority of the committee, in their report, set forth that the official returns gave the sitting Member a plurality of 3,553. The contestant attacked these returns on numerous grounds, the most important

of which were fraudulent registration, fraudulent voting, violation of law as to appointment of election officers, violence, intimidation, and false counting. The majority of the committee thus summarize:

We find that no valid election was held for Representative in the Fifty-seventh Congress from the Twelfth district of Missouri, because—

First. Fraud so permeated the conduct of the election in a large part of the district as to prevent a full, free, and fair expression of the public desire in respect to the election of a Representative in Congress.

Second. While the evidences of Democratic fraud are numerous and in almost every precinct discoverable, yet upon one of the many phases of the testimony showing Democratic frauds it appears that about 5,000 votes were cast for the contestee and about 2,000 for the contestant under names and addresses which a careful canvass could not discover as representing actual residents. We can not apply one rule of inference to one side and refuse to apply it to the other side. Nor can we when so many votes apparently tainted with fraud are involved determine that he who has least benefited by them shall be declared elected. It is possible that this conclusion may not be entirely fair to the contestant, but we are convinced that it is the only just decision we could render.

The minority of the committee, in views submitted by Mr. Sydney J. Bowie, of Alabama, contend that—

there is no competent evidence in this record which remotely tends to invalidate a sufficient number of these votes to make this majority even doubtful.

The majority of the committee, preliminary to the consideration of specific acts of fraud, call attention to certain conditions which existed or were created to further what is termed a conspiracy. A new election law had recently been enacted, which enabled the party of the sitting Member to deny to the other party an efficient, representation on the boards of officers conducting the registration and voting. The police board of the city in which the district was located was also under the partisan control of sitting Member's party; and the committee concluded, from a report of a grand jury which sat in St. Louis, that it was used in furtherance of a conspiracy entered into by leading officials of sitting Member's party.

A further fact having a bearing on the decision of the case was the provision of the constitution of Missouri that every ballot voted should be numbered in the order of its reception and opposite the name of the voter depositing it, and that this record should be open in case of contest. The majority of the committee examined—

1. The fraudulent registration. There appeared from the testimony to have been a fraudulent registration to the extent of about 9,180 in a total registration of 27,467. The methods and extent of this registration were proven as follows:

(*a*) By the testimony of 5 witnesses, who saw acts disclosing a system of illegal registration by the issuance of slips of paper containing fictitious names on which repeaters registered.

(*b*) By canvassers in certain precincts which disclosed enough fraudulent registration to discredit the election in those precincts.

(*c*) By the testimony of persons living in houses neighboring to those wherein suspicious registrations were located, and who did not know the persons registered, although they did know everyone living in the houses.

(*d*) Testimony similar to the above from persons actually living in the houses from which the alleged fraudulent registration occurred.

(*e*) Registration from lots found to be vacant.

(*f*) That registered letters addressed to about 1,500 suspicious names could be delivered only in a few cases. The minority attempt to impeach this by showing certain cases where the persons were in fact living at the address but did not receive the registered letters. These cases were not numerous.

(*g*) Apparent registration of about 2,500 names from low resorts, saloons, yards, shops, stables and other places where there were no dwellings attached.

(*h*) By admissions on the part of those who participated in the frauds. The majority of the committee say:

> There is much heresay evidence of specific admissions by persons claiming to have participated in the frauds, but we have not considered such evidence unless it appeared that the person thus confessing was in a position of authority, or was engaged in the fraudulent work aside from his admissions.
>
> Thus we learn, that one Reese Evans was industriously engaged with a gang of repeaters distributing slips to his men, so that they might have timely advice as to their names, ages, and places of residence. The plan of using these dips will be more fully referred to when we come to a description of the election itself. Reference is here made to it for the purpose of showing Evans's relation to the conspiracy.
>
> The witness tells us, that he knows Evans well, and that before the election Evans told him that he had 20 men on his list, and that he was registering them as many as twenty times a day.
>
> It may be said that this testimony narrates an improbable story. The simple answer to that is that it is very full and explicit, and that Evans does not go upon the stand and deny it; nor is any explanation suggested why he did not do so.

(*i*) The excessive registration in the district as compared with population. The ratio was 24 per cent of the population, while in New York the ratio was 17.7, and in Philadelphia 18.1. The minority contended that this comparison was misleading and made on a false basis.

(*j*) By a comparison, on the initiative of the committee itself, of the first 509 names to which registered letters were sent, with the city directory which was made from a canvass within two or three weeks after the election, the committee found in the directory 110 of the persons, and did not find 399.

(*k*) By a comparison with the returns of the Federal census taken in the June preceding the registration in October. From this it appeared that of 27,467 persons registered, 14,088 were not enumerated in the census. The majority say:

> It is not to be denied that no census can be exactly accurate, and it must be true that conditions in June do not necessarily determine conditions in October. Nevertheless, whatever may be the conditions of population as to permanence, it is not for a moment admissible that in a city like St. Louis half of the population registered in October did not reside in the district in June, nor can it be true that if residing there they were not found by the census enumerators.

(*l*) By a canvass made in the latter part of December under direction of attorneys for contestant, and ostensibly for the purpose of a trade directory. This canvass, called the "McBurney canvass," failed to find 12,411 of the 27,467 names on the registration lists. This canvass also demonstrated that many persons entitled to registration were not registered. As to this canvass, which was a subject of much contention in this case, the majority of the committee say:

> While some question is raised as to the competency of this canvass as evidence in the case by reason of the fact that the canvassers themselves were not put upon the witness stand, we are yet inclined to receive it for what it is worth in precisely the same way and for exactly the same purpose as that for which we would consider a city directory competent.

It must not be forgotten that this is not a case in which an effort is being made to prove that Richard Roe did or did not commit a crime or whether John Doe did or did not vote at a certain place at a certain time. Considering the character of the issue made in this case and the nature of the frauds alleged and otherwise proven, it is difficult to understand what kind of testimony could be more persuasive or even more competent than the results of the canvass made under the circumstances in which a city directory of a great city is ordinarily made.

It is proven in this case to our entire satisfaction that the canvassers under McBurney were competent to perform their duty; were suitably instructed; that each made an affidavit to the correctness of his returns; that that affidavit was the basis upon which his compensation was fixed; and that the canvass made by them and by them returned, and tabulated by Mr. McBurney, is, in all respects, as worthy of credibility as any canvass for a city directory could possibly be.

As to its persuasiveness respecting any particular individual we would of course have very grave doubts, but as to the charges made and the facts en masse nothing could be more convincing. So we consider that whatever objections there are to the McBurney canvass go to its weight, and its weight is to be determined by its comparison with other testimony.

The minority of the committee assail this testimony as heresay:

There were 57 canvassers who did this work, only one of whom, Mr. Elmer L. Moone, was examined. The testimony as to the work done by the remaining 56 canvassers consists simply of a lot of names and residences written down in a book, signed by them, and which they left with Mr. McBurney. The latter testifies that he knows absolutely nothing as to the correctness of the work of any of these canvassers, but the tabulated figures which he makes are based upon the assumption that it is correct. In other words, he testifies as to what they told him.

The minority then quote at length the authorities against heresay evidence; and also attacks the canvass on its merits.

(*m*) The majority of the committee also draw unfavorable conclusions from the failure of sitting Member to contradict the testimony of false registration:

But when we consider the specific testimony on behalf of the contestant, pointing out people by name who had participated in unlawful registration and unlawful voting, when house after house was specifically referred to as places from which many persons had been registered, but did not live there and had never lived there; when, in a word, hundreds of accurately and unmistakably described instances were given of fraud which, if they had not occurred, could be disproved in a moment by witnesses who must have been subject to the call of the contestee, it amounts to little short of an admission of the truth of the contestant's statement for the contestee to say that it was not necessary to take testimony in his own behalf.

2. The fraudulent voting. The system under which the majority alleged this to have been done was disclosed by testimony as to the following features of the election:

(*a*) It was shown in a recount of the ballots that—

In the wards in which the greatest frauds were perpetrated, 60 out of 113 judges and clerks who were appointed by the Democratic deputy commissioner as Republican judges and clerks were opposed to the election of Horton.

(*b*) The ejection of Republican challengers from polling places where fraudulent voting was about to take place.

(*c*) The activity and inactivity of the police in apparent furtherance of the plans for fraudulent voting, as shown by uncontradicted testimony.

(*d*) The use of repeaters, described by the majority of the committee as follows:

The various leaders in charge of repeating gangs possessed themselves of slips, upon each of which was recorded the name and address of some fictitious person, or of a person having no right to vote, who was registered in a certain precinct. Arranging these slips by precincts, the man in charge of the

repeating crowd would, when approaching the polling place, distribute among his people the slips representing registrations from that precinct. The crowd then entered the polling place, each one giving to the judges the name which he found written on the slip in his hand. The judges, of course, promptly found the proper name and address upon the registration list and permitted the offering voter to vote. This operation was repeated at that precinct as often as it was deemed safe to do so until as many of the illegally registered names could be voted as the leader cared to risk; then the crowd passed on to the next precinct, where the same process was carried on.

Among the most striking incidents was the fact that at a polling place the votes cast while the repeating gangs were present would be given by voters who, to the number of over 100 consecutively, had no middle names, although in other parts of the poll lists such a phenomenon was not observed.

3. The recount of the ballots showed that sitting Member had been credited on the count with a larger number of votes than were actually cast. Contestant charged that this excess amounted to 913; and sitting Member admitted that it amounted to 402, thus leaving his official majority at only 3,151.

The recount also showed that sitting Member received 3,727 votes of persons not found either by the census or the McBurney canvass; and that contestant received 1,345 votes from such persons.

Deducting the 3,727 apparently fraudulent votes from sitting Member, would leave a majority for contestant; but the committee consider that in applying such a rule it would be necessary also to deduct the 1,345 apparently fraudulent votes from contestant's vote, which would still leave sitting Member elected. But in view of the widespread corruption. which tainted so many of the polling places, and in view of the fact that the testimony indicated that there had been some fraudulent manipulation of ballots after they were cast, the majority reported the following resolution:

Resolved, That no valid election for Representative in Congress was held in the Twelfth Congressional district of Missouri on the 6th day of November, 1900, and that the seat now held by the contestee is hereby declared vacant.

The minority reported resolutions declaring sitting Member elected and entitled to the seat.

The report was debated on June 27 and 28,[1] and on the latter day the motion to substitute the minority proposition for the majority was disagreed to, yeas 100, nays, 136. Then the resolution declaring the seat vacant was agreed to.

1124. The North Carolina election case of Fowler v. Thomas, in the Fifty-seventh Congress.

Although the election in a large part of a county may be vitiated by disregard of law by the county election officers, yet the returns of unassailed precincts in the county should be counted.

On April 9, 1902,[2] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted a report in the case of Fowler *v.* Thomas, of North Carolina.

The sitting Member had on the face of the returns a plurality of 1,909 votes over contestant, and a majority of 1,893 over all. The contestant claimed the

[1] Record, pp. 7527, 7577–7594.

[2] First session Fifty-seventh Congress, House Report No. 1514.

rejection of enough votes to give himself a plurality of 574 votes. But in order to effect a result favorable to contestant it would be necessary to deduct, the entire vote of the two counties of Craven and Duplin, the first of which gave sitting Member a majority of 911 votes and the second of which gave him 810 majority.

Craven County.—The first reason given for excluding the entire vote of Craven County is—

that the county board of elections of Craven County, in appointing judges of election for the various voting precincts under the law of the State of North Carolina, which provides that each party shall have representation among the said judges, ignored those who had been recommended by the Republican executive committee in all the precincts in said county except Maple, Cypress, Truitts, Dover, Fort Barnwell, Core Creek, Lees Farm, First Ward, and Third Ward.

The vote in these excepted districts, as to which contestant concedes that the judges were properly appointed, was 915 for sitting Member and 357 for the contestant, a majority of 558 for the sitting Member. The report goes on:

There is evidence that in some or all of the other precincts the election officers were all Democrats, or that if Republicans they were not those recommended by the Republican executive committee. We are not satisfied that the consolidation of some of the other precincts, so as to crowd more Republican and Populist voters into one precinct than could readily vote and be counted in single day if attempts were made to delay the voting, was done for an honest purpose. But if we were to throw out all of those districts Mr. Thomas would still have a majority in the unattacked districts as above stated, and we have been shown no reason why the vote of the unattacked districts should be rejected. Therefore, notwithstanding the evidence of considerable irregularity in some parts of this county, we are unable to reject the entire vote as requested by contestant.

Duplin County.—The report says:

Contestant also complains that in Duplin County the election boards were either composed entirely of Democrats, or where Republicans or Populists were appointed they were not those recommended by the recognized authorities of said respective parties. It does not appear from the evidence that the Republican party submitted any list of those whom it desired placed upon the respective election boards. The Populists did, and asked for the appointment of a Populist on each election board. The county board, however, in some instances appointed Republicans and in others appointed Populists, but not always the persons named by the party authority.

There is evidence tending to show that in some of the districts the so-called Republican or Populists who were appointed were of doubtful allegiance to the parties they were supposed to represent and sometimes voted mixed tickets, but we have not been pointed to any evidence that they worked or voted against the contestant.

As to some districts no cause has been shown for complaint as to the complexion of the election boards, and upon the whole we are not satisfied that the vote of the entire county can properly be rejected.

There was also some evidence that, in the August election preceding the Congressional election of November, there was intimidation in Duplin County, but very little evidence of any in November.

There was also some evidence of other irregularities, but not enough to prevent the committee from arriving unanimously at the conclusion that the contestant had not been elected, and that the sitting Member was entitled to the seat.

On May 21,[1] the House, with little debate and no division, concurred in the report.

[1] Record, p. 5754.

1125. The Ohio election case of Lentz v. Tompkins, in the Fifty-seventh Congress.

Instance wherein the Elections Committee condemned pleadings in notice and answer for irrelevant charges and insinuations.

The Elections Committee has no authority to alter or suppress improper pleadings in the notice and answer.

Ex parte and hearsay testimony is rejected by the Elections Committee.

The House should not count a bribed vote, although no State law may require its rejection.

The entire vote of a precinct should not be rejected simply because certain votes are shown to be corrupt by reason of bribery.

On April 10, 1902,[1] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, presented the unanimous report of that committee in the case of Lentz *v.* Tompkins, of Ohio, finding that contestant was not elected, and that the sitting Member was entitled to the seat.

This report discussed two questions—(1) a question of pleading, and (2) the merits of the contest.

1. As to the pleading the committee say:

The statute governing contested Congressional elections provides that the contestant shall, within a specified time, give notice to the Member whose seat he designs to contest, "and in such notice shall specify specifically the grounds upon which he relies in the contest." The Member whose seat is contested must, "within thirty days after the service thereof, answer such notice, admitting or denying the facts alleged therein and state specifically any other grounds upon which he urges the validity of his election." (R. S., secs. 105, 106.)

This notice and answer constitute the pleadings of the case and are intended to present clearly the issue to be determined.

The notice filed by the contestant in this case contains 29 specifications, 18 of which were declared by his counsel to have been abandoned, no testimony whatever having been offered in support of any of them. They embraced charges against persons and matters in no wise connected with the Congressional election. They were evidently not intended to have any bearing upon the contest, but simply to place upon record slurs, insinuations, and direct charges against persons not parties to the proceeding and having no opportunity to defend themselves. The reply of the contestee also contains much that is objectionable and wholly unjustifiable, except as it may be stated to be a reply in kind to the notice of contest. Contestant then filed an additional paper, not authorized by law, containing matter still more scurrilous and abusive. All three of these papers would, if contained in pleadings in any court, be suppressed as scandalous and impertinent. Your committee has no authority to suppress or alter them, but desires as earnestly as possible to condemn the manifestly improper use of papers, which are intended by the act of Congress to be the means of enlightening the committee and the House as to the precise points at issue in the contest, by making them vehicles of abuse and vilification of each other by the parties to the contest, and particularly of third parties in no way connected therewith.

2. As to the merits of the contest, the committee found that Mr. Tompkins had an apparent plurality on the face of the returns of 18 votes. The report says:

The ballot in use in Ohio is of the form known as Australian, and under the laws of that State each ballot about which there is any dispute or question is required to be placed by the election officers in a sealed envelope, with evidence showing whether it was counted or not, and if counted, for whom. It is remarkable that in an election at which 51,903 votes were polled there were only 25 such ballots. Some

[1] First session Fifty-seventh Congress, House Report No. 1528.

of them were counted for contestant, some for contestee, some were not counted at all, and as to others there is no evidence showing whether they were counted or not, or if counted, for whom.

Having carefully examined these ballots and the law relating thereto, your committee finds that a proper counting of them shows an increase of 1 vote in favor of contestee, increasing his plurality to 19.

The committee go on to notice the charges of bribery made against the sitting Member, and after analyzing the testimony rejected certain as ex parte, certain other as hearsay, and other because it was shown that it had been procured by the offer of bribes. Finally the committee conclude:

But if the ex parte affidavits and the hearsay testimony were all admitted and all the testimony accepted as true according to the construction most favorable to contestant, it could not be found that more than 10 persons had received or been promised, either directly or indirectly, compensation to vote for Mr. Tompkins.

The integrity of the election returns is in no way attacked. No election officer has been proved, or even charged, with any irregularity whatever. No such general bribery in any precinct has been shown as ought to require the entire return to be rejected. But if there had we could not tell what precincts to throw out, as the evidence as to some of the said 10 persons does not show in what precinct or precincts they voted, and as to others does not show that they voted at all. Furthermore, as to some of the 10 who are shown to have voted, it does not appear whether they voted for Tompkins or Lentz.

If we were convinced that any precinct ought to be thrown out entirely we could not say whether to throw it out would benefit the contestant or contestee, as we have not been furnished evidence showing the vote by precincts. We have the vote by counties only. Surely we could not throw out a whole county, even if it were clearly shown that the 10 persons had been bribed and had voted.

The injustice of disfranchising more than 50,000 honest voters will at once appear. There is authority in the minority report in Delano *v.* Morgan, 2 Bart., 204, written by a former Speaker of the House, that as the law of Ohio provides only for the punishment of persons offering or receiving bribes, but does not declare their votes illegal, therefore they must be counted. But we can not consent to this doctrine, holding, as we do, that to receive and count a vote clearly shown to have been cast as the result of a bribe would be in violation of the spirit, if not the letter, of all laws tending to secure the freedom and purity of the ballot.

If satisfied from the evidence that these 10 persons had been paid to vote for contestee and bad so voted, your committee would not reject the entire vote of the respective precincts in which they deposited their ballots, even if we knew which precincts they were, or had returns by precincts so that we might act upon them. We would not throw out the entire precinct, but exclude the illegal votes, following Robinson *v.* Harrison, Fifty-fourth Congress, Report 1121, Bowen *v.* Buchanan, Rowell, 196. But the throwing out of such votes would not change the result of the election.

On May 21 [1] the report was considered by the House, and after brief debate the House, without division, concurred in the conclusion of the committee, and confirmed the sitting Member in his seat.

1126. The South Carolina election case of Johnston v. Stokes, in the Fifty-seventh Congress.

Where the notice of contest was objected to as to specifications not relating to vital questions, the Elections Committee disregarded the objections.

A declination of members of one political party to participate at an improvised poll legally conducted does not vitiate the vote cast.

The House, overruling its committee, declared the seat vacant in a case wherein thousands of voters were kept from the polls by what it deemed an unconstitutional registration law.

[1] Record, p. 5755.

Instance wherein the House determined that a State registration law was obnoxious to the State constitution.

The House declined to count votes of persons whose right to vote was illegally nullified on the evidence of statements of fact signed by those persons.

Discussion of a signed statement of an elector whose vote has been refused in relation to the doctrine of res gestae.

Form of resolution declaring a contested seat vacant.

On April 13, 1902,[1] Mr. John J. Jenkins, of Wisconsin, from the Committee on Elections No. 3, submitted the report of the majority in the case of Johnston *v.* Stokes, of South Carolina. The sitting Member, on the face of the returns, had a plurality of 4,702 votes, but certain corrections reduced this to 4,204.

A preliminary question had been raised by the sitting Member, who insisted that the notice of contest was not sufficient under the law, inasmuch as it failed to state particularly the grounds upon which the contestant relied in the contest. But as the result did not turn upon the objections, the committee went on and heard the case without passing on the question. In the course of his argument[2] before the House Mr. Jenkins discussed these specifications quite fully.

Two features of the case, over which there was no argument as to law or fact, were:

(*a*) At the precincts of Gadsden and Eastover the regularly appointed election officers—all members of sitting Member's party—did not open the polls. Thereupon members of the party supporting contestant improvised a board of election and held an election, following all the requirements of law. The voters of sitting Member's party declined, however, to participate in this election. The committee were unanimous in counting the votes of these precincts, which had also in fact been allowed, at the request of counsel for both sides, by the State canvassers.

(*b*) At Strawberry Ferry, after the official returns were made by the precinct officers to the board of county canvassers, and before that body proceeded to canvass the votes of Berkeley County, the ballot box used at Strawberry Ferry, containing the votes cast at that precinct, the official returns, poll list, and tally sheets, were all stolen. By competent evidence it was proved that there were cast at that precinct 104 votes—92 for Johnston and 12 for Stokes-and the committee has counted them for the respective parties, as proven.

Aside from these minor points the decision of the case turns upon the registration law of South Carolina and questions arising out of its application. No better statement of the facts in regard to this law can be made than is contained in the brief minority views filed by Mr. Samuel W. McCall, of Massachusetts, chairman of the committee, whose views the House finally adopted.

I concur in the conclusion of the majority of the committee that the contestant was not elected. The testimony, in my opinion, does not show such a tender of votes on the part of the excluded voters, such as the authorities require, as will justify the counting of a sufficient number of them to overcome the adverse plurality. But while the testimony is not sufficient for such a purpose, it does show a wholesale exclusion of voters and an unfair application of the registration law.

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[1] First session Fifty-seventh Congress, House Report No. 1229; Rowell's Digest, p. 530.

[2] Record, p. 5766.

The law only provides one registration place in each county, and only one day for registration each month from December to June, inclusive. Although the constitution provides that a male person otherwise qualified shall have the right to vote who has resided in the precinct sixty days before the election, the registration law, in fact, denied him registration, and, consequently, the right to vote unless he had resided in the precinct on the 1st day of July preceding the election. This provision is clearly repugnant to the constitution of South Carolina, which, under the pretense of regulating suffrage, imposes a new qualification upon it and is, therefore, unconstitutional. I may add that the chief justice of South Carolina and the judge of the United States court for that circuit each rendered an opinion that the law was unconstitutional, and although their associates held in each of the cases presented that the court did not have jurisdiction, that fact does not detract from the weight of the opinions.

The testimony shows that many voters, some of them coming 30 or 40 miles, appeared regularly at the places of registration from month to month, and were denied registration by means of a systematic obstruction. It shows further that many thousand men who had the constitutional qualification, but were not registered, and who therefore had the right to vote if the registration laws were unconstitutional, expressed their desire to vote by going to the polls. Doubtless many thousands more unregistered voters remained at home who would have come had they not known that a rule requiring registration certificates was in force and that they would be excluded if they came.

"If the officers conducting an election adopt and enforce an erroneous rule as to the qualification of voters which prevents certain legal voters who offer to vote from giving in their votes, and being made known prevents other legal voters similarly situated from offering to vote, the election may be set aside, especially if it appear that such votes if offered and received would have changed, or rendered doubtful, the result. After a decision has been made by the election officers affecting the right of a class of voters to vote and that decision becomes known, it is not necessary that every voter belonging to such class should offer his vote and have it formally rejected." (McCrary on Elections, third edition, section 241; Scranton borough election case, Brightly's Election Cases, 4,55.)

The colored race is enormously in the majority in this district, and it appears that as a rule the voters of that race in that district were Republicans. Believing that the registration law of South Carolina was unconstitutional, I am constrained to find from the evidence in this case that if said law had not been applied at all, or even fairly applied, the result would probably have been different, and I am therefore not able to give my assent to the conclusions of the majority of my colleagues that the contestee was elected.

The entire committee were—unanimously of the opinion that this registration law was unconstitutional, and all arguments proceeded on the basis that such was the fact.

The contestant, realizing that this registration law was the means of disfranchising his supporters, had printed in advance and distributed to list keepers at the several polling places the following forms of petition:

To the honorable Senate and House of Representatives of the United States in Congress assembled:

The petition of the subscribers, citizens of the State of South Carolina, respectfully showeth

That your petitioners are over the age of 21 years and male residents of the county of Colleton, and the voting precinct of Walterboro, in the county and State aforesaid, and are legally qualified to register and vote.

That on this the 6th day of November, 1894, they did present themselves at said voting precinct in order to vote for Member of Congress, and that they were denied the right to vote.

That your petitioners have made every reasonable effort to become qualified to vote according to the registration law of this State, but have been denied an equal chance and the same opportunity to register as are accorded to others of their fellow-citizens.

Your petitioners desired and intended to vote for Hon. Thomas B. Johnston for Member of Congress

Wherefore your petitioners pray that you investigate the facts herein stated and the practical workings of the registration and election laws of this State and devise some means to secure to us the free exercise of the rights guaranteed to us by the constitution of this State and the laws and Constitution of the United States, and your petitioners will ever pray, etc.

An aggregate of 7,336 names were signed to petitions of this kind, the signatures being made sometimes by the person and sometimes by the list keeper or another who was authorized to sign.

The main issue of the case arises over the admissibility of these lists as testimony that the person whose vote was rejected was a legally qualified voter, that he actually made a tender of his vote, and that the vote so tendered was a vote for contestant.

Two distinct questions are involved in this branch of the case: (1) A question of law, and (2) a question of facts.

1. As to the question of law.

A minority of the committee, composed of Messrs. Jesse Overstreet, of Indiana, James A. Walker, of Virginia, and Henry F. Thomas, of Michigan, contended that the lists were competent evidence. They say in their views:

> The evidence discloses that, on account of the very large number of voters who were present at the polls and desired to vote for the contestant, and made effort to cast their votes and failed, it was impossible to take the evidence of each separate voter, and to facilitate the matter and properly show the entire conditions that existed, and the number of voters thus deprived of their vote, lists of voters were kept by various parties at the precincts; and the person keeping said lists submitted himself to examination and testified to the facts, and it is sought by the contestant to admit in evidence these lists so prepared as above stated.

After describing the form of the petition, they say—

> Nor should we be unmindful of the truth so we11 expressed in Reed *v.* Kneass (Brightley's Election Cases, 260):
>
> "The true policy, to maintain and perpetuate the vote by ballot, is found in jealously guarding its purity, in placing no fine-drawn metaphysical obstructions in the way of testing election returns charged as false and fraudulent, and in assuring to the people by a jealous, vigilant, and determined investigation of election frauds, that there is a saving spirit in the public tribunals charged with such investigations, ready to do them justice if their suffrages have been tampered with by fraud, or misapprehended through error."
>
> This language is quoted with approval in McCreary on Elections, section 467, and the author adds:
>
> "It is the spirit of this rule that questions respecting evidence in contested-election cases should be solved."
>
> No doubt it is true, as a general proposition, that the party offering evidence is required to produce the best evidence of which the case in its nature is susceptible, but it will be observed that the nature of the case is to be considered. Here a class of men numbering thousands was denied the right to vote because of the nature, as well as the administration, of the registration law of South Carolina. To have examined each of these witnesses concerning each and all of the facts establishing his right to registration and to vote, proving the incidents of the attempt or failure to exercise the right of suffrage, and subjecting the witnesses to lengthy cross-examinations by contestee's attorneys, would have required more time than the law grants for the taking of testimony and have caused a miscarriage of justice. And so it became incumbent upon the contestant to offer the best evidence that he could command within the limitations and conditions existing, and he did that by furnishing the written declarations of these men as to their qualifications, efforts, and purposes, supplemented by the testimony of men who knew them, to the effect that they were entitled to but were denied the right of suffrage. Where there is no substitution of evidence, but only a selection of weaker instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule concerning the production of the best evidence is not infringed. (1 Greenleaf on Evidence, 14 ed., sec. 82.) We submit that the contestant's evidence was a selection of weaker instead of stronger proofs, and for the very best of reasons, considering reasons from the standpoint of existing conditions and not of theory.

They then proceed to refer to the text writers and the precedents, Greenleaf on Evidence, the New Jersey, or Broad Seal case, Vallandigham *v.* Campbell, certain English cases,[1] etc., and say:

The principle underlying the Congressional cases above cited is this: That the declaration of a voter, or one entitled to vote at a given election, made at or in the vicinity of the voting place immediately following his effort to vote, concerning his own acts and qualifications or disqualifications, are parts of the res gestae, and are admissible in evidence. In voting or in attempting to vote, or in being present at the polls with the desire to vote, the voter is discharging, or attempting to discharge, or desiring to discharge one of the most solemn and momentous duties of citizenship, and to us it seems clear that his every act and word calculated to show in any degree what his purposes or qualifications were are clearly admissible in evidence as part of the res gestae. This evidence may be furnished by the depositions of others, or by the written statements of others, made at the time, preserving and exhibiting the statements or declarations or admissions, either oral or written, made by the voter or the nonvoter, as the case may be, as is clearly established by the preceding authorities.

After announcing their endorsement to the following statement of principle made by counsel in the case—

We are aware that, while the same general rules of evidence which govern courts of law are observed in the investigation of contested election cases, yet the rules of evidence are applied by the committee more according to their spirit than with the technical strictness observed by ordinary judicial tribunals.

The minority call attention to the fact that the declarations of the rejected voters "were brought into the record by the depositions of the men who made the lists, or who signed to the petitions the names of the rejected voters at their request," and say:

These authorities, and the reasoning upon which they are predicated, clearly show that the declarations of those who were deprived of the privilege of voting on election day are competent evidence in support of the allegation that they were lawful voters, intended to vote, were deprived of that privilege, and would have voted for contestant. These declarations were made at the time of holding the election, and to persons in or near the voting places. They related to the subject-matter of the election, formed a part of the history of the transactions of the election, and were in the highest and truest sense parts of the res gestae.

Further, in debate,[2] Mr. Overstreet explained that the minority counted only the lists where the voters in person approached the list keeper in the vicinity of the polling booth immediately after the rejection of the vote and disclosed to him the facts which showed his qualifications; and second where the persons did not approach the list keeper, but where the latter swears that he saw the vote rejected, and also swears to the facts that show the person to have been a qualified voter and belonging to a political party supporting contestant. In cases where a third person, not the list keeper, deposed to the fact that the list was kept, or where the lists were not kept, at the polling place, the minority rejected them.

The majority of the committee—and on this feature of the case Mr. McCall concurred with them—decline to accept the lists as testimony. The report says:

No doubt it is the safer and better rule, when the evidence will warrant it, and as this House has done in many instances since the Nineteenth Congress, to count lawful votes, lawfully tendered and unlawfully refused, when the number is sufficient to change the result and it is known for what candidate the elector intended to vote. But before the vote can be counted, it ought to appear by competent evidence that qualified electors, sufficient in number to change the result, had lawfully tendered their

[1] Pages 22–26 of report.

[2] Record, pp. 5868, 5871.

votes and were unlawfully rejected, and for whom the rejected electors would have voted if they had been permitted to vote.

Certainly this is as far as any court or legislative body ought to go. But in this case, to unseat the contestee, this House is asked to go further—to receive the declarations of a supposed elector in order to count his vote—a position not sustained by any law writer or judicial authority anywhere. Yet even if this was the law and rule of the House it would not affect the right of the contestee to his seat in the House, because under it not a dozen votes could be counted for the contestee according to law and evidence.

An examination of the evidence will prove that, with very few exceptions, no declarations were made, not even anything that could be called hearsay evidence, and if what are called declarations are admissible none of the same are sufficient to show that a qualified elector lawfully tendered his vote and was unlawfully rejected, and for whom he would have voted if permitted to vote. Moreover, all of these so-called declarations were made away from the polling place and subsequent to any offer or attempt to vote, even if any such were made. Yet it is asked, on this class of testimony, that enough votes be counted to impeach the certificate of election held by the contestee.

In the debate [1] Mr. Jenkin more specifically criticized the petition, calling attention to the fact that the signers do not even declare that they tried to vote, but say that they desired and intended to vote; that they were not in fact declarations or even memoranda.

The report of the majority continues further in this line:

It is also difficult to understand what reliance can be placed upon the lists as evidence, if the heading to the lists contained all the necessary elements to justify the counting of the votes. The signing of the same would not make the lists evidence. It would only be ex parte evidence at the best. It would not be as strong as an affidavit, and certainly an ex parte affidavit would not be considered as evidence, for a party has a right to be present when witnesses are examined in his case and participate in the examination.

If the mode of procedure had in this case is permitted, this valuable right would be denied. Not a fact that must be proved in order to count a vote can be found in the headings of the lists. There is no statement in the heading that they tendered their vote or that they belonged to a class of electors that were denied the right to vote by the election officers. If the declaration of the elector who was denied the right to vote can not be received, certainly the headings of the petition can not be admitted as evidence for a declaration.

No doubt a few votes can be counted, but not enough to make mention of; but independent of that there is no evidence to show declarations of electors as to their qualifications, intentions, or efforts to vote.

It is elementary that hearsay evidence is not admissible in election cases. The same rules of law apply in election cases as in all other cases, and while the power of the House is very great in election cases, yet its actions should be governed by law and evidence. It is not only just, but safe.

If the House, uninfluenced by partisan feeling, decide election cases according to the established principles of law and rules of evidence, it will come nearer doing exact and equal justice; and it will be establishing a dangerous precedent to admit what is offered in this case to impeach the title to a seat in this House.

It was argued upon the part of the contestant that these lists, etc., might be received as a part of the res gestae. It certainly is no part of the res gestae, for anything said or done after the vote was rejected and the elector had gone away from the polls would have no connection whatever with the principal fact, which in this case was what was said and done by the elector at the polls when offering to vote. But even this position would fail from the fact that no declarations were made, if correct as a proposition of law.

The question of the res gestae was also gone into very thoroughly in the debate.[2]

(2) As to the facts relating to the petitions.

The minority of the committee did not contend that all of the 7,366 names on the lists should be credited to contestant. They credited him with 4,523 votes—

[1] Record, pp. 5909, 5910.

[2] See remarks of Mr. Powers, of Vermont, Record, p. 5904.

enough to show his election—adopting principles governing their rulings, illustrated by the following cases:

(*a*) In Calleton County they count the lists for these reasons:

The lists of voters taken at the various precincts in said county were brought into the record by the witnesses who took the declarations from the voters immediately after the vote was rejected and in the vicinity of the polling place, the qualification of all of said voters whose ballots were so rejected being shown either by the heading of the petition or paper upon which their names were entered or by the statement of the voter himself, for the paper, being signed by the voter or by one authorized to sign it for him, discloses the qualification and intention of the voter, and therefore becomes a part of the declaration itself; and, taken together, all constitute one and the same transaction, and each of said votes should be counted the same as if each of the voters themselves had come upon the stand and testified singly to the same statements.

(*b*) In Sumter County a more liberal rule was followed:

Lists of voters whose votes were rejected were kept by persons who testify in the case, but at these precincts the voters whose votes were so rejected did not make the declaration to the persons who kept the lists, but an examination of the evidence shows that the witnesses who testify to having kept these lists testify to the qualification of the voters and the fact of their rejection, and testify also that these voters belong to the Republican party; and, as herein before held, inasmuch as Johnston was the regular candidate of the Republican party, it is reasonable to assume that the voters at these precincts mentioned intended to cast their votes for the contestant, and we therefore count the votes at these precincts.

The minority also say:

Objection is made in the majority report of the committee that all of these lists are not properly tendered in evidence, and therefore can not be considered as part of the record. But, while it is true that the formal technical presentation of the list, filed as an exhibit, was not resorted to in each case, yet the lists themselves appear in the record and are subject to the scrutiny and criticism of the committee; and, inasmuch as they conform to the testimony introducing them, it is our opinion that the objection to their form of presentation is too technical to warrant their exclusion, and we have therefore considered them as having been properly introduced in the case.

The majority of the committee do not admit the contention that the lists justify the addition of the number of votes allowed by the minority, even in view of their admission as evidence. Mr. James H. Codding, of Pennsylvania, who filed views of his own,[1] called attention to three precincts, on the lists of which contestant was credited by the minority with 293 votes (the minority contention only allowed him a plurality of 233 votes), on evidence that did not come up even to the rules established by the majority.

From the different views of the case, the majority proposed to declare sitting Member entitled to the seat; the minority proposed to seat the contestant, and Mr. McCall proposed to declare the seat vacant, on the ground that there had been no valid election.

The report was debated fully and ably in the House on May 26, 28, and 29.[2] On the latter day the proposition of the minority, to award the seat to the contestant, offered as a substitute, was rejected—yeas 95, nays 105[3]—and at the same time the majority resolution declaring contestant not elected was agreed to—yeas 103, nays

[1] These views do not appear with the report, but were presented in the House on May 28, and may be found in the Record, p. 5875.

[2] Record, pp. 5756, 5866, 5897–5915.

[3] Journal, pp. 552, 553.

99. On June 1 this latter vote was reconsidered, and Mr. McCall offered as a substitute for the majority resolutions the following:

That there was no valid election for Representative in the House of Representatives of the Fifty-fourth Congress from the Seventh Congressional district of South Carolina on the sixth day of November, eighteen hundred and ninety-four, and that neither Thomas B. Johnston nor J. William Stokes is entitled to a seat therein.

This substitute was agreed to—yeas 130, nays 125. Then the resolutions of the majority, as amended, were agreed to.[1]

1127. The Virginia election case of Wilson v. Lassiter in the Fifty-seventh Congress.

Incompetent testimony and long statements by counsel tending to present such evidence should not be included in the record of an election case.

The mere existence of frauds and irregularities does not vitiate an election if insufficient to affect the result.

On June 30, 1902;[2] Mr. Kittredge Haskins, of Vermont, from the Committee on Elections No. 3, submitted a report in the case of Wilson *v.* Lassiter, of Virginia. The sitting Member in this case was returned by an official majority of 4,738. The committee concluded:

That while the evidence shows that frauds and irregularities were practiced in the interest of the contestee it falls short of being sufficient to legally justify a change in the result of the election.

The minority of the committee concurred in the result, but not in admitting that frauds were shown.

On an incidental question the report says:

The practice of introducing into the record in contested election cases, as was done in this case, testimony clearly incompetent and irrelevant, and long statements by counsel intended to convey information as to facts which could not be properly proven, is inexcusable and deserves to be severely condemned.

This report was not acted on at this session of Congress.

1128. The Missouri election case of Wagoner v. Butler in the Fifty-seventh Congress.

The returns of 41 out of 116 election precincts being rejected, the contestant was seated on his plurality in the remaining precincts, which cast over half the returned vote.

Offlcial copies of registration lists, such copies made in pursuance of law, were admitted as evidence of the registration by a divided committee.

A fraudulent registration was held to justify a conclusion that a conspiracy existed to perpetrate fraud in the election.

Instance wherein the city directory and a canvass by means of registered letters was accepted to discredit a registration.

Where a law requiring ballots to be numbered, even though directory merely, was totally disregarded, and the poll books and ballot boxes disagreed essentially, the returns were rejected.

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[1] Journal, pp. 557, 558.

[2] First session Fifty-seventh Congress, House Report No. 2744.

In a district where gross frauds prevailed generally irregularities in the reception and record of the ballots were held to justify rejection of the return.

On February 24, 1903,[1] Mr. Marlin E. Olmsted, of Pennsylvania, presented the report of the majority of the Committee on Elections No. 2 in the Missouri case of Wagoner *v.* Butler. The sitting Member had been returned at a special election, November 4, 1903, by a plurality of 6,293. The report thus states the circumstances of the case:

At the regular Congressional election in 1900 James J. Butler, the Democratic candidate, was returned as having been elected to membership in the Fifty-seventh Congress by a plurality of 3,553. His Republican opponent, William M. Horton, contested his election.

That case was heard by Committee on Elections No. 1, which, in an able and exhaustive report[2] presented by its chairman to this House April 5, 1902, found that frauds numerous and varied had been so extensively practiced in or relating to said election that the honest choice of the voters could not be determined, and recommended a resolution, adopted by this House June 28, 1902, to the effect that there had been no valid election and that the seat held by Mr. Butler be declared vacant. The governor of Missouri ordered a special election to fill the vacancy thus caused, which special election was held Tuesday, November 4, 1902, that being also the day for the regular election of Representatives in the Fifty-eighth Congress. Mr. Butler was returned as elected to fill the vacancy in this present Congress caused by his own unseating and by the increased plurality of 6,293. He took the oath of office December 1, 1902, and now occupies the seat of which he was once deprived by the action of this House, as above indicated.

His counsel informs your committee that at the same election Mr. Butler was also elected to membership in the Fifty-eighth Congress and by a still larger plurality. No evidence concerning that election has, however, been presented to your committee, and with it this Congress has, in any event, no concern.

Mr. Wagoner, who was not a candidate for membership in the Fifty-eighth Congress, contests the election of Mr. Butler for the remainder of the Fifty-seventh Congress and claim himself to have been lawfully chosen to fill the vacancy.

The notice of contest charges that in and with respect to 63 election precincts, hereinafter named, there were practiced nearly every variety of fraud yet devised for producing unfair and dishonest political results, such as padded registration, repeating, false personation, the reception of ballots from persons whose names were not upon the registration books and, therefore, under the laws of the State of Missouri, not entitled to vote at all, the stuffing of ballot boxes, fraudulent conspiracies on the part of election officers to prevent free voting and honest returns, improper interference by the police, intimidation, and, in some instances, actual violence. As to some, if not all, of these precincts the charges are well sustained by proof.

The Twelfth Congressional district comprises certain wards and parts of wards, and is wholly within the city of St. Louis. It extends across the city from east to west, the western end, however, being considerably wider and greater in extent than the eastern, which borders upon the Mississippi River. No complaint is made as to the election in the western portion of the district, but the middle and eastern portions embrace what are, let us trust, the worst portions of the city, and contain the lowest classes of her inhabitants. Saloons, bawdy houses, low theaters, mule stables, boarding houses for roustabouts, gambling houses, etc., here abound in great profusion, and the field is well adapted to corrupt political practices.

The district comprises 116 election precincts. As to 53 of these, counsel for the parties mutually agree that there were no such irregularities as would justify the setting aside or modification of the returns.

As to the 63 precincts remaining in dispute, the majority found that in 41 it was impossible to determine the true and lawful vote, and therefore that the returns

[1] Second session Fifty-seventh Congress, House Report No. 3857.

[2] First session, Fifty-seventh Congress, House Report No. 2744.

should be rejected. These returns from the 41 precincts had given Butler 9,239 and Wagoner 2,179, a majority of 7,060. So it is evident that the rejection of the 41 precincts gave to contestant a majority of 1–67 in the district. The vote returned for contestant and sitting Member together in the whole district was 27,395, and the total vote for both in the rejected 41 precincts (out of 116 precincts in all) was 11,418. So the portion rejected was less than half the vote and less than half the precincts.

In discussing the reasons justifying the rejection of the precincts in question, the majority first describe the registration system.

The so-called "Nesbit law," adopted in 1899, provides election machinery applicable to the city of St. Louis only.

Counsel for contestant claim that the provisions of this law give partisan control of the election machinery and facilitate the perpetration of corrupt practices. Counsel for contestee claims that some of its most objectionable provisions were eliminated by the supplementary act of 1901. It appears that in 1898, just prior to the adoption of the Nesbit law, this particular district elected a Republican Congressman by a majority of 2,321, but since the adoption of the law Democratic majorities have invariably been returned. This of itself may or not prove anything. It seems to your committee that the law, even as amended, contains some very objectionable features.

The entire election machinery of the whole city is placed under the control of a "board of election commissioners," composed of three members appointed by the governor for the term of four years. The law does, indeed, provide that "one of said commissioners shall be a member of and belong to the leading party politically opposed to that to which the governor belongs." Nevertheless, he is selected by the governor and not likely to be very antagonistic to the party whose governor confers upon him the position. It is provided that "said election commissioners shall make all necessary rules and regulations, not inconsistent with this article, with reference to the registration of voters and conduct of elections, and shall have charge of and make provisions for all elections, general, special, local, municipal, State and county, and of all others of every description to be held in such city or any part thereof at any time."

The voters in the several election precincts are not permitted to select their own judges, inspectors, and clerks of election, but this board of three election commissioners appointed by the governor is authorized to select for each polling place four judges and two clerks of election. It is, indeed, provided that two of the judges and one of the clerks shall be "designated" by the minority commissioner. It requires, however, the concurrence of at least one of the majority commissioners to make this designation effective.

The provision of the Nesbit law with reference to registration is a striking feature, and, it is believed, unknown to the election machinery of any other city. A voter may upon a certain day register in the precinct in which he lives, but except upon that day registration must be made outside of the precinct, and in many cases outside of the Congressional district, at the office of the central board of election commissioners. The provisions of the Nesbit law upon this matter of registration afford a wide field for fraud. It appears from the testimony that by far the greater portion of the names appearing upon the registration books were placed there not in the precincts where the voters lived, but at the central office of the board of election commissioners.

The four judges of election in each precinct are constituted by law a board of registration for their precinct, but, as already stated, the majority of registrations are made at the office of the board of election commissioners and not with the precinct board.

The general board is required to furnish to the precinct board verification lists. No new, names are permitted to be added after "the Saturday following the Tuesday three weeks preceding such election," but the clerks of election are constituted canvassers of their respective precincts and, being supplied with the verification lists, may "come together and canvass their precinct, calling at each dwelling house for the purpose of verifying the register." When that has been done a further meeting is to be had for corrections of the registration. Then it is provided by law that—

* * * * * * *

"SEC. 7238. Judges shall sign registry—registry to be sent to commissioners—commissioners to proceed—how lists public records.

"At the end of the last session provided for the said board of registration and said clerk shall compare and correct the registers aforesaid and make them correspond and agree; and said judges shall then, immediately following the last name on each page of the register, sign their names so that no other name can be added without discovery, and shall return the two registers to the possession of the election commissioners; thereupon the said commissioners shall at once cause copies to be made of such registers, of all the names upon the same, with the address, and arranged according to the streets, avenues, or alleys, commencing with the lowest number and arranging the same in order according to street numbers, and shall then cause such precinct register, under such arrangement, to be printed in sufficient numbers to meet all demands, and upon application a copy of the same shall be given to any person in such precinct. Said registers in the office of the election commissioners shall be public records and open to public inspection."

Duly authenticated copies of these precinct registers were presented in the testimony and relied on by the majority.

The minority views [1] present testimony to show the unreliability of the lists, and say:

The lists above referred to, which are named "Exhibit C, of January 3, 1903, on the part of the contestant," and are made a part of the record in this case, were introduced on January 3, 1903, with the testimony of Louis P. Aloe, which appears on page 289 of the record. Mr. Aloe identified them as official lists of the registered voters of the various precincts, as issued by the election commissioners' office for the convenience of voters, official, however, only, as he afterwards stated, in the sense that they were issued by the election commissioners' office. He states that these sheets were printed from the verification lists which are prepared by the judges and clerks of election in the various precincts as provided for by section 7233, which is as follows:

"SEC. 7233. *Verification lists—challenges.*—The election commissioners shall prepare and furnish to the board of registration in each precinct two blank books to be known as 'verification lists,' each page to be ruled into columns and contain pages sufficient for each street, avenue, and alley in the precinct. During the progress of registration or immediately thereafter, the clerks of said board shall transfer all the names upon the register to the left-hand pages of such 'verification lists,' arranging them according to the streets, avenues, alleys, or courts, beginning with the lowest residence number and placing them numerically, as nearly as possible, from the lowest up to the highest number. They shall, first write the name of such street, avenue, alley, or court at the top of the second column and then proceed to transfer the registered names to the pages of such 'verification lists,' headed 'Registered names,' according to the street number, as above indicated.

"If, during either day of registration, a registered voter of the ward shall come before the board of registry and make oath that he believes that any particular person upon such registry is not a qualified voter, such fact shall be noted, and after the completion of such 'verification lists,' such board or one of said judges shall make across or check a in ink opposite such name upon each of said 'verification lists.' If such judges shall, however, know that any person so complained of is a qualified voter, and shall believe that such complaint was only made to vex and harass such qualified voter, then such cross or checked mark shall not be put upon such lists. Said board of registration shall, before 8 o'clock on the following day, return said 'verification lists' to the office of such election commissioners." (New section.)

The above section is contained in the law of 1895 and is no part of the much-abused Nesbit law.

It will be seen that these registration sheets, upon which the majority of the committee rests so much of their case, can not be said to have special verity or genuineness of character to be admitted as evidence of the actual legal registration in any court in the United States. It is not suggested that they have the color of verity in any degree, such as would examined copies or certified copies of the registration books.

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[1] Presented by Mr. John J. Feely, of Illinois.

They are not copies of the registration books. They are not even copies of copies of the registration books, but they are arranged from verification lists, which verification lists are made up by taking the names of the registered voters from the registration books and arranging them by streets, avenues, and alleys, commencing with the lowest street number of any voter registered from any street, etc.

The majority report finds from testing the registration that it was to a large extent false and fraudulent and that the conclusion therefrom is irresistible that a conspiracy existed in the district to perpetrate systematic fraud in the interest of sitting Member:

Contestant addressed or caused to be addressed and sent through the post-office a registered letter to each person whose name and address were thus shown to be registered in the 63 precincts in controversy. The total number of registered letters thus Mailed was 25,179. Of this number, 12,608 were returned, with endorsements bearing the number of the letter carrier and statements to the effect that the parties were not found at the address given. These letters were mailed, some on the 16th and some on the 17th of December following the election.

Of the 25,179 names appearing on the officially published registry lists, 16,045 do not appear in the city directory for 1902, and, as will hereinafter appear, thousands of votes were cast and counted in names not appearing upon either.

Four thousand six hundred and sixty-nine of the registered letters returned bore the statements of the letter carriers to the effect that the parties to whom they were addressed had "removed." Of this 4,669 names of persons appearing upon the registry lists, all of whom "removed "shortly after election, only 245 grace the pages of the St. Louis city directory for 1902.

These registry lists, printed by authority and required by law to be published for the information of the public as to the registration in each precinct, were offered and received in evidence, with no objection whatever on the part of the contestee, either as to their authenticity or relevancy, or as to their not being the best evidence. But the minority election commissioner was cross-examined and subsequently called on behalf of contestee for the purpose of showing that they were not correct. He actually testified that they were not, but that a great many of the names which were actually upon the registration books in his office were not included in these printed sheets.

Contestee also placed in evidence the certificate of the secretary of the board of election commissioners, showing 425 names upon the original registration book of Ward 22, precinct 1, whereas the printed registry sheets showed only 205; also a similar certificate showing 676 names upon the registration book in the office of the board of election commissioners from Ward 4, precinct 7, although the printed registry sheets showed only 169.

These exhibits, offered on behalf of Mr. Butler, seem to your committee to present the highest evidence of fraud. No names could have been honestly placed upon the registration books after the published registry sheets were given out except in a few cases of persons who, having been refused registration in their respective precincts, had appealed to the board of election commissioners. The testimony of the minority commissioner is to the effect that there were not more than forty of such cases in the entire city of St. Louis, but in this Congressional district alone thousands of persons voted whose names were not upon the printed registry lists, and it now appears from the contestee's own testimony that in one of the precincts above mentioned less than half the names upon the registration books were contained in the printed sheets and in the other less than a fourth.

This same state of affairs, extending throughout the entire district or at least throughout the 63 precincts in controversy, shows premeditated and deliberate fraud, for either thousands of names were illegally added to the registration after the giving out of the printed sheets or else thousands of the names upon the registration books were deliberately and intentionally omitted from the published lists for the purpose of depriving the public of ascertaining or knowing the extent to which false registration had been made. No such glaring discrepancies as are here apparent can possibly be accounted for upon the ground of accident or ignorance.

Counsel for Butler has insisted with great earnestness that the evidence as to the sending out of the registered letters and the results thereof was improperly offered by contestant in rebuttal and ought not, therefore, to be considered by your committee. The fact appears to be, however, that the

sending of such letters having become public, the person who had charge of the matter was called by contestee himself and much information concerning the results elicited.

An attempt was also made by contestee to impugn the character of this witness, for the purpose of discrediting his evidence as to the number of letters sent out and those returned. The contestee himself having proceeded so far in the taking of testimony upon the subject, your committee is unable to see that it was not proper for contestant, in rebuttal, to place in evidence the letters themselves, bearing the returns of the letter carriers who had attempted to deliver them. We are not prepared, however, to accept the conclusions which the contestant asks us to draw from this testimony. In a given case a man may have been lawfully entitled to vote, although his name did not appear in the city directory published some months before the election, and he was not found by the letter carrier a few weeks after the election. We therefore decline to cast out any particular vote or votes upon that ground.

Nevertheless the fact that so great a number of names appearing upon the registry list could not be found either in the directory or by the letter carriers does throw suspicion upon the integrity of the registration. When this is coupled with evidence offered by the contestee himself to show that thousands of names were found upon the registration books which do not appear in the printed lists, and were therefore not embraced within the registered-letter scheme of detection, and that the votes of such persons not upon the registry lists were received by hundreds and thousands throughout these 63 precincts, the conclusion is irresistible that there was premeditated and systematic fraud perpetrated in the interest of the contestee.

It appears from the evidence that, although the law of Missouri expressly provides that no vote shall be received from any person not registered, there were in these 63 precincts actually cast for Mr. Butler 3,017 ballots and for Mr. Wagoner 636 ballots by persons whose names did not appear upon the printed registry sheets submitted to the public. Higher evidence of fraud it would be difficult to imagine.

The constitution of Missouri expressly provides "that in all cases of contested elections the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law."

There appear in the evidence in this case the complete registration lists for these 63 precincts, showing the name of every person registered according to the information which the election commissioners supplied to the public immediately before election. Also the poll books giving the name and address of every person who appeared and voted, or at least in whose name a ballot was deposited, and, the boxes having been opened, the evidence showing for what candidate for Congress the ballot voted in that name was cast. With all this information before us it is possible to detect some, though not all, of the frauds which have been perpetrated.

The report proceeds to consider each of the 41 precincts in detail. In several of these there is direct affirmative testimony as to the fraudulent character of the registration, the witnesses being personally cognizant of frauds. In the Fourth Ward, ninth precinct, where a mob assaulted and badly injured an election officer of contestant's party, the following state of facts was disclosed, as viewed by the majority:

We have in evidence the registration list, which contains, or ought to contain, the names of all persons entitled to vote in this precinct. The manner in which it was made up appears from the testimony cited. There has been also offered in evidence the poll book, which, as that term is used in Missouri, means a book supplied in blank and in duplicate to the election officers. The numbers 1, 2, 3, etc., are printed at the beginning of each line. The name and address of the first person who appears and votes is, or should be, written in the first line. The name and address of the second person in the second line, etc.

Each voter is, or should be, given a ballot numbered to correspond with the number of the line upon which his name and address are written. This poll book, which is thus made up as the voting proceeds, should show the name and address of each person voting. It has been offered in evidence (p. 459). It contains the names, addresses, and numbers of 258 persons who are supposed to have appeared and voted in this precinct.

The ballot box was opened, and commencing on page 796 will be found a statement showing the number of each ballot found therein and the name of the candidate for whom said ballot was voted for the

short term for Congress. A study of these tables shows remarkable results. According to the poll book 258 persons, and no more, whose names and addresses are given, appeared and voted. There were found in the ballot box 260 ballots. According to the poll book 258 was the highest number of ballot voted, but there were found in the box ballots numbered 270, 275, 302, 303, 304, 305, 306, 307, 308, 310, 312, 314, 315, 317, 318, 319, 320, 321, 323, 328, 335, 349, 351, 352, and 898–25 numbers in all, none of which appear upon the poll book, and all of which were counted for Butler.

Another remarkable fact is that ballots numbered 43, 115, 117, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 134, 136, 137, 138, 139, 142, 144, 146, 149, 150, 151, 152, 154, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168, 180, 181, 182, 183, 185, and 222—45 in all, were voted and counted twice for Butler, while ballot number 137 was voted and counted three times for him. In other words, these 46 persons in repeating did not even take the usual precaution of voting under different names. How many times they voted under other names will never be known.

The further fact, still more significant if possible, is that as to 77 names of persons appearing in the poll book no corresponding ballots are found in the box at all. These numbers are 3, 5, 12, 13, 20, 34, 37, 39, 46, 48, 52, 55, 56, 61, 64, 71, 77, 78, 80, 89, 105, 109, 111, 112, 113, 178, 187, 188, 190, 191, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 211, 213, 215, 216, 221, 226, 227, 228, 231, 233, 234, 236, 237, 238, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, and 258.

Thus, if the integrity of the poll book can be assumed, it appears that 77 ballots cast were not found in the ballot box at all, their places being supplied in part by the duplication of other numbers upon the poll book and the addition of 25 numbers not found on the poll book. Those who fixed up this return tried to make the accounts balance. There were 258 names and numbers on the poll book, and they returned 258 votes, 237 for Butler and 21 for Wagoner. But even counting the 45 duplications and 1 triplication and the 25 additional votes not accounted for on the poll book at all, there were in the box only 227 ballots bearing Butler's name, while there were 28 bearing Wagoner's, 3 bearing the name of Artz, and 1 containing no name for Congress.

Election signifies choice. In view of this array of facts it needs no argument to show that the returns from this precinct afford no evidence whatever as to the choice of the voters. The registration, the conduct of the election, the poll books, and the returns are all fraudulent and utterly unreliable. There was ballot-box stuffing and ballot-box robbing, and nearly every form of irregularity known to political history.

The minority admit in their views that the returns of the above-mentioned precinct should be rejected.

On another precinct, No. 10, of Ward 15, an issue is joined. The majority say:

The poll book shows 171 persons as having voted. The opening of the ballot box disclosed 167 ballots. Not a single one of these ballots was numbered, as required by law, and it is therefore impossible to tell what ballot was voted by any particular person whose name appears upon the poll book or whether any of them were voted by the persons whose addresses thus appear. Eighty-nine ballots bearing Butler's name were found in the ballot box. The returns gave him 98. Fifty-nine bore Wagoner's name. The returns give him 61. By reason of the absence of numbers upon these ballots it is impossible to tell whether all or any of these ballots cast by persons who, according to the poll book, did appear and vote, were found in the box or whether the persons who cast the ballots which were found in the box were registered voters, or whether, as in most of the other precincts, there were duplications of ballots by the same voters. The provision of the Missouri statute upon this subject is as follows:

"SEC. 7247. *Procedure when ballot is offered by voter in cases of challenge.*—One of the said judges of election shall receive the ballot from the voter, and shall announce his residence and name in a loud voice, and shall write on the back of said ballot the number of the same, in the order in which it was received, which number shall also be placed opposite the name of the voter in the poll book in the column headed 'number,' and another judge shall put the vote in the ballot box in the presence of the voter and the judges and clerks, and in plain view of the public. The judge or clerk having charge of the registry shall then, in a column prepared thereon, in the same line of the name of the voter, mark 'voted,' or the letter 'V.'

"If such person so registered shall be challenged or disqualified, the party challenging shall assign his reason therefor, and thereupon one of said judges shall administer to him an oath to answer ques-

tions, and he shall be questioned by said judge or judges touching such cause of challenge and touching any other cause of his disqualification, and may also be questioned by the person challenging him in regard to his qualifications and identity, but if a majority of the judges are of the opinion that he is the person so registered and a qualified voter his vote shall then be received accordingly. The vote of no one shall be received by said judges whose name does not appear upon the books of registration as a qualified voter."

Whether the provision as to numbering the ballot should be considered as mandatory or as merely directory it is not important to consider. Ordinarily an honest voter ought not to be deprived of his vote by any dereliction on the part of the election officers, but where the action or inaction of election officers renders it impossible to ascertain the honest vote in a precinct the whole return must be rejected. It seems incredible that 171 or 167 persons could have voted without noticing that their ballots were not numbered.

The minority say in opposition:

We have had no positive evidence pointed out to us by counsel for the contestant of any irregularity in this precinct outside of what is shown in the Owen registered letter and directory tabulation. On the contrary, we find the positive testimony of Judge of Election Steve Pensa that the election in that precinct was conducted honestly, fairly, and in an orderly manner.

As to Ward 15, precinct 6, the majority say:

The poll book shows 140 persons to have voted. The opening of the ballot box disclosed 139 ballots. Ninety-three of these (including 4 duplications) bore Butler's name. The returns give him 95. Fifteen ballots bore the initials of but one judge, whereas the law requires two. Thirty-two ballots cast for Butler, 16 for Wagoner, and 2 for Artz were not numbered as required by law. Four ballots were duplicated and counted for Butler. Notwithstanding the fact that the number of ballots found in the box is only one less than the number of persons whom the poll book shows to have voted, 52 names appearing upon the poll book as having voted were not found represented by ballots in the box when opened, their numbers being missing. It is impossible to ascertain whether the unnumbered ballots were cast by persons whose names appeared upon the poll book.

The minority say:

No citation of positive evidence of irregularity was furnished the committee by contestant's counsel, and we find positive evidence of Election Officials William S. Wellman and Otto Bell as to the absolute fairness and regular conduct of the election in that precinct.

The minority also say generally:

It is true that there is shown in the evidence instances where fewer ballots were found in the box than the poll books show to have been cast, and this is taken by the majority to be an evidence of fraud, and great stress is laid upon that particular fact in their report. They totally exclude from their guessing the possibility that defective ballots are not placed in the box, but are directed under the law to be segregated and placed in envelopes and kept separate and apart from the remaining ballots when returned.

These envelopes are what axe known as rejected-ballot envelopes. The evidence shows that no demand was made by contestant or his counsel for these rejected-ballot envelopes, by which the discrepancy between the number of ballots found in the box and the number of votes shown by the poll book to have been cast would have been accounted for.

Ward 4, precinct 2, affords another example, thus set forth by the majority report:

The poll book (p. 440) shows 488 persons to have appeared and voted. The opening of the ballot box (p. 780) disclosed 486 ballots therein. Of this number, 472 (including 45 duplications) bore Butler's name. The returns give him 471. Wagoner had 14 ballots in the box. The returns give him 17. Three hundred and thirty-two persons voted in this precinct whose names were not on the printed registration list. Forty-five persons voted twice upon the same names and numbers. There were missing from the ballot box the ballots of 48 persons who, according to the poll book, appeared and voted.

The fact that 31 persons, mostly Irish, registered from one building, 1038 Third street, in this precinct and arrived at the place of registration in reverse alphabetical order is not more remarkable than that 39 others, mostly Italians, registering from 615 Franklin avenue, by a singular coincidence, arrived in precisely the same order. Assuming that each one of these persons did appear personally for registration, as the law requires, these coincidences would be remarkable, but upon the not very violent assumption that if there were such persons actually in existence, which may be fairly doubted, their names were handed by designing persons to registration officers anxious to assist in false registration for the purposes of the election. The case is not unusual. It is perhaps not singular that every vote cast from the two houses above named were cast for Butler.

After an examination of the 41 precincts, and in accordance with their conclusions, the majority recommend the following:

Resolved, That James J. Butler was not elected a Representative in the Fifty-seventh Congress from the Twelfth Congressional district of Missouri, and is not entitled to a seat therein.

Resolved, That George C. R. Wagoner was elected a Representative in the Fifty-seventh Congress from the Twelfth Congressional district of Missouri, and is entitled to a seat therein.

The minority views, while conceding that some frauds might have existed, dissented from the conclusion that they were sufficient to invalidate sitting Member's title to the seat.

The report was debated on February 26,[1] and on that day the question was taken on substituting resolutions confirming the title of sitting Member for the resolutions proposed by the majority; and the motion to substitute was lost, yeas 112, nays, 153.

A motion to recommit was disagreed to, and then the question recurred on the first resolution proposed by the majority report. This resolution was agreed to.

The second resolution was also agreed to, ayes 161, noes 2, the minority not generally voting in pursuance of dilatory tactics, and the Speaker pro tempore overruling the point of no quorum present as dilatory.

Mr. Wagoner thereupon appeared and took the oath.

1129. The Massachusetts election case of Conry v. Keliher in the Fifty-eighth Congress.

The House declined to consider false publications, neither party being shown to be concerned therein, and no deception of voters being shown, as a reason for changing an election return.

On January 18, 1904,[2] Mr. Joseph H. Gaines, of West Virginia, from the Committee on Elections No. 1, submitted the unanimous report[3] of the committee in the Massachusetts election case of Conry *v.* Keliher.

The committee found the following facts:

It appears that the Ninth Congressional district of Massachusetts, which is located in Boston, is a district of overwhelming Democratic strength. The Democratic Congressional convention in that district in 1902 was unable to agree upon a nominee within the time fixed by the law of Massachusetts for convention nominations. The contestant, Conry, and the contestee, Keliher, were each candidates before the Democratic convention, and after the final adjournment of the convention each became a candidate by petition.

Each of these candidates, a few days before the election, endeavored to get the support of Hon. James M. Griggs, chairman of the Democratic Congressional committee. Each of them communicated

[1] Record, pp. 2715–2728.

[2] Second session Fifty-eighth Congress; Record, p. 844.

[3] House Report No. 385.

with Griggs and each received a telegram from Griggs. Each of these candidates caused to be published, as an advertisement, in certain Boston papers, a telegram purporting to have been received by him, or the chairman of his committee, from Mr. Griggs.

Contestant insists that contestee was guilty of gross fraudulent representations in the publication of the telegram which contestee caused to be published, and contestee claims that contestant was guilty of gross fraudulent misrepresentations in the telegram which contestant caused to be published.

Contestant denies, and it is not shown, that he was responsible for the published advertisement of the fraudulent telegram which was published in his interest, and it is not shown that contestee was personally cognizant of the fraud in the telegram published in his interest.

At the election contestee received 10,352 votes and contestant 10,099 votes. Contestant insists that by reason of the false telegram from Mr. Griggs, published as a paid advertisement in behalf of contestee, enough voters who would otherwise have voted for contestant were led to vote for contestee. It is not shown by the evidence that any particular person so changed his intention or was led by the advertisement to vote for contestee when he intended otherwise to have voted for contestant.

But contestant urges that it is the duty of the Committee on Elections, and of the House itself, to assume that the publication of a false telegram from the chairman of the Democratic Congressional committee recommending to the voters of the Ninth Congressional district of Massachusetts that he favors a particular candidate ought to have great weight.

The telegram published in the interest of contestee purported to be a denial of a previous telegram published in the interest of contestant, both telegrams purporting to be from Mr. Griggs. Contestant urges that the telegram, published in behalf of contestee, which denied the authenticity of the telegram published in behalf of contestant, attributed such moral turpitude to contestant that many people who read contestee's later telegram, and believed it to be true, were thereby persuaded to vote against contestant, because they believed him to have published a falsehood in his own favor.

Contestant urges that it is the duty of the Committee on Elections and the House itself to assume that voters must have been so influenced and must have so changed their votes from contestant to contestee.

The conclusions of the committee were as follows:

It appears to this committee that the claim that the Committee on Elections should assume a certain number of voters in the Congressional district were influenced, because they ought to have been influenced, by improper charges, to vote for one candidate when otherwise they would have voted for the other candidate, is a claim which belongs in the realm of hypothetical presumptions. To agree to the claims set up by contestant would require a method of ratiocination on our part too fantastic for our minds.

We do not condone the offense of publishing false telegrams or telegrams in a different manner from the one in which they are sent. It may be true that the resident voters in Boston were waiting with bated breath to learn what Hon. James M. Griggs thought before they cast their ballots. Mr. Griggs himself, however, thinks otherwise. His conduct in the matter was very careful and very gentlemanly, as would be expected coming from him.

We are inclined to agree with him that the influence upon the Boston voters of the telegrams sent by him, and those published and purporting to have been sent by him, has been very much exaggerated by the counsel in this case.

Some allegations of fraudulent voting and of fraudulent colonization of voters have been made by contestant, but not enough votes are involved in these charges to make any change in the result of the election.

The Committee on Elections No. 1 therefore beg leave to report to the House, and respectfully recommend the adoption of the following resolutions:

"Resolved, That Joseph A. Conry was not elected a member of the Fifty-eighth Congress from the Ninth Congressional district of Massachusetts, and is not entitled to a seat therein.

"Resolved, That John A. Keliher was elected a member of the Fifty-eighth Congress from the Ninth Congressional district of Massachusetts, and is entitled to retain his seat therein."

The resolutions were at once agreed to, without debate or division.

1130. The Pennsylvania election case of Connell v. Howell, in the Fifty-eighth Congress.

It being shown that election officers had flagrantly ignored and violated mandatory law, the House declined to purge and rejected the poll.

As to the extent to which hearsay testimony is admissible to prove that a person recorded as voting was not within the precinct on election day.

As to the force of admissions by counsel during argument of an election case.

Admissions in the brief of a party to a contest are of force if not contrary to proven facts.

Election officers being required to file certain affidavits with a prothonotary, his certificate that this was not done was accepted as proof that the affidavits were not taken.

On February 9, 1904,[1] the House began consideration of the election case of Connell *v.* Howell, from Pennsylvania. The sitting Member had received the certificate by a returned plurality of 461 votes. In the course of the contest over 6,000 witnesses were examined, the great majority in behalf of contestant, and the evidence filled 3,824 large pages.

Four essential points were involved in the examination:

(1) The rejection of the returns of certain polls:

(*a*) The poll of the borough of Winton, Second Ward. After quoting the law of Pennsylvania the majority,[2] in their report, say:

> Notwithstanding the plain, unequivocal statement in the statute which provides that "No man shall be permitted to vote at the election on that day whose name is not on said registry list, unless he shall make proof of his right to vote," as herein before required; and notwithstanding the oaths of said election officers above set forth, they permitted in this ward a large number of men to vote whose names were not on the registry list, without affidavits in proof of their right to vote as required by law. Contestant's counsel claimed in the argument that there were 83 such voters, and their names are set forth in his brief. Contestee's counsel, in his presence, admitted 50. The returns show that 220 votes were cast in this ward, and of these 50 are admitted to have been received by the election officers contrary to the positive directions of the law and in violation of their solemn obligations. The evidence does not disclose that any affidavits were required at that voting precinct from unregistered voters. And contestee's counsel practically admitted it, for at page 18 of their brief, in referring to the Second and Third wards of Winton, they say:
>
> "The contestee affirms that a careful examination of the evidence fails to disclose any fraud, irregularity, intimidation, improper or corrupt practices of any of the election officers in either of these election districts. An examination of the list of voters who voted at this election, and a comparison with the registry list, shows that no persons voted who were not registered; therefore no affidavits were taken by the election officers."
>
> This fact alone is sufficient to cast grave suspicion on the honesty and good faith of those election officers. But other facts are disclosed by the evidence. In the neighborhood of 50 votes were received in the names of men who were not present and did not vote. Votes were received in the names of dead men. Several duplications were received. A large number of names were added to the registry list of this ward by the election officers, in violation of the law and their duty. The illegal votes received amounted to much more than a majority of the votes cast and counted.

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[1] Second session Fifty-eighth Congress, Record, pp. 1791, 1845–1867.

[2] Report No. 639, submitted by the chairman of the committee, Mr. Michael E. Driscoll, of New York.

The minority views, by an evident clerical error, fail in certain respects to join issue, taking up considerable space in discussion of documentary evidence relating to another borough, that of Old Forge. On the points where issue is joined they say:

The majority of the committee insist that the reception of so large a number of illegal votes from nonregistered persons, who filed no affidavits, can be accounted for on no other ground than that of gross and palpable fraud, connived at, encouraged, and participated in by the managers of election.

Not one single manager or clerk of that precinct was called to the stand in the case and no witness has testified to any single act or utterance of said election managers, so that the sole ground for rejecting the precinct is the inference that such a large number of illegal votes could not have been cast without fraud. Let us see if there is any testimony in the record that shows that any man voted who was not entitled to vote. Contestant's counsel argued that there were names on the poll list that were not on the registration list, and that no affidavits were required of the nonregistered voters. There is absolutely no proof in the record that the managers of election did not take affidavits as the law required from all nonregistered persons who applied to vote.

The second finding, that about 50 votes were received in the names of men who were not present and did not vote, is based upon evidence printed in the record. We think the evidence established that Wallace Barber, D. W. Dawson, Michael Corcoran, Richard Sanderson, Thomas Wright, and John Mackey were not present and did not vote and somebody impersonated them and voted in their names. The two last-named men were dead. The other four were called to the stand and testified that they did not vote at said precinct on November 4, 1902. Their evidence is competent and unimpeached. As to all the other alleged impersonations, we are not inclined to argue them. Begging pardon for encumbering this report with such matter, we here quote every word of the testimony in the record tending to establish the impersonations. Aside from the fact that it is given by men who were employed by the contestant to hunt up evidence, almost every sentence is hearsay and is utterly incompetent.

The minority then quote, in support of this attack on the evidence, the testimony of two witnesses, Gaughan and Kearney, each of whom had an acquaintance with the people of the ward and had canvassed it to ascertain whether or not the persons recorded as voting had actually voted. The witness would testify in some cases that he had seen the voter personally and the latter had told him that he did not vote, and that he (witness) knew personally that no other person of that name lived in the ward. In other cases witness would testify that the wife or parents or an associate of the voter said that voter was at some other place on the day of election, and then witness would testify that he knew personally that no other person of that name lived in the ward.

After quoting the testimony, the minority say:

We now come to the finding that the election officers added a large number of names to the registry list in violation of the law and of their duty. If any witness testified touching such a matter, we have been unable to find it after a most careful and painstaking examination. We confidently assert that there is no evidence on that point, and that there is nothing to discuss.

The fourth and last finding of the majority is that there were duplications. The only evidence we can find to sustain this is that the name John Kennedy appears twice on the poll list as voter 176 and 211, and Thomas O'Connor appears as voter 8 and 75. It is fairer to assume that there are two John Kennedys and two Thomas O'Connors than it is to impute fraud to the election officers.

In the debate, on February 9,[1] a question arose as to the admissions made by sitting Member's counsel. Mr. Joseph T. Johnston, of South Carolina, conceded that Mr. Balentine, counsel for sitting Member, admitted that there were 50 illegal votes; but denied that sitting Member was present, claiming without contradiction

[1] Record, pp. 1791, 1850.

from the majority that Mr. Howell was absent in Pennsylvania at the time. Mr. Johnston denied that such admission was effective, saying:

I admit that a lawyer can bind his client by an admission in a pleading. I admit that a lawyer can bind his client by an admission in writing entered upon the minutes of the court. That is all right; but to tell me that when a lawyer is arguing a case before a judge, if he misstates the facts and the record shows that he misstates the facts, the judge is bound to decide the case by what the lawyer said and not by what the record shows, is a new sort of justice to me. That is the way it happened. In the argument of the case this lawyer did say that there were 50 illegal votes at that precinct, but that does not bind anybody. The record says otherwise. We are trying the case on the record.

Speaking on the next day for the majority of the committee, Mr. James Kennedy, of Ohio, said:

When the argument opened we stood in the presence of this record a. little appalled at the amount of work that the committee thought was before it, and when Mr. Balentine, representing the contestee, arose to talk, I inquired of him whether or not certain admissions could not be agreed upon by counsel, so as to shorten the labor of the committee, calling his attention directly to the claim of the contestant to the great number of votes in these three wards cast by men whose names were not on the registration list. That was at the beginning of the hearing, and he said that the figures presented by the attorney for the contestant were inaccurate in this regard.

I forget what the exact figures were with reference to the Second Ward of Winton, but it was something like 83 votes that the contestant claimed had been cast in this way, the names of those who cast them not appearing upon the registry list. Mr. Balentine said that there were 50 in that ward, that the balance of the 83 names on that list were not names that did not appear on the registry list, but that they were substitutions.

The minority views lay stress on the fact that Mr. Green, associate counsel for sitting Member, declined to concur in the admissions.

As to the admission in sitting Member's brief, quoted by the majority report, Mr. Johnston said:

The majority of the committee quote that as an admission of counsel that no affidavits were taken. Why, gentlemen, if you are going to quote that for anything, quote it for all it is worth. He makes two affirmative declarations. One is that no affidavits were taken and the other is that nobody voted who was not on the registry list. If you are going to take his statement about one, take it about the other.

In reply on this point, Mr. Henry W. Palmer, of Pennsylvania, stated that a comparison of the list showed the declaration that no one not on the registry list voted not to be true.

(*b*) As to Winton, Third Ward, the majority report states:

Contestant's counsel claimed that in this ward 80 votes were received from persons whose were not on the registry list, and from whom no affidavits were required in proof of their right to vote, as required by law. Contestee's counsel, in his presence, admitted 53.

James Conry, judge of election in that district, swore that no affidavits were taken from men who voted and whose names were not on the registry list.

The evidence further discloses that in this precinct about 22 votes were cast and received in the names of other persons, and it is difficult to understand how so many violations of the election law could be due to honest mistakes on the part of the election officers. It was also claimed, with some evidence to sustain the contention, that about 15 men voted at this precinct none of whose names appeared on the voting, list as returned by the election officers. That one H. V. Lawler, a tax collector and adherent of the contestee arranged with one Benni Betti to bring in his friends to vote and when he was informed that they were not citizens he did not hesitate but said" take them anyway." When those men reached the polls they were taken in charge by one John Lally, one of the inspectors of election and a friend of the contestee, their ballots were marked, and they were voted.

The majority further cite facts indicating that the election machinery was entirely in the hands of sitting Member's friends.

The minority, in their views, say:

The judge of elections at this precinct was sworn, and testified that no persons voted who were not registered, and for that reason no affidavits were taken. In so far as it is alleged that some men voted in the names of men who were not present, and that some voted whose names were not entered on the poll list, we think the fairest thing we can do is to quote the evidence relied upon by the contestant. The witnesses are F. A. Snyder, Benni Betti, and Domineck Cherntom, and they utterly failed, in our judgment, to sustain their allegations.

The minority here cite testimony similar in general character to that cited in discussion of the Second Ward of Winton, and which was criticized as hearsay.

Speaking of this evidence on February 10 [1] Mr. Henry W. Palmer, of Pennsylvania, said:

The committee finds that there were 50 men who were returned as having voted in that precinct who were not there at all. I suppose the best evidence in proof of this fact would have been to summon the men themselves if they could be found on the face of the earth, to bring them before a commissioner and take their testimony that they were not present and did not vote. That was not the course pursued. A man was sent out who was not a stranger—a man who was a tax collector and assessor in that little borough of Winton, who knew every man, woman, dog, and cat in the place. They sent him out with a list in his hand of 50 men who were returned as having voted there, but who did not in fact vote, as it was alleged. He was sent out to ascertain facts, and he came back and reported that A had moved away, that B was in some other country, that C had died, etc. Nobody contradicted his testimony or doubted his veracity. It may not have been the highest or best form of evidence; but in the absence of any contradictory proof which Mr. Howell could have made, if any such existed, it was enough to satisfy a reasonable man of the fact.

Mr. B. P. Birdsall, of Iowa, speaking particularly of the committee's investigation of this ward, showed, by quoting the testimony of a considerable number of persons who voted, that in regard to the voting of unnaturalized persons not on the list, the testimony was not hearsay but direct and positive as to the fact of illegal voting. After showing that the law of Pennsylvania requiring affidavits from persons not on the lists was declared by the courts to be mandatory (Cusick's case, 13 Pa., 459), he said: [2]

The testimony hereinbefore quoted shows that illegal voters, without any declaration whatever to the judges, were accompanied by adherents of contestee into the voting booths, and in truth did the voting for the foreigner, who was indifferent as for whom he voted.

In the face of the positive injunctions of the law as to the care in the exercise of their duty, how, in the light of this testimony, can we conclude that an honest election was held? How could the election officers on this record defend themselves from the charge of negligently performing their duties? And if they can not, it is folly to urge that conduct which subjects them to the penalty of the law does not amount to such fraud as will vitiate their returns.

(*c*) As to Old Forge precinct the majority report says:

Contestant's counsel claimed in the argument that there were 158 votes cast in this district by persons whose names did not appear on the registry list and from whom no affidavits were taken in proof of their right to vote, as required by law. Those names are set forth in their brief. Contestee's counsel, in his presence, admitted 90.

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[1] Record, p. 1860.

[2] Record, p. 1801.

There was some dispute in the arguments on the question whether any affidavits were taken from unregistered voters in proof of their right to vote. But the certificate of the prothonotary of Lackawanna County seems to settle it. The following is a copy of the certificate:

"COMMONWEALTH OF PENNSYLVANIA, *County of Lackawanna, ss:*

"I, John F. Cummings, prothonotary of said county of Lackawanna in said Commonwealth, do hereby certify that among the returns of the election held in the said county of Lackawanna on the 4th day of November, A. D. 1902, which returns are now on file in my office pursuant to law, it appears that one affidavit only was filed from the first district of Old Forge borough in said county, which affidavit is the oath of office taken by the election officers, and that no affidavit of any voter was filed from said district.

"In witness whereof I have hereunto set my hand, and have affixed the seal of court of common pleas of the said county of Lackawanna, at the city of Scranton in the said county, this 12th day of January, A. D. 1904.

"JOHN F. CUMMINGS,
"Prothonotary of Lackawanna County."

According to the evidence about 11 persons voted at that election in that district whose names did not appear on the voting list as returned by the election officers. There were duplications and substitutions in that district, and about 8 persons were permitted to vote, opposite whose names the letters "D. I." appeared on the registry list, without filing affidavits in conformity with the law in proof of their right to vote.

On the morning of election, one Michael Cafferty was sent for and appointed an inspector of election. He was not registered, but he voted without making an affidavit in proof of his right to vote. Although there was no disturbance, peace officers were present, apparently assisting the election officers who were friends of the contestee; threats were used; a Republican watcher was forcibly ejected; the right of challenge was denied; voters were denied the right to make their own selection of persons to assist them in marking their ballots, and ballots were marked contrary to the instructions of voters; and the election generally in this district was conducted in a high-handed manner and without regard to the provisions of law and the sworn obligations of the election officers. And the active participants in those lawless practices were the political friends and adherents of the contestee.

(*d*) Speaking generally of the propriety of rejecting the three above-mentioned polls, the minority say:

From the foregoing facts, and others which may be recited from the evidence, pertaining to the conduct of the elections in the Second and Third wards of the borough of Winton and the first district of the borough of Old Forge, your committee is of the opinion that the election officers in those three districts, and other friends of the contestee acting with them for a common purpose, were guilty of carelessness, lawlessness, and fraud to such an extent as to impeach the returns from those districts.

Fraud can never be presumed, and must in all cases be proved. But it may be established by circumstantial as well as by direct evidence. In those three districts the character and ignorance of a large proportion of the voters, the political conditions, the party feeling, the admitted violations of the election law and reckless disregard of their oaths on the part of the election officers, the opportunities for substitutions, personations, and other illegal voting, the advantage taken of those opportunities, as shown by the evidence, all point to such fraud on the part of the election officers and others, by their consent and connivance, as to vitiate the returns from those districts.

It is a serious matter to disfranchise the honest and legal voters in three districts, or even in one; but it is a more serious matter to trifle with the law which was enacted and intended to be so enforced as to protect the legal and honest voters against fraud and imposition. If the honest, legal voters in any district would insure an honest vote and a fair count, they must see to it that only honest and competent election officers are on guard. The maintenance of the law in its purity and vigor is of more importance than the vote of one or three districts, and your committee is of the opinion that should it excuse the election officers in those three districts for their acts as disclosed by the evidence, such a decision would be accepted by them and others as a justification of their reckless and lawless practices in disregard of their sworn official duties.

Your committee therefore finds that the election in those three districts was so tainted and permeated with fraud as to make them void, and that the returns from them should be thrown out and deducted from the official returns of the respective candidates.

Legal voters in those three districts who supported the contestee were not necessarily disfranchised by this action. Their votes could have been proven aliunde during the contest. That was not attempted.

The minority cite McCrary at length in support of this view. In the debate on February 9, Mr. Michael E. Driscoll, of New York, cited the cases of Knox *v.* Blair, Finley *v.* Walls, Van Wyck *v.* Green, Wise *v.* Young, Murray *v.* Elliott, Robinson *v.* Harrison, and Noyes *v.* Rockwell.

Speaking on February 9,[1] Mr. Birdsall said on behalf of the majority, after showing the mandatory nature of the laws of Pennsylvania controlling the acts of the election officers:

The evidence, to my mind, establishes such gross negligence and a willful violation of the law as to render their acts and returns unworthy of belief in any tribunal worthy to investigate them. It is difficult, indeed, to find a single provision of the law that was not violated in some one of the districts in question. A few of these violations may be noted, as clearly shown by the evidence already alluded to and elsewhere found in the record, namely:

The reception of known illegal votes;

The appointment of a disqualified inspector;

The denial of the right of assistance;

The permission to accompany voters to the booths and mark their ballots when no assistance was demanded;

The acceptance of votes from nonregistered persons who made no affidavits;

The reception of votes on defective affidavits;

The presence of peace officers in the voting places;

The rejection of Republican watchers;

The failure to seal the ballot boxes as required by law;

The failure to deposit them as required by law; and

The electioneering of one of the inspectors.

If such gross violations of the law as are shown in this case are permitted to stand and meet with our approval, then we may as well desist in all efforts to enact laws for the protection of the ballot. No man can with honesty be the beneficiary of such frauds. Let us set a higher standard for the conduct of election officers and keep as pure as possible the fountain of authority in this Government. * * *

In the debate Mr. Johnston, speaking for the minority, urged that the polls should have been purged:[2]

I want, before I take up this case in detail, to say that it is a dangerous doctrine, it is a damnable doctrine to throw out entire precincts in an election. You may find that where partisan zeal has controlled it has been done, but I challenge you to show where courts of law have thrown out entire precincts. The law which is laid down in the books, the law which must commend itself to our sense of justice, is that if it is possible to purge a ballot box of illegal votes it shall be done. I do not stand for fraud; I detest it whether it is in politics or in the private walks of life. In this case there is absolutely no reason for saying that fraud was shown to such an extent as to justify throwing out entire precincts. Every illegal ballot can be ascertained. The contestant has set forth with great particularity the name of every voter that he claims cast an illegal ballot. He has referred to the testimony upon which he bases that contention.

There is nothing in the way of this committee—there is nothing in the way of this House taking up those names one by one and determining the facts judicially whether the alleged vote was illegal, and if it was illegal, and the testimony shows for whom it was cast, deduct it from the candidate who

[1] Record, p. 1802.

[2] Record, stpp. 1789, 1790.

received it. If the testimony fails to show for whom it was cast, then adopt the sound rule of law that says that illegal votes, in the absence of testimony showing how they were cast, shall be deducted from the candidates in proportion to their legal votes. I want in my remarks to incorporate certain citations from authorities in regard to the law upon this point.

Mr. Johnson cited the cases of Le Moyne *v.* Faxwell, Taylor *v.* Reading, Burch *v.* Van Horn, Atkinson *v.* Pendleton, Bromberg *v.* Haralson, Cessna *v.* Myers, Butler *v.* Lehman, Chaves *v.* Cheever, Abbott *v.* Frost, Koontz *v.* Coffroth, English *v.* Hilborn, Wallace *v.* McKinley, Hurd *v.* Romeis, Todd *v.* Jayne, and Barnes *v.* Adam in support of his contention.

1131. The case of Connell v. Howell, continued.

The mutilation of ballots in the return of election officers did not cause rejection of the returns in absence of proof of fraud on part of the officers or the party apparently benefited.

Over 2,000 illegal votes having been proven, the committee by proof aliunde determined for whom a portion were cast and rejected them without disturbing the remainder.

A voter's testimony under oath that he was disqualified and voted for a certain candidate was accepted as justification for rejecting the vote.

Where the ballot was secret, testimony of an acquaintance as to voter's declaration before election was accepted as proof aliunde.

(2) As to their refusal to reject the poll of Dunmore precincts the majority say:

Contestant's counsel in their briefs and arguments vigorously attacked the returns from the first and second districts of the First Ward, the second district of the Second Ward, the third district of the Third Ward, and the first district of the Sixth Ward, all of the borough of Dunmore, for fraud, and for the reason that after the contest was commenced the ballots returned from those districts were destroyed, or so mutilated by being wet as to make them undecipherable. It was claimed that this was done in the interest of the contestee, for the purpose of covering and concealing fraud perpetrated by the election officers. The destruction of those ballots, under the circumstances revealed in the evidence, is not; free from suspicion. But your committee does not find sufficient evidence to establish fraud on the part of the election officers nor to charge the contestee with the responsibility of destroying the ballots, and therefore this claim is dismissed.

(3) As to illegal votes in the district at large and proof aliunde as to how they were east, the majority show that 489 votes were cast by persons who gave defective affidavits where the law required accuracy, and continue:

It was also urged on the part of the contestant, in the notice of contest and in the briefs and arguments of his counsel, that, aside from the 489 votes above referred to and aside from the Second and Third wards of Winton and the first district of Old Forge, 1,795 votes were cast in said Congressional district for Representative in Congress, received by the election officers, counted by them, returned to the canvassing board, and canvassed by men who were illegal voters under the statutes of the State of Pennsylvania, as construed by the courts of that State. The contestee's counsel admitted this claim, except as to the number of about 211, and it was practically conceded that 1,584 of those votes were illegal. Therefore, according to the evidence and the concessions of counsel on the argument, about 2,002 votes were cast in said district by illegal voters, aside from the Second and Third wards of Winton and the first district of the borough of Old Forge.

Contestant attempted to prove aliunde that those votes were cast for contestee. Proving how men voted is generally a difficult matter and always is so when the political supporters of the opposing candidate are on the witness stand. The law provides for a secret ballot. No man is required to state

how he voted. On the part of the contestant evidence was introduced tending to show that practically all those illegal votes were cast for contestee. However, the evidence in many of those cases was not entirely satisfactory to a majority of your committee, but after a careful examination of the evidence it finds that at least 200 of those votes were proven by competent and sufficient evidence to have been cast for the contestee and should be deducted from his count, and that one of those votes was proven by competent and sufficient evidence to have been cast for contestant and should be deducted from his count.

The minority say:

Testimony was taken tending to show that more than 2,000 illegal votes were cast in districts other than the three which the majority of the committee have thrown out entirely. The majority of the committee have declined to take up these alleged illegal votes and purge the ballot boxes. They have gone just far enough to find a plurality for the contestant and ignored all other illegal votes. The pleadings brought up the question of the legality of votes in every precinct. Testimony was taken for the purpose of substantiating these allegations. By what rules of law or justice the committee can consider only a part of the record and a part of the illegal votes we are unable to discover. At a trial of causes at law it may and frequently does happen that the determination of one point renders the consideration of all others unnecessary.

For instance, if one brings suit for personal injuries against a railway company, where the doctrine of contributory negligence obtains, after the jury finds that the plaintiff sustained his injuries through his own negligence, it is unnecessary for the jury to go further and consider the expenses he incurred on account of his injuries, his sufferings, etc. This is not a case of that nature. The whole election is at issue. Suppose, for instance, that the contestee had been elected to Congress by a plurality of two votes, and the contestant had demanded and this Congress had granted a recount of the ballots; and suppose, further, that after counting three boxes the contestant had gained three votes, would any committee or any Congress stop then and there and say that they had gone far enough, and that the contestant is entitled to his seat? It would shock the ordinary lawyer and paralyze the honest layman. It appears to the minority of the committee that under the circumstances supposed the entire vote would be counted. It appears to us that the entire illegal vote should be eliminated according to the rules and forms of law and the seat awarded to that man who received the majority of the legal votes.

Speaking on February 9 [1] on behalf of the majority, Mr. Birdsall said:

The committee relied on all these points, and I desire to say that the gentleman who preceded me is entirely mistaken in saying that the majority of the committee rely on the character of the testimony that he refers to, and which is set out in the minority report in determining the fact that an illegal vote was cast. A stronger rule was adopted by the majority of the committee than met with my approval. I think there is sufficient evidence in this record to establish the fact that between 1,500 and 1,600 of these illegal votes were cast for Mr. Howell.

Mr. Kennedy, on the same point, said [2] as to the mass of testimony:

Now, when we approached that testimony, it was as if this House had submitted to this committee the question of whether or not in that great haystack there were rats to a greater number than eight or nine. We went out and hunted and hunted, and we found 200 rats. We saw them. The committee all saw them. There were many more than I discovered; there were evidences all around us of more rats. It seemed unreasonable to go through, clear through, that entire stack, straw by straw, when we had already found so many illegal votes that were cast for Mr. Howell.

Mr. Kennedy, then proceeded to reply to the assertions of the minority that the evidence by which illegal votes were shown to have been cast for sitting Member was inadmissable as heresay. He quoted a number of witnesses whose testimony showed that they were not qualified voters, and who declared positively that they voted for sitting Member, and declared that he found 200 cases as well substanti-

[1] Record, p. 1802.

[2] Record, p. 1853.

ated as those quoted. In conclusion he presented a table giving the names of the persons illegally voting and the precincts where their votes were cast.

Concluding the argument on February 10,[1] Mr. Driscoll said:

Judge Birdsall, who addressed the House yesterday on this question—who has been on the bench and is a well poised lawyer—said that about 1,400 or 1,500 of those 2,000 illegal ballots were cast for Mr. Howell. And another gentleman from Ohio [Mr. Kennedy], who has spoken this morning, has said that 600 or 800 or 1,000 of those votes were cast for Mr. Howell. I suppose I was one of the conservative members of that committee. I did not go as high in my estimate as some of the rest; but I had no doubt that on the evidence at least 200 of those votes were cast for Mr. Howell.

Questioned as to why the names were not set forth in the majority report, he said:

That was not necessary when we showed that only 10 illegal votes were required to overcome the apparent plurality for Mr. Howell after those three precincts were thrown out. Nobody questioned this in the committee. It was unnecessary to set out the names with the pages of the evidence.

(4) As to the proof aliunde by which contestant proved 32 votes cast for him in the three precincts of which the committee had rejected the poll, the minority views say:

One witness proves all these aliunde votes, except three. Here is the evidence, and, in our judgment, it is incompetent, for reasons appearing on its face.

The minority give a list of the votes, all but five of which were in the Second Ward of Winton, and then quote the evidence, which generally as to each voter was as follows, the questions being put by contestant's counsel, to one Flynn, witness for contestant:

Q. Patrick J. Walsh, do you know him?—A. Yes, sir.
Q. Was he supporting Mr. Connell?—A. Yes, sir.
Q. Do you know Daniel Dyer up there, also?—A. Yes, sir.
Q. Was he supporting Mr. Connell in the last campaign?—A. He was.
Q. Do you know John Kearney?—A. Yes, sir.
Q. Was he supporting Mr. Connell in the last campaign?—A. Yes, sir.
Q. Do you know John E. Walsh?—A. Yes, sir.
Q. Was he supporting Mr. Connell in that campaign?—A. He was.
Q. Do you know John Macker?—A. Well, Macker—I don't know that gentleman.
By Mr. BALENTINE (sitting Member's counsel):
Q. Are you attempting to tell whom these men voted for?—A. Yes, sir; men told me that.
By Mr. DONOVAN (contestant's counsel):
Q. Do you know Anthony O'Connor?—A. Yes, sir.

Q. And was he supporting Mr. Connell last fall?—A. Yes, sir .

On cross-examination witness testified generally that he did not see the voters cast their votes, but that they told him before election how they should vote.

The majority in their report content themselves with declaring the sufficiency of the proof; but in the debate[2] on February 9, Mr. John A. Sterling, of Illinois, one of those concurring in the report, said:

The question arises, What kind of testimony is competent to prove how a vote was cast? Where the ballot is secret, the ballot does not disclose the fact. What is the next best evidence? The party who casts the vote, and in that regard I desire to call attention particularly to the statement made by the gentleman from Iowa, that in the pages of this record it appears that when the contestee had asked

[1] Record, p. 1864.

[2] Record, p. 1805.

witnesses as to how they had voted the contestant interposed an objection and stated and instructed the witness that he need not answer. We are not complaining of that. The gentleman representing the contestee is complaining of the character of the evidence, and I desire to call his attention now to the testimony of the very witness from which he read, Mr. Flynn, who testified that some of these persons who voted legally in these precincts had voted for Mr. Connell, and that same witness was asked by the attorney for the contestant for whom he voted, what his politics were; and the contestee objected and instructed that witness that he need not answer.

Both the contestee and contestant seem to have tried this case on the theory that a voter was not permitted and could not be required to testify as to how he voted, and the pages of this record are full of objections made by counsel for contestee when contestant sought to prove by a witness as to how he voted. I say the record is full of objections and instructions from their mouths to the witnesses.

So he is estopped now from complaining that the evidence in this case as to how these men voted did not come from the mouths of the voters themselves. He told these witnesses that they need not disclose that fact, and witness after witness took advantage of the instruction and this information as to what their rights were under the law, and refused to tell under the instructions of counsel for the contestee as to how he voted. * * *

It is convenient here now to call attention to the position taken by the counsel for the contestee on that very question by this very witness. I am quoting from the testimony of Flynn. The counsel for the contestant asked what was his politics—that is, the witness's politics. He asked, "Do you know James Flynn?" That is the witness himself. He said, "Yes." He was asked, "What is your politics?" The witness answers, "Mine?" And the question is, "Yes; yours." Mr. Ballentine, attorney for the contestee, says, "You don't have to answer that question if you don't want to." I am reading on page 26 of the Views of the minority, a little above the middle of the page. That is the witness that the gentleman from Iowa read from on that same page.

The gentleman from Iowa [Mr. Martin J. Wade, who sustained the minority contention] also said this is the character of his testimony, and he read as follows: "Patrick J. Walsh; do you know him?" "Yes." "Was he supporting Connell?" "Yes." Now, that is not all the evidence of James Flynn. The evidence farther down on the same page, on cross-examination of Flynn, is, "Are you attempting to tell whom these men voted for?" And the witness says, "Yes; the men told me so."

Now, the question is whether or not the declaration made by the voters themselves is competent to prove how they voted. If the ballot does not disclose the facts, if the witness himself is not allowed to testify, where are you going for proof as to how this or that man voted in any election? Is it impossible to purge the ballot for the reason that these two classes of evidence are barred under the law? The next best evidence, and the only evidence that is left for any party in a case of this kind, is to prove what? Why, to prove what the voter said—prove his declarations, prove what political party he belongs to.

In accordance with their conclusions, the majority rejected the three polls above mentioned, thus deducting 172 votes from contestant and 625 from sitting Member; credited contestant with 32 legal votes proven aliunde; and deducted from sitting Member 200 illegal votes proven aliunde to have been cast for him. One illegal vote was deducted from contestant.

The result of these corrections left a plurality of 223 for contestant; and the majority reported the usual resolutions:

Resolved, That Hon. George Howell was not elected a Representative in the Fifty-eighth Congress from the Tenth district of the State of Pennsylvania.

Resolved, That Ron. William Connell was duly elected a Representative in the Fifty-eighth Congress from the Tenth district of the State of Pennsylvania, and is entitled to a seat therein.

The minority proposed substitute resolutions declaring Mr. Connell not elected, and Mr. Howell elected and entitled to the seat.

The report was debated at length on February 9 and 10, and on the latter day the substitute was disagreed to, yeas 150, nays 161. Then the first resolution

of the majority was agreed to, yeas 160, nays 148. The second resolution was agreed to, yeas 159, nays 147.

Mr. Connell then appeared and took the oath.

1132. The Tennessee election case of Davis v. Sims, in the Fifty-eighth Congress.

The House will not, on pretense that a class of voters are unconstitutionally prevented from voting, count the votes of persons not shown individually to have attempted or desired or been qualified to vote.

Votes may not be proven aliunde on mere estimates of witnesses.

The Elections Committee declined to consider the failure of election officers to hold the elections in certain precincts when it was not shown that either party was deprived thereby of votes to which he was entitled.

No fraud being shown, a slight irregularity in canvassing returns was not considered by the Elections Committee.

On March 4, 1904,[2] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, submitted the report of the Committee in the Tennessee election case of Davis *v.* Sims. The sitting Member had been returned by a majority of 976, which the committee found reduced to 970 by corrections which it made in the returns. But one question was involved in the decision made by the committee. Contestant claimed—

that a large number of votes, not cast nor offered to be cast, should be counted as if actually cast for him, because, as he alleges, the persons who would otherwise have cast them were prevented from voting by the operation of the "Dortch law," which he holds to be unconstitutional.

For the sake of the argument the committee admit that the law is unconstitutional, and thus conclude:

What would be the effect of holding the Dortch law unconstitutional? The election was held under it in only 13 civil districts out of a total of 168 in the Congressional district. If we throw out entirely the returns from these 13 districts the contestee will still have a majority. The contestant insists, however, that in the event of holding the law unconstitutional the vote already counted should stand, presumably upon the theory that persons who voted under the Dortch law would also have been entitled to vote under the laws in force at the time of its enactment and which it, if constitutional, must be held to have repealed. He also contends that we must add to his total a large number of unvoted votes which he asserts would have been cast had the Dortch law not been enacted. He claims that it has been proved that 1,061 persons named in the testimony would have voted for him had they been entitled to vote under the Dortch law, thus giving him a majority of 85—and that 1,920 persons, "estimated," but not named in the proof, should also be treated as having voted for him, thus increasing his majority to 2,005.

Just 20 persons who were actually called to the stand testified that they would have voted for contestant had not the Dortch law prevented, and as to one of them the testimony does not show that he was registered or had paid a tax so as to be qualified to vote under any law. As to all the other persons claimed, the evidence is purely hearsay and very unreliable.

As to 12 of them, contestant's claim that they shall be considered as having voted for him rests solely upon the testimony of J. H. Falls (the first witness called to prove names of this class), of which the part bearing upon this question is as follows:

"5. Q. Can a person who can not read vote under the provisions of the said Dortch law?—A. No, sir.

"6. Q. What effect does the Dortch law have upon the Republican voters of the Fourth civil district of Hardin County?—A. It has a big effect to keep them from voting.

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[1] Record, pp. 1783–1810, 1845–1867.

[2] Second session Fifty-eighth Congress, House Report No. 1382; Record, pp. 2804–2809.

"7. Q. How many do you know, of your own knowledge, in said Fourth district who are disfranchised under the provisions of this law?—A. Twelve, that I know of.

"8. Q. Will you please give the names of those whom you know to be disfranchised?—A. Buck House, old man Ras White.

"9. Q. How long have you lived in this district?—A. I have lived in this district all my life.

"10. Q. How old are you?—A. 1 am 53 years old.

"11. Q. Have you a list of persons who did not attend the November election because the same was held under the provisions of the Dortch law?—A. Yes, sir; I have got a list of them.

"12. Q. Please give the names of the parties contained on your list, and are they Republican or Democrats?—A. Marion Cole, Wiley Cherry, Bud Campbell, Henry Doran, Tom Ellison, Ike Kendall, Ike Rhone, B. F. Rinks, Ulis Lowry, Buck House, John White, and old man Ras White. They are all Republicans.

"13. Q. Do the above-named parties all live in the Fourth district of Hardin County?—A. Yes; every one of them.

"Cross-examined:

"1. Q. Where did you get the list of names that you have just read?—A. I got them all over there at my store.

"2. Q. When did you make up said list?—A. I do not recollect whether it was before Christmas or since Christmas.

"3. Q. How came you to make up said list? What was it made for?—A. Abernathy come along there one day and asked me if I knowed how many around there that had not voted, and I told him there was a good many. He told me to write them down; that he would be back a certain day and I could hand them to him.

"4. Q. Did Mr. Abernathy tell you what he wanted with the names?—A. I believe he did tell me. I do not exactly remember, it was about the election some way or another.

"5. Q. How do you know that the names you have given are men who can not vote under the Dortch law?—A. I do not know. I did not ask them about that.

"6. Q. Then you just mean that they did not vote in the last November election, and do not know whether they could vote under the Dortch law or not. Is that correct?—A. I do not know whether all of them could or not. Them two old men told me they could not vote, because they could not make their mark straight.

"7. Q. As a matter of fact, most of those that you have named did vote in the last August election, in 1902, did they not?—A. I do not know whether they did or not; I did not even ask them that.

"Further this deponent saith not."

The witness practically contradicted every statement he made save that the 12 were all Republicans. Not one of the 12 was called to testify whether he was or was not a Republican, or had registered and paid taxes, or had or had not voted, or was prevented by the Dortch law from voting, or whether, if able to vote, he would have voted for contestant.

The substantial part of the testimony of the next witness, L. K. Freeman, is as follows:

"5. Q. What kind of a qualification does said law put upon the voters where the same is in operation, if any?—A. It is necessary for the voter to be able to read and write; both.

"6. Q. How has this law operated upon the Republican party in the elections of the Fourth district of Hardin County, and how did it operate in the election of November 4, 1902?—A. It disfranchises a great number of the voters.

"7. Q. Give your best estimate of the number of Republicans disfranchised in the Fourth district of Hardin County, in said November election, by the provisions of said law.—A. From 75 to 100 voters.

"8. Q. Have you gone over and made a list of the names of the Republican disfranchised by the Dortch law in said election of November 4, 1902, in said district; and if so, will you give the names of those whom you know to be unable to vote under the provisions of said law?—A. Yes; I have made a. list to the best of my knowledge and recollection. The names are as follows: Sam Broyles, Wes Bailey, Lute Bailey, Andy Bailey, Josh Bailey, Bill Cherry, Newt Campbell, Marion Cole, Bud Campbell, Lige Dixon, Henry Doran, Mose Davis, Henry Dillahunt, A. C. Duckworth, George Graham, Ned Graham, Pete Gillis, Tom Graham, Fred Guinn, Gus Houston, Pate Hopson, Jack Hunt, Bob Hunt, Bob Hardeman, Lewis Hassell, John Hassell, Ben Higgins, G.O Hunt, Bill Hunt, Bud Hunt, Chub Hunt, Caesar Kendall, George King, Bill Kyle, Jim Lutts, Jerry McDougal, Jim McKinney, John Pol-

lard, Sid Pollard, Frank Pollard, Tom Patton, Green Patton, W. A. Palmer, Otis Pointer, Jerry Sevier, Elias Stephens, Jim. Stephens, Joe Sanderson, Mose Shull, Sam Tall, Dave Winters, Bishop White, Elias Williams, Joe Young, Louis Hassell, Bob House, Buck House, John Hinton, Dez Johnson, Ernest Johnson, Ike Kendall, Bob Johnson, Ras White, Ike Lynch, Bill Wolf, Will Fitzgerald, Adam Ellison, Sam Bundy, Charlie Ermin, Press Martin, Andrew Mack, Jonas Ross.

"9. Q. Will you please file said list as Exhibit A to this, your deposition, making it a part of the same?—A. I herewith file the same, marked 'Exhibit A.'

"10. Q. Was the parties whose names you have given otherwise qualified voters in said November election for all State and county officers, barring the provisions of the Dortch law?—A. I think they were."

In his cross-examination this passage occurs:

"14. Q. How many of the persons named by you in answer to question 8 in chief that can not read?—A. I could not say just how many.

"15. Q. Had the persons whose names you give in answer to question 8 in chief paid their poll taxes for the year 1901 before the November election, 1902?—A. I could not say whether all of them had or not, but I know some of them had.

"16. Q. How many of them had registered for voting?—A. I do not know."

Even among these vague statements there is not a single assertion that anyone of the 72 persons named desired, even if qualified, to vote for contestant.

S. J. Creevy produced a list of 345 names, concerning which he testified as follows:

"27. Q. I will ask you to state if you have briefly, made a list of voters in this city and civil district who are unable to read?—A. Yes, sir; I made that yesterday.

"28. Q. How many names does this list prepared by you contain?—A. If I made no mistake in the count it is 345.

"29. Q. Do you think those persons appearing from this list are able to vote under what is known as the Dortch law?—A. I do not.

"30. Q. If those persons appearing upon said list could vote, what ticket would they vote?—A. My opinion is they would vote the Republican ticket."

From his cross-examination the following is taken:

"8. Q. You have stated that there were 750 Republican voters in the city of Jackson, and of this number you estimated about 345 were unable to read. Now state whether the remaining 405 voters are able to vote under the Dortch law.—A. I think they are.

"9. Q. Then how do you account for the fact that Hon. F. M. Davis, candidate for Congress, received only 23 votes in this city at the last November election?—A. I account for it by the Republican voters not having their poll taxes and by general indifference as to the result of the election.

"10. Q. What was the cause of that indifference?—A. To some extent dissatisfaction existing in the Republican party in the county; and being what we term an off year, accounts for some of it.

"11. Q. What dissatisfaction do you speak of existing in the Republican party?—A. Dissatisfaction as to the county organization; as to who would be recognized as county chairman and members of the executive committee.

"12. Q. Is it not a fact that there were two factions—one headed by H. C. Worsham and the other headed by F. R. Bray—amd that the majority of the colored voters were identified with the Worsham faction?—A. I can't say a majority. They were nearly equally divided from the strength exhibited in the convention.

"14. Q. Which faction had the larger following?—A. Both factions claimed it.

"15. Q. Did either faction champion Mr. Davis's candidacy?—A. The Bray faction recognized Mr. Davis as the regular nominee and entitled to the Republican support.

"16. Q. What was the attitude of the Worsham faction toward Mr. Davis?—A. Apparently it was hostile.

"17. Q. Did this apparent hostility serve to keep the members of the Worsham faction from voting for Mr. Davis?—A. I am of the opinion that it did.

"18. Q. Of the 345 voters in the city of Jackson whom you say are unable to read, what per cent of these can be instructed or coached before election so as to be able to vote under the Dortch law?—A. My opinion, not over 5 per cent.

"19. Q. Is it necessary to pay poll tax in order to vote in the Fifteenth civil district?—A. If you are not exempt by age or infirmity, it is.

"20. Q. Are you able to state what per cent of the persons whose names appear on Exhibit A pay their poll taxes?—A. I estimate 75 per cent of them are over age.

"21. Q. Can you say of your own knowledge what per cent of the remainder pay their poll taxes?—A. I can not.

"22. Q. From your personal knowledge, then, it may be that none or a very few of them?—A. It may be; yes, sir. I am not informed."

Upon the mere expression of opinion by the witness that "they would all vote the Republican ticket" and without evidence of registration or tax payments we are asked to add 345 to contestant's vote. The evidence concerning the remainder of the names claimed as proved by contestant is of the same class except that in some instances there was evidence tending to show registration and payment of taxes.

Upon this character of testimony we are asked to treat 1,061 named persons as if they had voted for contestant. As already shown, 20 only of them have testified. As to the other 1,041, the evidence is even less satisfactory than that which was rejected in the Forty-third Congress in Bell *v.* Snyder (Smith's digest, 247), in which case the committee said:

"L. Bloomer, supervisor at that precinct, in his deposition, page 164, states that the 20 persons whose names are given by him had certificates of registration, and that he saw all of them registered except two, and that they would have voted for contestant if they had been allowed to vote; that they presented their certificates of registration and offered to vote; then made affidavit and offered to vote. He says that he did not read all the tickets, but to the best of his knowledge the parties would have voted for Bell, as all the Reform tickets were alike.

"The committee regard the fact of these 20 persons having been registered as voters as sufficiently proven, but the proof as to the fact that all of them offered to vote for contestant or that they intended to or would have voted for contestant is insufficient."

In the case in hand 1,041 of the persons named did not even offer to vote. As to many of them we have no evidence of their registration or payment of taxes, and as to none of them have we any save hearsay evidence that they desired to vote at all or would in any event have voted for contestant.

The additional 1,920 claimed by contestant rest upon evidence even more flimsy—the mere estimates of witnesses of which a fair sample is found in the testimony of T. J. Sawner, here given in toto:

"1. Q. What is your age, place of residence, and what position do you hold in the county?—A. I am 46 years old; reside at Savannah, Tenn., and am sheriff of Hardin County.

"2. Q. What experience have you had in the politics of Hardin County, and how many times have you canvassed the county?—A. I have had some experience in the politics of the county. I have canvassed the county something like half a dozen times, but not thoroughly, though, every time.

"3. Q. How many times have you been sheriff of Hardin County, and what other offices have you held?—A. I have been sheriff three times, and was constable of the fourth district before I was elected sheriff.

"4. Q. Are the elections of the Fourth civil district of Hardin County held under the provisions of the Dortch law and what kind of qualifications does it place upon the voters?—A. They are held under the Dortch law, and a man is required to read and has to be a good marker.

"5. Q. Is it possible for a person who can not read to vote the Dortch ticket?—A. It is not, unless he has assistance.

"6. Q. What effect has the application of the Dortch law had upon the Republican vote of Hardin County? I mean how much has it diminished their vote?—A. I believe it has diminished their vote something like 500.

"7. Q. In your best judgment, how many Republicans are there in the Fourth civil district of Hardin County who can not vote under the Dortch law?—A. I believe there is 100.

"8. Q. What effort was there made by the leading Republicans of Hardin County in the campaign in 1902 to poll their full strength for their ticket?—A. They made as strong an effort as possible under the circumstances.

"9. Q. I will ask you if there were men selected and put into each civil district of the county several days before the election for the purpose of canvassing each Republican voter in order to get him out to the November election, 1902?—A. That is my understanding.

"10. Q. I will ask you if the Republicans felt very buoyant and hopeful of success in the Congressional election of November, 1902—?–A. They did.

"11. Q. Have you made a list of the Republicans whom you know to be disfranchised under the operation of the Dortch law in the Fourth civil district of Hardin County?—A. No; I have not.

"Further this deponent saith not."

Upon this it is demanded that 100 votes be added to contestant's count, and upon similar testimony a total of 1,920. No names are given, no evidence of registration or payment of taxes, nor of intention or desire upon the part of the unknown persons to vote for contestant. Such evidence is wholly inadmissible for any purpose. There have been cases in which persons proved to have been qualified, desiring, intending, and attempting to vote, have had their votes counted, notwithstanding that they were not received by the election officer; but there is no precedent for adding to the count the votes of persons not shown to have attempted or desired or been qualified to vote for any candidate under the law.

A careful study and analysis of all the evidence in this case and of the printed briefs, supplemented by exhaustive oral arguments of able counsel, convinces us that, no matter what view may be taken of the Dortch law, the result of the election is not changed. Your committee therefore recommends the adoption of the following resolutions (H. Res. No. 241):

"Resolved, That F. M. Davis was not elected to membership in the House of Representatives of the United States in the Fifty-eighth Congress, and is not entitled to a seat therein.

"Resolved, That T. W. Sims was elected to membership in the House of Representatives of the United States in the Fifty-eighth Congress, and is entitled to a seat therein."

The resolutions were agreed to by the House without debate or division.

Although the main issue was thus simplified, the committee discussed several questions related to the case but not essential to its determination:

(1) As to a failure of election officers to hold elections in certain precincts:

In the two precincts of Sibley and Walnut Grove, in Hardin County, the election officers failed to hold any election. It is claimed that the Republicans are in considerable majority in these precincts, and that by the failure of the Democratic officials to hold elections the contestant was deprived of votes which he would otherwise have received. It appears, however, that under the law of Tennessee a voter may vote in any one of several precincts in the same civil district, and it is in evidence that there were three other voting places in that particular civil district in which the residents of Sibley and Walnut Grove might have voted. We are not fully satisfied with the reason given for failure to hold elections in these precincts. It is perhaps not unfair to presume that the real reason was a desire to prevent or reduce the Republican vote by subjecting these people to the inconvenience of journeying to other precincts at distant points. But as we are not advised whether all or any of the voters in these precincts did vote in any of the three other precincts in which they were lawfully entitled to vote, we are unable to say to what extent, if at all, failure to hold elections in Sibley and Walnut Grove affected the votes of the respective parties to this contest.

(2) As to an irregularity in handling returns:

Contestant charges that the returns in Henry County were opened before the meeting of the election board. The fact appears to be that the chairman, upon receipt of the returns, opened them, compiled the vote on a properly prepared sheet, and upon the meeting of the full board submitted the same to them, when the returns were compared with the tally sheet and certified. There is no evidence of any dishonesty in this practice or that the returns as certified were not correct.4

1133. The case of Davis v. Sims, continued.

Discussion of the claim that a ballot law practically disfranchising the ignorant established an unconstitutional qualification.

Discussion of the claim that a law practically disfranchising the ignorant in certain portions only of a State violated a constitutional provision that "elections shall be free and equal."

Reference to the principle that in exercise of the powers conferred by the Federal Constitution the State legislature is not controlled by the State constitution.

(3) As to the constitutionality of the Dortch law.

The committee describe the law:

The so-called "Dortch law" (named after the person who originally devised or introduced the system) now comprises a principal act passed in 1890 and a number of supplemental acts of various later dates. It does not apply to the whole State, but requires that in certain specified portions there shall be used an official ballot, which may be described as one variety of the Australian form.

"This ballot contains no party emblems, devices, designations, nor party column. There is no provision for voting a straight party ticket by marking in a circle or square or in any other manner. The law requires that "the names of all candidates for the same office shall be printed together and arranged alphabetically according to the initials of their surnames, irrespective of party; but the order in which the title of the various offices to be filled shall be arranged upon each separate ticket or ballot shall be left to the will of the officer or officers charged with the printing of said ticket."

After giving forms of ballot, the report continues:

The voter having received a ballot is to go into the voting compartment and "prepare his ballot by marking in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate of his choice in the blank space provided therefore and marking a cross (X) opposite thereto."

He may not have in advance a specimen ballot, and until he receive the official ballot, just before going into the booth, can not even know the order in which the respective offices will be grouped thereon. But he may with his ballot receive a printed card of instruction, of which the following is a sample:

"Official card of instructions prepared by commissners of registration of election.

This card is intended to assist and instruct voters how to prepare their ballots.

"1. Having received from the registrar your polling place an official ballot, present it with your certificate of registration to the assistant registrar, who will number the stub of the ballot and put the same number on your certificate of registration; then go to one of the shelves or compartment and prepare your ballot by placing a cross mark (thus X) before or after the line in which the name of your choice appears.

"2. You are not allowed to vote any ticket except the official ballot.

"3. If you spoil your ballot in trying to mark it correctly, return it to the registrars and get another; you will be allowed to get but three ballots. You are not allowed to take or remove any ballot from the polling place, but must deposit the ballot as received, or return the same to the registrars, as above provided, in case you have spoiled the game.

"4. If you are unable to your ballot, by reason of blindness or other physical disability, ask the officer holding the election to assist you.

"5. Before leaving the voting shelf fold your ballot without displaying the marks thereon, but so that the words 'Official ballot for,' etc., printed on the back of the ballot, and the numbered stub shall be plainly visible; then present to the officers of election your certificate of registration, your poll-tax receipt, and your marked ballot.

"6. It is your duty to mark and deposit your ballot without undue delay and quit the polling place as soon as you have voted. If other persons are ready to vote when you get your ballot you will be allowed only five minutes in which to mark it, but if no other voters are waiting you will be allowed ten minutes.

"7. You must not allow any person to see your ballot, or to take the same from you, or remove the same from the polling place, nor to place any mark on the same other than as hereon instructed, it being a misdemeanor to do so."

If "by reason of blindness or other physical disability he is unable to mark his ballot" the voter may receive the assistance of the officer holding the election in marking the same, but unless so blind or otherwise physically disabled he can be assisted only in the following way:

"The registrar shall upon demand of any voter made at the time his ballot is handed to him give

to such voter a correct statement of the order in which the title of the various offices to be filled stand upon the particular ballot furnished to such voter."

It is expressly provided that "a voter who shall, except as herein otherwise provided, allow his ballot to be seen by any other person * * * or any person who shall * * * aid, or attempt to aid, any voter by means of any mechanical device, or any other means whatever, in marking his ballot, shall be punished by a fine of not less than $10 nor more than $100," and election officers are to cause the arrest of any person so violating this provision, and the offender is to be "treated as one caught in the very act of committing a misdemeanor."

It is alleged by contestant in his notice of contest that these statutory provisions "are highly partisan; were passed, together with their amendments, with partisan motives and in an intolerant partisan spirit."

We do not see, however, that we have anything to do with that. This House can hardly be expected to preserve the balance of partisanship in State legislatures, nor can the motives of State legislators be considered in determining Congressional elections, provided the statutes enacted by them were within their constitutional authority.

The inquiry as to the constitutionality of this law involved two branches:

(*a*) Does it establish an additional qualification:

But contestant contends that no person who can not read can vote the official ballot; that by the Dortch law an additional qualification is thus imposed, and that it violates Article I of the State constitution of Tennessee, which declares "that elections shall be free and equal, and the right of suffrage as hereinafter declared shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime previously ascertained and declared by law and judgment thereon by a court of competent jurisdiction."

And section 1 of article 4, which is as follows:

"Every male person of the age of 21 years being a citizen of the United States and a resident of this State for twelve months, and of the county wherein he may offer his vote for six months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers of the county or district in which he resides; and there shall be no qualifications attached to the right of suffrage, except that each voter shall give to the judges of election where he offers to vote satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the legislature shall prescribe, and at such time as may be prescribed by law, without which his vote can not be received; and all male citizens of the State shall be subject to the payment of poll taxes and to the performance of military duty within such ages as may be prescribed by law. The general assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box."

Some seventy witnesses in this case, some of whom were white and some colored, some Democrats and some Republicans, all testified that ability to read is essential to enable one to vote this form of ballot. The contestee himself frankly admits that a person unable to read can not vote "as well as a man who can read and write; but he can possibly vote some ballots under the law, and they do it." It must be manifest to anyone that the persons unable to read, who can successfully mark all the candidates of a particular party, especially in a Presidential year, must be very few, if any.

The supreme court of Tennessee, however, in Cook *v.* State, 90 Tenn., 407, sustained an indictment and conviction for "aiding electors in marking their ballots, instructing them how to vote," etc., and expressly declared that this law does not violate Article IV of the State constitution. This ruling was followed by the Elections Committee and the House in Thrasher *v.* Enloe in the Fifty-third Congress, the minority, however, expressly declaring its opinion that the act was unconstitutional.

(*b*) As to the provision of the Tennessee constitution requiring that "elections shall be free and equal":

The Tennessee court does not appear to have considered the constitutional requirement that "elections shall be free and equal." This provision, found in many State constitutions, must have been intended to have some meaning and effect. Unlike the rain from heaven, the Dortch law does not fall upon the just and the unjust alike or, to be more accurate, it does not fall upon all of the just

nor upon all of the unjust. It does not apply to the whole State nor to the whole of this Congressional district. It applies only in spots.

In the Eighth Congressional district there are 168 civil districts. The Dortch law applied in 13 of them and practically required the voter to be able to read in order properly to mark his ballot. In the other districts a voter might use a printed ballot or write his ballot, if he desired, or have somebody else write it for him and carry it in his vest pocket for a week or six weeks and vote it freely upon election day and have it counted, provided, of course, he was duly registered and had paid his taxes. With such varying conditions in different parts of the same Congressional district, are elections "free and equal?"

The supreme court of Tennessee further sustained this law in Moore *v.* Sharp, 98 Tenn., 491.

The constitution of Kentucky, like that of Tennessee, contains a provision that all elections shall be "free and equal." The legislature prescribed a form of ballot and required each voter to retire to a compartment and there unaided and alone indicate by marks on his ballot the various candidates for the several offices for whom he wished to vote. The supreme court of that State in Rogers *v.* Jacob, Mayor, etc. (98 Ky., 502), unanimously declared that provision of the statute unconstitutional, Mr. Chief Justice Lewis, who delivered the opinion, saying (p. 508):

"A statute requiring votes to be given by ballot need not, any more than the mode of voting viva voce, operate unequally or so as to deprive any person entitled of the privilege of suffrage, and if the one we are considering conflicts with that clause of the constitution, or denies the privilege of free suffrage, which really exists independent of that section, it is simply on account of defect or vice of some particular provision not indispensable to the general or successful operation of the law. And the only question about which we have any difficulty is in regard to section 9, that, by requiring each voter to retire to a compartment and there, alone and unaided, indicate by a mark on his ballot the various candidates for numerous offices he wishes to vote for, practically operates to deprive those unable to read or write of a free and intelligible choice, and in fact makes free suffrage as to them a matter of chance or accident. And thus, while the interests and rights of many may be involved and should not be denied or jeopardized by nullifying the entire statute already in operation, if it is in other respects valid, we have no right to sanction any law or part of a law that takes from a single human being his constitutional rights. It is, however, permissible and often important to limit the operation of, disregard, or strike from a statute one or more provisions that conflict with the constitution rather than allow them to vitiate the whole; and in accordance with, or at least in analogy to, that rule section 9 must be held inoperative to the extent it in the manner mentioned deprives illiterate persons of the opportunity and means of freely and intelligibly voting, for they have the right to avail themselves of whatever reasonable aid and information may be necessary to enable them to cast their ballots understandingly, and can not be legally deprived of it."

The State of Virginia had a similar provision in its constitution requiring freedom and equality of elections. The legislature passed a law providing a ballot much like the Dortch-law ballot, except that it provided that "at the request of any elector in the voting booth who may be physically or educationally unable to vote, the said special constable may render him assistance by reading the names and offices on the ballot and pointing out to him the name or names he may wish to strike out, or otherwise aid him in preparing his ballot."

In passing upon that statute, in Pearson *v.* Supervisors, etc. (91 Va., 322), the supreme court of that State said (p. 330):

"It will not be disputed—

"First. That the right of suffrage is derived from the constitution of the State, and to it we look for the qualification of voters and the limitations and restrictions upon the right of voting; in other words, to ascertain who may or who may not vote.

"Second. That the legislature can not prescribe any qualification in addition to those found in the constitution, and any attempt to do so openly or covertly, directly or indirectly, is void.

"Third. That there is no educational qualification prescribed by our constitution, and a person otherwise qualified to vote, no matter how ignorant he may be, is entitled to vote.

"Fourth. That the sole function of the legislature, with respect to the exercise of the right of suffrage, is to provide the mode in which those entitled to vote may do so and have their votes counted, and to guard against improper, illegal, or fraudulent voting.

"Fifth. That to this end the legislature may adopt and enforce reasonable rules and regulations to secure the one and prevent the other.

"Sixth. But if under cover of a law to regulate voting a provision is introduced into the law which virtually establishes a test of the qualification of the voter, additional to those prescribed in the constitution, such provision of the law transcends the power of the legislature and is null and void."

And again (p. 332):

"It is obvious that one who, either from physical or intellectual blindness, is unable to read, is wholly incapable of voting by ballot without assistance from some quarter."

The court sustained the statute in that case by construing the word "may" to mean "must," thus making it absolutely the duty of the sworn special constable not only to point out the names and offices on the ballot, as provided in the Tennessee statute, but also to do what is positively prohibited by the Dortch law, viz, "otherwise aid him in preparing his ballot."

A Michigan statute, providing an official ballot and requiring it to be marked by the voter in the booth, contained no provision either forbidding or allowing him to have assistance. Its constitutionality was challenged in Common Council *v.* Rush, 82 Mich., 532, and the supreme court of that State, after referring to the Kentucky case, said (p. 541):

"It is contended that under the act in question the result is the same, because no one is permitted to accompany the voter to the booth to assist him. It is to be regretted that the legislature did not expressly provide for furnishing ballots to this class of voters. We must therefore carefully examine the act to ascertain if it leaves no way for such voters to obtain ballots. It is clear that if voters are limited to the use of tickets provided in the booths then some voters are disfranchised by the very terms of the law. But we do not think that the law necessarily bears that construction. There is no express prohibition against assisting such a person in the preparation of his ticket, nor against his obtaining a ticket outside the polling place for that purpose, nor against assisting to a booth or the polls one physically unable to go alone. Such a case is not within the mischief aimed at, and we hold that under this law such a voter is entitled to receive assistance in the preparation of his ticket, and to receive and have his ticket prepared outside the polling places. This, we think, is in accord with that maxim of interpretation that a thing which is within the spirit of a statute is within the statute, although not within the letter, and a thing within the letter is not within the statute unless within the intention."

In other words, in order to sustain the statute, the Michigan court construed into it a very liberal provision providing for such assistance to the voter as, under the Dortch law, would render the voter and the person assisting him subject to fine and imprisonment.

In Capen *v.* Foster, 12 Pick., 488, the supreme court of Massachusetts marked the distinguishing line between laws which took away or abridged the right of suffrage and those which may lawfully be enacted to regulate its exercise, and held, substantially, that in order to belong to the latter class, such laws must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than to subvert or impede, the exercise of the right to vote. This proposition was sustained by the supreme court of Ohio in Monroe et al. *v.* Collins, 17 Ohio, 665, in which case a statute of that State was declared unconstitutional and void because, although entitled "An act supplementary to the act entitled 'An act to preserve the purity of elections,'" it imposed upon certain classes of persons conditions not imposed upon others, to enable them to exercise the right to vote.

The supreme court of Pennsylvania in a very recent case held in an opinion by Chief Justice Mitchell, as reported in the Philadelphia Press of February 16, 1904, that—

"The constitution confers the right of suffrage on every citizen possessing the qualifications named in that instrument. It is an individual right and each elector is entitled to express his own individual will in his own way. His right can not be denied, qualified, or restricted. The constitution itself regulates the times and, in a general way, the method, to wit, by ballot with certain specified directions as to receiving and recording it. Beyond this the legislature has the power to regulate the details of place, time, manner, etc., in the general interest for the due and orderly exercise of the franchise by all electors alike. Anything beyond this is not regulation, but unconstitutional restriction.

"It is never to be overlooked, therefore, that the requirement of the use of an official ballot is a questionable exercise of legislative power, and even in the most favorable view treads closely on the border of a void interference with the individual elector. Every doubt, therefore, in the construction of the statute must be resolved in favor of the elector.

"Every elector, as already said, has the right to express his individual will in his own way and for his own reasons, which are not open to question, however unsound or unimportant others may deem them. And the rights of electors acting together as a party are equally beyond question. The electors themselves are the only tribunal to decide whether the principles, platform, aim, or method of reaching the desired object are broad enough, permanent enough, or important enough to be the basis of united action as a party, and, if they so decide, courts must recognize and treat them accordingly."

We have stated contestant's contention very fully and the authorities bearing thereon in conflict with the Tennessee decisions.

(4) Another question raised by the sitting Member was stated by the committee but not discussed.

But the contestee, while not admitting that the Dortch law is in violation of any provision of the State constitution, contends that even if it were it would still be valid because of the provision of sec. 4, art. 1, of the Constitution of the United States, that in the absence of action by Congress "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof." He contends that in the exercise of the powers thus conferred by the Federal Constitution the legislature can not be controlled by the constitution of the State, and in support of this proposition cites Baldwin *v.* Trowbridge, 2 Bart.; Donnelly *v.* Washburn, 1 Ells., 495, and McCrary's Law of Elections, 109–112.

The resolutions recommended by the committee were agreed to without division.

1134. The South Carolina election case of Dantzler v. Lever in the Fifty-eighth Congress.

The House declined to invalidate an election because a State constitution had established qualifications of voters in disregard of reconstruction legislation.

As to the duty of the House to pass on the constitutionality of a State law as to the qualifications of voters.

On March 18, 1904,[1] Mr. James R. Mann, of Illinois, from the Committee on Elections No. 1, submitted the unanimous report of the Committee on the South Carolina election case of Dantzler v. Lever. This report was as follows:

At the Congressional election in the Seventh district of South Carolina on the 4th day of November, 1902, the contestant, Alexander D. Dantzler, received in said district the total number of 167 votes. The contestee, Asbury F. Lever, received 4,220 votes.

There is nothing in the record or in the case to sustain a claim that the contestant, Dantzler, was elected. It is indisputable that if a legal election were held in the district the contestee, Lever, was fairly elected.

It is urged on behalf of contestant that no legal election was held in South Carolina, and the claim is made that both the election laws and the constitution of South Carolina, then and now in operation, are illegal, invalid, and unconstitutional because in direct conflict with the so-called reconstruction act of June 25, 1868 (15 Stat. L., 73), readmitting South Carolina and other States to representation in Congress upon the condition (stated in said act to be a "fundamental" condition) "that the constitution of neither of said States shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State who are entitled to vote by the constitution thereof herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided,* That any altering of said constitution may be made with regard to the time and place of residence of voters."

The constitution of South Carolina referred to in the reconstruction act of June 25, 1868, did not contain any educational or property qualification of voters. The constitution of South Carolina of 1895

[1] Second session Fifty-eighth Congress, House Report No. 1740; Record, p. 3429.

(which was adopted and put into effect by a constitutional convention without a vote of the people adopting it), as well as the election laws adopted or passed in accordance with it, contain educational and property qualifications.

It is claimed that under the South Carolina constitution of 1895, and the election laws in force under it, many citizens are deprived of the right to vote in said State who were and would be entitled to vote by the constitution of 1868, referred to in the reconstruction act of June 25, 1868. The South Carolina constitution of 1895 and the election laws under it are therefore claimed to be in direct conflict with the reconstruction act of June 25, 1868, readmitting South Carolina to representation in Congress upon the conditions therein named as "fundamental conditions."

Contestant claims that if the citizens of the Seventh Congressional district of South Carolina who could have voted under the terms of the constitution of 1868 had been permitted to vote he would have been elected, and he asserts that many thousands of colored voters in the Congressional district entitled to vote under the constitution of 1868 were deprived of the right to vote under the educational and property qualifications of the constitution of 1895.

It is very plain that contestant was not elected; but counsel for contestant insists that if contestant was not elected then no election was held, and that it is the duty of Congress to declare that no valid election was held in South Carolina for Members of the Fifty-eighth Congress, and therefore to unseat the contestee.

It would seem that if no valid election was held in the Seventh Congressional district of South Carolina in November, 1902, and if the House of Representatives, holding this view, should declare the seat from that district vacant, then no election could be held to fill the vacancy until after the South Carolina constitution of 1895 and the election laws under it had been changed. This would necessarily involve an entire lack of representation from the district for a considerable period of time.

If the Seventh district of South Carolina were the only district involved it might be proper for the Committee on Elections, as well as the House itself, to put on record its opinion in the case and to declare elected or not elected, as that opinion might run, the contestee. But the reconstruction acts were not confined to South Carolina. Practically the same "fundamental conditions" are found in the acts readmitting Virginia, North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas to representation in Congress. Most of these States have adopted new constitutions said to be in conflict with the terms and provisions of the reconstruction acts readmitting them to representation in Congress.

It follows, therefore, quite logically that if the House should unseat the contestee on the ground that no valid election was held or could be held in his district under the present constitution and election laws of South Carolina, a similar construction would require the House, in the case of contest, to unseat all of the Members from South Carolina and from most of the other Southern States, and that new elections could not be held to fill the vacancies until the respective constitutions of these States had been changed so as to comply with the reconstruction acts.

The question of the constitutionality and validity of the constitution and election laws of South Carolina, therefore, in its effect upon the membership of this House is one of far-reaching importance. It involves in its outcome the right of a very large number of the Members of the House to their seats. But the decision of this House against the contestee in this case would have no binding force in South Carolina except in this particular case. It probably would not be followed or obeyed by the State of South Carolina except in this particular case.

However desirable it may be for a legislative body to retain control of the decision as to the election and qualification of its members, it is quite certain that a legislative body is not the ideal body to pass judicially upon the constitutionality of the enactments of other bodies. We have in this country a proper forum for the decision of constitutional and other judicial questions. If any citizen of South Carolina who was entitled to vote under the constitution of that State in 1868 is now deprived by the provisions of the present constitution he has the right to tender himself for registration and for voting, and in case his right is denied, to bring suit in a proper court for the purpose of enforcing his right or recovering damages for its denial.

That suit can be carried by him, if necessary, to the Supreme Court of the United States. If the United States Supreme Court shall declare in such case that the "fundamental conditions" in the reconstruction acts were valid and constitutional and that the State constitutions are in violation of those acts, and hence invalid and unconstitutional, every State will be compelled to immediately bow in

submission to the decision. The decision of the Supreme Court would be binding and would be a positive declaration of the law of the land which could not be denied or challenged.

On the contrary, the decision of the House of Representatives upon this grave judicial question would not be considered as binding or effective in any case except the one acted upon or as a precedent for future action in the House itself.

A majority of the Committee on Elections No. 1 doubt the propriety in any event of denying these Southern States representation in the House of Representatives pending a final settlement of the whole question in proper proceedings by the Supreme Court of the United States. Some of the members of the committee believe the "fundamental conditions" set forth in the reconstruction acts to be valid and the constitutions and election laws of these States to be in conflict with such conditions, and hence to be invalid.

Some of the members of the committee believe the "fundamental conditions" set forth in the reconstruction acts to be invalid and the constitutions and election laws of the States claimed to be in conflict with such conditions to be valid. Some members of the committee have formed no opinion and express no belief upon the subject.

Your Committee on Elections No. 1 therefore respectfully recommend the adoption of the following resolution:

"Resolved, That Alexander D. Dantzler was not elected a Member of the Fifty-eighth Congress from the Seventh Congressional district of South Carolina, and is not entitled to a seat therein."

The resolution was agreed to by the House without debate or division.

1135. The South Carolina election cases of Jacobs v. Lever, Myers v. Patterson, and Prioleau v. Legare, in the Fifty-ninth Congress.

The House will not count votes of persons alleged to have been illegally denied the right to vote, on the strength of mere lists of such persons kept loosely and not authenticated by testimony.

Affirmation of the conclusion that the House would not invalidate an election because a State had disregarded reconstruction legislation as to qualifications of voters.

Where the validity of a State's election system was questioned, the House merely declared contestant not elected, and did not declare sitting Member entitled to the seat.

On June 5, 1906,[1] Messrs. James R. Mann, of Illinois; Lewellyn Powers, of Maine, and H. Olin Young, of Michigan, from the Committee on Elections No. 1, respectively reported on the South Carolina election cases of Charles C. Jacobs *v.* Asbury F. Lever, Isaac Myers *v.* J. O. Patterson, and Aaron P. Prioleau *v.* George S. Legare.

Each of these cases involved the constitutional question passed on in the Fifty-eighth Congress in the case of Dantzler *v.* Lever,[2] and in each case the committee affirmed the conclusion arrived at in that case.

In the Prioleau case [3] this further question was decided:

At the Congressional election held in said district November 8, 1904, the contestant, Aaron P. Prioleau, received 234 votes. The contestee, George S. Legare, received 6,068 votes. This gave to the contestee, on the face of the returns, a majority of 5,834 votes.

To overcome this apparent majority, the contestant claims that 11,800 legal voters in said district applied to the managers of election in the different precincts for the right to vote and were denied that right; that all of said persons would have voted for contestant and that, as the refusal to permit them to vote was illegal, their votes should be counted for contestant. To sustain the claim of contestant,

[1] First session Fifty-ninth Congress, Record, p. 7886; House Reports Nos. 4779, 4780, 4781.

[2] See Section 1134 of this chapter.

[3] Report No. 4779.

he has introduced in evidence lists of names purporting to be the names of persons who were those illegally refused the right to vote for contestant. These lists, as set forth in contestant's brief, are as follows:

VOTING TABLE.

Name.	Town.	Ward.	Polling precinct.	A. P. Prioleau. Rejected Voters. No.	G. S. Legare. No.
J. L. Smalls	Charleston, S. C	4		279	6,068
Thadus Smalls	do	6		400	
A. Campbell	James Island			450	
J. S. Glover	Charleston, S. C	12		300	
J. J. Lockwood	do	10		400	
R. B. Geddes	John Island			620	
S. G. Gilliard	Beach Hill			350	
Henry Wilson	Fivemile House			450	
Robert Small	Charleston, S. C	7		683	
Frank Barnwell	do	8		520	
I. L. Prioleau	Calamus Pound			570	
R. W. Sinchler	Summerville, S. C			650	
F. J. Byas	Edisto Island			583	
J. C. Tingman	St. Steven		5	560	
R. W. Green	Biggins Church			460	
R. G. Richardson	Tenmile Hill			398	
Robert Heywood	Charleston, S. C	6		200	
J. W. Keith	Cams Crossroad			680	
James Wright	Cooper Store			650	
E. W. Polly	Charleston, S. C	5		335	
S. W. Barnwell	St. Andrews			450	
George Frost	Charleston, S. C	10		250	
C. J. Glover	do	12		231	
S. S. Maxwell	do	11		198	
Solomon Brown	do	1		150	
J. C. Gary	do	1		300	
John Drayton	do	11		300	
J. E. Tentin	do	9		300	
J. R. Cuthbert	do	7		200	
James Collins	Mount Pleasant, S. C.			386	
Robert Teaden	Charleston, S. C	7	No. 2	280	
C. P. Ragin	St. Paul, S. C. (P. O.).		St. Paul, S. C	516	
Ira Learn	Manning (P. O.)		Harmony	300	
Jno. Dow	do		Panda	400	
Jno. Gill, secretary county executive committee.			Aledo	112	
			McFaddin's store	69	
			Davis station	165	
			Boykin's store	72	
			Jordan	174	
			Wilson	21	
			Fonston	17	
Total rejected voters vote.				14,429	
Vote counted				234	
Total				14,663	6,068

Majority for A. P. Prioleau, 8,595.

The tabulation in contestant's brief makes a total of 14,429 rejected voters, which added to the 234 votes actually cast for contestant would, as he claims, make 14,663 votes which he is entitled to have counted for him, or a majority over contestee of 8,595.

It is claimed by contestant that these lists were kept by persons who were stationed for that purpose not far from the respective polls in a large number of precincts in the district and that the men whose names appear upon the lists, after attempting to vote and being denied the right, returned to the persons who were keeping the lists in the various precincts and either wrote their respective names upon the lists or gave their names to the persons in charge of the respective lists who wrote the names thereon. In some instances the person keeping a particular list was not near enough to the polls to know of his own knowledge whether the men whose names he placed upon the lists, or which were placed there by the men themselves, had, in fact, actually offered to vote. He could have no means of knowing how the rejected voters would have voted, if permitted to do so, except from their own statements, and in many cases he could not know whether they were, in fact, qualified voters.

Without expressing any opinion upon all of the lists offered in evidence, the committee is of the opinion that a considerable portion of the lists would have to be rejected in any event, because wholly lacking in any sort of identification of either the person offering to vote, his right to vote, or how he would have voted. Candidates can not be elected to office merely by having some one keep lists of names of persons who come near the polls. It is not necessary in this case to determine whether sufficient identification has been made in this case in regard to some of the lists to consider them as prima facie evidence, because, in any event, the lists as presented do not, in the opinion of the committee, make out a case in favor of contestant. The evidence is utterly lacking to show that contestant is entitled to the election on the facts presented by him.

A careful comparison of the tabulation of the lists set forth above with the lists themselves as they appear in the record shows that the tabulation made by contestant's counsel in his brief gives a number of persons far in excess of the number of names actually appearing on the lists themselves. The committee find from an examination of the lists that the correct tabulation would be as follows:

[The committee then give a revised tabulation, showing a total of 9,026 rejected votes.]

This reduces the footings of the lists from 14,229 to 9,026; but a large number of these lists must be rejected because of absolute failure to make any effort to properly prove the lists or identify the persons. For example, take the following cases:

R. B. Geddes, John Island; list, 620 name

Because Geddes's testimony shows that he did not keep all of this list, but was assisted so to do by one A. E. Croffort, who took part of the names and was not called as a witness, and the testimony utterly fails to show which of the names were taken by Geddes and which were taken by Croffort.

Frank Barnwell, Charleston; list, 194 names.

This list must be rejected because the testimony fails to show that any person on that list was refused the right to vote.

R. W. Sinchler, Summerville; list, 650 names.

This list must be rejected because the testimony shows that Sinchler did not keep all of the list; that he had no knowledge as to the persons" he did not himself place upon the list; that he fails to identify any of those he placed upon the list or state how many there were, and these omissions are not supplied by any other testimony.

J. C. Tingman, St. Steven; list, 560 names.

This list must be rejected for the reason that the testimony shows that "some two or three persons" kept this list, the names of whom are not given, and Tingman does not state how many of the names he placed upon the list, and no other testimony was produced for filling the gaps in his evidence.

R. W. Green, Biggins Church; list, 460 names.

This list is not authenticated by any testimony whatever, nor is it identified as a list of rejected voters.

R. G. Richardson, Tenmile Hill; list, 398 names.

It clearly appears that the precinct at Tenmile Hill had been abolished in 1898, and there is no evidence that any of the persons appearing upon this list offered or were refused the right to vote at the precinct in which they lived or at any legal precinct whatever.

J. E. Tentin, Charleston; list, 96 names.

The testimony shows that one John Graham, who was not called as a witness, assisted in keeping this list. Tentin could identify only seven names upon it as having been placed there by himself, nor

is there any testimony in regard to the other names upon the list placed there by Graham or some one else.

James Collins, Mount Pleasant; list, 386 names.

This list was kept by Peter Johnson, who was not called as a witness. Collins could not read or write and so could not know and did not know that Johnson kept the list correctly, nor is there any other evidence to supply this omission.

There is another infirmity about all the above lists, namely, that it nowhere appears in the testimony or the lists themselves that the parties named thereon were voters in the particular precinct in which they attempted to vote.

John Gill, secretary of the county executive committee, Clarendon County; lists, 638 names.

The exhibits produced by Gill included those marked "D" to "J," inclusive, making a total of 638 names. These lists were left with Gill and are not authenticated by any testimony whatever, and the persons who kept the lists are not even named in the testimony, nor, indeed, that they were kept at all as a list of rejected voters.

Ira Learn, Manning, Harmony; list, 58 names.

John Dow, Manning, Panada; list, 168 names.

The list produced by Ira Learn and that produced by John Dow were not kept by the parties producing them, neither of whom could write, but both signed their testimony with a mark.

The deductions made in the examples of rejections of lists, asset forth above, amount to 4,228. The cases given as examples only indicate the various infirmities which attach to nearly all of the testimony in this case. The testimony which is not analyzed above is generally as defective as that so analyzed. But deducting the 4,228 votes comprised in the above lists, shown to be utterly worthless as testimony, from the total footing of all the lists, 9,026, there is left 4,798, which, if the 234 votes cast for Prioleau be added, makes a total of 5,032, or 1,036 less than the number of votes cast and counted for contestee.

The Committee on Elections No. 1 has shown every consideration to the contestant; has listened to long and exhaustive arguments in his behalf, and is of the opinion that the contestant, Aaron P. Prioleau, was not elected a Member of Congress at the election in question.

In the Myers case,[1] a similar question was thus decided:

At the Congressional election in the Second district of South Carolina, on the 8th day of November, 1904, the contestant, Isaac Myers, received in said district 419 votes. The contestee, J. O. Patterson, received 7,426 votes.

The contestant asserted in his notice of contest that 10,000 or more voters offered to vote for him at the election, but were refused the opportunity and deprived of their rights by the election officers, who resorted to unfair and fraudulent methods to bring about the election of the contestee. The contestant offered in evidence a number of lists of persons who were thus deprived of the opportunity to vote for contestant. The committee finds that these lists contain the names of 2,963 persons whom the contestant alleges would have voted for him had they not been deprived of their legal privileges, and contestant asserts that all of the persons whose names appear on the lists were entitled under the laws and Constitution of the United States to the right of suffrage at such election.

Your committee does not express any opinion as to whether these lists of names have any legal validity as evidence for the purpose of showing that the persons named therein were entitled to vote, were denied the right to vote, and would have voted for contestant if permitted to vote, except to say that such evidence at the best is unsatisfactory. If lists of persons offering to vote and refused the right to vote are to be considered as evidence in any case, that such persons were entitled to vote, and, if permitted, would have voted for a particular candidate (which is doubtful, unless a conspiracy to commit fraud be shown), then such lists should be kept by persons who know all the persons offering to vote, who see such persons offer to vote, and who testify as to their knowledge when called as witnesses where thorough cross-examination may be had.

But if all the lists offered in evidence in this case were accepted as legal evidence they only affect something less than 3,000 persons, not enough to overcome the majority of the contestee.

Your committee is of opinion therefore that the contestant, Isaac Myers, was not elected.

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[1] Report No. 4780.

With each report the committee recommended a resolution similar to the following:

Resolved, That Charles C. Jacobs was not elected a Member of the Fifty-ninth Congress from the Seventh Congressional district of South Carolina, and is not entitled to a seat therein.

The House, without debate or division, agreed to each of the resolutions.

It is to be noted that the decision in each case declares only that contestant was not elected, and does not-as is usual in cases of contested elections—pass on the title of sitting Member.

Chapter XLI.

THE MEMBERS.[1]

1136. By rule the Member is restricted as to his movements during business or debate, and as to wearing his hat and smoking.

Members may not remain near the Clerk's desk during a vote.

[1] See also:

Volume I, Chapter II, sections 14–63, for precedents as to Members' credentials and enrollment at organization of House.

Volume I, sections 183–195, 500, as to status of a Member-elect.

Volume I, Chapter V, sections 127–185, administration of oath to Members.

Volume I, Chapters XIII to XVI, sections 414–506, for precedents as to qualifications of Members.

Volume 1, sections 417, 478, 485–506, as to whether or not a Member is an officer of the Government.

This volume, sections 1603, 1606—Attempt to bribe a Member a breach of privilege.

This volume, Chapter LII, sections 1641, 1651—Punishment of Members for contempt.

Volume III, Chapter LXXXII, sections 2667–2725—Privilege as related to Member.

Volume III—Section 1726, Member called as witness before the House. Section 1811, paper demanded of a Member by the House. Sections 2033, 2034, Members examined as witnesses in impeachment trials.

Volume V, Chapters CXII–CXIV–Sections 4978–5202, as to conduct of Member in debate. Sections 6971–6974, as to revision of remarks in Congressional Record; and sections 6990–7012, as to "leave to print" in the Record.

[2] Questions as to deductions of pay. (Sec. 3011, Vol. IV.)

[3] Term of a Member who fills a vacancy (sec. 3, Vol. I); of a Senator, (secs. 787–790, Vol. I, and sec. 6689, Vol. V).

[4] Appointment of a future day for resignation to take effect. (Sec. 488, Vol. I.)

Resignation appears satisfactorily from Member's letter to the governor of his State. (Secs. 565–567, Vol. I.)

Instances wherein Speaker was directed to inform the State executive of a vacancy. (Secs. 773, 824, Vol. I.)

As to what constitutes a declination. (Sec. 500, Vol. I.)

The Sergeant-at-Arms, and Doorkeeper are charged with the enforcement of certain rules relating to decorum.

Form and history of Rule XIV, section 7, relating to decorum of Members.

The decorum of Members within the Hall is regulated in part by section 7 of Rule XIV:

> While the Speaker is putting a question or addressing the House no Member shall walk out of or across the Hall, nor, when a Member is speaking, pass between him and the Chair; and during the session of the House no Member shall wear his hat, or remain by the Clerk's desk during the call of the roll or the counting of ballots, or smoke upon the floor of the House; and the Sergeant-at-Arms and Doorkeeper are charged with the strict enforcement of this clause. Neither shall any person be allowed to smoke upon the floor of the House at any time.

This rule, in very nearly its present form, was adopted in the revision of the Forty-sixth Congress.[1] It was derived from the old rule No. 65, which in its main provision dated from April 7, 1789.[2] The portions relating to wearing the hat was the fruit of a considerable agitation. In early years, following the custom of Parliament, Members wore their hats during the sessions.[3] As early as March 13, 1822.[4] Mr. Charles F. Mercer, of Virginia, proposed this rule:

> Nor shall any Member remain in the Hall covered during the session of the House.

but it was not adopted. Again, on March 18, 1828,[5] the matter was laid on the table when presented by Mr. George McDuffie, of South Carolina. On December 3, 1833,[6] Mr. James K. Polk, of Tennessee, again suggested the change, but the objection was made successfully that Members would have no places in which to put their hats if they should not wear them, and also that the custom of wearing hats was the sign of the independence of the Commons of England, and therefore a good usage to preserve in the American House. Again in 1835 [7] Mr. James Parker, of New Jersey, urged the reform unsuccessfully. But on September 14, 1837,[8] the House adopted the rule that no Member should wear his hat during the session of the House or remain near the Clerk's table during a roll call.[8] The prohibition of smoking dates from February 28, 1871.[9] The last sentence, prohibiting smoking at any time, was added on January 10, 1896.[10]

1137. The Member should rise in objecting to a request for unanimous consent.—On April 24, 1902,[11] in Committee of the Whole House on the state of the Union, Chairman Marlin E. Olmsted, of Pennsylvania, declined to take notice of an objection made by a Member who did not rise to make it.

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[1] Congressional Record, second session Forty-sixth Congress, pp. 206, 830.

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

[3] "Sketches of America," by Henry Bradshaw Fearon (London, 1818), records of the House of Representatives that "contrary to the practice of the Upper House (the Senate) at once Members and visitors wear their hats."

[4] First session Seventeenth Congress, Annals, p. 1301; Journal, p. 353.

[5] First session Twentieth Congress, Journal, pp. 424, 426.

[6] First session Twenty-third Congress, Journal, p. 25; Debates, pp. 2138, 2139, 2163.

[7] First session Twenty-fourth Congress, Journal, p. 39; Debates, p. 1957.

[8] First session Twenty-fifth Congress, Globe, p. 31.

[9] Third session Forty-first Congress, Globe, p. 1764.

[10] First session Fifty-fourth Congress, Journal, p. 103.

[11] First session Fifty-seventh Congress, Record, p. 4641.

1138. On May 15, 1854,[1] Mr. Speaker Boyd insisted that a gentleman making an objection must rise in his place and do so.

1139. The House has discussed but not settled the question as to its power to compel a Member to accompany it without the Hall on an occasion of ceremony.—On June 2, 1797,[2] the House had completed consideration of its address in reply to the speech of the President, and had voted:

> That Mr. Speaker, attended by the House, do present the said address.

Mr. Matthew Lyon, of Vermont, at his own request, was excused from attending with the House.

Again, on November 29, 1797,[3] under similar circumstances, Mr. Lyon made the same request. The request was debated at some length, Messrs. Nathaniel Macon, of North Carolina, and Albert Gallatin, of Pennsylvania, taking the ground that the House had no power to compel a Member to accompany it without its walls.

The motion was finally removed from consideration by a negative decision of the motion, "Shall the main question be now put?" [4]

1140. Origin of the title 11 Father of the House," as applied to the Member of longest continuous service.—On February 24, 1842,[5] Mr. John Quincy Adams, speaking of the death of Mr. Lewis Williams, of North Carolina, referred to his title of "Father of the House," and said that it was borrowed from the practice of the British House of Commons, where the oldest member was so called. Mr. Williams had served since 1814.

1141. A Senator having changed his name, the Senate instructed its Secretary to use the new name.—On January 12, 1846,[6] in the Senate, Mr. James D. Westcott, of Florida, announced that his colleague, Senator David Levy, of Florida, had been permitted by act of the Florida legislature to change his name to David Levy Yulee, and after having exhibited the journals of the legislature to show the action moved that hereafter the Secretary of the Senate, when he should have occasion to use the name of the gentleman, should designate him as Mr. Yulee. This motion was agreed to.

1142. Instance wherein leave of absence was granted by motion made and carried.—On May 2, 1906,[7] the Speaker laid before the House the request of a Member for leave of absence. Usually such leaves are granted by unanimous request, but in view of the fact that objection was being made to all requests for unanimous consent, the Speaker was proceeding to put the question on granting the leave.

Thereupon Mr. John S. Williams, of Mississippi, objected that no motion had been made.

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[1] First session Thirty-third Congress, Globe, p. 1189.

[2] First session Fifth Congress, Journal, p. 23 (Gales & Seaton ed.); Annals, pp. 234, 235.

[3] Second session Fifth Congress, Journal, p. 92 (Gales & Seaton ed.); Annals, pp. 650–652.

[4] Such was the effect of the previous question in its early use. See sections 5443–5446 of Vol. V of this work.

[5] Second session Twenty-seventh Congress, Globe, p. 264.

[6] First session Twenty-ninth Congress, Globe, p. 181.

[7] First session Fifty-ninth Congress, Record, p. 6295.

The Speaker[1] thereupon entertained a motion made by Mr. Williams that the Member have leave of absence, and the motion was agreed to by the House.

1143. Requests for leaves of absence are sometimes opposed and even refused.—On December 11, 1816,[2] Mr. Joseph Hopkinson, of Pennsylvania, moved—

that the House excuse John Sargeant, one of the Representatives for the State of Pennsylvania, for nonattendance on his duties in this House during the present session.

As Mr. Hopkinson first presented the motion it was to grant leave of absence. Objection was made both to the first form and to the modified form. Mr. John Forsyth, of Georgia, characterized the motion in its first form as unprecedented and incorrect, inasmuch as the Member had not yet attended during the session. Moreover, his duties to the House were paramount to any other, except those of necessity. In this case the Member was to depart for Europe.

It was urged in the debate that the Member's absence was a question between him and his constituents, but, on the other hand, it was replied that the House should not by vote sanction a relinquishment of public duties.

The motion was disagreed to—yeas 74, nays 81.

1144. On May 25, 1882,[3] a request for a leave of absence was opposed in the House, and on a yea-and-nay vote was denied, yeas 13, nays 134.

1145. On August 28, 1888,[4] the request of a Member for leave of absence was objected to, and the question on granting the leave was put to a vote.[5]

1146. Under a former rule a request for a leave of absence has been entertained as a privileged question.—On September 9, 1850,[6] Mr. Nathaniel S. Littlefield, of Maine, claiming the floor for a privileged question, asked the House to grant him a leave of absence from and after the 23d instant for the remainder of the session.

The Speaker,[7] after inquiring under what rule of the House the request was presented, and being referred to the sixty-sixth rule,[8] entertained the motion and put the question to the House.

1147. On December 19, 1882,[9] several requests for leave of absence were presented, and objection being made, the question was put on each, and on one there was a yea-and-nay vote.

Mr. Robert M. McLane, of Maryland, proposed, while the requests were being

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

[2] Second session Fourteenth Congress, Journal, p. 57; Annals, p. 265.

[3] First session Forty-seventh Congress, Record, p. 4239.

[4] First session Forty-eighth Congress, Record, p. 8040.

[5] On January 30, 1828, the Speaker laid before the House a letter from John Randolph (of Roanoke), of Virginia, stating that he deemed it incumbent on him to inform the House that, without leave of absence, he had been detained from the House by sickness. The letter was read and inserted in the Journal (first session Twentieth Congress, Journal, p. 232.)

[6] First session Thirty-first Congress, Globe, p. 1777.

[7] Howell Cobb, of Georgia, Speaker.

[8] See section 5941 of Volume V of this work for present form of rule and the form at that time. The form of rule at that time mentioned leaves of absence, but such reference does not appear in the present form of rules.

[9] Second session Forty-seventh Congress, Record, pp. 436–438.

submitted and acted on, to offer a resolution providing for the holiday recess of Congress.

The Speaker[1] declined to entertain the resolution until the requests were disposed of.

Mr. McLane made the point of order that such requests had no standing under the rules, and that it was only the practice of the House which gave them privilege.

The Speaker thereupon expressed the opinion that a motion to adjourn would have precedence, but declined to pass upon the question raised by Air. McLane.

1148. Rate and method of payment of compensation and mileage of Speaker and Members. The Constitution of the United States, Article I, section 6, provides that—

> Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the Treasury of the United States.

The statutes[2] fix the salaries of Members and Delegates at $7,500[3] per annum, computed from the 4th of March next succeeding the general election and payable thereafter monthly during the term of two years after the taking of the oath.[4]

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[1] J. Warren Keifer, of Ohio, Speaker.

[2] The subject of the compensation of Members has been treated of in several statutes. The act of September 22, 1789 (1 Stat. L., pp. 70, 71), provided for each Representative and Senator a compensation of "six dollars for every day he shall attend," and also an allowance "at the commencement and end of every session, six dollars for every twenty miles of the estimated distance, by the most usual road, from his place of residence to the seat of Congress." There was also provision for the salary of the Member when detained from the sessions by illness.

By the act of January 22, 1818 (3 Stat. L., p. 404), this compensation was changed to "eight dollars for every day he has attended, or shall attend, the House of Representatives." Senators received the same.

This per diem pay was continued until the act of August 16, 1856 (11 Stat. L., p. 48), when the compensation was changed to six thousand dollars for each Congress, which is the same as three thousand dollars a year, the term of a Congress being two years. The law of 1856 (11 Stat. L., p. 49) also provided that there should be a deduction of the proportionate amount due for each day for every day that the Member should be absent for any other reason than illness of himself or family. But this provision has been generally inoperative, although in 1894, at a time when peculiar conditions of obstruction prevailed, the deductions were actually made.

By the act of July 28, 1866 (14 Stat. L., p. 323), the compensation of each Senator and Representative was fixed at five thousand dollars a year, "and in addition thereto mileage at the rate of twenty cents per mile, to be estimated by the nearest route usually travelled in going to and returning from each regular session." (There is one regular session each year.) By the same act the salary of the Speaker was fixed at eight thousand dollars a year.

By act of March 3, 1873 (17 Stat. L., p. 486), the compensation of Representatives and Senators was increased to seven thousand five hundred dollars per annum, and the salary of the Speaker to ten thousand dollars per annum, these sums to be in lieu of all pay and allowance except actual individual travelling expenses going to and returning from the seat of government. This law was obnoxious to the people, perhaps largely because of a provision giving certain back pay to the legislators who enacted it, and was repealed by the act of January 20, 1874 (18 Stat. L., p. 4).

So the pay and mileage continued until 1907 at the rates fixed by the act of July 28, 1866.

For an early and elaborate report on the compensation of Members see American State Papers (Miscell.), Vol. II, p. 403.

[3] Speaker raised from $8,000 and Members from $5,000 by legislative appropriation act of 1907. (34 Stat. L.)

[4] Revised Statutes, section 39.

The salary of the Speaker is $12,000 [1] per annum. In addition to the salary, Members receive mileage at the rate of 20 cents per mile, estimated by the nearest route usually traveled in going to and returning from each regular session.

When a Member or Delegate dies the salary and traveling expenses due him at the time of his death are paid to his widow or heirs, and in such case the salary is computed and paid for a period not less than three months.[2] A Member's successor, whether the vacancy was occasioned by death or otherwise, receives compensation from the date the compensation of his predecessor ceased.[3]

When a Member is unseated in a contest he retains the compensation already received and is paid his salary to the day on which his case is decided. When the contesting Member is seated his salary is paid him for the entire term up to the day on which he is declared entitled to his seat. Both contestant and contestee are allowed a sum not exceeding $2,000 each for actual expenses of conducting the contest.[4]

The pay and mileage of Members are disbursed by the Sergeant-at-Arms,[5] or, in case of his disability, by the Treasurer of the United States.[6] The Speaker certifies the amounts due the Members during the sessions,[7] and the Clerk during the months when the House is not in session.[8]

The statutes also provide for deductions from the pay of Members who are absent from the sessions of the House for reasons other than illness of themselves or families, or who retire before the end of the Congress,[9] but this penalty is rarely enforced.[10]

No Member is entitled to any allowance for newspapers; [11] and books ordered for Members or Delegates by resolution of either or both Houses must be paid for by the Members, except when the books are ordered printed by the Congressional Printer.[12] Each Member and Delegate is entitled to ten charts of the coast survey for each regular session of Congress.[13]

1149. The statutes provide that a Member or Delegate withdrawing from his seat before the adjournment of a Congress shall suffer deductions from his compensation.—The act of July 17, 1862,[14] provides:

> When any Member or Delegate withdraws from his seat and does not return before the adjournment of Congress, he shall, in addition to the sum deducted for each day, forfeit a sum equal to the amount

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[1] Speaker raised from $8,000 and Members from $5,000 by legislative appropriation act of 1907. (34 Stat. L., pp. 993, 994.)

[2] See Revised Statutes, sections 49 and 50, and Laws 1–43, p. 4.

[3] Revised Statutes, section 51. See. Report No. 269, third session Thirty-fourth Congress, for examination by the Judiciary Committee; also First Comptroller's Decisions (1882), Vol. III, pp. 321, 328.

[4] See 20 Stat. L., p. 400; 18 Stat. L., p. 389.

[5] See 26 Stat. L., p. 645.

[6] See Sess. Laws 1–47, p. 108, act of June 22, 1882.

[7] For statement as to early functions of the Speakers and Sergeants-at-Arms in disbursing pay, see first session Twenty-second Congress, Journal; p. 856; Debates, p. 3318.

[8] 19 Stat. L., p. 145; Revised Statutes, sections 38, 47, and 48.

[9] Revised Statutes, sections 40 and 41.

[10] See Cong. Record, first session Fifty-first Congress, p. 9922; second session Fifty-third Congress, pp. 5042–5051.

[11] Revised Statutes, section 433; 15 Stat. L., p. 35.

[12] Revised Statutes, section 42.

[13] 28 Stat. L., p. 620.

[14] 12 Stat. L., p. 628, see. 41, R. S.

which would have been allowed by law for his traveling expenses in returning home; and such sum shall be deducted from his compensation, unless the withdrawal is with the leave of the Senate or House of Representatives, respectively.

1150. The statutes provide for deductions by the Sergeant-at-Arms from the pay of a Member or Delegate who is absent from his seat without a sufficient excuse.—The act of August 16, 1872,[1] provides:

The Secretary of the Senate and Sergeant-at-Arms of the House, respectively, shall deduct from the monthly payments of each Member or Delegate the amount of his salary for each day that he has been absent from the Senate or House, respectively, unless such Member or Delegate assigns as the reason for such absence the sickness of himself or of some member of his family.[2]

1151. The old and new systems of providing clerks for Members. On July 20, 1893, in response to a series of questions by the Clerk of the House, the First Comptroller of the Treasury rendered a decision[3] that the resolution of March 3, 1893,[4] authorizing the allowance of clerk hire to Members and Delegates, House of Representatives, authorized the following: (1) That Members and Delegates should employ clerks at and during the extra or called session of Congress; (2) that where a Member or Delegate pays the clerk the agreed compensation and certifies the amount thereof in compliance with the terms of the resolution, such Member or Delegate is to be paid the amount of such expenditure; (3) that where two or more Members certify that they have each employed the same clerk and each agreed to pay him a fixed amount, the total thereof being either less or greater than $100 per month, such person may be legally paid as clerk for each of said Members and the amount each certifies he has agreed to pay him; (4) payments may be made from the contingent fund of the House to the Members and Delegates of the amounts they have paid for clerical services or to the clerks employed by such Member or Delegate or of the agreed compensation, without such payments being first sanctioned by the Committee on Accounts of the House, under the requirements of the act of October 2, 1888;[5] (5) the clerks provided under the above resolution are not required to take the oath prescribed by section 1756, Revised Statutes.

The legislative appropriation act of 1907[6] changed the system, however, and provided for the payment to—

each Member and Delegate for clerk hire, necessarily employed by him in the discharge of his official and representative duties, one thousand five hundred dollars per annum, in monthly installments.

And further provided that—

Representatives and Delegates elect to Congress whose credentials in due form of law have been duly filed with the Clerk of the House of Representatives, in accordance with the provisions of section 31, Revised Statutes of the United States, shall be entitled to payment under this appropriation.

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[1] 11 Stat. L., p. 49, sec. 40, R. S.

[2] See also section 1153 and 1154 for discussions as to this law.

[3] Decisions of the First Comptroller, 1893–94 (Bowler), pp. 43, 44.

[4] 27 Stat. L., p. 757.

[5] Supp. Rev. Stat., p. 627, par. 8.

[6] 34 Stat. L.

1152. The old law as to clerk hire for Members, and construction thereof.—On July 7, 1898, in response to a request of the Clerk of the House, the Comptroller of the Treasury [1] rendered a decision in the claim of Mr. H. H. Powers, of Vermont, chairman of the Committee on Pacific Railroads. This committee was entitled to a "session clerk," and Mr. Powers claimed that he was entitled to reimbursement, not to exceed $100 per month, for the amount expended by him for clerk hire necessarily employed in the discharge of his official and representative duties, notwithstanding he is chairman of a committee having a clerk.

The Comptroller decided:

The appropriation for the fiscal year ending June 30, 1898, as contained in the act of February 19, 1897 (29 Stat., 543), is as follows:

"To pay Members and Delegates the amount they certify they have paid or agreed to pay for clerk hire necessarily employed by them in the discharge of their official and representative duties, as provided in the joint resolution approved March third, eighteen hundred and ninety-three, during the session of Congress, and when Congress is not in session, as provided in House resolution passed May eighth, eighteen hundred and ninety-six, four hundred thousand dollars, or so much thereof as may be necessary."

This joint resolution of March 3, 1893 (27 Stat., 757), and the House resolution of May 8, 1896,[2] referred to in the appropriation, are as follows:

"That on and after April first, eighteen hundred and ninety-three, each Member and Delegate of the House of Representatives of the United States may, on the first day of each month during sessions of Congress certify to the Clerk of the House of Representatives the amount which he has paid or agreed to pay for clerk hire necessarily employed by him in the discharge of his official and representative duties during the previous month, and the amount so certified shall be paid by the Clerk out of the contingent fund of the House on the fourth day of each month to the person or persons named in each of said certificates so filed: *Provided,* That the amount so certified and paid for clerical services rendered to each Member and Delegate shall not exceed one hundred dollars for any month during the session: *And provided further,* That the provisions of this resolution shall not apply to Members who are chairmen of committees entitled under the rules to a clerk.

"That the Clerk of the House of Representatives be, and he is hereby, authorized to pay out of the contingent fund of the House to each Member and Delegate for annual clerk hire an amount not exceeding the sum of one hundred dollars per mouth, to be certified by them on the first day of each calendar month in the manner provided in the joint resolution approved March third, eighteen hundred and ninety-three: *Provided,* That the provisions of this resolution shall not apply to Members who are chairmen of committees entitled under the rules to annual clerks."

It is to be noticed that the resolution of May 8, 1896, is not a law, but simply an order of the House to its Clerk directing him to make certain payments from the contingent fund. But in view of the fact that a specific appropriation has been made to meet the expenditures contemplated by the resolution, it is clear that that appropriation is exclusive; and as the House resolution is, in effect, made a part of the appropriation, it must be considered in connection with the laws on the subject of clerk hire.

The resolution of 1893 gives the right to clerk hire to each Member who is not chairman of a committee "entitled under the rules to a clerk," and limits that right to the time Congress is in session. The resolution of 1896 grants the clerk hire to each Member for every month in the year, but excludes Members who are chairmen of committees "entitled under the rules to annual clerks."

If those two resolutions were of equal force, there could be no doubt that the later would supersede the earlier one, so that the chairman of a committee entitled to a clerk during the session only could receive the clerk-hire allowance for the entire year. But the later resolution is of no force as law except as it must be considered in construing the language of the appropriation. In my opinion all doubt is removed when we examine the appropriation act. It specifically provides for payments when Congress is in session in accordance with the resolution of 1893 (i. e., to Members who are not

[1] Comptroller R. J. Tracewell.

[2] Cong. Record, first session Fifty-fourth Congress, p. 4990.

chairmen of committees entitled to either an annual or a session clerk), and when Congress is not in session in accordance with the resolution of 1896 (i.e., to Members who are not chairmen of committees entitled to an annual clerk).

In the general deficiency appropriation act approved by the President to-day, there is the following clause:

"That hereafter Members of the House of Representatives who are chairmen of committees entitled to annual clerks shall be entitled to the same allowance for clerk hire as is authorized to other Members of the House of Representatives who are not chairmen of committees by the joint resolution approved March third, eighteen hundred and ninety-three, and by House resolution passed May eighth, eighteen hundred and ninety-six; and the appropriation for clerk hire to Members and Delegates made in the legislative, executive, and judicial appropriation act for the fiscal year eighteen hundred and ninety-nine is hereby made available to pay such clerk hire as herein provided: *Provided,* That this provision shall apply to members [chairmen?] of committees entitled to annual clerks, during the vacation of Congress only."

This legislation refers only to chairmen of committees having annual clerks, and does not affect the claim made by Mr. Powers, whose committee has a session clerk. By this act chairmen of the first-named class of committees are placed in the same position in regard to personal clerk hire as are those of the second-named class-that is, they receive the allowance only during vacation.

For the reasons stated I have to advise you that you are not authorized to pay Mr. Powers's claim.[1]

1153. The pay of a Member may be deducted on account of absence.— In 1894[2] the provisions of section 40[3] of the Revised Statutes of the United States

[1] On May 15, 1894, Mr. Barnes Compton, chairman of the Committee on the Library, which has a clerk, resigned his seat in the House, and Mr. Franklin Bartlett, of New York, under the provisions of section 3 of Rule X of the House, became chairman and assumed the duties of the position. The question then arose as to whether Mr. Bartlett was entitled to the clerk hire provided by the joint resolution of March 3, 1893 (27 Stat. L., p. 757). The First Comptroller decided (Decisions of the First Comptroller (Bowler) 1893–94, p. 259) that Mr. Bartlett was not entitled to the clerk hire.

On March 14, 1895, the Comptroller of the Treasury decided (Decisions of the Comptroller of the Treasury (Bowler), Vol. I, p. 299) that Members who were chairmen of committees of the House of Representatives of the Fifty-third Congress ceased to be such chairmen upon the expiration of that Congress on March 3, 1895, and were, under an act of March 2 (28 Stat., p. 864), extending for thirty days the allowance for clerk hire made by the joint resolution of March 3, 1893 (27 Stat., p. 757), entitled to payment on that account to the same extent as Members who had not been chairmen of committees.

On July 17, 1896, the Comptroller of the Treasury decided (Decisions of the Comptroller of the Treasury (Bowler), Vol. III, p. 22) that under the appropriation in the act of June 8, 1896 (29 Stat., p. 302), a Member of the House of Representatives was entitled to clerk hire from June 12 (the day after the adjournment of the session) to June 30, 1896, notwithstanding the session clerk to the committee of which he was chairman was paid for the entire month of June.

On July 17, 1896, the Comptroller of the Treasury, in the case of Mr. C. J. Boatner, of Louisiana, decided (Decisions of the Comptroller of the Treasury (Bowler), Vol. III, p. 20) that the act of June 8, 1896 (29 Stat., p. 302), for the payment of clerk hire to Members of the House of Representatives from the adjournment of the first session to the beginning of the second session, did not authorize payment to a Member-elect who had not qualified.

[2] Second session Fifty-third Congress, Reports H. of R., Nos. 704, 1218; Record, pp. 3797, 4130–4133. On February 19, 1897 (second session Fifty-fourth Congress, Record, pp. 2013, 2049–2057), a paragraph in the deficiency appropriation bill provided for reimbursement of those Members of the Fifty-third Congress whose pay had been deducted. This paragraph was fully debated, the method by which the Speaker made the deduction and the form of vouchers used being described; on February 20 the paragraph was stricken out by a vote of ayes 113, noes 55. On June 7, 1832 (first sessionTwenty-second Congress, Journal, p. 856; Debates, p. 3318), the Speaker made a statement of interest to the House in regard to the method of disbursement of the pay of Members.

The House voted that this statement should be printed in the Journal.

[3] See section 1150 for the exact form of this statute.

relating to the deduction of the pay of Members for absence was the subject of long and minute examination on the part of the Judiciary Committee of the House. The majority of the committee found that the statute was still in force, and recommended a resolution directing the Sergeant-at-Arms to enforce it. It does not appear that this resolution was actually adopted by the House, but the Speaker and the Sergeant-at-Arms proceeded to enforce the statute, and deductions were made from the pay of absent Members. The minority of the Judiciary Committee took the ground that the statute had been repealed, and in the reports there is an exhaustive review of the statutes relating to the pay of Members.

1154. The House has decided that the law relating to deductions from the pay of Members applies only to those who have taken the oath.—On December 16, 1869,[1] the Speaker laid before the House a letter from S. G. Ordway, Sergeant-at-Arms of the House, stating that the law of 1856[2] made it the duty of the Sergeant-at-Arms to deduct from the pay of Members the number of days which each Member should be absent during the session of Congress, except when detained by the sickness of himself or some member of his family. The Sergeant-at-Arms stated that the law was undoubtedly meant to apply to Members admitted and duly qualified at the opening of the first session; but its mandatory provisions raised a question as to whether he ought not to deduct from the pay of Members and Delegates who had been elected and taken their seats since the commencement of the present Congress the number of days the House was in session previous to their admission.

This communication was referred to the Committee on the Judiciary, and on March 16, 1870, Mr. John A. Peters, of Maine, made from that committee this report:[3]

> That in the opinion of said committee, the act of 1856, which requires a per diem deduction from the pay of Members on account of absences, being intended as a forfeiture to compel the attendance of Members who were already sworn into their seats, has no application to such as were not admitted to seats, and that no deduction shall be made on that account; such a conclusion, however, not to be construed so as to allow compensation to the Representatives of States admitted under the acts of reconstruction for any period of time prior to their election under such acts.

On March 16, 1870,[4] this report was agreed to by the House.

1155. The question relating to the compensation of Ernest M. Pollard in the Fifty-ninth Congress.

The question as to the pay of a Member elected after the beginning of the term of the Congress to fill a vacancy caused by a declination or resignation of effect on the day the term of the Congress began.

On December 13, 1906,[5] Mr. Ernest M. Pollard, of Nebraska, as a question of privilege, offered this resolution, which was agreed to by the House:

> Whereas on July 18, 1905, Ernest M. Pollard was elected to fill the vacancy in the Fifty-ninth Congress caused by the resignation of Hon. E. J. Burkett; and
>
> Whereas the Sergeant-at-Arms of the House of Representatives paid Ernest M. Pollard for the

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[1] Second session Forty-first Congress, Journal, p. 79; Globe, p. 196.

[2] Now section 40, Revised Statutes. See section 1150 of this chapter

[3] Second session Forty-first Congress, House Report No. 37.

[4] Journal, p. 477.

[5] Second session Fifty-ninth Congress, Record, pp. 351, 352.

period intervening between March 4, 1905, the beginning of the Fifty-ninth Congress, and July 18, 1905, the date of his election thereto; and

Whereas Mr. Pollard's legal right to receive pay for this period has been questioned and his action in accepting it has been severely criticised by certain parties; and

Whereas section 51 of the Revised Statutes of the United States, under which payment was made, has never been construed by the courts in a case exactly like this: Therefore, be it

Resolved by the House of Representatives, That this whole matter be referred to the Judiciary Committee of the House with instructions to investigate the legal questions involved and report its conclusions to this House before the termination of the present Congress.

On February 21, 1907,[1] Mr. John J. Jenkins, of Wisconsin, submitted the report of that committee:

[1] Report No. 8043.

Your committee have carefully examined the legal question involved as directed. The question turns, under section 51, Revised Statutes of the United States, upon whether or not there was a vacancy after the commencement of the Fifty-ninth Congress, and whether or not Mr. Pollard had a predecessor in the Fifty-ninth Congress, for, to entitle Mr. Pollard to the salary from March 4, 1905, to July 18, 1905, two things must concur. There must have been a vacancy after the commencement of the Fifty-ninth Congress, and Mr. Pollard must have had a predecessor in the Fifty-ninth Congress. Section 51 of the Revised Statutes of the United States provides that if the vacancy occurs after the commencement of the Congress to which Mr. Pollard was elected, he should be paid from the time the compensation of his predecessor ceased. To understand and apply the law, your committee state that it is found as undisputed facts that Hon. E. J. Burkett was elected to and served the full term of the Fifty-eighth Congress from the First district of the State of Nebraska; that he was elected to the Fifty-ninth Congress from the same district and State, but before the expiration of his term in the Fifty-eighth Congress, he was elected to the Senate of the United States from the State of Nebraska. Mr. Burkett received no compensation as a Member of the House of Representatives in the Fifty-ninth Congress. His compensation as a Member of the House ceased upon the close of the term of the Fifty-eighth Congress. He accepted the Senatorship before the expiration of the Fifty-eighth Congress.

On January 19, 1905, Mr. Burkett filed his resignation with the governor of the State of Nebraska as a Member of the Fifty-ninth Congress, to take effect March 4, 1905.

At a special election called for that purpose, Hon. Ernest M. Pollard was elected July 18, 1905, as a Member of the Fifty-ninth Congress, as successor to the Hon. E. J. Burkett. The President of the United States called a special session of the Senate to convene March 4, 1905, at 12 o'clock noon, and Mr. Burkett entered the Senate at that time and took the oath of office as a Senator of the United States.

The language of section 51, Revised Statutes of the United States, is as follows:

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

This statute was passed July 12, 1862, resolution No. 54, 12 Stat. L., 624.

It is very plain that there was a vacancy, but this concession does not determine the question, for the vacancy within the meaning of the statute must have occurred after the commencement of the Fifty-ninth Congress, and whether the words "commencement of the Congress" relate to the beginning of the term on March 4 or to the assembling of the Congress in December, is unnecessary for the committee to determine, because in this case no vacancy occurred after the term itself commenced.

If the vacancy occurred after the commencement of the Fifty-ninth Congress, the salary of Mr. Pollard would commence from the time the compensation of Mr. Burkett ceased, if Mr. Burkett was a predecessor of Mr. Pollard in the Fifty-ninth Congress. Unquestionably, speaking generally, Mr. Burkett was the predecessor of Mr. Pollard, but was not the predecessor within the meaning of section 51. The word "predecessor" there used means predecessor in the same Congress, when Mr. Pollard had no predecessor in the Fifty-ninth Congress. It can not be successfully urged that there might have been a small portion of time on March 4, 1905, when Mr. Burkett was a Member of this House, as a Member of the Fifty-ninth Congress—between the time when he ceased to be a Member of the Fifty-

[1] Report No. 8043.

eighth Congress and became a Senator—and therefore a predecessor of Mr. Pollard and a Member of the Fifty-ninth Congress, for the time was too short and the doctrine of relation and incompatibility would apply and prevent it.

Your committee fully agree with what the courts of the United States have said on this subject. This section (51) contemplates a vacancy occurring after the commencement of a Congress, not one existing at its commencement, and authorizes a reference back to the predecessor, who is to be found in some individual previously in the same, not a preceding Congress. (Page *v.* United States, 23 C. C. R., 4.)

"Section 51 refers only to a vacancy occurring after the commencement of a particular Congress and in the membership of that Congress," and the reference to a predecessor is plainly intended to apply only to a predecessor in that Congress. (Page *v.* United States, 127 U. S., 67.)

While no doubt the construction placed upon the statute is correct, the resignation of Mr. Burkett settles the matter beyond all question, conclusively showing that Mr. Burkett was only a Member-elect to the Fifty-ninth Congress; that there was no vacancy after the commencement of the Fifty-ninth Congress, no matter what those words mean; and that Mr. Pollard had no predecessor in the Fifty-ninth Congress. The resignation of Mr. Burkett took effect March 4, 1905, on the day of the commencement of the term of the Fifty-ninth Congress. Generally speaking, the law does not regard fractions of a day, but when important to the ends of justice or conflicting interests are involved the courts have, as in the case of the approval of a statute or an act done, ascertained the precise time of the approval of the statute or the doing of the act. This is not such a case. Mr. Burkett elected to have the resignation effective March 4, and when that day came the resignation went into effect. In such case the law can not and will not regard a fraction of a day. When March 4, 1905, came, Mr. Burkett ceased to be a Member of the House of Representatives of the Fifty-ninth Congress, and the time of day that the two separate acts became final and operative is immaterial.

Neither can your committee find any warrant for the payment of this compensation under section 38 of the Revised Statutes. The material part of this section is as follows:

"Representatives and Delegates-elect to Congress whose credentials in due form of law have been filed with the Clerk of the House of Representatives in accordance with the provisions of section 31, may receive their compensations monthly from the beginning of their term until the beginning of the first session of each Congress, etc."

Undoubtedly the expression herein "from the beginning of their term "relates to the term for which each Member is elected. If it had been intended by this section that Members-elect should be paid by the Sergeant-at-Arms from the beginning of the term of the Congress to which they am elected, the Language would have been different. The use of the expression "the term" instead of "their term" would make some difference in the meaning of the section. What was the term of Mr. Pollard? Undoubtedly it was the unexpired term of the Fifty-ninth Congress, existing or remaining on the date of his election. He had nothing to do with and no relation to any part of this term that had expired before he was elected. His term commenced on July 18, 1905, the day of his election, and upon the proper filing of his certificate of election it was the duty of the Sergeant-at-Arms to pay him his salary from that day until the first assembling of the Fifty-ninth Congress. There was no warrant of law for the payment to him of any compensation for any period of time prior to his election. The payment to him, therefore, of compensation from Much 4, 1905, to July 18, 1905, was without authority of law.

Your committee concludes therefore that the Hon. Ernest M. Pollard was not entitled to compensation as a Member of this House from March 4, 1905, to July 18, 1905, under section 51 of the Revised Statutes of the United States.

A bill (H. R. 25771) "to authorize the Treasurer of the United States to receive $1,861.84 from Ernest M. Pollard," etc., was introduced after the Judiciary Committee had reported, and was referred to the Committee on Ways and Means. On February 22, 1907,[1] Mr. Charles H. Grosvenor, of Ohio, from that committee reported the bill with the following recommendations:

Your committee is unable to concur in the opinion of the Committee on the Judiciary, and, without elaborating the argument, we find that the resignation of Mr. Burkett did not take effect until the 4th

[1] Report No. 8064.

day of March, 1905, and that on that day his resignation created a vacancy in the membership of the Fifty-ninth Congress, and therefore coming within the statute, which is as follows:

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

We believe that Mr. Pollard was entitled to his pay and that the proper construction of the statute was put upon it by the disbursing officer of the House of Representatives. But inasmuch as Mr. Pollard insists on returning this money to the Treasury of the United States, and for the purpose of aiding him to that end, we advise the following amendments:

In line 8 strike out the words "without authority of law," and insert at the end of line 9 the following:

"prior to his election as a Member of the Fifty-ninth Congress to fill a vacancy, which salary the said Pollard desires to return to the Treasury, the said funds to be credited to the general funds of the United States."

No action was taken by the House.

1156. The Speaker during sessions and the Clerk during recesses of Congress certifies to the compensation of Members; and the Speaker certifies as to mileage.—The act of July 28, 1866,[1] provides:

The salary and accounts for traveling expenses in going to and returning from Congress of Senators shall be certified by the President of the Senate, and those of Representatives and Delegates by the Speaker of the House of Representatives.

The Act of August 15, 1876,[2] provides:

The Clerk of the House of Representatives is authorized and directed to sign, during the recess of Congress after the first session, and until the first day of the second session, the certificates of the monthly compensation of Members and Delegates in Congress, which certificates shall be in the form now in use and shall have the like force and effect as is given to the certificate of the Speaker.

The Act of March 3, 1873,[3] provides:

Representatives and Delegates-elect to Congress, whose credentials in due form of law have been duly filed with the Clerk of the House of Representatives, in accordance with the provisions of section 31, may receive their compensation monthly from the beginning of their term until the beginning of the first session of each Congress, upon a certificate in the form now in use to be signed by the Clerk of the House, which certificate shall have the like force and effect as is given to the certificate of the Speaker.

1157. Certificates of salary and mileage of Members may be signed for the Speaker by a designated employee.

A joint resolution, approved November 12, 1903,[4] provides:

Resolved, That the Speaker is authorized to designate from time to time some one from among those appointed by him and appropriated for and employed in his office, whose duty it shall be under the direction of the Speaker to sign in his name and for him all certificates required by section forty-seven of the Revised Statutes for salary and accounts for traveling expenses in going to and returning from Congress of Representatives and Delegates.

1158. The statutes provide for Members a mileage of 20 cents a mile going to and coming from each regular session of Congress.—The statutes provide that Members shall receive mileage at the rate of 20 cents per mile, to be estimated by the nearest route usually traveled in going to and returning from each

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[1] 14 Stat. L., p. 323, see. 47, R. S. See page 191 of Vol. 5 of Opinions of Attorneys-General for opinion of Attorney-General Reverdy Johnson as to the effect of the certificate of the Speaker and President of the Senate as to salaries.

[2] 19 Stat. L., p. 145.

[3] Sec. 38, R. S., 17 Stat. L., p. 488.

[4] 33 Stat. L., p. 1.

regular session, the accounts to be certified by the Speaker,[1] and the mileage to be payable on the first day of each session.[2] In no case may "constructive mileage" be computed or paid.[3] In case a Member leaves his seat before the adjournment, of Congress without leave, and does not return thereto, he forfeits a sum equal to his mileage for his return home.[4] The certificate of the Speaker of the House of Representatives, as to the salary and mileage, is conclusive upon all departments of the Government, and the Comptroller has no jurisdiction to render a decision upon the amount due to a Member for salary or mileage.[5]

1159. The law relating to mileage of Members applies only to the regular sessions of Congress.—On July 22, 1893, the First Comptroller decided that section 17 of the act of July 28, 1866,[6] which provides for the pay of the mileage of Members, applied only to regular sessions, and would not apply to the extra session about to meet in the coming August.[7]

1160. An appropriation for mileage of Members at a regular session is authorized by law, although mileage may have been appropriated for a preceding special session.

In the later view an existing session ends with the day appointed by the Constitution for the regular annual session.

Citation of statutes relating to the pay and mileage of Members.

On January 29, 1904,[8] the urgent deficiency appropriation bill was under consideration in Committee of the Whole House on the state of the Union, when this paragraph was read:

HOUSE OF REPRESENTATIVES.

For mileage of Members of the House of Representatives and Delegates from Territories for the second session of the Fifty-eighth Congress, $145,000.

SENATE.

For mileage of Senators for the second session of the Fifty-eighth Congress, $45,000.

Mr. John W. Maddox, of Georgia, made the point of order that the appropriation was not authorized by existing law.

The question of order was debated at length on this day and on January 30, with abundant citations of precedents and a discussion of the constitutional question involved.

At the conclusion of the debate the chairman held:[9]

The question raised by the point of order made by the gentleman from Georgia [Mr. Maddox] does not involve the question of whether or not Senators, Representatives, and Delegates attending Congress at this time should or should not receive mileage. That is a question for the Committee of the Whole to decide and not the Chair. The question presented to the Chair is the parliamentary

[1] 14 Stat. L., p. 323; Sess. Laws, first session Forty-third Congress, p. 4.

[2] 11 Stat. L., p. 367.

[3] 11 Stat. L., pp. 442, 443.

[4] Revised Statutes, section 41.

[5] Decisions of Comptroller, Vol. II, p. 339. (January 10, 1896.)

[6] 14 Stat. L., p. 323.

[7] Decision of the First Comptroller, 1893, 1894 (Bowler), p. 48.

[8] Second session Fifty-eighth Congress, Record, pp. 1397–1402, 1407–1415.

[9] James A. Tawney, of Minnesota, chairman.

question of whether or not there is any existing law authorizing the payment of the mileage for which it is proposed to appropriate the amount stated in this bill.

The legislative, executive, and judicial appropriation bill passed at the last session of the Fifty-seventh Congress appropriated for the payment of mileage to Senators, Representatives, and Delegates attending the first annual session of the Fifty-eighth Congress. This appropriation, however, was not available until the day appointed by the Constitution for the assembling of this Congress at its first annual session.

The Fifty-eighth Congress was convened by proclamation of the President of the United States November 9, 1903. Soon thereafter it passed the following resolution:

"Resolved, etc., That the appropriations for mileage of Senators, Members of the House of Representatives, and Delegates from the Territories made in the legislative, executive, and judicial appropriation act for the fiscal year 1904, approved February 25, 1903, be, and the same are hereby, made immediately available and authorized to be paid to Senators, Members of the House of Representatives, and Delegates from the Territories for attendance on the first session of the Fifty-eighth Congress."

By this resolution the money appropriated for the payment of mileage at the session of this Congress beginning on the first Monday of December last was paid to Senators, Representatives, and Delegates attending the session of this Congress convened by the President. By the wording of this resolution Congress declared that the session convened by the President was the first session of the Fifty-eighth Congress. It is now declared by the paragraph in this urgency deficiency appropriation bill that this is the second session of this Congress, and it is proposed to appropriate money for the payment of mileage to Senators, Representatives, and Delegates attending upon this second session.

The gentleman from Georgia makes the point of order against this paragraph, claiming there is no existing law authorizing the appropriation, and that therefore the paragraph is not in order under section 2 of Rule XXI, which is as follows:

"2. No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress; nor shall any provisions changing existing law be in order in any general appropriation bill or in any amendment thereto."

The Chair has spent some time in endeavoring to ascertain what, if any, law there is governing the payment of mileage. As a result of this investigation it has been ascertained that under various statutes Senators, Representatives, and Delegates attending the sessions of Congress have received mileage whether the session was convened by the President or assembled at the time fixed by the Constitution or by statute, the only exception being in the Fortieth Congress. When the act fixing the 4th of March for the assembling of Congress, in addition to the times fixed by the Constitution, was passed, by that act it was provided that Members and Senators of the previous Congress should not receive mileage for attendance upon the session beginning March 4, and for the information of the committee, and with its permission, the Chair will print, in connection with this ruling, these several statutes.

The act of 1874, repealing the increase of salaries of Members of Congress to $7,500 a year, revived the act of 1866, since which time there has been no legislation upon this subject. Therefore the act of 1866 is the law in force to-day in respect to the compensation to be paid to Senators, Representatives, and Delegates, and also the law now in force governing the question of mileage. This law reads as follows:

"SEC. 17. *And be it further enacted,* That the compensation of each Senator, Representative, and Delegate in Congress shall be $5,000 per annum, to be computed from the first day of the present Congress, and in addition thereto mileage at the rate of 20 cents per mile, to be estimated by the nearest route usually traveled in going to and returning from each regular session."

It will be observed that the language of this act in respect to mileage is significant, and from it there can be but one conclusion, and that is that the mileage authorized to be paid is intended as additional compensation without any particular reference to the expense incurred in traveling to and from the sessions of Congress, just as the law allows a certain per diem in addition to the salary paid to the officers and agents of the Government who are obliged to travel on the business of the Government or in the discharge of their duties. The language which follows is merely descriptive of how the mileage authorized to be paid is to be estimated. The law says it is "to be estimated by the nearest route usually traveled in going to and returning from each regular session." In the opinion of the Chair the words "regular session" do not mean alone the sessions of Congress convened under authority of the Con-

stitution, but rather that this mileage is to be paid at any session of Congress lawfully convened, and the amount is to be estimated as stated in the act—that is, on the same basis that mileage is paid to Senators and Representatives when attending the regular or annual sessions provided for by the Constitution.

Of course no one contends that under this law Senators and Representatives and Delegates are entitled to more than one payment as mileage for attending one session of Congress. The question, therefore, of whether this paragraph is in order or whether there is any existing law authorizing the appropriation of this money turns upon the proposition of whether Congress is now in the session convened by the President of the United States or whether that session expired by operation of law, and Congress is now in session under and by virtue of that provision of the Constitution which designates the first Monday in December as the day when it shall assemble in annual session.

When this Congress convened on November 9 the business of the Congress proceeded as usual, and it was in session on Saturday, December 5, 1903, the last secular day before the first Monday in December. In the House of Representatives, at the close of that day, as appears from the Record, the simple motion to adjourn was agreed to, and the Speaker announced, "The House stands adjourned," without adding, as usual, the day to which the "House stands adjourned." No resolution to terminate the session was proposed. In the Senate on the same day it was voted to take a recess until 11.50 a.m., Monday, December 7. On that day and hour the Senate met, and after the transaction of the usual business and the adoption of the usual vote of thanks to the presiding officer, the hour of 12 o'clock having arrived, the President pro tempore said:

"Senators, the hour provided by law for the meeting of the first regular session of the Fifty-eighth Congress having arrived, I declare the extraordinary session adjourned without day."

And the President pro tempore left the chair.

Immediately thereafter the President pro tempore called the session to order for the second session of the Fifty-eighth Congress.

In the House at the same hour the Speaker called the House to order and, after prayer by the Chaplain, directed that the roll be called by States to ascertain the presence of a quorum, and business proceeded as at the beginning of a session. The usual resolution was passed, notifying the President of the United States that the second session of the Fifty-eighth Congress was assembled and that a quorum of the two Houses was present and ready to receive any message which he might deem proper to submit.

This is a complete Statement, as shown by the Record, of what took place in the two Houses of Congress on December 5 and December 7.

On the following day the Journal of the House records the fact that on Monday, December 7, the second session of the Fifty-eighth Congress assembled. The language of the Journal is as follows:

"JOURNAL OF THE HOUSE OF REPRESENTATIVES, CONGRESS OF THE UNITED STATES.

"Begun and held at the Capitol, in the city of Washington, in the District of Columbia, on Monday, the 7th day of December, in the year of Our Lord 1903, being the second session of the Fifty-eighth Congress, held under the Constitution of the Government of the United States, and in the one hundred and twenty-eighth year of the Independence of said States.

"MONDAY, *December 7, 1903.*

"On which day, being the day fixed by the Constitution of the United States for the meeting of Congress, Joseph G. Cannon, the Speaker (a Representative from the State of Illinois), and the following Members of the House of Representatives answered to their names."

This journal declaring this to be the second session of the Fifty-eighth Congress was unanimously approved by the House. The Journal of the Senate reciting the same facts was likewise approved.

In the opinion of the Chair the question of whether this is a continuation of the session of Congress convened by the President or the second session convened under and by virtue of the provision of the Constitution fixing the time for the assembling of Congress is a mixed question of law and fact, and the Chair, as the presiding officer of this committee appointed by the Speaker of the House, in deciding this question is bound to take cognizance of what the House itself has done in determining whether or not this is or is not the second session of the Fifty-eighth Congress.

As a matter of law, the Chair is clearly of the opinion that the session of this Congress convened by the President of the United States terminated when the moment of time arrived for the Congress to convene in its regular annual session under the Constitution. That session of Congress there termi-

nated by operation of law, not because there is any law fixing the limit of time that a session of Congress convened by the President should remain in session, but because of the constitutional provision fixing the time when the first regular annual session of this Congress should convene. The contention that because Congress was in session on the last secular day preceding the first Monday in December, and that there was no formal termination of this session at that time, and that therefore this is a continuation of that session, seems to the Chair untenable. It would, in the opinion of the Chair, be as reasonable to say that because there will be no formal ending of to-day and no formal beginning of to-morrow therefore Saturday will continue forever or throughout our existence.

The illustration used by the gentleman from Maine to prove his contention that this is a continuous session—namely, that if the House was in the act of calling the roll upon the passage of some bill when the hour arrived for the convening of Congress in its annual or constitutional session that the roll call could not be further proceeded with—does not prove anything. As a matter of fact, and as the records of Congress show, that incident or circumstance has occurred on several occasions when the time for the termination by operation of law of the second annual session of Congress arrived. The opinion of the Chair that the first session of the Fifty-eighth Congress convened by the President terminated by operation of that provision of the Constitution which fixes the time for the beginning of the annual session of this Congress is not without precedent.

In the Fortieth Congress this same question arose. Just at the close of the extra session, Mr. Sherman, then a Senator from Ohio, said:

"I can not see any object in passing this concurrent resolution."

The concurrent resolution he referred to was that the presiding officers of the two Houses should at a specified time declare their respective Houses adjourned without day.

Said Mr. Sherman:

"The Constitution provides that the regular session of Congress shall be on the first Monday of December, and, according to law, I believe—or, at any rate, such is the usage—the hour for meeting on that day is 12 o'clock. We shall meet at that time in a new session. The recent law has not changed that regular time of meeting, and the result is that the next session of Congress will commence necessarily at noon on Monday."

Mr. Sumner, on the same occasion, said:

"And that brings me to the exact point as to whether the present session should expire precisely at the time when the coming session begins. I see no reason why it should not. I see no reason why we should interpose the buffer even for five minutes."

It was proposed to adjourn to 11 o'clock and 55 minutes.

"Let one session come right up close upon the other, and then we shall exclude every possibility of evil consequences from the character of the Chief Magistrate. * * * Now, I know not why when this session expires we may not at the same time announce the beginning of the new session."

These quotations, taken from the Globe, show that in the judgment of such men as Mr. Sherman and Mr. Sumner, two of the ablest men in either House of Congress at that time, if not since, the called session of the Fortieth Congress expired by operation of law when the time for the Congress to assemble under the Constitution arrived.

The proceedings of the Forty-fifth Congress have been referred to, and the Chair desires to present to the committee in support of its ruling the history of the matter from the precedents prepared by Mr. Asher C. Hinds, clerk at the Speaker's table.

On October 15, 1877, Congress met in extraordinary session on the call of the President and remained in session until the first Monday in December, the day appointed by the Constitution for the regular assembling of Congress.

On Saturday, December 1, 1877, Mr. Fernando Wood, of New York, offered the following resolution, which was agreed to by the House:

"Resolved (the Senate concurring), That the President of the Senate and the Speaker of the House of Representatives be, and they are hereby, directed to adjourn their respective Houses, without delay, at 3 o'clock p.m. this day."

Later on the day of December 1 the House took a recess until 10 a.m. of the calendar day of Monday, December 3, the day prescribed by the Constitution for the meeting of the regular session of Congress.

On the same day, December 1, the Senate adjourned until Monday, December 3, at 10 a.m.

As soon as the Senate had approved its Journal on Monday, December 3, Mr. George F. Edmunds, of Vermont, offered this resolution, which was agreed to without debate:

"Resolved by the Senate (the House of Representatives concurring), That it is the judgment of the two Houses that the present session of Congress expires by operation of law at 12 o'clock meridian this day."

On the same day this resolution was agreed to by the House without debate.

After the above resolution had been agreed to the Senate took up the resolution of the House of December 1, and agreed to it with an amendment striking out the words "3 o'clock p.m. this day" and inserting "11 o'clock and 50 minutes a.m., Monday, the 3d of December, instant." The House concurred in that amendment.

Then the two Houses agreed to the usual resolutions authorizing the appointment of a joint committee to wait on the President and inform him of the adjournment.

And at 11.50 a.m. the Speaker declared the House adjourned sine die in accordance with the resolution of the two Houses; and ten minutes later the Speaker, at 12 m., called the House together in the new session, the roll being called by States.

Some gentlemen have said that the value of this precedent is practically destroyed because the resolution declaring it to be the judgment of both Houses of Congress that the extra session expired by operation of law was agreed to without debate. The Record shows that there was considerable discussion over this proposition. There was some trouble or fear of trouble in the matter of securing a sine die adjournment, and at the last moment, in order that the question might be settled, Senator Edmunds offered the concurrent resolution expressing the judgment of the two Houses upon this question.

In the judgment of the Chair, therefore, the session of Congress convened by the President on November 9, 1903, terminated by operation of law; that this is a session of Congress separate and distinct from that one, and, as declared by the unanimously approved Journals of the House and Senate, is the second session of the Fifty-eighth Congress. It being the regular annual session, and as the law of 1866 authorizes the payment of mileage to Senators, Representatives, and Delegates attending this session, in the opinion of the Chair the paragraph appropriating the money for the payment of that mileage is clearly in order.[1]

The Chair therefore overrules the point of order.

1161. Each Member is allowed $125 annually for stationery and the Clerk maintains a stationery room for supplying articles.

The Clerk furnishes stationery to the several committees and to the offices of the House.

The stationery for the use of the House is contracted for by the Clerk.[2] The annual appropriation allows $125 to each Member for stationery, or commutation therefor. By resolution of the House[3] the clerk is required to deliver to every Member of the House the usual articles of stationery furnished to Members to an amount not exceeding in value that authorized by law, at the cost price, in the stationery room, or, at the option of the Members, to pay them the proper commutation in money; to keep a true and accurate account of all stationery which he may so deliver to the several Members of the House; and if in any case a Member shall receive a greater amount of stationery during any session than is above provided, the Clerk shall, before the close of such session, furnish to the Sergeant-at-Arms an account of such excess beyond the amount above specified, who is required to deduct the amount of such excess from the pay and mileage of such Member, and refund the same into the Treasury. This limitation is not intended to be made

[1] The Chair inserted as an appendix to this decision the various statutes enacted for compensation and mileage for Members of Congress:

[2] See section 251 of Vol. I of this work.

[3] Second session Fortieth Congress, Journal, p. 1173.

applicable to the use of wrapping paper and envelopes which may be required in the folding room.

The Clerk is also authorized and required to deliver to the chairman of each of the committees of the House, for the use of such committees, and to the Postmaster, Sergeant-at-Arms, and Doorkeeper, for the use of their respective offices, at every session of Congress, similar articles of stationery, not exceeding in value an amount which from time to time shall be fixed upon by the Committee on Accounts and approved by the Speaker.

Stationery for the House and committees, except such as is purchased for sale in the stationery room, is furnished by the Public Printer on requisition from the Clerk.[1]

The act of February 12, 1868,[2] provided:

"From and after the 3d day of March, 1868, no Senator or Representative shall receive any newspapers except the Congressional Globe, or stationery, or commutation therefor, exceeding one hundred and twenty-five dollars for any one session of Congress."

1162. By the legislative, executive, and judicial appropriation bill of March 3, 1893, a sum was appropriated which would allow $125 to each Member for stationery for the fiscal year 1894. The question arose as to whether the commutation of $125 might be allowed during the extra session of Congress; and the First Comptroller decided that it might be, as there was no time fixed when the commutation should be made. A Member might avail himself of his right whenever he should see fit. Whether or not the Member would be entitled to additional stationery or commutation therefor during the regular session would depend upon whether Congress made an appropriation therefor and also upon such rules as the House might adopt.[3]

1163. Conditions under which the franking privilege is exercised by the Member.—No allowance is made the Member for postage;[4] but Members and Delegates and the Clerk may send and receive free through the mail all public documents printed by order of Congress, the name of the user and designation of the office being written thereon, this privilege continuing until the 1st day of December following the expiration of the user's term of office.[5] The Congressional Record or any part thereof, or speeches or reports contained therein, may, under the frank of a Member or Delegate, to be written by himself, be carried free under such regulations as the Postmaster-General may prescribe.[6] Seeds transmitted by the Commissioner of Agriculture, or by any Member or Delegate receiving seeds from the Department for transmission, are sent free in the mails under frank, and this privilege applies to ex-Members and ex-Delegates for a period of nine months after the expirations of their terms.[6] The Public Printer furnishes to the Department of Agriculture for the use of Members franks for the transmission of seeds.[7] Members, Members-elect, Delegates, and Delegates-elect may send free through the mails, under their franks, any mail matter to any Government official or to any

[1] 28 Stat. L., p. 624.

[2] 15 Stat. L., p. 35.

[3] Decision First Comptroller, 1893–94 (Bowler), p. 47.

[4] Rt. S., sec. 44.

[5] 19 Stat. L., p. 336; 20 Stat. L., p. 10.

[6] 18 Stat. L., p. 343.

[7] 32 Stat. L., pp. 741, 742.

person, correspondence not exceeding 2 ounces in weight upon official or departmental business.[1]

1164. Penalties are provided for attempts to bribe Members; and a Member may not be interested in a public contract.—The statutes of the United States prescribe severe penalties for whomsoever attempts to bribe a Member of either House of Congress with intent to influence his vote or decision on any matter pending in either House; and also for any Member who solicits or receives such a bribe, or who receives any valuable consideration for services in regard to contracts or offices under the Government or claims, etc., against the Government.[2] Neither may Members be interested in any public contract.[3]

1165. A Member who was interested in a contract forbidden to him by law was relieved by legislation.—In 1867 a joint resolution was passed (S. Res. 29) by Congress and signed by the President, canceling a contract into which a citizen who subsequently became a Member of Congress had entered before his election for the transportation of mails. The law forbade (act of Congress approved April 21, 1808) a member of Congress being interested in a contract.[4]

1166. Opinion of the Attorney-General as to construction of the statute forbidding Members from being interested in contracts.—On October 21, 1903,[5] the Attorney-General of the United States, P. C. Knox, submitted to the Secretary of War an opinion as to the provision of law relating to the interest of Members of Congress in contracts:

The provision of law referred to, as carried into the Revised Statutes (section 3739), reads as follows:

"No Member of or Delegate to Congress shall directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States by any officer or person authorized to make contracts on behalf of the United States. Every person who violates this section shall be deemed guilty of a misdemeanor, and shall be fined three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced on the part of the United States, in consideration of any such contract or agreement, it shall be forthwith repaid; and in case of refusal or delay to repay the same, when demanded by the proper officer of the Department under whose authority such contract or agreement shall have been made or entered into, every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law for the recovery of any such sum of money so advanced."

Your inquiry is this: If a contract under the jurisdiction of your Department is entered into in violation of the above section and is completely executed on both sides, the articles contracted for having been delivered and the consideration paid at the time of the delivery, what portion of the consideration, if any, is subject to a demand for repayment?

The answer, which seems clear, turns entirely on the sense in which Congress used the word "advanced" or some form of it. Did it use it in its legal sense, or in a broader sense, including not only "advances," strictly speaking, but payments made upon the delivery of the thing, or the performance of the work contracted for? The word, as you point out, has always had a definite and well-understood meaning in law. An "advance," in connection with a contract, is something paid in

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[1] 28 Stat. L., p. 622; 26 Stat. L., p. 1081; 30 Stat. L., p. 443.

[2] The law also provides that no Member shall practice in the Court of Claims. (Revised Statutes, section 1058.)

[3] See Revised Statutes, sections 5450, 5500, 1781, 1782.

[4] First session Fortieth Congress, Journal, p. 360; Globe, p. 93.

[5] Vol. 25, Opinions of Attorneys-General, p. 71.

anticipation of the performance of the contract—a part of the consideration paid in "advance" of the delivery of the thing, or the performance of the work bargained for. It is therefore plain that the term is without meaning or significance except where the contract is in an executory state. If the thing contracted for was delivered and the consideration paid at the time of the delivery-in other words, if the contract has been executed—there can, of course, be no such thing as an "advance" in the legal sense of the word. Whence it follows that in the case you put, which is the case of an executed contract, the Government having received and paid for all it contracted for, you are not authorized by section 3739 of the Revised Statutes to demand the repayment of any portion of the consideration paid by the Government, if the term "advance," as used in that section, is to be understood in its general legal acceptation.

The issue, then, narrows down to this: Did Congress, in the enactment of the provision in question, use the word "advance" in any other than its generally accepted legal meaning? I am clear that it did not.

1167. In recent, as well as early, practice a Member frequently informs the House by letter that his resignation has been sent to the State executive, such letter being presented as a privileged question.—On January 4, 1887,[1] the Speaker[2] as a privileged question laid before the House a letter from Mr. Abram S. Hewitt, of New York, informing the House that he had tendered his resignation, to take effect on the 1st day of January, 1877.

1168. On January 17, 1887,[3] Mr. William McAdoo, of New Jersey, as a question of privilege, submitted to the House the letter of Mr. Robert S. Green, of New Jersey, in which the latter announced his resignation, which he had forwarded to the governor of New Jersey, to take effect on the date of the letter.

The letter, which was addressed to the Speaker, was read and ordered to lie on the table, in accordance with the usual custom.

1169. On April 16, 1830,[4] the Speaker laid before the House a letter from Mr. John M. Goodenow, of Ohio, informing the House that he had transmitted his resignation as Congressman to the governor of Ohio.

1170. On January 23, 1816,[5] Mr. Peter B. Porter, of New York, informed the House, by letter to the Speaker, that he had transmitted his resignation to the governor of New York.

1171. As early as 1797[6] it appears to have been the practice for a Member to transmit his resignation to the executive of his State.

1172. On January 4, 1858,[7] Mr. Speaker Orr laid before the House, by unanimous consent, a letter from Mr. Nathaniel P. Banks, of Massachusetts, informing the House that he had transmitted his resignation to the governor of his State.

1173. On January 8, 1834,[8] the Speaker laid before the House a letter from Mr. H. A. Bullard, of Louisiana, informing the House, through the Speaker, that his seat had become vacant by resignation addressed to the State of Louisiana. The letter was read and laid on the table.

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[1] Second session Forty-ninth Congress, Journal, p. 164.

[2] John G. Carlisle, of Kentucky, Speaker.

[3] Second session Forty-ninth Congress, Journal, p. 293; Record, p. 739.

[4] First session Twenty-first Congress, Journal, p. 544.

[5] First session Fourteenth Congress, Journal, p. 212.

[6] Second session Fifth Congress, Journal, pp. 95, 433 (Gales & Seaton ed.).

[7] First session Thirty-fifth Congress, Journal, p. 121.

[8] First session Twenty-third Congress, Journal, p. 172; Debates, p. 2364.

On January 15,[1] Mr. John Davis, of Massachusetts, informed the Speaker by letter that he had "signified to the government of the State of Massachusetts" his resignation of his seat in the House. This letter was read and laid on the table.

1174. On April 16, 1830,[2] the Speaker laid before the House a letter from Mr. John M. Goodenow, of Ohio, informing the House that he had transmitted his resignation as Congressman to the governor of Ohio.

1175. On December 18, 1860,[3] the Speaker, by unanimous consent, laid before the House a letter from Mr. Israel Washburn, jr., of Maine, informing the House that he had resigned his seat as a Member, the resignation to take effect on January 1, 1861.

1176. On January 7, 1884,[4] the Speaker laid before the House a letter from Mr. George D. Robinson, of Massachusetts, informing the House that, having been elected governor of Massachusetts, he had delivered to the governor of the Commonwealth his resignation of the office of Representative to the Forty-eighth Congress from the Twelfth Congressional district of Massachusetts.

1177. Forms of letters tendering a Member's resignation to the House or the governor of a State.

Instance wherein a Member tendered his resignation to take effect at a future date.

On December 13, 1906,[5] the Speaker laid before the House the following communication, which was read and laid on the table:

HOUSE OF REPRESENTATIVES
COMMITTEE ON INSULAR AFFAIRS,
Washington, D. C., December 13, 1906.

To the SPEAKER:

I herewith tender my resignation as a Member of the Fifty-ninth Congress, to take effect on the 15th day of January, 1907.

I have the honor to inclose a copy of a letter addressed to the Hon. John I. Cox, governor of Tennessee, notifying him of my said resignation.

I have the honor to be, respectfully,

M.R. PATTERSON,
Member of Congress, Tenth District, Tennessee.

DECEMBER 13, 1906.

His Excellency JOHN I. COX,

Governor of Tennessee.

SIR: I have the honor to notify you that I have this day tendered my resignation as a Member of the Fifty-ninth Congress to the Speaker of the House of Representatives, said resignation to take effect January 15, 1907.

A copy of said resignation is herein inclosed.

I have the honor to be, respectfully,

M. R. PATTERSON,
Member of Congress, Tenth District, Tennessee.

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[1] Journal, p. 205.

[2] First session Twenty-first Congress, Journal, p. 544.

[3] Second session Thirty-sixth Congress, Journal, pp. 90, 91; Globe, p. 121.

[4] First session Forty-eighth Congress, Journal, p. 211.

[5] Second session Fifty-ninth Congress, Record, p. 370.

1178. On May 2, 1902,[1] the following communication was presented to the House by the Speaker, read, and laid on the table:

HOUSE OF REPRESENTATIVES, UNITED STATES,
Washington, D. C., May 1, 1902.

HON. DAVID B. HENDERSON,

Speaker of the House of Representatives.

SIR: I beg leave to inform you that I have this day transmitted to the governor of the Commonwealth of Massachusetts my resignation as a Representative in the Congress of the United States from the Sixth Massachusetts district.

I have the honor to be, your obedient servant,

WILLIAM H. MOODY.

1179. In a few instances Members have announced their resignations to the House verbally.—On July 14, 1856,[2] a resolution for the expulsion of Mr. Preston S. Brooks, of South Carolina, was disagreed to, and thereupon Mr. Brooks rose, and having by unanimous consent submitted remarks, announced that he—

was no longer a Member of the Thirty-fourth Congress.

On July 16, 1856,[3] Mr. Lawrence M. Keitt, of South Carolina, who had been censured by the House, rose, and after submitting remarks, announced that—

he was no longer a Member of this House.

The Globe indicates that he announced that he had sent his resignation to the governor of his State, but this does not appear from the journal.

1180. The journal of July 30, 1850,[4] has this entry:

Robert C. Winthrop, a Member from the First Congressional district, in the State of Massachusetts, rose and announced his resignation of his seat in the House.

The record of debates shows that Mr. Winthrop gave the reason for his resignation—his appointment to the Senate—requested that the fact of his resignation be announced in the usual form to the governor of Massachusetts, and took farewell of the House.

1181. A Member may resign his seat by a letter transmitted to the House alone.—On February 11, 1802,[5] the Speaker laid before the House a letter from Mr. Richard Sprigg, of Maryland, containing his resignation of his seat in the House.

On March 24[6] Mr. Walter Bowie, his successor, appeared and took the oath. March 25, the Committee on Elections, to whom were referred Mr. Bowie's credentials, reported that he appeared to have been duly elected, and that—

the resignation of Richard Sprigg satisfactorily appears from his letter of the 10th of February last, addressed to the Speaker of the House of Representatives.

1182. On March 28, 1796,[7] the Speaker laid before the House a letter from Gabriel Duvall containing his resignation of a seat in the House as one of the Members for the State of Maryland. The letter was read and ordered to lie on the table.

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[1] First session Thirty-first Congress, Journal,. p. 1271.

[2] First session Thirty-fourth Congress, Journal, p. 1202; Globe, p. 1629.

[3] Journal, p. 1221; Globe, p. 1646.

[4] First session Thirty-first Congress, Journal, p. 1205; Globe, p. 1474.

[5] First session Seventh Congress, Journal, p. 93 (Gales & Seaton ed.)

[6] Journal, pp. 156, 158.

[7] First session Fourth Congress, Journal, p. 485 (Gales & Seaton ed.).

1183. On August 17, 1850,[1] the Speaker, by unanimous consent, laid before the House a communication from Charles M. Conrad, tendering his resignation as Representative from the Second Congressional district of Louisiana.

1184. On August 4, 1852,[2] the Speaker, by unanimous consent, laid before the House a communication from Mr. Humphrey Marshall, resigning his seat in this House as a Member from the State of Kentucky.

1185. Three Members resigned during the second session of the Forty-fourth Congress—Smith Ely, jr., of New York, on December 12, 1876; William B. Spencer, of Louisiana, on January 17, 1877, and Frank Hereford, of West Virginia, on January, 31 1877. Each of these resignations was tendered to the House in a communication addressed to the Speaker, and not in the form of a letter informing the House that the resignation had been transmitted to the governor of the State.[3]

1186. On July 27, 1846,[4] the President of the Senate laid before the Senate a letter from William H. Haywood, jr., resigning his seat as one of the Senators from North Carolina.

Some discussion arose, participated in by Messrs. Webster, Calhoun, and Berrien, as to the form of resignation. It seemed to be the opinion that it was according to usage for the Senator to send his resignation to the President of the Senate, and for the Senate, on motion made and carried, to authorize the President of the Senate to communicate the fact of the resignation to the executive of the State.

1187. When a Member resigns directly to the House, it is the practice to inform the State executive of the vacancy.—On April 9, 1806,[5] the Speaker laid before the House a letter from Joseph Hopper Nicholson, esq., one of the Members from the State of Maryland, containing the resignation of his seat in the House.

On April 10—

Resolved, That the Speaker be requested to inform the executive of the State of Maryland of the resignation of Joseph H. Nicholson, one of the Representatives from that State.

On November 23, 1804,[6] Mr. Samuel L. Mitchell, of New York, who had been elected a Senator of the United States, transmitted his resignation by letter to the Speaker, and the same having been laid before the House, the Speaker was directed to inform the executive of New York of the resignation.

1188. February 17, 1808,[7] the Speaker laid before the House a letter from Mr. David Thomas, of New York, containing his resignation as a Member. The House thereupon directed the Speaker to inform the executive of the State of New York.

1189. On May 19, 1830,[8] the Speaker laid before the House a letter from Mr. James W. Ripley, of Maine, resigning his seat in the House.

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[2] First session Thirty-second Congress, Journal, p. 1010.

[3] Second session Forty-fourth Congress, Journal, pp. 68, 250, 347.

[4] First session Twenty-ninth Congress, Globe, p. 1141.

[5] First session Ninth Congress, Journal, pp. 378, 379 (Gales & Seaton ed.).

[6] Second session Eighth Congress, Journal, p. 22 (Gales & Seaton ed.).

[7] First session Tenth Congress, Journal, p. 182 (Gales & Seaton ed.).

[8] First session Twenty-first Congress, Journal, p. 444.

On May 29,[1] on the eve of the close of the session, the House directed the Speaker to inform the governor of Maine of the vacancy.

1190. On April 7, 1838,[2] the Speaker presented to the House a letter from Mr. John M. Patton, of Virginia, resigning his seat in the House to accept an appointment conferred on him by the legislature of his State. The letter having been read, it was ordered that the Speaker communicate to the governor of Virginia the fact that a vacancy had occurred.

1191. On March 23, 1842,[3] Mr. Joshua R. Giddings, of Ohio, who had been censured by the House, sent to the Speaker his resignation, which was laid before the House, as follows:

WASHINGTON CITY, *March 22, 1842.*

SIR: I hereby resign my office as Representative in the Congress of the United States from the Sixteenth Congressional district of Ohio.

With great respect, your obedient servant,

J. R. GIDDINGS.

HON. JOHN WHITE,

Speaker of the House of Representatives.

The letter having been read—

Ordered, That the said communication do lie on the table, and that the Speaker communicate a copy thereof to the governor of the State of Ohio.

1192. On September 9, 1850,[4] the Speaker, by unanimous consent, laid before the House a communication from James Wilson, resigning his seat in the House as a Representative from New Hampshire. It was then

Ordered, That the Speaker notify the governor of New Hampshire thereof.

1193. The executive of a State may inform the House that he has received the resignation of a Member.—On July 10, 1876,[5] the Speaker laid before the House a telegram from the governor of Maine, announcing that he had tendered to Hon. James G. Blaine the appointment as United States Senator, and that Air. Blaine had placed in his hands his resignation as Representative, to take effect Monday, July 10.

1194. On May 4, 1886,[6] the Speaker laid before the House a letter from the secretary of state of the State of New York, informing the House that the resignation of Mr. Joseph Pulitzer as Representative of the Ninth Congressional district of that State was filed in the office of secretary of state on April 12.

1195. Sometimes the House learns of the resignation of a Member only by means of the credentials of his successor.—On December 5, 1796,[7] the first day of the session, the House was apprised of the resignation of Messrs. Jeremiah Crabb, of Maryland; James Hillhouse, of Connecticut, and Daniel Hiester, of Pennsylvania, through the presentation of the credentials of their successors.

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[1] Journal, p. 807.

[2] Second session Twenty-fifth Congress, Journal, p. 716.

[3] Second session Twenty-seventh Congress, Journal, pp. 586, 587; Globe, p. 349.

[4] First session Thirty-first Congress, Journal, p. 1433.

[5] First session Forty-fourth Congress, Journal, p. 1242; Record, p. 4491.

[6] First session Forty-ninth Congress, Journal, p. 1487. The letter of the secretary of state appears in the Journal in full.

[7] Second session Fourth Congress, Journal, p. 606 (Gales & Seaton ed.).

1196. An instance wherein the State executive transmitted the resignation of a Member with the credentials of his successor.—On November 30, 1797,[1] the Speaker laid before the House a letter from the secretary of state of Pennsylvania, inclosing a letter from George Ege, containing his resignation of a seat in this House; also a return of the election of Joseph Hiester as successor of said Ege.

It was the practice at this time for Members to transmit their resignations to the governors of their States.[2]

1197. On unofficial information that a Member's resignation had been accepted and a successor elected, the Senate held that the Member's seat was vacated.

A Senator tendered his resignation to take effect at a future day.

On January 20, 1815,[3] the President of the Senate laid before that body a letter from Mr. Jesse Bledsoe, of Kentucky, stating that he had doubts as to his right to continue in his seat in the Senate. Previous to December 24, 1814, he had forwarded his resignation by mail to the governor of Kentucky, to take effect on December 24, 1814, and to be by him communicated to the legislature of the State, then, and so far as he was informed, still in session. The governor acknowledged the receipt of the resignation, but stated that he would withhold it in the hope of a change in Mr. Bledsoe's determination until the last of the month, when he would lay it before the legislature. Unofficial information indicated he did so, and that the legislature had chosen a successor.

Under these circumstances Mr. Bledsoe asked the decision of the Senate as to his right to continue in the seat.

Thereupon a resolution was proposed that the facts stated did not vacate the seat. The word "not" was stricken out by a vote of 25 to 8, and then, by a vote of 27 to 6, the amended resolution was agreed to. So the seat was declared vacant.

1198. It was long the practice to notify the executive of the State when a vacancy was caused by the death of a Member during a session.—On January 13, 1801,[4] the death of Mr. James Jones, of Georgia, was announced to the House. Besides the appointment of the usual committee, and the order for wearing crape and attending the funeral, it was—

Resolved, That the Speaker address a letter to the executive of Georgia, to inform him of the death of James Jones, late a Member of this House, in order that measures may be taken to supply the vacancy occasioned thereby.

The same resolution was passed on January 1, 1801,[5] upon the death of Thomas Hartley, of Pennsylvania.

1199. On January 12, 1805,[6]—

Resolved, That the Speaker address a letter to the executive of the State of North Carolina, communicating information of the death of James Gillespie, late a Member of this House, in order that measures may be taken to supply any vacancy occasioned thereby in the representation from that State.

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[1] Second session Fifth Congress, Journal, p. 95 (Gales & Seaton ed.).

[2] Second session Fifth Congress, Journal, p. 433.

[3] Third session Thirteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 869.

[4] Second session Sixth Congress, Journal, p. 758 (Gales & Seaton ed.).

[5] Journal, p. 750.

[6] Second session Eighth Congress, Journal, p. 86 (Gales & Seaton ed.).

1200. On December 19, 1820,[1]—

Resolved, That the Speaker of this House be requested to inform the executive of the State of Rhode Island of the death of Nathaniel Hazard, one of the Representatives from said State.

1201. On January 19, 1828,[2] the House directed the Speaker to notify the executive of New Jersey of the death of George Holcombe, late a Member of the House.

1202. On February 28, 1838,[3] after Mr. Jonathan Cilley, of Maine, had been killed in a duel, the House, on motion of Mr. George Evans, of Maine—

Resolved, That the Speaker communicate to the governor of the State of Maine that a vacancy has occurred in its representation in the House of Representatives by the decease of Jonathan Cilley, late a Member thereof from that State.

1203. A seat being declared vacant the House directs that the executive of the State be informed.—On January 2, 1808,[4] it was—

Resolved, That the Speaker address a letter to the executive of the State of North Carolina, communicating information of the decision of this House vacating the seat of John Culpeper, one of the Members returned from that State to serve in this House, in order that measures may be taken to supply the vacancy occasioned thereby in the representation from that State.

1204. On April 20, 1870,[5] Mr. Michael C. Kerr, of Indiana, offered as a question of privilege, and the House received as such, without objection, the following:

Resolved, That the Speaker of the House be directed to inform the governor of the State of Louisiana that there is a vacancy in the representation of that State in the First Congressional district thereof.

1205. On September 25, 1890,[6] the House having declared the Member from the Second district of Arkansas not entitled to his seat, the House, by resolution, directed the Clerk to inform the governor of that State of the fact by transmitting to him a copy of the resolution.

1206. Discussion as to the length of term of a Member elected to fill a vacancy caused by the House having declared a seat vacant.—On January 22, 1895,[7] Mr. W. I. Hayes, of Iowa, from the Committee on Elections, submitted a report on the claim of Charles H. Page for a certain balance claimed to be due him as a Member of the Forty-ninth Congress from the Second district of Rhode Island. The regular election for Representatives to the Forty-ninth Congress was held in the Second Rhode Island district on November 4, 1884, and William A. Pirce received the governor's certificate of election. Mr. Page, who was the opposing candidate, contested the election, and on January 25, 1887, the House declared the seat vacant, no one having obtained the majority required by the State law. A new election was ordered, and occurred February 21, 1887. Mr. Page was elected by a majority over all, and took his seat February 25, 1887, within a few days of the expiration of the Forty-ninth Congress. He received the usual mileage, and pay

[1] Second session Sixteenth Congress, Journal, p. 80 (Gales & Seaton ed.).

[2] First session Twentieth Congress, Journal, p. 191; Debates, p. 1063.

[3] Second session Twenty-fifth Congress, Journal, p. 507.

[4] First session Tenth Congress, Journal, p. 106 (Gales & Seaton ed.).

[5] Second session Forty-first Congress, Journal, p. 652; Globe, p. 2859.

[6] First session Fifty-first Congress, Journal, p. 1080.

[7] Third session Fifty-third Congress, House Report No. 1645; Rowell's Digest, p. 493.

from January 26, 1887 (the time Mr. Pirce was unseated), until the expiration of the Congress. He claimed, however, the pay for the whole term of the Congress, two years in all.

In considering this claim, the committee discussed the status of Mr. Pirce, who had been unseated:

The claim is based upon the following clause of the Constitution of the United States (section 5 of article 1):

"Each House shall be the judge of the elections, returns, and qualifications of its own Members."

And upon section 35 of the Revised Statutes of the United States, as amended by the act of January 20, 1874, which fixes the salary or compensation of a Representative in Congress at $5,000 per annum.

In this case the House decided that William A. Pirce was not elected, as before stated. Mr. Page was elected to, sworn in, and took his seat as a Representative in the Forty-ninth Congress, from the Second district of Rhode Island, and is the only one ever so entitled to act, and is entitled to full compensation.

A title to membership in the House of Representatives is only obtained by virtue of the clause in the fifth section of the first article of the Constitution, which says, "Each House shall be the judge of the elections, returns, and qualifications of its own Members," and the laws passed in accordance therewith.

The certificate of the governor of Rhode Island, on which William A. Pirce was recognized, only justified the Clerk of the House in placing his name on the roll under the provisions of section 31 of the Revised Statutes, which says:

"Before the first meeting of each Congress the Clerk of the next preceding House of Representatives shall make a roll of the Representatives-elect and place thereon the names of those persons, and of such persons only, whose credentials show that they were regularly elected in accordance with the laws of their States, respectively, or the laws of the United States."

This section does not give the governor of any State the authority to judge of the constitutional or legal right of anyone to be a Member of the House. The governor's certificate is only good as to a Representative who, by virtue of such a certificate, is entitled to have his name placed on the Clerk's roll until such time as the House may judge of the election, returns, and qualifications of the person holding such certificate.

The House of Representatives, acting under the authority given it by this clause of the Constitution of the United States, declared that William A. Pirce was not elected, and by the laws of Rhode Island and under the facts as determined no one was then elected, and it follows that Mr. Page was the only one ever legally elected to that Congress or entitled to any standing as a Member. Its declaration was as follows:

"Resolved, That William A. Pirce was not elected a Member of the House of Representatives of the Forty-ninth Congress from the Second Congressional district of Rhode Island, and that the seat be declared vacant."

The House of Representatives knew its duty under the Constitution and as affected by the laws of Rhode Island, and asserted it, the certificate of the governor to the contrary notwithstanding. William A. Pirce was never, in legal contemplation, a Member of the Forty-ninth Congress, and no one but Mr. Page ever so legally represented this district.

The report then quotes section 51 of the Revised Statutes, wherein it provides that where a vacancy occurs after the commencement of the Congress, the person elected to fill it shall receive compensation from the time the salary of his successor ceased, and points out that it has no application, since there never was a vacancy except from the failure to elect, and therefore Mr. Page had no predecessor in the sense of the statute. A predecessor to a Member must be a Member, and to be a Member must have been elected. The vacancy therefore existed from the very beginning of the Congress, and Mr. Page, when elected, was chosen for the whole Congress and not to any fractional part thereof.

As to the practice of the House in the payment of Members who take seats after the sessions have commenced, the report says:

The Revised Statutes provide that Members of Congress shall be paid a salary of $5,000 per annum. There are no restrictions as to the time when the Member shall be elected, provided he is elected in accordance with law, to entitle him to the per annum salary. He may be elected before the Congress begins or at any time during the Congress if he is the only Member legally elected for a given district for that Congress. He is the Member mentioned in the Constitution and laws, and entitled to all the privileges and emoluments thereof.

The uniform practice has been that Members who were elected after the beginning of Congress were paid from the beginning of the Congress to which they were elected, or from the time the vacancy occurred, if there had been an actual predecessor. The cases are numerous in support of this practice, and it is not necessary to refer to those where, upon contest, the contestant is seated, and in those cases both draw salary, the contestant from the beginning of the Congress and the contestee for the time he holds, and the fact that Mr. Pirce so drew here need excite no comment and should make no difference.

There have been such cases where the seating of contestant was on the very last day of the Congress. The cases most nearly analogous to this one are the Sypher and Morey cases from Louisiana in the Forty-first Congress, where neither party was held entitled to a seat, and upon new elections each of these men were elected in their respective districts, and out of their pay was deducted what was allowed them for expenses of contest in the first instance, and in the Sypher case the Forty-sixth Congress determined practically in accordance with this resolution upon a resolution to reimburse him this deduction, and in the report the committee said:

"The decision of the question your committee believe depends upon the time from which the salary of a Congressman begins. We have examined the question and have come to the conclusion that the general practice has been to allow a Member his salary, without qualification or condition, for the whole Congress to which he was elected, although he may have taken his seat after the expiration of a portion of the term when such election was not held to fill a vacancy occurring after the commencement of the Congress. If Mr. Sypher was entitled to the salary of a Member of the Forty-first Congress, under the facts as found, we think it should have been allowed him freed from the conditions imposed by the resolutions of the 12th of December, 1870. [This condition was deducting what he had been paid as a contestant.] We are strengthened in the conclusion to which we have arrived by the action of the Forty-third Congress in allowing to Mr. Morey the amount which he had been compelled to refund by the terms of the same resolution—the case of Mr. Morey and that of Mr. Sypher being alike in every material particular. Should the doctrine of res adjudicata, be invoked as applicable to this case, and as a bar to the claimant's right to the allowance he asks, we would remark that the action of the Forty-third Congress in allowing to Mr. Morey the amount he had been compelled to refund we regard as a precedent directly applicable and decisive of the question involved.

"We therefore recommend that the claim of Mr. Sypher be favorably considered, and that the following resolution be adopted and referred to the Committee on Appropriations."

There seems to be no reason, law, or precedent to deny Mr. Page the relief asked.

This report was not acted on by the House.

1207. A Member's name remains on the roll until the House is officially notified of his resignation, or takes action respecting it.

A resolution relating to the status of one borne on the roll of membership of the House was held to be privileged.

On May 3, 1885,[1] Mr. Alphonso Hart, of Ohio, from the Committee on Elections, submitted a report from the Committee on Elections, to whom was referred the following resolutions:

Whereas on October 14, 1884, Hon. James S. Robinson, a Representative in the Forty-eighth Congress from the ninth district of the State of Ohio, was elected to the office of secretary of state of the State of Ohio;

Whereas said Hon. James S. Robinson is still, to all intents and so far as any official notification of

[1] Second session Forty-eighth Congress, House Report No. 2679.

resignation to this House is concerned, a Member of this body, and that his name is still borne upon the roll as a representative in Congress: Therefore,

Resolved, That the Committee on Elections of the House be ordered to investigate and report to this House at the earliest moment the status of the right of said Hon. James S. Robinson as Member of this body.

A question of order being raised, the Speaker[1] held[2] them to be privileged, as they related to the status of one borne on the roll as a Member.

The committee found the facts to be as stated in the preamble and that Mr. Robinson had at 11 o'clock on January 12, 1885, tendered his resignation as a Member of the Forty-eighth Congress to the governor of Ohio. This resignation was duly placed on file in the office of the governor, and on the day of the resignation Mr. Robinson duly qualified as secretary of state. Since that time he had not been a Member of the House, nor had he attempted to exercise any of the rights and privileges which would belong to a Member of the House. The committee therefore concluded that he was not and did not claim to be a Member of the House, and recommended that the Clerk be instructed to omit the name of James S. Robinson from the roll of Members.

This report was made within a few hours of the close of the Congress, and was not acted on.

1208. The fact of a Member's resignation not appearing, either from the credentials of his successor or otherwise, the House ascertained the vacancy from information given by other Members.—On December 31, 1800,[3] the Committee on Elections reported that Samuel Tenney was entitled to take his seat in the House in place of William Gordon, as the certificate of the governor of New Hampshire showed him duly appointed, and as "it is further made to appear by information from several Members of the House from the said State, that such appointment was made to supply the vacancy occasioned by the resignation of William Gordon."

1209. An inquiry of the Clerk having elicited from the State executive the fact that a Member had resigned, the Speaker directed his name to be stricken from the roll.—On February 16, 1875.[4] the Speaker laid before the House the following letter from the Clerk of the House:

CLERK'S OFFICE, HOUSE OF REPRESENTATIVES,
Washington, D.C., February 16, 1875.

SIR: The secretary of state of Florida informs me by telegraph, in reply to an inquiry made of him by me, that Hon. William J. Purman resigned his seat in the Forty-third Congress on the 25th of January, 1875.

Very respectfully, your obedient servant,

EDWARD MCPHERSON,
Clerk House of Representatives.

HON. JAMES G. BLAINE,
Speaker House of Representatives.

The letter having been read, the Speaker said:

Upon this statement the chair directs the name of Mr. Purman to be stricken from the roll. It is the only notification the House has had of his resignation officially.

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[1] John G. Carlisle, of Kentucky, Speaker.

[2] Record, p. 1038.

[3] Second session Sixth Congress, Journal, p. 748 (Gales & Seaton ed.)

[4] Second session Forty-third Congress, Journal, p. 476; Record, p. 1322.

1210. Instances wherein Members have been reelected to fill the vacancies occasioned by their own resignations.—On May 5, 1842,[1] the Journal has this entry:

A new Member, viz, Joshua R. Giddings, from the State of Ohio, elected to supply the vacancy occasioned by the resignation of Joshua R. Giddings (the same person who now appears), appeared, was sworn to support the Constitution of the United States, and took a seat in the House.

1211. On August 1, 1856,[2] the Journal has this entry:

Mr. Preston S. Brooks, a Member-elect from the State of South Carolina, to supply the vacancy occasioned by his own resignation, appeared, was sworn to support the Constitution of the United States and took a seat in the House.

1212. On August 6, 1856,[3] the Journal has this entry:

Mr. Lawrence M. Keitt, a Member-elect from the State of South Carolina, to fill the vacancy occasioned by his own resignation, appeared, was sworn to support the Constitution of the United States, and took a seat in the House.

1213. A Member who had resigned was not permitted by the House to withdraw his resignation.

The House declined to consider as privileged a resolution that a former Member be permitted to withdraw his letter announcing his resignation and resume his seat.

On February 28, 1870,[4] the Speaker laid before the House the following letter from Mr. Jacob S. Golladay, of Kentucky:

HOUSE OF REPRESENTATIVES,
Washington, February 28, 1870.

SIR: I enclose you a letter herewith tendering my resignation to the State of Kentucky as a Member of Congress from the Third district.

Very respectfully,

J. S. GOLLADAY.

Hon. JAMES G. BLAINE.

The inclosed letter, which was also read to the House, was as follows:

HOUSE OF REPRESENTATIVES,
Washington, D.C., February 28, 1870.

DEAR SIR: I herewith tender you my resignation as a Member of Congress from the Third district of Kentucky.

Very respectfully,

J. S. GOLLADAY.

His excellency JOHN W. STEVENSON.

Of this resignation, and the resignation of another Member presented at the same time, the Journal had the following entry:

The Speaker laid before the House communications from Jacob S. Golladay and John T. Deweese, respectively, notifying the House that they had resigned their seats as Members of the House, the former from the State of Kentucky and the latter from the State of North Carolina; which were severally laid on the table.

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[1] Second session Twenty-seventh Congress, Journal, p. 784.

[2] First session Thirty-fourth Congress, Journal, p. 1336; Globe, p. 1863.

[3] First session Thirty-fourth Congress, Journal, p. 1377; Globe, p. 1944.

[4] Second session Forty-first Congress, Journal, pp. 390, 427, 433; Globe, pp. 1597, 3739–1743.

On March 7, 1870, Mr. William B. Stokes, of Tennessee, claiming the floor for a question of privilege, offered the following:

Whereas on the 28th day of February, 1870, Jacob S. Golladay, a Member of this House, tendered his resignation to the governor of the State of Kentucky; and whereas he inclosed a copy of his communication to said governor to the Speaker of this House, by whom it was communicated to this House; and whereas the governor of the State of Kentucky peremptorily refused to accept the resignation tendered as aforesaid, and has requested a withdrawal of the same, which request has been complied with. Now, therefore, be it

Resolved, That in view of said refusal of the governor of Kentucky to accept the resignation tendered to him, and in view of the withdrawal of his communication to said governor, Jacob S. Golladay be, and is hereby, permitted to withdraw his communication to the Speaker of the House, and resume his seat in this body.

The Speaker laid before the House letters received by him confirming the assertion of the preamble. Mr. Golladay had been charged with selling cadetships, and the governor had declined his resignation on the ground that he owed it to the State, to his constituency, and to himself to return to the House and demand a Congressional investigation.

A question arose as to the effect of the notification to the House that a resignation had been transmitted to the governor, and whether or not the fact that this notification had been recorded on the Journal and Mr. Golladay had been dropped from the rolls, constituted such a resignation to the House as prevented his return after he had withdrawn the actual resignation filed with the governor. It was urged especially by Mr. John A. Bingham, of Ohio, that the governor, in declining to accept the resignation, had far exceeded his powers, and had neglected the constitutional mandate requiring him to issue writs for a new election. There was also discussion of the control of the House over the resignations of its Members, if any.

Finally, Mr. Noah Davis, of New York, made the point of order that the Whittemore case had determined that the right of resignation was purely personal to the Member; that when he has exercised this right he becomes ipso facto no longer a Member; that Mr. Golladay's resignation had been announced to the House, entered on the Journal after being accepted sub silentio, and thus became a complete resignation de jure. The gentleman retired from the House and ceased to act as a Member, and the House ceased to treat him as a Member. Therefore the pending resolution was a proposition to give a seat to an entire stranger, a man not entitled to a seat by virtue of any election.

Mr. John A. Bingham, of Ohio, supported this point of order.

The Speaker [1] said:

The gentleman from Tennessee rose and stated that he had a question of privilege under the rules of the House. Whatever may be the opinion of the Chair, it is his duty to submit that question to the House. In the judgment of the Chair, Mr. Golladay is no more a Member of the House than any stranger in the gallery. That is his individual opinion; but the Chair can not interpose his individual judgment so as to preclude the gentleman from Tennessee presenting his question of privilege. Under the point of order presented by the gentleman from New York and the gentleman from Ohio, the Chair will submit the question to the House whether it will entertain the preamble and resolution of the gentleman from Tennessee as a question of privilege.

[1] James G. Blaine, of Maine, Speaker.

The question was put, and the House, without division, decided that the preamble and resolution should not be entertained as a question of privilege.

Thereupon Mr. Davis offered the following, which was agreed to:

Whereas it is of grave importance to the constitution of this House that it should be determined whether a Member thereof during the session may resign his seat without the consent of the House, and thereby evade his duties and responsibilities: Therefore be it

Resolved, That the Committee on the Judiciary be instructed to inquire and report to this House, by bill or otherwise, at any time, what action or rule should be taken or established for the determination of that question.

It does not appear that any report was made.

1214. Only in a single exceptional case has the House taken action in the direction of accepting the resignation of a Member.—On May 20, 1876,[1] the Speaker pro tempore, by unanimous consent, laid before the House the following communication:

SALISBURY, CONN., *May 18, 1876.*

SIR: Having been elected by the legislature of Connecticut a Senator in Congress to fill the unexpired term of the late Hon. Orris S. Ferry, I hereby tender to you, and through you to the House of Representatives, my resignation as a Member of Congress from the Fourth Congressional district of Connecticut.

I have the honor to be, respectfully, your obedient servant,

WM. H. BARNUM.

TO MICHAEL C. KERR,
Speaker of the House of Representatives, Washington, D.C.

On motion of Mr. Nathaniel P. Banks, of Massachusetts, the said letter was ordered to be entered on the Journal as an acceptance of the resignation of Mr. Barnum.

On July 19 the resignation of W. W. Ketcham, of Pennsylvania, transmitted, direct to the Speaker, was read, but no further action was taken.[2]

1215. In exceptional cases old Members have expressed in their letters of resignation their feelings toward the House—On February 15, 1844,[3] the Speaker laid before the House a letter from Mr. Henry A. Wise, of Virginia, announcing that he had transmitted his resignation to the governor of the State of Virginia. Mr. Wise in his letter went on to express his feelings of attachment and respect for the Congress. The letter appears in full in the Journal.

1216. On March 6, 1844,[4] the Speaker laid before the House a letter from Mr. Samuel Beardsley, of New York, announcing that he had forwarded to the governor of New York his resignation of his seat in the House. Mr. Beardsley also went on to express his regret at leaving the associations of his membership in the House. The letter appears in full in the Journal.

1217. On December 13, 1815,[5] the Speaker laid before the House a letter from Nathaniel Macon informing the Speaker and the House that he had that day, by

[1] First session Forty-fourth Congress, Journal, pp. 987, 988; Record, p. 3237.

[2] Journal, P. 1297.

[3] First session Twenty-eighth Congress, Journal, p. 392.

[4] First session Twenty-eighth Congress, Journal, p. 529.

[5] First session Fourteenth Congress, Journal, p. 50 (Davis ed.); Annals. p. 384.

letter to the governor of North Carolina, resigned his seat in the House of Representatives. Mr. Macon also expressed a grateful appreciation of his pleasant relations with Members of the House for many years.

1218. The withdrawal of Members caused by the secession of States.— On December 24, 1860,[1] the Speaker laid before the House a letter from the Members from South Carolina, announcing the secession of their State, which had "thereby dissolved our connection with the House of Representatives." The letter was read and laid on the table.

On January 12, 1861,[2] a letter from the Mississippi Members announced the secession of their State, and announced their "withdrawal" from the House. On March 2[3] a vacancy on a committee caused by the withdrawal of one of the Mississippi Members was recorded in the Journal as caused by the Member's "declination." On January 21[4] the Alabama Members announced their "withdrawal." On January 23[5] the Georgia Members announced that they were no longer Members, except one, Mr. Joshua Hill, who tendered his resignation. On January 30[6] a letter from Mr. Williamson R. W. Cobb, of Alabama, announced that, as his State has seceded, he would "decline further participation" in the business of the House.

In all the above cases the Speaker presented the communications by unanimous consent, and the only action of the House was to lay them on the table, as in the case of letters of resignation.

1219. Senators having withdrawn from the Senate, the Secretary was directed to omit their names from the roll.

The Journal of the Senate made no mention of the withdrawal of Senators by reason of the secession of their States.

On January 22, 1861,[7] in the Senate, the Vice-President stated that no notice had been taken in the Journal of the withdrawal of certain Senators from the Chamber on yesterday, and that no paper had been filed with the presiding officer by those Senators notifying him that they had withdrawn from the Senate; and that he would like some instruction as to what vacancies existed in the committees, and whether the names of those Senators should continue to be called in taking the yeas and nays.

Thereupon Mr. Judah P. Benjamin, of Louisiana, submitted the following motion:

Ordered, That the Journal of the proceedings of the Senate be so corrected as to record the fact that the Senators from the States of Florida and Alabama, and the Hon. Jefferson Davis, Senator of the State of Mississippi, made announcement that the said States of Florida, Alabama, and Mississippi had seceded from the Union, had resumed the powers delegated by the said several States to the United

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[1] Second session Thirty-sixth Congress, Journal, p. 112; Globe, p. 190.

[2] Journal, p. 179.

[3] Journal, p. 484.

[4] Journal, p. 208.

[5] Journal, p. 221; Globe, p. 531.

[6] Journal, p. 247.

[7] Second session Thirty-sixth Congress, Globe, pp. 500–505.; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 951.

States of America, and that they, the said Senators, considered themselves by reason of said action of said States as being no longer entitled to retain their seats as Senators, and accordingly thereupon withdrew from the Senate.

At once debate arose as to proper method of making up the Journal. It was urged that the Journal should contain only those things voted on, and that there would be great difficulty in determining and stating exactly the grounds of their action. Mr. Stephen A. Douglas contended that the Senate could with propriety enter only the fact of their withdrawal, and he moved as a substitute for the order the following:

That Jefferson Davis, of Mississippi, Stephen R. Mallory and David L. Yulee, of Florida, C. C. Clay and Benjamin Fitzpatrick, of Alabama, having announced to the Senate their withdrawal from the same,

Ordered, That their names be stricken from the list of Senators, and the Secretary directed no longer to call the same.

Finally the subject was laid on the table, yeas 32, nays 22.[1]

On March 13, 1861,[2] Mr. William Pitt Fessenden, of Maine, proposed the following:

Resolved, That Albert G. Brown and Jefferson Davis, of Mississippi, Stephen R. Mallory, of Florida, Clement C. Clay, jr., of Alabama, Robert Toombs, of Georgia, and Judah P. Benjamin, of Louisiana, having announced that they are no longer Members of the Senate, and having withdrawn therefrom, their seats in this body have thereby become vacant, and the Secretary is directed to strike their names from the roll of Members.

Considerable debate arose as to the effect of the action of the Senators in question and their States, and finally, after various propositions had been made and rejected, the resolution was amended and agreed to, as follows:

Whereas the seats of Albert G. Brown and Jefferson Davis, of Mississippi, Stephen R. Mallory, of Florida, Clement C. Clay, jr., of Alabama, Robert Toombs, of Georgia, and Judah P. Benjamin, of Louisiana, as Members of the Senate, have become vacant: Therefore,

Resolved, That the Secretary be directed to omit their names, respectively, from the roll.

1220. Members have presented their resignations to take effect at a future date, and until that time have sometimes participated in the proceedings.—On January 7, 1873,[3] the Speaker presented to the House the resignation of Mr. John L. Beveridge, of Illinois, to take effect January 4, 1873, the date the letter of resignation was written.

1221. The Journal of August 18, 1856,[4] the last day of the session, has the following entry:

The Speaker laid before the House a letter from the Hon. William A. Richardson, announcing that he had notified the governor of Illinois of his resignation of his seat as a Member of this House from the State of Illinois, to take effect on the 25th instant.

The House adjourned sine die on this day, but on the 21st of August Congress was convened again by proclamation of the President, but Mr. Richardson does not appear to have participated in proceedings during the remainder of the time before the 25th.

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[1] The Senate Journal contains no reference to the withdrawal on the 21st, but records the proceedings on the 22d. Journal, pp. 131, 132.

[2] Second session Thirty-sixth Congress, Globe, pp. 1452, 1454–1456.

[3] Third session Forty-second Congress, Journal. p. 137; Globe, p. 393.

[4] First session Thirty-fourth Congress, Journal, p. 1521.

1222. On April 30, 1894,[1] the Speaker laid before the House a letter from Mr. John A. Caldwell, of Ohio, announcing that he had forwarded to the governor of his State his resignation as a Member of the House, to take effect on May 4, 1894.

On May 3 there was a call of the roll, and it appears that the name of Mr. Caldwell was called.

The letter of resignation appears in full in the Journal.

1223. On December 24, 1846,[2] the Speaker laid before the House the following communication:

HOUSE OF REPRESENTATIVES, *December 24, 1846.*

SIR: I have the honor to announce that I have forwarded to his excellency the governor of the State of Illinois my resignation as a Member of the House of Representatives, to take effect from the 15th of January, or sooner if my successor shall appear and take his seat.

Very respectfully, your obedient servant,

E. D. BAKER.

To the Hon. J. W. DAVIS,

Speaker of the House of Representatives.

Mr. Baker remained a Member of the House and participated in its debates until December 30. At that time a question was raised as to the propriety of Mr. Baker holding a seat in the House and a commission in the Army, and in the course of the debate Mr. Baker tendered his resignation, which the Journal records as follows:

Mr. Edward D. Baker rose and said: "Mr. Speaker, I now resign my seat as a Representative from the Seventh district in the State of Illinois in the Twenty-ninth Congress."

1224. On January 25, 1906,[3] the Speaker laid before the House the following letter, which was read and laid on the table:

WASHINGTON, D.C., *January 24, 1906.*

To the Speaker of the House of Representatives.

SIR: I have this day transmitted to the governor of the Commonwealth of Virginia my resignation as a Member of the House of Representatives of the Fifty-ninth Congress for the Fifth district of Virginia, to take effect January 30, 1906.

Respectfully, yours,

CLAUDE A. SWANSON.

On January 26,[4] Mr. Swanson was present, participating in the proceedings by voting on a roll call and by introducing sundry private bills.

1225. On January 8, 1903,[5] the following communication was laid before the House:

Washington, D.C., *January 8, 1903.*

To the Hon. DAVID B. HENDERSON,

Speaker of the House of Representatives, Washington, D.C.

MY DEAR SIR: I have this day tendered my resignation as a Representative in Congress from the Eighth Congressional district of Texas to the Hon. Joseph D. Sayers, governor of the State of Texas, to take effect on the 15th instant.

I have the honor to be, very respectfully, your obedient servant,

S. W. T. LANHAM,

Member of Congress, Eighth District, Texas.

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[1] Second session Fifty-third Congress, Journal, pp. 365, 372; Record, pp. 4273, 4392.

[2] Second session Twenty-ninth Congress, Journal, pp. 91, 112; Globe, p. 100.

[3] First session Fifty-ninth Congress, Record, p. 1588.

[4] Record, pp. 1604, 1627.

[5] Second session Fifty-seventh Congress, Journal, pp. 92, 97.

On January 9[1] Mr. Lanham was relieved from duty on the Committee on the Judiciary and also on a conference committee.

1226. Instance wherein a Senator resigned, appointing a future date for the resignation to take effect.—On February 10, 1873,[2] the Vice-President laid before the Senate the following letter, which was read and ordered to lie on the table:

TO SCHUYLER COLFAX, *Vice-President of the United States.*

SIR: On the 8th instant I transmitted to the governor of Massachusetts my resignation as a Senator of the United States, to take effect at the close of the Forty-second Congress, on the 3d of March next.

Your obedient servant,

HENRY WILSON.

SENATE CHAMBER, *February 10, 1873.*

Mr. Wilson was inaugurated as Vice-President on March 4.[3]

On March 17[4] Mr. Charles Sumner, of Massachusetts, presented the credentials of Mr. George S. Boutwell, elected by the legislature of Massachusetts as Mr. Wilson's successor.

1227. After full consideration the Senate decided that a Member might resign, appointing a future date for his retirement—On December 6, 1852,[5] the credentials of Archibald Dixon, of Kentucky, were presented in the Senate. A question was at once raised as to whether or not a vacancy existed in the representation from that State. The peculiar circumstances of the case were clearly explained, on December 20, by Mr. William H. Seward, of New York:

The following facts make up the case: On the 17th of December, 1851, Henry Clay was a Senator from Kentucky, chosen by the legislature for six years, which would have expired on the 3d of March, 1855. Being so a Senator, he resigned by a communication to the legislature of Kentucky, declaring that it was to take effect on the first Monday in September, 1852. The legislature, then in session, received the resignation and chose Mr. Dixon to fill the vacancy thus to occur from the first Monday in September, 1852, to the 3d day of March, 1855. The legislature then adjourned. On the 29th day of June, 1852, during the recess of the legislature of Kentucky, Mr. Clay died, and the governor of that State made a "temporary appointment" of Mr. Meriwether as a Senator from Kentucky, to hold the seat until the first Monday of September, 1852. Mr. Meriwether immediately took the vacant seat, and held it until Congress adjourned on the last day of August, 1852. On the 6th of December, 1852, the Senate reassembles, Mr. Meriwether does not appear, and Mr. Dixon appears and presents his credentials, and claims the vacant seat.

Manifestly, Mr. Dixon is one of two Senators "chosen by the legislature" of Kentucky "for six years," and he was chosen to fill a vacancy which has happened in the term of Mr. Clay.

The whole question turns on the point, How did this vacancy happen? Mr. Clay resigned, fixing the first Monday of September as the day when he should vacate his seat, and died, nevertheless, a Senator before that day arrived. Mr. Dixon was appointed by the legislature when in session, before not only the day which Mr. Clay's resignation fixed for his retirement, but also before Mr. Clay's death.

We who maintain Mr. Dixon's title insist that the vacancy happened by Mr. Clay's resignation. On the contrary, those who deny Mr. Dixon's title insist that the vacancy happened by Mr. Clay's death.

Four questions arise:

First. Can a Senator resign?

Second. Can a Senator resigning appoint a future day for his retirement from the Senate?

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[1] Record, pp. 622, 628.

[2] Third session Forty-second Congress, Senate Journal, p. 305.

[3] Senate Journal, pp. 594, 600.

[4] Senate Journal, p. 615.

[5] Second session Thirty-second Congress, Globe, pp. 2, 93, 96.

Third. Can the proper appointing power receive such a resignation and prospectively fill the vacancy?

Fourth. If the legislature so prospectively fill the vacancy, can the appointment be defeated by the death of the resigning Senator before the arrival of the day fixed for his retirement from the Senate?

If a Senator can resign, and can so resign prospectively, and if the legislature can so fill the vacancy prospectively, and if their action can not be defeated by the death of the resigning Senator, then Mr. Dixon's title is good, valid, and complete.

The first question is expressly decided by the Constitution, which declares that vacancies may "happen by resignation."

The second question is decided by an unbroken succession of precedents from the foundation of the Government. Mr. Bledsoe so resigned, fixing a future day; so did Mr. Clay in 1842; so did Mr. Berrien in 1852; and so did Mr. Foote in 1852.

The third question is answered with equal distinctness by precedents. The legislature of Kentucky prospectively filled the vacancy made by Mr. Clay's resignation in 1842, the governor of Georgia prospectively filled the vacancy of Mr. Berrien in 1852, and the governor or legislature of Mississippi prospectively filled the vacancy of Mr. Foote in 1852.

The only question remaining is the fourth: Can the death of the resigning Senator after the legislature has prospectively filled the vacancy, and before the day fixed for his retirement, defeat the appointment of his successor already made?

On December 20, after long debate, the Senate declined to refer the case to a committee, and by a vote of yeas 27, nays 16, adopted a declaration that Mr. Dixon had been duly elected to fill the vacancy occasioned by the resignation of Henry Clay, and that he was entitled to the seat.

1228. The Senate election case of Horace Chilton, of Texas, in the Fifty-second Congress.

A Senator may resign, appointing a future day for his resignation to take effect, and the State executive may by appointment fill the vacancy before that date.

On December 7, 1891,[1] the Vice-President laid before the Senate the credentials of Horace Chilton, appointed a Senator by the governor of the State of Texas to fill the vacancy occasioned by the resignation of John H. Reagan in the term expiring March 3, 1893; which were read and placed on file.

On the same day Mr. Chilton appeared. The oath prescribed by law was administered to him, and he took his seat.

On the same day, on motion of Mr. George F. Hoar, of Massachusetts,

Ordered, That the Committee on Privileges and Elections be directed to inquire into the circumstances and validity of the appointment of Horace Chilton as a Senator from the State of Texas.

On January 25, 1892,[2] Mr. Hoar, from the Committee on the Judiciary, submitted a report as follows:

Mr. Reagan, elected Senator from the State of Texas for the term of six years from the 4th of March, 1887, resigned his office, the resignation to take effect on the 10th day of June, 1891. The executive of the State of Texas, on the 25th day of April, 1891, and after the receipt of the resignation of Mr. Reagan, appointed Mr. Chilton to fill the vacancy occasioned by said resignation. Mr. Chilton's credentials set forth the resignation of Mr. Reagan, and further declare—

"Now, therefore, I, J. S. Hogg, governor of the State of Texas, by virtue of the authority vested in me by the Constitution and laws of the United States and of the State of Texas, do hereby appoint Horace Chilton, of Smith County, Tex., Senator in the Congress of the United States from the State of

[1] First session Fifty-second Congress, Record, p. 3.

[2] Senate Report No. 105.

Texas, to fill the vacancy occasioned by the resignation of the Hon. John S. Reagan. This appointment to take effect the 10th day of June, A. D. 1891."

The certificate bears date April 25, 1891.

Mr. Chilton is in all other respects duly qualified to be a Senator from the State of Texas. The only question is whether the governor might lawfully make this appointment before the resignation of Mr. Reagan actually took effect.

The provision of the Constitution affecting the question is as follows:

"Art. I, sec. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years, * * * and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

A similar state of facts has arisen in a number of instances since the Constitution went into operation.

The term of Uriah Tracy, Senator from Connecticut, expired March 3, 1801; he was appointed by the governor of Connecticut February 20, 1801, "from the 3d of March next until the next meeting of the legislature of said State," the legislature of the State not being in session at the time of said appointment or thereafter until after said 4th of March. Exception being taken to his credentials, he was admitted to the seat by a vote of 13 yeas to 10 nays, and held the seat during the special session of the Senate, March 4 and 5.

Joseph Anderson, of Tennessee, was appointed by the executive February 6, 1809, to fill the vacancy which would result from the expiration of his term, March 3, 1809. He held the seat under these credentials during the special session of the Senate, March 4 to March 7, 1809.

John Williams, of Tennessee, was appointed by the executive to fill the vacancy which would result from the expiration of his own term, March 3, 1817. Under these credentials he held his seat from March 4 to 6, 1817.

John McPherson Berrien, of Georgia, resigned by letter dated Washington, May 28, 1852, addressed to the President pro tempore, and read in Senate same date. (Globe, first session Thirty-second Congress, p. 1493.)

Robert M. Charlton, his successor, appeared June 11, 1852, with credentials signed by the governor of Georgia, and dated May 18, 1852, to take effect from and after May 31, 1852. He was sworn and took his seat without objection. (Senate Journal, first session Thirty-second Congress, p. 468.)

March 4, 1825, James Lanman, of Connecticut, presented credentials showing an appointment made February 8, 1825, by the governor of the State to fill the vacancy about to result from the expiration of his term, March 3, 1825. Objection being made, Mr. Lanman was refused a seat by a vote of 23 to 13. There is no historical evidence from which we can determine on what ground the Senate rejected Mr. Lanman, whether it was on the ground that the governor could not fill a vacancy happening at the beginning of a term, or on the ground that the governor could not lawfully make the appointment in anticipation and before a vacancy occurred, and before he could possibly know whether the legislature might not be called together before that time. Judge Story (Const., sec. 727, n. 2) says:

"In the case of Mr. Lanman, a Senator from Connecticut, a question occurred whether the State executive could make an appointment in the recess of the State legislature in anticipation of the expiration of the term of office of an existing Senator. It was decided by the Senate that he could not make such an appointment. The facts were that Mr. Lanman's term as Senator expired on the 3d of March, 1825. The President had convoked the Senate to meet on the 4th of March. The governor of Connecticut, in the recess of the legislature (whose session would be in May), on the 9th of the preceding February appointed Mr. Lanman as Senator, to sit in the Senate after the 3d of March. The Senate by a vote of 23 to 18 decided that the appointment could not be constitutionally made until after the vacancy had actually occurred."

The following statement appears in the National Intelligencer of Tuesday, March 8, 1825:

"An important constitutional question was yesterday decided in the Senate by the refusal to admit Mr. Lanman to a seat in the Senate under a commission from the governor, granted before the expiration of Mr. Lanman's late term of service. This is the first time this question has been adjudicated under such circumstances as to form a precedent; and we presume it may now be considered a settled construction of the constitutional provision that a vacancy must have literally 'happened' or come to pass before an appointment can be made to fill it. The case has once been questioned and decided differently, but it was in strong party times, all the Federal Members voting for the Member's taking

his seat and all the Democratic Members against it, under which circumstances the decision has not been much respected as a precedent. So far as it was a precedent it is now reversed."

Gorden's Digest of the Laws of the United States, 1827, appendix, note 1 B, states the ground of the decision in the same way, but manifestly bases the statement on the authority of the National Intelligencer.

On the other hand, Mr. Grundy, in his report from the Committee on the Judiciary in the case of Mr. Sevier, Senator from the State of Arkansas, who was appointed by the governor of Arkansas January 17, 1837, to fill the vacancy which would occur on the 3d of March following by the expiration of Mr. Sevier's previous term, declared that the decision in the Lanman case was on the ground "that the legislature must provide for all vacancies, which must occur at stated and known periods, and that the expiration of a regular term of service is not such a contingency as is embraced in the second section of the first article of the Constitution." He distinguished Mr. Sevier's case from the Lanman case by the fact that the time that Mr. Sevier was to go out of office was decided by lot, he having been one of the Senators appointed by the State on its admission.

Niles's Register of Friday, March 12, states the question in regard to the Lanman case:

"The question was whether the failure by the legislature to make a choice of Senator constitutes the contingency in which the governor may appoint a Senator."

Mr. Benton, in his Thirty Years' View, states that the principal argument against the admission of Mr. Lanman was made by Mr. Tazewell, that argument being that the word "happen" in the Constitution could not apply to a foreseen event, bound to occur at a fixed period, and that therefore it was the right of the legislature only to fill a vacancy which was foreseen, regular, and certain, and that there was no right in the governor to supply that omission.

Mr. Lanman was not admitted to the seat. There is nothing in the contemporary record of the debates or in the resolution which enables us to determine whether the majority of the Senate based its action on the ground stated by Mr. Benton to have been maintained by Ms. Tazewell, or on the ground stated by Judge Story and by the National Intelligencer. The case, therefore, is not an authority on either side of the question. So that it is impossible to determine whether the Senate meant to overrule the Tracy case on one ground or the other.

On the other hand, an examination of the very numerous cases where the executives of States have made appointments when the legislature was not in session shows that in a great many of them the executive has postponed action, where the resignations were made to take effect at a future time or where the previous term had expired by its own limitation, until after the vacancy existed. In all probability this postponement was caused by a belief on the part of the executive that he had no authority to provide for filling a vacancy until it actually occurred or, at any rate, that the question was so far in doubt that it would be unsafe to make the appointment in anticipation.

So far, then, as the precedents are concerned, it appears that in three cases persons so appointed have been admitted to their seats without question; that Mr. Tracy was admitted and Mr. Lanman rejected, where the executive made the appointment in anticipation of a vacancy, there being a discussion in the Senate, but no satisfactory evidence of the grounds of the judgment; that in one case, that of Mr. Sevier, a person so appointed has been admitted, when the validity of the appointment was questioned, upon other grounds, without raising this question specifically; and that in modern times, the practice has been uniform for the State executive to delay appointment until the actual happening of the vacancy.

Under these circumstances, it seems to us that the Senate may now determine the question, unhampered by any precedents of its own.

We suppose that where the power is given to fill vacancies in public offices, it has been the uniform practice to permit resignations of such offices to be made, to take effect at a future day, and to hold that the appointing power is entitled to make the appointment in advance to fill the vacancy, to take effect when the resignation becomes operative, unless the language of the constitutional or statute provision under which the authority is exercised forbids such construction.

The Constitution of the United States, Article II, section 2, in providing for the appointing power, enacts:

"The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

We believe it has been the uniform practice of the Executive from the beginning to accept resignations which are to take effect in the future, and to make appointments, also to take effect in the future, to

fill them. We suppose that a like practice also prevails in regard to the heads of Departments in the exercise of the appointing power conferred by law upon them. The language of the provision of the Constitution under consideration, that "if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature," seems to us to admit easily of a like construction. We do not suppose that it was the intention of the framers of the Constitution to establish different rules for these two cases.

The Senate has recently, after full consideration, determined that the constitutional provision that the Senate shall choose a president pro tempore in the absence of the Vice-President permits the choice of an officer in advance of the actual occurrence of the contingency referred to, who may take the chair whenever the Vice-President may be absent, until the Senate otherwise order. In all these cases, including that which we are now considering, the important consideration is that it must have been the purpose of the framers of the Constitution, as it is clearly for the public interest, that the office as far as possible should always be filled. This consideration applies with peculiar force to the office of Senator. We should be very unwilling to establish a construction of the Constitution which would make it certain that in no case of the resignation of a Senator, however necessary that resignation might be, there should be a succession without a considerable interval.

This would bear with peculiar hardship upon States remote from the seat of government, and might determine the policy of the country in great emergencies and in matters peculiarly affecting particular States, when such States were but partially represented, or possibly not represented at all. The tendency of the opinion of the Senate, as evidenced by its more recent decisions, has been more and more to lean to a construction which, as far as possible, secures that the seats in the Senate should be filled without any interruption in the representation of the State. Thus, in the case of Mr. Bell and Mr. Blair, Senators from the State of New Hampshire, it has been held that the executive might fill the vacancy occurring at the beginning of the constitutional term in consequence of the failure or the inability of the legislature to elect a Senator for that term, in compliance with the statute of 1866 (Rev. Stat., secs. 14 and 19), in spite of very weighty and influential opinions to the contrary.

So it has been held and is now the settled construction, that if a vacancy occur during the recess of the Senate, and a person be regularly nominated to the Senate at its next session to fill it, and be rejected, and the Senate adjourn without the office being filled, the President is entitled to make a new appointment in the next vacation. So, if the officer died during the session, and his death be not known until after the adjournment, as is said by Attorney-General Taney in his able report (Opinions of Attorneys-General, vol. 2, p. 523):

"It is admitted by everyone that the President may appoint in such cases, and the practice of the Government has continually conformed to that construction."

"It was the intention of the Constitution," Mr. Taney further says, "that the offices created by law and necessary to carry out the operations of the Government should always be full, or, at all events, that the vacancy should not be a protracted one." (See also, to the same effect, the opinion of William Wirt, 1 Op. Attys. Gen., 631.)

It has been suggested that if this construction be established it will be in the power of the governor of the State to provide by appointment for the filling of future vacancies long before they occur, and, therefore, the will of the people of the State, as it exists at or near the time of filling the vacancy, fail of being carried into effect. But the instances must necessarily be very rare indeed where the vacancy can be anticipated beforehand under circumstances which will create such temptation to the executive. Against that, as against many other evils which axe possible under a popular government, as under other governments, the protection in general must be in the character and integrity of the persons clothed with high public office.

We therefore are of the opinion that Mr. Chilton was lawfully appointed by the executive of the State of Texas to the seat which he now holds, and recommend the adoption of the following resolution:

Resolved, That Mr. Horace Chilton, appointed by the executive of the State of Texas on the 25th day of April, 1891, to fill the vacancy occasioned by the resignation of the Hon. John H. Reagan, which had been previously been made, to take effect on the 10th day of June, 1891, is entitled to retain his seat.

On January 27 [1] the Senate agreed to the resolution reported by the committee.

[1] Record, p. 635.

1229. The Senate election case of James A. Hemenway, of Indiana, in the Fifty-ninth Congress.

A Senator may resign, appointing a future day for the resignation to take effect, and the State legislature may fill the vacancy before that date.

On February 21, 1905,[1] in the Senate, Mr. Albert J. Beveridge, of Indiana, presented the following credentials, to be placed on file:

In the name and by the authority of the State of Indiana. Executive department.

To all who shall see these presents, greeting:

This is to certify that on the 17th day of January, 1905, James A. Hemenway was duly chosen by the legislature of the State of Indiana a Senator to represent said State in the Senate of the United States for the unexpired portion of the term of six years from the 4th day of March, 1903, and to fill the vacancy occasioned therein by the resignation of the Hon. Charles W. Fairbanks.

Witness, his excellency our governor, J. Frank Hanly, and our seal hereto affixed at the city of Indianapolis, Ind., this 18th day of February, A. D. 1905.

By the governor:

J. FRANK HANLY, *Governor.*
DANIEL E. STORMS, *Secretary of State.*

[SEAL.]

Mr. Joseph W. Bailey, of Texas, said:

Mr. President, before the credentials are placed on file, I want to call the attention of the Senate to what I think is a fatal objection to this certificate of election and to the election itself.

The certificate shows that that election occurred in the legislature of Indiana during the month of January, and that Mr. Hemenway was chosen to fill a vacancy occasioned by the resignation of Senator Fairbanks, to take effect on the 4th of March. Thus the legislature of Indiana has asserted its right to fill a vacancy not only when no vacancy exists, but when it was possible under the law that no vacancy ever would exist. The courts have more than once held—and no court has held it more distinctly than the supreme court of Indiana—that a resignation to take effect at a future day is not a resignation at all, but simply a notice of an intention to resign, such resignation becoming effective if it remains with the officer authorized to receive it up to the time it was to take effect. But all the courts that have discussed the matter—possibly, that is too broad—I will say a large majority of the courts that have discussed the matter, hold that until the date indicated in the resignation the officer my withdraw it, and may thus prevent a vacancy.

Of course nobody believes that the distinguished Senator from Indiana [Mr. Fairbanks] will withdraw his resignation in order to remain amongst us instead of accepting the call to preside over us, but the probability or the improbability of the withdrawal of a resignation does not affect the law of the case.

I do not, however, intend to insist upon any reference of this particular credential, because the Senate seems to have considered and decided the very question in the Chilton case. There a Senator from my own State was appointed in April to fill a vacancy which, by the terms of the resignation, was to occur in June. His credentials were referred to the Committee on Privileges and Elections, and that committee reported unanimously that he was entitled to his seat. But the remarkable thing is that, although that report was prepared and presented by so great and so accurate a lawyer as the late Senator from Massachusetts, Mr. Hoar, it does not appear to have taken into consideration at all the very vital question in the case. The report devotes itself almost entirely to a line of reasoning upon the right of executives and legislatures to fill a vacancy which is certain to occur, in advance of its occurrence. But the report in no part of it, as I now recall—it has been some time since I examined it; I did examine it closely at the time, and remember distinctly to have believed, although I had no interest in it, that the Senate was wrong—the report, so far as I can now recall, does not consider the question as to whether a resignation may be withdrawn or not, and yet the courts have held over and over again that it may be.

I venture to say that the records of Congress will verify my statement that Senators have telegraphed their resignations to the governors of their States and afterwards withdrawn them. But, recognizing that—although it did not seem to consider the vital point in the case—the report and the action of the

[1] Third session Fifty-eighth Congress, Record, pp. 2971, 2972.

Senate in the Chilton case are on all fours with the present case, I am not going to ask that the credentials be referred to the Committee on Privileges and Elections, but content myself with simply saying that if it were an important question, I should not want it to be understood as concluded by the action of the Senate here.

Mr. Julius C. Burrows, of Michigan, referred to the precedents in the cases of Clay and Dixon; and Mr. Henry M. Teller, of Colorado, referred to the report in the Chilton case, saying:

Mr. President, I was chairman of the committee when the report was made. This matter was referred more particularly to Senator Hoar, who made the report. I was somewhat embarrassed at the time by the question from the fact that in 1882 1 had resigned my seat in the Senate to take another place, and I had resigned to take effect when my successor should be elected or appointed. I had remained in the Senate until the governor of the State had appointed and sent here my successor to be sworn in, and then I took the other place.

When this question came before the Committee on Privileges and Elections it was a new question to me, although I knew that some Senators had raised the question, but not until after I had gone out of the Senate, and I did not take any part in that discussion or in the report except pro forma.

The credentials were placed on file.

On March 4, 1905,[1] at the organization of the Senate, Mr. Hemenway appeared and took the oath and his seat without question.

1230. A Member-elect may resign before taking the oath.

A Member-elect having resigned, the House decided that the person elected as his successor was entitled to the seat.

The House very early found the law of Parliament inapplicable in the case of a resignation.

On November 9, 1791[2] the Speaker laid before the House a letter from the governor of Maryland, inclosing a letter to him from William Pinckney, a Member returned to serve in this House from Maryland, containing his resignation of that appointment; also a return of John Francis Mercer, elected a Member to serve in this House in place of the said William Pinckney. These papers were referred to the Committee on Elections.

This Congress had organized on October 24, 1791. Mr. Pinckney did not appear that day, nor thereafter, and so did not qualify as a Member.

On November 18 Mr. Samuel Livermore, of New Hampshire, submitted the report of the Committee on Elections, which found that Mr. Mercer was entitled to the seat.

On November 22 the report was debated at considerable length, the discussion relating to the status of the Member-elect before he takes his seat, and whether such an one may resign. It was urged on one side that the usage of the British Parliament, which did not permit resignations, should be adhered to; and on the other, that there being no analogy between the House of Representatives and Parliament, and the Constitution not prohibiting resignation, it should be concluded that a Member may resign. Doubt was expressed, however, as to whether the present case should be termed a resignation.

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[1] First session Fifty-ninth Congress, Record of Special Session of the Senate, pp. 1, 2.

[2] First session Second Congress, Journal, pp. 451, 457, 461; Annals. pp. 205–207.

On November 23 the House adopted the resolution reported by the committee, which was as follows:

It appears that, at an election held for the State of Maryland, on October 1, 1790, William Pinckney was duly elected a Representative for that State, to Serve in the House of Representatives of the United States; that the certificate of his election has been duly transmitted by the executive thereof, and heretofore so reported by your committee; that, by letter dated September 26, 1791, directed to the governor and council of that State, William Pinckney resigned that appointment; and that, in consequence of such resignation, the executive issued a writ for an election, to supply a vacancy thereby occasioned, and have certified that John Francis Mercer was duly elected, by virtue of that writ, in pursuance of the law of the State of Maryland in that case provided.

Resolved, That it is the opinion of this committee that John Francis Mercer is entitled to take a seat in this House, as one of the Representatives for the State of Maryland, in the stead of William Pinckney.

1231. An instance of the resignation of a Member who had not taken his seat.—In the Thirty-third Congress, Mr. Zeno Scudder, of Massachusetts, did not appear in the House, being detained away by an accident, and resigned without having taken his seat. His resignation appears from the fact that his successor appeared on April 17, 1854,[1] and was qualified. The Journal does not seem to have any other mention of the fact of resignation except for a resolution presented on June 23 to pay to Mr. Scudder his per diem and mileage to the date of his resignation.

1232. A Member-elect's letter of resignation, transmitted to the Speaker before the election of that officer, was laid before the House after organization.—On December 2, 1901,[1] at the organization of the House, after the Speaker had been elected and the Members sworn in, the Speaker laid before the House the following letter:

NEW YORK, *November 19, 1901.*

SIR: I hereby resign the office of Representative in the House of Representatives of the Congress of the United States in and for the Seventh Congressional district of the State of New York; this resignation to take effect the 1st day of December, 1901.

Yours, respectfully,

NICHOLAS MULLER.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES
OF THE CONGRESS OF THE UNITED STATES,
WASHINGTON, D. C.

Mr. Muller's name had been called on the roll call of States, but he did not answer.

1233. A Senator-elect has resigned before taking the oath.—On March 15, 1893,[3] Mr. Asahel C. Beckwith, of Wyoming, presented his credentials as Senator, being appointed by the governor to fill a vacancy. There being a question as to the legality of the appointment, the oath was not administered to Mr. Beckwith, but his credentials were referred to the Committee on Privileges and Elections. On March 27 Mr. George F. Hoar, of Massachusetts, reported from that committee a resolution declaring Mr. Beckwith "entitled to be admitted to a seat as a Senator from the State of Wyoming."

On August 7, before this resolution had been acted on, the Vice-President laid

[1] First session Thirty-third Congress, Journal, pp. 643, 1036; Globe, pp. 924, 1463.

[2] First session Fifty-seventh Congress, Journal, p. 6; Record, p. 45.

[3] Senate Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 83.

before the Senate the following communication, which was read and ordered to lie on the table:

[The Beckwith Commercial Company, merchants. Incorporated 1887.]

EVANSTON, WYO., *July 11, 1893.*

DEAR SIR: Owing to a combination of circumstances over which I had no control, I have been obliged to hand in my resignation to Governor Osborne of my appointment as United States Senator from Wyoming.

I beg to remain, your obedient servant,

A. C. BECKWITH.

Hon. ADLAI E. STEVENSON, *Washington, D. C.*

1234. An instance wherein one who had been declared elected to a seat in the House declined to accept it.

One who had been declared elected to a seat in the House having failed to appear, the House directed the State executive to be notified of its action.

On March 9, 1830,[1] the Speaker laid before the House a letter from Silas Wright, Jr., stating that he declined to accept the seat in the House lately occupied by George Fisher, to which he had been declared to be entitled as one of the Representatives from the State of New York.

The letter was read and laid on the table.

Mr. Wright's memorial asking to be admitted to a seat in place of Mr. Fisher, had been presented December 15, 1829,[2] and on February 5, 1830,[3] the House had declared him entitled to the seat.

On February 13,[4] Mr. Wright having failed to appear and qualify, the House directed the Speaker to inform the executive of New York that the seat lately occupied by Mr. Fisher had been awarded to Mr. Wright.

On December 6, 1830,[5] at the opening of the next session, there appeared "Jonah Sanford, in the place of Silas Wright, jr., who declined to take the seat awarded to him at the last session."

1235. Instance wherein a Senator-elect notified the Senate that he had formally declined to accept an appointment to be a Senator.—On January 5, 1881,[6] the Vice-President laid before the Senate a letter of James A. Garfield, as follows:

"MENTOR, OHIO, *December 23, 1880.*

"SIR: On the 13th and 14th days of January, 1880, the general assembly of the State of Ohio, pursuant to law, chose me to be a Senator in the Congress of the United States from said State for the term of six years, to begin on the 4th day of March, A. D. 1881.

"Understanding that the lawful evidence of that fact has been presented to the Senate and filed in its archives, I have the honor to inform the Senate that I have by letter dated December 23, A. D. 1880, and addressed to the governor and general assembly of the State of Ohio, formally declined to accept the said appointment and have renounced the same.

"I am, Sir, very respectfully, your obedient servant,

"J. A. GARFIELD.

"To the PRESIDENT OF THE SENATE OF THE UNITED STATES, *Washington, D. C."*

This letter was read and ordered to be placed on the files of the Senate.

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[1] First session Twenty-first Congress, Journal, p. 394.

[2] Journal, p. 34.

[3] Journal, p. 358.

[4] Journal, p. 293.

[5] Second session Twenty-first Congress, Journal, p. 7.

[6] Third session Forty-sixth Congress, Senate Journal, pp. 83, 84.

Mr. Garfield was a Member of the House of Representatives in the Forty-sixth Congress, and participated in the proceedings of the second session, which adjourned on June 16, 1880.[1]

In the summer of 1880 he was nominated for President of the United States and was elected to that office in November, 1880. When the third session of the Forty-sixth Congress met, on December 6, 1880,[2] Mr. Garfield did not appear; and on December 13[3] the credentials of Ezra B. Taylor, "to fill the vacancy occasioned by the resignation of James A. Garfield," were presented.

The credentials of Mr. Garfield as a Senator-elect were presented in the Senate on May 7, 1880,[4] for the term to begin March 4, 1881.

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[1] Second session Forty-sixth Congress, House Journal, p. 1521.

[2] Third session, House Journal, pp. 6, 7.

[3] House Journal, p. 58.

[4] Second session Forty-sixth Congress, Senate Journal, p. 526.

Chapter XLII.

PUNISHMENT AND EXPULSION OF MEMBERS.[1]

1236. The Constitution provides that the House may punish its Members for disorderly behavior, and expel a Member by a two-thirds vote.— The Constitution in Article I, section 4, provides:

Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member.

1237. Provisions of the parliamentary law in cases where charges arise against a Member from report of a committee on examination of witnesses in the House.—In Jefferson's Manual[3] certain principles are laid down regarding the conduct of Members:

No Member may be present when a bill or any business concerning himself is debating; nor is any Member to speak to the merits of it till he withdraws. (2 Hats., 219.) The rule is, that if a charge against a Member arise out of a report of a committee or examination of witnesses in the House, as the Member knows from that to what points he is to direct his exculpation, he may be heard to those points before any question is moved or stated against him. He is then to be heard and withdraw before any question is moved. But if the question itself is the charge, as for breach of order or matter arising in the debate, then the charge must be stated—that is, the question must be moved—himself heard, and then to withdraw. (2 Hats., 121, 122.)

Where the private interests of a Member are concerned in a bill or question he is to withdraw. And where such an interest has appeared his voice has been disallowed, even after a division.[4] In a case so contrary, not only to the laws of decency, but to the fundamental principle of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the House that this rule of immemorial observance should be strictly adhered to. (2 Hats., 119, 121; 6 Grey, 368.)

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[1] See Chapter LII, sections 1641–1665, of this volume for punishment of Members for contempt. A proposition to investigate conduct of a Member or punish him is a question of privilege (Secs. 2648–2655 of Vol. III.)

[2] Discussion of power to expel in Roberts's case (sec. 475, Vol. 1), in the Senate case of Smoot (sec. 481, Vol. I), and in relation to Delegates (sec. 469, Vol. 1).

[3] Jefferson's Manual is made the rule of the House in those particulars where the rules are silent. (See sec. 6757, Vol. V of this work.)

[4] See sections 5949–5963 of Volume V of this work for interpretation of the rule relating to personal interest.

1238. Proceedings when it is necessary to put a Member under arrest, or when on public inquiry matter arises affecting a Member.—Section III of Jefferson's Manual, on the subject of privilege, provides:

When it is found necessary for the public service to put a Member under arrest, or when, on any public inquiry, matter comes out which may lead to affect the person of a Member, it is the practice immediately to acquaint the House, that they may know the reasons for such a proceeding, and take such steps as they think proper. (2 Hats., 259.) Of which see many examples. (ib., 256, 257, 258.) But the communication is subsequent to the arrest. (1 Blackst., 167.)

1239. A Member having resigned, and expulsion therefore not being proposed, the House adopted a resolution censuring his conduct.—On February 28, 1870,[1] the Speaker laid before the House a letter from Mr. John T. Deweese, of North Carolina, informing the House through the Speaker that he had, by letter and telegraph, tendered his resignation as a Member of the Forty-first Congress to the governor of North Carolina. The letter was read and laid on the table.

On March 1, Mr. John A. Logan, of Illinois, from the Committee on Military Affairs, reported the following resolution:

Resolved, That John T. Deweese, late a Representative in Congress from the Third Congressional district of North Carolina, did make an appointment to the United States Naval Academy in violation of law, and that such appointment was influenced by pecuniary considerations, and that his conduct in the premises has been such as to show him unworthy of a seat in the House of Representatives, and is therefore condemned as conduct unworthy of a Representative of the people.

Mr. Logan explained that the committee would have reported a resolution of expulsion had not the House by its action in a previous case decided against expelling a Member who had resigned.

The resolution was then agreed to, yeas 170, nays 0.

1240. A resolution of censure should not apply to more than one Member.—On February 27, 1873,[7] Mr. Fernando Wood, of New York, proposed a resolution censuring several Members for alleged connection with the Credit Mobilier.

Mr. Samuel J. Randall, of Pennsylvania, raised the question of order that it was not in order to include in a resolution of censure more than one name.

The Speaker[3] said:

Upon all questions affecting the personal or representative character of a Member the gentleman from New York will himself see the propriety of each Member standing absolutely on his own merits.[4]

1241. Instance of the presentation in the Senate of a petition for the expulsion of a Senator.—On Friday, February 9, 1906,[1] in the Senate the Vice President presented the petition of C. W. Post, a citizen of the United States, praying for the expulsion from the United States Senate of Thomas C. Platt, a Senator from the State of New York; which was referred to the Committee on Privileges and Elections.

This petition was signed by "C. W. Post" before a notary public, whose signature and seal appear thereon.

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[1] Second session Forty-first Congress, Journal, pp. 390, 396; Globe, pp. 1597, 1616, 1617.

[2] Third session Forty-second Congress, Globe, p. 1835.

[3] James G. Blaine, of Maine, Speaker.

[4] See, however, instance wherein the Senate by one resolution expelled several Senators. (Sec. 1266 of this chapter.)

[5] First session Fifty-ninth Congress, Record, p. 2331.

1242. The Senate declined to investigate charges against the Vice President, it being urged that he was subject to impeachment proceedings only.—On January 28, 1873,[1] the Vice-President (Mr. Colfax) asked the Senate for a committee to investigate certain charges made against his character. The proposition was opposed by Mr. Allen G. Thurman, of Ohio, on the ground that the Vice-President was not a Member of the Senate who might be expelled, but an officer of the Government, who should be proceeded against by process of impeachment, if at all. The motion for the appointment of the committee was not agreed to.

1243. In a single instance the Senate annulled its action in expelling a Member.—On March 3, 1877,[2] the Senate annulled the action whereby on July 11, 1861, William K. Sebastian was expelled. The resolution of annulment was adopted on report from the Committee of Privileges and Elections, which held that the Senate possessed this right of review.

1244. Parliamentary law as to offenses committed by a Member in the House, especially in debate.—Section III of Jefferson's Manual, on the subject of privilege, provides:

> If an offense be committed by a Member in the House, of which the House has cognizance, it is an infringement of their right for any person or court to take notice of it till the House has punished the offender, or referred him to a due course. (Lex Parl., 63.)
>
> Privilege is in the power of the House, and is a restraint to the proceeding of inferior courts, but not of the House itself. (2 Nalson, 450; 2 Grey, 399.) For whatever is spoken in the House is subject to the censure of the House; and offenses of this kind have been severely punished by calling the person to the bar to make submission, committing him to the Tower, expelling the House, etc. (Seeb., 72; L. Parl., c. 22.)

1245. The House considered but did not act on propositions to expel or censure a Member who had published in a newspaper an article alleged to be in violation of the privileges of the House.—On February 21,1839,[3] Mr. Sergeant S. Prentiss, of Mississippi, rising to a question of privilege, moved the following resolutions:

> *Resolved,* That this House proceed forthwith to inquire—
>
> First. Whether Alexander Duncan, a Member of this House from the State of Ohio, be the author of a certain publication, or publications, under his name, in relation to the proceedings of this House and certain Members thereof, published in the Globe newspaper of the 19th instant;
>
> Second. Whether, by said publication or publications, the said Alexander Duncan has not been guilty of a violation of the privileges of this House; of an offense against its peace, dignity, and good order; and of such grossly indecent, ungentlemanly, disgraceful, and dishonorable misconduct, as renders him unworthy of a seat in this House, and justly liable to expulsion from the same.

After debate, Mr. Prentiss offered the following as a modification of his proposition:

> That, as Alexander Duncan has avowed himself the author of the publication in the Globe, he be, and is hereby, expelled from the House.

Debate arose over this proposition, Mr. John Quincy Adams, of Massachusetts, calling attention to the fact that it involved the constitutional power of the House

[1] Third session Forty-second Congress, Globe, p. 895.

[2] Second session Forty-fourth Congress, Record, pp. 2193–2203

[3] Third session Twenty-fifth Congress, Journal, pp. 618–631; Globe, pp. 197, 199.

to expel a Member. Finding opposition, Mr. Prentiss withdrew the proposition to expel.

On the succeeding day, Mr. Waddy Thompson, jr., of South Carolina, proposed a substitute, which was accepted by Mr. Prentiss, in the form of a preamble reciting the article from the Globe in full, with other matters pertinent to the controversy, and concluding with a resolution that Mr. Duncan had subjected himself to the just censure of the House, and should be reprimanded by the Speaker.

After debate, Mr. Sherrod Williams, of Kentucky, moved that the matter be laid on the table, and the motion was agreed to, yeas 117, nays 95.

1246. A Member was censured for presenting a resolution insulting to the House.

A Member against whom a resolution of censure was pending participated in the debate.

On May 14, 1866,[1] Mr. Robert C. Schenck, of Ohio, as a question of privilege, submitted the following:

Resolved, That John W. Chanler, a Representative from the Seventh district of the State of New York, by presenting this day a resolution to be considered by this House, in the following terms:

"Resolved, That the independent, patriotic, and constitutional course of the President of the United States in seeking to protect by the veto power the rights of the people of this Union against the wicked and revolutionary acts of a few malignant and mischievous men meets with the approval of this House and deserves the cordial support of all loyal citizens of the United States," has thereby attempted a gross insult to the House, and is hereby censured therefor.

After debate, in the course of which Mr. Chanler spoke in his own behalf, the question was taken and there were yeas 72, nays 30, and so the resolution was agreed to.

1247. A Member who had used offensive words against the character of the House, and who declined to explain when called to order, was censured by order of the House.—On January 15, 1868,[2] during the consideration of the bill (H. R. 439) supplementary to the act to provide for the more efficient government of the rebel States, when Mr. Fernando Wood, of New York, was called to order for the use of the following words:

A monstrosity, a measure the most infamous of the many infamous acts of this infamous Congress.

On demand of Mr. John A. Bingham, of Ohio, the words were taken down, and the Speaker[3] decided that they were not in order.

Mr. Wood having declined to explain, the question was put: Shall the Member be permitted to proceed? and decided in the negative, yeas 40, nays 108.

Thereupon, Mr. Henry L. Dawes, of Massachusetts, submitted the following resolution:

Resolved, That Fernando Wood, a Member of this House from the State of New York, having this day used in debate, upon the floor of the House, the following words: "A monstrosity, a measure the most infamous of the many infamous acts of this infamous Congress," deserves therefor the censure of this House, and the Speaker is hereby directed forthwith to pronounce that censure at the bar of the House.

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[1] First session Thirty-ninth Congress, Journal, p. 695; Globe, p. 2573.

[2] Second session Fortieth Congress, Journal, pp. 193–195; Globe, p. 542.

[3] Schuyler Colfax, of Indiana, Speaker.

A motion to lay on the table having been decided in the negative, the resolution was agreed to under the operation of the previous question, yeas 114, nays 39.

Thereupon Mr. Wood appeared at the bar of the House, and the Speaker said:

Mr. Fernando Wood: May's Treatise on the Law, Privileges, and Usages of Parliament, from which we derive the fundamental principles of our parliamentary law, in speaking of occurrences like that which has caused the vote the result of which has just been announced, thus speaks:

"It is obviously unbecoming to permit offensive expressions against the character and conduct of Parliament to be used without rebuke; for they are not only a contempt of that high court, but are calculated to degrade the legislature in the estimation of the people. If directed against the other House and passed over without censure, they would appear to implicate one House in discourtesy to the other; if against the House in which the words are spoken, it would be impossible to overlook the disrespect of one of its own Members. Words of this objectionable character are never spoken but in anger; and when called to order the Member must see the error into which he has been misled, and retract or explain his words and make a satisfactory apology. Should he fail to satisfy the House in this manner he will be punished by a reprimand or commitment."

Having violated this universally recognized rule of parliamentary law in all deliberative bodies, the House has ordered its censure to be pronounced upon you by its presiding officer. This duty having been performed, you will resume your seat.

1248. A Member having used words insulting to the Speaker, the House, on a subsequent day and after other business had intervened, censured the offender.

An insult to the Speaker has been held to raise a question of privilege not governed by the ordinary rule about taking down disorderly words as soon as uttered.

When the House was considering a resolution censuring a Member for an alleged insult to the Speaker, the Speaker called another Member to the chair.

On July 9, 1832,[1] during debate on a question of order, Mr. William Stanbery, of Ohio, in criticizing a ruling of the Chair, said:

I defy any gentleman to point me to a single decision to the contrary, until you presided over this body. And let me say that I have heard the remark frequently made, that the eyes of the Speaker are too frequently turned from the chair you occupy toward the White House.

Mr. Stanbery being called to order by Mr. Franklin E. Plummer, of Mississippi, sat down; and the debate proceeded.

The pending question being disposed of, Mr. Thomas F. Foster, of Georgia, moved that the rules be suspended in order to enable the House to consider[2] the following resolution:

Resolved, That the insinuations made in debate this morning by the honorable William Stanbery, a Member of this House from Ohio, charging the Speaker of House with shaping his course, as this presiding officer of the House, with the view to the obtainment of office from the President of the United States, was an indignity to the Speaker and the House, and merits the decided censure of this House.

The vote being taken, there were yeas 95, nays 62; so the House refused to suspend the rules.

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[1] First session Twenty-second Congress, Journal, p. 1113; Debates, pp. 3876, 3877, 3887.

[2] The pressure of business had at this date become such as not to permit the regular order to be interrupted except by unanimous consent or by a vote to suspend the rules; but the system had not been instituted yet of admitting such resolutions as matters of privilege—or at least not in cases of this kind.

On July 10,[1] when the States were called for the presentation of resolutions,[2] Mr. James Bates, of Maine, presented the resolution again, with the slight modification of "words spoken" instead of "insinuations made."

Mr. Charles F. Mercer, of Virginia, made the point of order against the resolution that the words of the gentleman from Ohio, were not taken down at the time they were spoken, nor at the close of the speech of the Member; because other business had occurred since the imputed insinuations were made; and because a day had elapsed since the words were used, without any action or proceeding of the House in relation thereto. Jefferson's Manual was quoted in support of this contention.[3]

The Speaker pro tempore[4] decided that the resolution was in order. This was a question concerning the privileges of the House; therefore the rules of ordinary debate did not apply.

Mr. Mercer appealed; but pending the discussion the hour expired, and although Mr. George MeDuffie, of South Carolina, insisted that the pending question had precedence, because it related to the dignity and privileges of the House, the House voted to proceed to the orders of the day. On the next day, however, when the question arose again, the Speaker pro tempore corrected his decision of the day before, and decided that a question of order involving the privileges of the House took precedence of all other business.

On July 11[5] debate on the appeal of Mr. Mercer was resumed. Mr. John Quincy Adams, of Massachusetts, said that this seemed to be a case of punishment for disorderly words spoken in debate. But in such a proceeding the words should be taken down, which had not been done in this case, although the Manual specifically provided such a course of procedure. That course was founded in reason and justice, and was, as expressly declared, "for the common security of all."

The decision of the Chair, on Mr. Mercer's appeal, was finally sustained, yeas 82, nays 48.

The question recurring on agreeing to the resolution of censure, Mr. Stanbery justified what he said as parliamentary by quoting Lord Chatham's words, which had passed without a call to order in open Parliament, "the eyes of the Speaker of that House were too often turned toward St. James's."

Mr. Samuel F. Vinton, of Ohio, raised a question as to whether or not interrogatories should not be propounded by the Chair to the Member about to be censured, to ascertain whether he admitted or denied the fact charged in the resolution; but the Speaker declined to do so.

The question being taken,[6] the resolution of censure was agreed to, yeas 93, nays 44.

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[1] Journal, p. 1118; Debates, pp. 388S–3891.

[2] In the order of business at that time an hour was devoted to the presentation of resolutions, etc., before passing to the Speaker's table and the orders of the day.

[3] See Chapter XVII of Jefferson's Manual.

[4] Clement C. Clay, of Alabama, Speaker pro tempore. Mr. Speaker Stevenson had left the chair from motives of delicacy. Debates, p. 3898.

[5] Journal, pp. 1134, 1135; Debates, pp. 3899–3903.

[6] Journal, p. 1141; Debates, p. 3907.

Several Members asked to be excused from voting, on the ground that they had not heard the words spoken by Mr. Stanbery, but the House declined to excuse them. Mr. Adams, however, refused to vote.

1249. A Member in debate having declared the words of another Member "a base lie," the Speaker declared the words out of order and the House inflicted censure on the offender.

The Speaker having, by order of the House, censured a Member, the words of censure were spread on the Journal.

On January 26, 1867,[1] during debate on the bill (H. R. 543) for restoring to the States lately in insurrection their full political rights, Mr. John W. Hunter, of New York, was called to order by Mr. Ralph Hill, of Indiana, for the use of the following words: "I say that, so far as I am concerned, it is a base lie," referring to a statement by Mr. James M. Ashley, of Ohio.

The Speaker[2] decided the words out of order.

Thereupon Mr. Hill submitted the following resolution:

Resolved, That the gentleman from New York, Hon. Mr. Hunter, in declaring during debate in the House, in reference to the assertions of the gentleman from Ohio, Hon. Mr. Ashley, "I say that, so far as I am concerned, it is a base lie," has transgressed the rules of this body, and that he be censured for the same by the Speaker.

The resolution having been agreed to—yeas 77, nays 33—Mr. Hunter appeared at the bar of the House and the Speaker administered the censure. This censure by the Speaker appears in full in the Journal.

1250. A Member having explained that by disorderly words which had been taken down he had intended no disrespect to the House, a resolution of censure was withdrawn.—On June 1, 1860,[3] on the request of Mr. John Sherman, of Ohio, the following words spoken in debate were taken down:

By Mr. CHARLES R. TRAIN, of Massachusetts: "I am not in the habit of troubling the House much, and I never insist upon speaking when I am clearly out of order. I should consider myself guilty of gross impropriety, not only as a Member of the House, but as a gentleman, if I insisted upon addressing the Chair, and interpolating my remarks when I had no right to the floor."

By Mr. GEORGE S. HOUSTON, of Alabama: "I wish to know if the gentleman from Massachusetts applied that remark to me?"

By Mr. TRAIN: "I mean exactly what I did say, and I stand by what I said."

By Mr. HOUSTON: "I mean to say that if he applied that remark to me, he is a disgraced liar and scoundrel."[4]

Mr. Sherman submitted this resolution:

Resolved, That the gentleman from Alabama, Mr. Houston, be censured for disorderly words spoken in debate.

During the discussion of the resolution the point of order was made that the gentleman from Ohio did not call the gentleman from Alabama to order before asking that the words be taken down.

The Speaker overruled the point of order.

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[1] Second session Thirty-ninth Congress, Journal, pp. 271–273; Globe, pp. 785–787.

[2] Schuyler Colfax, of Indiana, Speaker.

[3] First session Thirty-sixth Congress, Journal, pp. 972–981; Globe, pp. 2546, 2548, 2564.

[4] These words appear in full in the Journal as taken down.

[5] William Pennington, of New Jersey, Speaker.

A motion was then made to amend the resolution by including the name of Mr. Train. Finally, after motions to lay the resolution on the table had been decided in the negative, and after the previous question had been ordered on the resolution and amendment, Mr. Sherman withdrew his resolution by permission of the House, and Mr. Houston made an explanation that he had intended no disrespect to the House.

1251. After abandoning a proposition to expel, the House arrested and censured a Member for gross personalities aimed at another Member, and for deception of the Speaker when the latter had proposed to prevent the utterances.—On February 4, 1875,[1] the House was considering the motion of Mr. Benjamin F. Butler, of Massachusetts, to recommit the bill (H. R. 7196) to protect all persons in their civil and political rights.

Pending the debate, Mr. John Young Brown, of Kentucky, was called to order for words used in debate, and the following were taken down:[2]

Now again that accusation has come from one—I speak not of men but of language, and within the rules of the House—that accusation against that people has come from one who is outlawed in his own home from respectable society; whose name is synonymous with falsehood; who is the champion, and has been on all occasions, of fraud; who is the apologist of thieves; who is such a prodigy of vice and meannesses that to describe him would sicken imagination and exhaust invective.

In Scotland years ago there was a man whose trade was murder, and who earned a livelihood by selling the bodies of his victims for gold. He linked his name to his crime, and to-day throughout the world it is known as "Burking."

The SPEAKER. Does the Chair understand the gentleman to be referring in this language to a Member of the House?

Mr. BROWN. No, sir; I am describing an individual who is in my mind's eye.

The SPEAKER. The Chair understood the gentleman to refer to a Member of the House.

Mr. BROWN. No, sir; I call no names.

This man's name was linked to his crime, and to-day throughout the world it is known as "Burking." If I wished to describe all that was pusillanimous in war, inhuman in peace, forbidden in morals, and infamous in politics, I should call it "Butlerism."

Mr. Robert S. Hale, of New York, then offered the following:

Resolved, That the Member from Kentucky, Mr. John Young Brown, in the language used by him upon the floor and taken down at the Clerk's desk, as well as in the prevarication to the Speaker, by which he was enabled to complete the utterance of the language, has been guilty of the violation of the privileges of this House and merits the severe censure of the House for the same.

Resolved, That the said John Young Brown be now brought to the bar of the House in the custody of the Sergeant-at-Arms, and be there publicly censured by the Speaker in the name of the House.

Mr. Henry L. Dawes, of Massachusetts, moved to amend by substituting a resolution of expulsion, but after debate withdrew it, saying it was evident that it could not receive a two-thirds vote.

Thereupon, after debate, the resolution of censure was agreed to, yeas 161, nays 79.

Thereupon the Sergeant-at-Arms appeared at the bar having in custody Mr. Brown, and the Speaker pronounced the censure of the House.[3] He was then discharged from custody.

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[1] Second session Forty-third Congress, Journal, pp. 392–394; Record, pp. 986–992.

[2] The Journal does not have the words taken down (p. 392), but simply says, "the words having been reduced to writing."

[3] The Journal (p. 394) gives the remarks of the Speaker in full.

1252. It has been held in order to censure a Member for words alleged to be treasonable, even though they were not taken down at the time they were uttered.—On April 12, 1864,[1] the House was considering a preamble and resolution reciting that Alexander Long, a Representative from Ohio, had in Committee of the Whole declared himself in favor of recognizing the independence of the so-called Confederacy, thereby violating the oath required of all Members of the House, and providing for his expulsion from the House.

To this Mr. John M. Broomall, of Pennsylvania, offered an amendment in the nature of a substitute, declaring that the said Long had by declarations in the national capitol and by publications in New York, shown himself disloyal and negligent of his oath by favoring the recognition of the so-called Confederacy, and then resolving as follows:

Resolved, That the said Alexander Long, a Representative from the Second district of Ohio, be, and he is hereby, declared to be an unworthy Member of the House of Representatives.

Resolved, That the Speaker shall read these resolutions to the said Alexander Long during the session of the House.

Mr. Charles A. Eldridge, of Wisconsin, made the point of order that the amendment was out of order, on the ground that the words spoken by Mr. Long were not taken down in writing at the time of their utterance, nor was exception taken to them either in Committee of the Whole or in the House until after another Member had spoken and other business had intervened.

The Speaker pro tempore[2] overruled the point of order and decided that the amendment proposed was in order.

Mr. Eldridge having appealed, the decision of the Chair was sustained on the succeeding day, yeas 79, nays 66.

1253. After considering the question of expulsion, the House censured a Member for words alleged to be treasonable.

A Member, against whom a resolution of censure was pending, addressed the House without permission being asked or given.

Calling a Member to the Chair, Mr. Speaker Colfax offered from the floor a resolution for the expulsion of a Member.

On April 9, 1864,[3] Mr. Edward H. Rollins, of New Hampshire, was called to the chair, and the Speaker[4] as a question of privilege, submitted the following preamble and resolution:

Whereas on the 8th of April, 1864, when the House of Representatives was in Committee of the Whole on the state of the Union, Alexander Long, a Representative from the Second district of Ohio, declared himself in favor of recognizing the independence and nationality of the so-called Confederacy, now in arms against the Union; and whereas the said so-called Confederacy thus sought to be recognized and established on the ruins of a dissolved or destroyed Union has as its chief officers, civil and military, those who have added perjury to their treason, and who seek to obtain success for their parricidal efforts by the killing of the loyal soldiers of the nation, who are seeking to save it from destruction; and whereas the oath required of all Members, and taken by the said Alexander Long on the first day

[1] First session Thirty-eighth Congress, Journal, pp. 518, 519, 520; Globe, p. 1593.

[2] Edward H. Rollins, of New Hampshire, Speaker pro tempore.

[3] First session Thirty-eighth Congress, Journal, pp. 505, 520, 522, 523; Globe, pp. 1505, 1533, 1577, 1618, 1626, 1634.

[4] Schuyler Colfax, of Indiana, Speaker.

of the present Congress, declares "that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility to the United States,"[1] thereby declaring that such conduct is regarded as inconsistent with membership in the Congress of the United States: Therefore,

Resolved, That Alexander Long, a Representative from the Second district of Ohio, having, on the 8th of April, 1864, declared himself in favor of recognizing the independence and nationality of the so-called Confederacy, now in arms against the Union, and thereby "giving aid, countenance, and encouragement to persons engaged in armed hostility to the United States," is hereby expelled.

The resolution and preamble were debated at length, it being urged against them that the words actually spoken did not bear the interpretation put upon them, and that the expulsion of a Member for speech on the floor of the House was against the Constitution and the spirit of the institutions of the country. On the other hand, it was urged that the whole tenor of the speech had been such as to give encouragement to the enemies of the Government and make its author unworthy to sit in the House.

On April 14, on the suggestion of Mr. John M. Broomall, of Pennsylvania, who had proposed an amendment to the same effect, Mr. Colfax modified the resolution, as follows:

Whereas Alexander Long, a Representative from the Second district of Ohio, by his open declarations in the National Capitol and publications in the city of New York, has shown himself to be in favor of a recognition of the so-called Confederacy now trying to establish itself upon the ruins of our country, thereby giving aid and comfort to the enemy in that destructive purpose—aid to armed traitors in erecting an illegal government within our borders—comfort to them by assurances of their success and affirmations of the justice of their cause; and whereas such conduct is at the same time evidence of disloyalty and inconsistent with his oath of office and his duty as a Member of this body: Therefore,

Revolved, That the said Alexander Long, a Representative from the Second district of Ohio, be, and he is hereby, declared to be an unworthy Member of the House of Representatives.

Revolved, That the Speaker shall read these resolutions to the said Alexander Long during the session of the House.

The debate continuing, Mr. Long addressed the House, rising in his place as a matter of course, and obtaining no permission to be heard.

A motion to lay the preamble and resolution on the table was decided in the negative, yeas 70, nays 80.

The first resolution was then agreed to, yeas 80, nays 70.

Then, by a vote of yeas 71, nays 70, the House agreed to the motion of Mr. William S. Holman, of Indiana, that the second resolution be laid on the table.

The preamble was then agreed to, yeas 78, nays 63.

1254. For words alleged to be treasonable, the House censured a Member after a motion to expel him had failed.

A proposition for the punishment of a Member is presented as a question of privilege.

On April 9, 1864,[2] Mr. Elihu B. Washburne, of Illinois, as a question of privilege, submitted the following preamble and resolution:

Whereas the Hon. Benjamin G. Harris, a Member of the House of Representatives of the United States from the State of Maryland, has, upon this day used the following language, to wit: "The South asked you to let them live in peace. But no; you said you would bring them into subjection. That

[1] This oath was specially adopted for the years of the war and the years immediately succeeding. It has since been repealed.

[2] First session Thirty-eighth Congress, Journal, pp. 506–509; Globe, pp. 518, 519.

is not done yet; and God Almighty grant that it never may be. I hope that you will never subjugate the South;" and whereas such language is treasonable and a gross contempt of this House: Therefore, be it

Resolved, That the said Benjamin G. Harris be expelled from this House.

The vote being taken, there appeared, yeas 84, nays 58; and so, two-thirds not concurring, the resolution was not agreed to.

Thereupon Mr. Robert C. Schenck, of Ohio, as a question of privilege, submitted the following:

Resolved, That Benjamin G. Harris, a Representative from the Fifth district of the State of Maryland, having spoken words this day in debate manifestly tending and designed to encourage the existing rebellion and the public enemies of this nation, is declared to be an unworthy Member of this House and is hereby severely censured.

After the disposal of several intervening motions, the question recurred on the resolution, which was agreed to, yeas 98, nays 20.

1255. An attempt to censure a Member for presenting a petition alleged to be treasonable failed after long debate.

Discussion as to whether or not the principles of the procedure of the courts should be followed in action for censure.

An instance wherein a Member against whom a resolution of censure was pending was allowed to insert in the Journal his demand for a constitutional trial.

It is not the duty of the Speaker to construe the Constitution as affecting proposed legislation.

On January 24, 1842,[1] Mr. John Quincy Adams, of Massachusetts, presented a petition of 46 citizens of Haverhill, in the State of Massachusetts, praying Congress immediately to adopt measures peaceably to dissolve the Union of these States, for three reasons, which were set forth in the petition. Mr. Adams moved that the petition be referred to a select committee, with instructions to the committee to report to the House the reasons why the prayer thereof should not be granted.

Pending proceedings on the reception of this petition Mr. Thomas W. Gilmer, of Virginia, as a question of privilege, presented the following:

Resolved, That in presenting for the consideration of the House a petition for the dissolution of the Union, the Member from Massachusetts (Mr. Adams) has justly incurred the censure of this House.

In the course of the consideration of this resolution, and on January 25,[2] Mr. Thomas F. Marshall, of Kentucky, proposed to amend the pending resolution by substituting the following preamble and resolution:

Whereas the Federal Constitution is a permanent form of government, and of perpetual obligation until altered or modified in the mode pointed out by that instrument, and the Members of this House deriving their political character and powers from the same are sworn to support it, and the dissolution of the Union necessarily implies the destruction of that instrument, the overthrow of the American Republic, and the extinction of our national existence, a proposition, therefore, to the Representatives of the people to dissolve the organic law framed by their constituents, and to support which they are commanded by those constituents to be sworn before they can enter upon the execution of the political powers created by it and intrusted to them, is a high breach of privilege, a con-

[1] Second session Twenty-seventh Congress, Journal, pp. 272, 273; Globe, p. 68.

[2] Journal, p. 278; Globe, p. 169.

tempt offered to this House, a direct proposition to the legislature, and each Member of it, to commit perjury, and involves necessarily, in its execution and its consequences, the destruction of our country and the crime of high treason:

Resolved, therefore, That the Hon. John Q. Adams, Member from Massachusetts, in presenting, for the consideration of the House of Representatives of the United States a petition praying for the dissolution of the Union, has offered the deepest indignity to the House of which he is a Member, an insult to the people of the United States, of which that House is the legislative organ, and will, if this outrage be permitted to pass unrebuked and unpunished, have disgraced his country, through their Representatives, in the eyes of the whole world.

Resolved, further, That the aforesaid John Q. Adams, for this insult, the first of the kind ever offered to the Government, and for the wound which he has permitted to be aimed, through his instrumentality, at the Constitution and existence of his country, the peace, the security, and liberty of the people of these States, might well be held to merit expulsion from the national councils; and the House deem it an act of grace and mercy when they only inflict upon him the severest censure for conduct so utterly unworthy of his past relations to the State and his present position. This they hereby do for the maintenance of their own purity and dignity, for the rest, they turn him over to his own conscience and the indignation of all true American citizens.

Motions to lay the subject on the table having been decided in the negative, and the debate having proceeded, on January 26[1] Mr. Adams raised the following question of order:

Has the House the right to entertain the resolution, because it charges him with crimes of which the House has no jurisdiction; and if the House entertain the jurisdiction, they deprive him of rights secured to him by the Constitution of the United States?

The Speaker[2] declined to decide the point submitted, it being a question which it was the peculiar province of the House to decide.

Mr. Marshall, in support of his proposition, referred to the precedent of John Smith in the Senate in 1807.

The question of consideration was put to determine whether the House would consider the matter, and it was decided in the affirmative, yeas 118, nays 75.

Mr. Adams then demanded the benefit of the sixth article of the amendments to the Constitution of the United States, and required that his demand be entered on the Journal. Without any vote being taken, the article was entered and appears on the journal as follows:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

After further debate, and a further refusal of the House to lay the subject on the table, on February 2[3] Mr. Adams, as a part of his defense, presented four resolutions calling on heads of departments and the President to furnish certain specified information on subjects relating to slavery and the rule of the House excluding petitions for the abolition of slavery.

Mr. Gilmer objected to the reception of the resolutions as contrary to the regular order of business.

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[1] Second session Twenty-seventh Congress, Journal, pp. 280, 283; Globe, pp. 180, 184.

[2] John White, of Kentucky, Speaker.

[3] Journal, pp. 298–306; Globe, pp. 200–203.

The Speaker decided to receive them, as connected with the subject before the House.

The first resolution was agreed to, yeas 97, nays 96, the second, yeas 95, nays 84; but the third and fourth, relating to action of the President of the United States with regard to the rule relating to petitions, were laid on the table, yeas 111, nays 64, although Mr. Adams declared the information which they called for most important for his defense.

The debate then continued, Mr. Adams contending that as he was to be tried for crime he should have time and means to make his defense, and Mr. Marshall urging that the House had a right to censure, irrespective of the relations of the offense to the courts of justice.

On this day also Mr. George W. Summers, of Virginia, proposed the following proposition:

That a select committee be appointed to take into consideration the contempt and breach of privilege alleged to have been committed by John Quincy Adams, a Member of this House, in presenting a petition on the 24th day of January last purporting to be signed by certain citizens of Massachusetts praying that Congress should take suitable measures for the peaceable dissolution of the Union, and that it be the duty of said committee to consider and report whether any, and, if any, what further proceedings should be taken by the House in the matter of said alleged contempt and breach of privilege; and if the said committee shall be of opinion that any action on the part of the House in relation to the presentation of said petition by the said John Quincy Adams be proper and expedient, then that the said committee do further report what, in their opinion, will be the best and most appropriate mode of conducting the proceedings of the House in relation thereto, having respect to the powers and duty of the House, the precedents of parliamentary usage, and the rights of the Member accused.

The debate proceeded, Mr. Adams contending that, although he admitted the force of the precedent in the case of John Smith and realized the discretionary power of the House to try him on a question of privilege, the House should either send him before a court of justice or try him themselves, before proceeding to pass judgment upon him.

Finally, on February 7,[1] on motion of Mr. John M. Botts, of Virginia, who said that the House and the country were anxious to get rid of the subject, the whole matter was laid on the table, by a vote of 106 yeas, 93 nays.

1256. The House censured Joshua R. Giddings for presentation of a paper deemed incendiary and without hearing him in defense.

Instance wherein a Member resigned his seat, sought reelection, and appeared again to be sworn in during the same Congress.

The previous question applies to a question of privilege as to any other question.

On March 21, 1842,[2] Mr. John B. Weller, of Ohio, moved the following:

Whereas the honorable Joshua R. Giddings, the Member from the Sixteenth Congressional district of the State of Ohio, has this day presented to this House a series of resolutions touching the most important interests connected with a large portion of the Union, now a subject of negotiation between the United States and Great Britain of the most delicate nature, the result of which may eventually involve these two nations, and perhaps the whole civilized world, in war; and

[1] Journal, pp. 313–315; Globe, p. 214.

[2] Second session Twenty-seventh Congress, Journal, pp. 573, 576; Cong. Globe, pp. 343, 345.

Whereas it is the duty of every good citizen, and particularly the duty of every selected agent and representative of the people, to discountenance all efforts to create excitement, dissatisfaction, and division among the people of the United States at such a time and under such circumstances, which is the only effect to be accomplished by the introduction of sentiments before the legislative body of the country hostile to the grounds assumed by the high functionary having in charge this important and delicate trust; and

Whereas mutiny and murder are therein justified and approved in terms shocking to all sense of law, order, and humanity: Therefore

Resolved, That this House hold the conduct of said Member as altogether unwarranted and unwarrantable, and deserving the severe condemnation of the people of this country, and of this body in particular.

Mr. Weller asked for the previous question, pending which Mr. Giddings inquired of the Chair whether the effect of that question, if sustained, would be to preclude him from giving his reasons why the resolution should not pass.

The Speaker decided that if Mr. Giddings desired to be heard in his defense, and claimed it as a matter of privilege, he would not entertain the previous question at this time, as it would cut him off from his right of defense.

Mr. Giddings then moved that the further consideration of the subject be postponed until Thursday week next, to the end that he might prepare for his defense.

Debate arising on this motion, Mr. Millard Fillmore, of New York, submitted that debate was not in order, and that the motion for the previous question should be now entertained by the Speaker.

The Speaker [1] then decided that, in his judgment, the matter before the House was a question of privilege, and that on a question involving the privileges of a Member of the House the previous question could not be applied, and consequently that the motion for postponement was open to debate.

From this decision Mr. Fillmore appealed, and the House overruled the Speaker, 118 nays to 64 yeas.[2]

On March 22 the preamble and resolution were agreed to, the resolution by a vote of 125 yeas to 69 nays; the preamble by a vote of yeas 119, nays 66.[3]

On March 23 Mr. Giddings resigned his seat in the House, and on May 5 again appeared, having been elected his own successor, and was qualified and took his seat.[4]

1257. Unparliamentary words spoken in Committee of the Whole are taken down and read, whereupon the committee rises and reports them to the House.

Members who had indulged in unparliamentary language in Committee of the Whole escaped the censure of the House by making apologies.

On June 14, 1882,[5] in the Committee of the Whole House on the state of the Union, the following words between Messrs. William D. Kelley, of Pennsylvania,

[1] John White, of Kentucky, Speaker.

[2] The previous question under the present rules is not so drastic. Forty minutes are allowed for debate after the previous question is ordered, if there has not previously been debate. (See sec. 5495 of Vol. V of this work.)

[3] Journal, pp. 578, 579; Globe, pp. 345, 346.

[4] Journal, pp. 586, 784; Globe, pp. 349, 479.

[5] First session Forty-seventh Congress, Journal, p. 1471; Record, pp. 4903–4905.

and John D. White, of Kentucky, were taken down on demand of Mr. William S. Holman, of Indiana:

Mr. WHITE. It is merely a question of veracity. I heard him make the statement myself.
Mr. KELLEY. And I denounce the statement as the ravings of a maniac or a deliberate lie.
Mr. WHITE. The gentleman may be scoundrel enough to make that statement.

The Chairman [1] directed the words to be read to the committee as taken down, and then under the rule caused the committee to rise and reported the words to the House.

The report having been made to the House, Mr. William M. Springer, of Illinois, offered a preamble reciting the words taken down, and continuing:

And whereas such language is disorderly and destructive of the dignity and honor of the House: Therefore,

Resolved, That it is the sense of this House that the Speaker do reprimand said Members for using said disorderly words in derogation of the good order and decorum of the House.

Thereupon, during debate, both Messrs. Kelley and White made explanations and apologies to the House, and the resolution and preamble were withdrawn.

1258. On March 1, 1883,[2] in Committee of the Whole House on the state of the Union, during consideration of the river and harbor appropriation bill, Mr. John Van Voorhis, of New York, criticized a certain item as one that no one would have ever heard of if the chairman of the committee reporting the bill were not from a certain portion of the country, and said:

It is so outrageous, so damnable, that nobody but a gambler or cutthroat would have thought of tacking such a thing as that to such a bill as this.

The words were taken down, on motion of a Member, and the committee rose and reported them to the House.

Thereupon Mr. Robert M. McLane, of Maryland, proposed a preamble reciting the words reported and this resolution:

Therefore resolved, That for the use of said language said Van Voorhis is expelled from this House.

Pending debate Mr. Van Voorhis, on motion of Mr. McLane and on vote of the House, was allowed to explain. Mr. Van Voorhis then said that he did not mean to apply the words to the chairman of the committee, and that he regretted that exception should be taken to them, or that he should be under the necessity of withdrawing them. He did in fact ask leave to withdraw the words.

Mr. McLane thereupon withdrew the preamble and resolution.

Mr. Hilary A. Herbert, of Alabama, however, offered the following:

Resolved, That the Member from New York, Mr. John Van Voorhis, in the language used by him upon the floor and taken down by the Clerk's desk, has been guilty of a violation of the privileges of this House and merits the severe censure of the House for the same.

Resolved, That the said John Van Voorhis be now brought to the bar of the House by the Sergeant-at-Arms and be there publicly censured by the Speaker in the name of the House.

Mr. Van Voorhis stated that he apologized to the House for the use of the language.

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[1] George D. Robinson, of Massachusetts, chairman.

[2] Second session Forty-seventh Congress, Journal, p. 533; Record, pp. 3540–3543.

Thereupon a motion to lay the resolutions on the table was decided in the negative, and then, on the question of agreeing to them, there were ayes 66, noes 78. So the resolutions were not agreed to.

1259. For unparliamentary language in Committee of the Whole, William D. Bynum was censured by the House.

Unparliamentary language used in Committee of the Whole was taken down and read at the Clerk's desk, and thereupon the committee voted to rise and report it to the House.

The Committee of the Whole having reported language alleged to be unparliamentary, a resolution of censure was held to be in order without a prior decision of the Speaker that the words were, in fact, out of order.

The House having agreed to a resolution of censure, and the Member being brought to the bar by the Sergeant-at-Arms to be censured, it was held that he might not then be heard.

Form of censure administered by the Speaker to a Member by order of the House.

On May 17, 1890,[1] during the consideration of the tariff bill (H. R. 9416) in Committee of the Whole House on the state of the Union, Mr. William D. Bynum, of Indiana, used these words:

> I desire simply to say that I did the other day, knowing full well the meaning of the words and that I was responsible for them, denounce Mr. Campbell as a liar and a perjurer. I want to say that I accept and am willing to believe that I have as great confidence in the character of Mr. Campbell as I have in the character of the gentleman who makes this attack upon me.

On the request of Mr. Byron M. Cutcheon, of Michigan, the chairman[2] directed the words to be taken down and read at the Clerk's desk.

Thereupon, on motion of Mr. Cutcheon, the committee rose, and the chairman reported that the Committee of the Whole House on the state of the Union had directed him to report to the House the following language, used by Hon. William D. Bynum in the course of debate, etc.

The Speaker[3] directed the Clerk to read sections 4 and 5 of Rule XIV,[4] which was done.

Thereupon Mr. W. C. P. Breckinridge, of Kentucky, made the point of order that "a Member can not be put on his defense except under the circumstances stated in the rule; that the record does not show that the words were spoken just before the committee rose, or at any particular time named in the record; so that the Speaker is assuming as a matter of fact that which the record does not show."

The Speaker overruled the point of order on the ground that the Chair can only pass upon the matter as reported to him by the chairman of the Committee of the Whole, and the presumption is that it is properly reported.

Mr. Breckinridge, of Kentucky, appealed from the decision of the Chair. Pending which Mr. Isaac S. Struble, of Iowa, moved to lay the appeal on the table; and

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[1] First session Fifty-first Congress, Journal, pp. 623–625; Record, pp. 4861, 4862, 4868, 4876.

[2] Charles H. Grosvenor, of Ohio, chairman.

[3] Thomas B. Reed, of Maine, Speaker.

[4] See sections 5175–5202 of Vol. V of this work.

the question being put, Shall the said appeal lie on the table? it was decided in the affirmative, yeas 126, nays 101. So the appeal was laid on the table.

And then Mr. Cutcheon submitted the following resolution:

Resolved, That the Member from Indiana, Mr. William D. Bynum, in the language used by him in Committee of the Whole House and taken down and reported to the House and read at the Clerk's desk, has been guilty of a violation of the rules and privileges of the House, and merits the censure of the House for the same.

Resolved, That said William D. Bynum be now brought to the bar of the House by the Sergeant-at-Arms, and there the censure of the House be administered by the Speaker.

And the House having proceeded to their consideration, Mr. Cutcheon demanded the previous question.

Pending this, Mr. William M. Springer, of Illinois, made the point of order against the resolutions on the ground that "no one has suggested that this language is out of order; and further, that the Speaker has not decided it to be unparliamentary language, and that the House has not been permitted to pass upon the naked question; and after the House shall pass upon it that it is the privilege of the Member to withdraw the language used or to make any explanation he desires before the House can proceed to pass such a resolution."

After debate, the Speaker overruled the point of order, making use of the following language:

The House will perceive at once from what has been stated how impossible it is for the Chair in such a case as this to pass upon the question of fact. The House can pass upon the question of fact in its vote upon the resolution; and the argument of the gentleman from Alabama will be very properly addressed to the House and to its discretion on the question of the passage of the resolution.

As to the point of order made by the gentleman from Illinois [Mr. Springer], the Chair finds not merely the precedent which has been cited by the gentleman from Michigan [Mr. Cutcheon], but also the following, on page 390 of the Journal of the House of Representatives of February 4, 1875, Forty-third Congress, second session:

"Pending the debate thereon, Mr. John Young Brown was called to order for words used in debate. The words having been reduced to writing, Mr. Robert S. Hale submitted the following resolution," which was a resolution of similar character to that proposed in the House to-day, and thereupon it was voted on.

The Chair therefore overrules the point of order made by the gentleman from Illinois.

Mr. Springer made a further point of order, that the language used by the gentleman from Indiana was not unparliamentary and not out of order.

The Speaker decided that the point could not be made at this time and overruled the point of order.

Mr. Springer having appealed, the appeal was laid on the table, 121 yeas to 98 nays.

Then, motions to adjourn and to lay on the table being negatived, the question recurred on Mr. Cutcheon's demand for the previous question.

Pending that, Mr. Springer moved that the resolutions be referred to the Committee on Rules, with instruction to inquire whether or not the language used was out of order and also whether there was not such provocation therefor as justified its use under all the circumstances.

Mr. David B. Henderson, of Iowa, made the point of order that it was not for the Committee of the Whole House or the Committee on Rules to pass upon the

question at issue, but for the House itself to decide; and the further point that the motion of Mr. Springer was in the nature of a proposition to correct the record made in Committee of the Whole House on the state of the Union, and that, the Speaker having held that the report made from that committee was presumed to be in all respects regular and in accordance with the rules of the House and the appeal from that decision having been sustained by the House, that question had been absolutely settled by the House.

The Speaker ruled that the resolution was not in order.

Mr. Springer appealed from the decision of the Chair, and on motion of Mr. Frederick T. Greenhalge, of Massachusetts, the appeal was laid on the table, yeas 114, nays 78.

The resolutions having been agreed to by the House, Mr. Bynum appeared at the bar with the Sergeant-at-Arms, and by direction of the Speaker the resolutions were read.

Mr. Bynum inquired if he might be heard.

The Speaker held that he could not.

Thereupon the Speaker pronounced the censure of the House:

Mr. William D. Bynum, you are arraigned at the bar of the House under its formal resolution for having transgressed its rules in your remarks. For this offense the House has directed that you shall be censured at this bar. In the name of the House, therefore, I pronounce upon you its censure. The Sergeant-at-Arms will discharge Mr. Bynum from custody.

1260. Prior rights of the House when a Member is accused of treason, felony, or breach of the peace.

A Member indicted for felony remains of the House until convicted. Section III of Jefferson's Manual, on the subject of privilege, provides:

And even in cases of treason, felony, and breach of the peace, to which privilege does not extend as to substance, yet in Parliament a Member is privileged as to the mode of proceeding. The case is first to be laid before the House, that it may judge of the fact and of the grounds of the accusation, and how far forth the manner of the trial may concern their privilege; otherwise it would be in the power of other branches of the Government, and even of every private man, under pretenses of treason, etc., to take any man from his service in the House, and so, as many, one after another, as would make the House what he pleaseth. (Dec'l of the Com. on the King's declaring Sir John Hotham a traitor. 4 Rushw., 586.) So, when a Member stood indicted for felony, it was adjudged that he ought to remain of the House till conviction;[1] for it may be any man's case, who is guiltless, to be accused and indicted of felony, or the like crime. (23 El., 1580; D'Ewes, 283, col. 1; Lex Parl., 133.)

1261. Two Members were expelled for treason, and the House ordered the governors of their respective States to be notified.—On December 2, 1861,[2] Mr. Francis P. Blair, jr., of Missouri, offered this resolution, which was agreed to by a two-thirds vote:

Resolved, That John W. Reid, a Member of the House of Representatives from the Fifth district of the State of Missouri, having taken up arms against the Government of the United States, is hereby expelled from the House, and the Speaker of the House is required to notify the Governor of the State of Missouri of the fact.

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[1] In the Fifty-ninth Congress a Member of the Senate and a Member of the House were indicted and convicted, but appealed. The Senate took action which precipitated the Senator's resignation, but the House did not act pending the Member's appeal.

[2] Second session Thirty-seventh Congress, Journal, p. 8; Globe, p. 5.

On December 3, 1861,[1] Mr. W. McKee Dunn, of Indiana, offered the following preamble and resolutions, which were agreed to by a two-thirds vote:

Whereas Henry C. Burnett, a Member of this House from the State of Kentucky, is in open rebellion against the Government of the United States; therefore,

Resolved, That said Burnett be, and he is hereby, expelled from this House, and that the governor of the State of Kentucky be notified of his expulsion.

Resolved, That the Sergeant-at-Arms of this House be directed not to pay to said Burnett his salary accrued since the close of the extra session of this Congress.

1262. A Member-elect, who had not taken the oath, was expelled from the House for treason.—On July 13, 1861,[2] Mr. Francis P. Blair, jr., of Missouri, as a question of privilege, submitted the following preamble and resolution:

Whereas John B. Clark was elected a Representative in the Thirty-seventh Congress from the Third Congressional district of the State of Missouri on the first Monday of August in the year 1860; and whereas since that time the said John B. Clark has taken up arms against the Government of the United States and holds a commission in what is known as the State guard of Missouri, under the rebel governor of that State, and took part in the engagement at Booneville against the United States forces; therefore,

Resolved, That John B. Clark has forfeited all right to sit as a Representative in the Thirty-seventh Congress, and is hereby expelled and declared to be no longer a Member of this House.

The debate was very brief, being limited by the previous question. Mr. Blair, upon his responsibility as a Member, affirmed that the allegation of the preamble was true. There was some objection that the case should be considered by a committee; but no one raised the point, which is apparent from the Journal, that Mr. Clark was a Member-elect merely, not having appeared and taken the oath.[3]

The resolution of expulsion was agreed to by a two-thirds vote, yeas 94, nays 45.

1263. William Blount, for a high misdemeanor inconsistent with his public trust and duty, was expelled from the Senate.

The Senate ordered a Senator to attend in his place when a report relating to charges against him was to be presented.

A committee having recommended the expulsion of a Senator, the Senate allowed him to be heard by counsel at the bar of the Senate before action on the report.

A Senator, impeached by the House of Representatives, was arrested by order of the Senate and released only on surety.

Impeachment proceedings against a Senator were continued after his expulsion.

The President of the United States transmitted to the Senate a letter impeaching the conduct of a Senator.

On July 3, 1797,[4] the Senate received a letter from the President of the United States, transmitting a letter purporting to have been written by William Blount, a

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[1] Second session Thirty-seventh Congress, Journal, pp. 26, 27; Globe, p. 7.

[2] First session Thirty-seventh Congress, Journal, pp. 75, 76; Globe, pp. 116, 117.

[3] This session began July 4, 1861. Mr. Clark did not appear with the other Missouri Members at the time of organization, nor is his presence recorded subsequently.

[4] First session Fifth Congress, Senate Journal, p. 383; Annals, p. 34.

Senator of the United States, for the purpose of laying plans for the cooperation of certain Indians of the South with British agents in an enterprise inimical to the interests of the United States and Spain. This letter was addressed to one Carey, an employee of the United States in the Indian country.

The message and papers having been read, the letter was again read to Mr. Blount, who was absent when it was read a first time. Being requested to declare whether he was the author of the letter or not, Mr. Blount observed that he wrote a letter to Carey, but was unable to say whether the copy was a correct one or not without recurrence to his papers. Therefore he desired a postponement until the next day, which was agreed to.

On July 4,[1] a letter was laid before the Senate from Mr. Blount, requesting further time. Thereupon the letter and message were referred to a select committee to consider and report what it was proper for the Senate to do thereon.

On July 5,[2] on report from this committee, it was—

Ordered, That the Vice-President notify William Blount, a Senator from the State of Tennessee, by letter, to attend the Senate.

On July 6,[3] a further report being made by the committee, Mr. Blount read in his place a declaration, purporting that he should attend in his seat from time to time to answer any allegation that might be brought against him.

Then it was—

Resolved, That Mr. Blount be heard by counsel, not exceeding two, to-morrow morning at 11 o'clock.

It was further—

Ordered, That the Secretary furnish Mr. Blount with attested copies of such papers as he may point out respecting the subject this day reported on by the committee.

On July 7,[4] the subject being again before the Senate, Mr. Blount notified the Senate that Jared Ingersoll and Alexander J. Dallas were the counsel he had employed agreeably to the vote of the Senate.

The President requested Mr. Blount to declare whether or not he was the author of the letter in question. Mr. Blount declined to answer.

At this point a message was received from the House of Representatives presenting the impeachment of William Blount for high crimes and misdemeanors. Thereupon, in accordance with the request of the House, the said William Blount was sequestered from his seat and taken into custody. Subsequently he furnished sureties.

On July 8,[5] Mr. Blount was heard by his counsel, and then the question was taken on the report of the committee, which was as follows:

That Mr. Blount, having declined an acknowledgment or denial of the letter imputed to him, and having failed to appear to give any satisfactory explanation respecting it, your committee sent for the original letter, which accompanies this report, and it is in the following words: (Here follows the letter, the purport of which is given above.)

Two Senators now present in the Senate have declared to the committee that they are well acquainted with the handwriting of Mr. Blount, and have no doubt that this letter was written by him.

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[1] Journal, p. 383; Annals, p. 34.

[2] Journal, p. 385; Annals, p. 35.

[3] Journal, p. 387; Annals, p. 38

[4] Journal, p. 388; Annals, p. 38.

[5] Journal, pp. 390–392; Annals, pp. 40–44

Your committee have examined many letters from Mr. Blount to the Secretary of War, a number of which are herewith submitted, as well as a letter addressed by Mr. Blount to Mr. Cocke, his colleague in the Senate, and to this committee, respecting the business now under consideration, and find them all to be of the same handwriting with the letter in question. Mr. Blount has never denied this letter, but, on the other hand, when the copy transmitted to the Senate was read in his presence, on the 3d instant, he acknowledged in his place that he had written a letter to Carey, of which he had preserved a copy, but could not then decide whether the copy read was a true one. Your committee are therefore fully persuaded that the original letter now produced was written and sent to Carey by Mr. Blount. They also find that this man Carey to whom it was addressed is, to the knowledge of Mr. Blount, in the pay and employment of the United States, as their interpreter to the Cherokee Nation of Indians, and an assistant in the public factory at Tellico Blockhouse. That Hawkins, who is so often mentioned in this letter as a person who must be brought into suspicion among the Creeks, and if possible driven from his nation, is the superintendent of Indian affairs for the United States among the southern Indians, Dinsmore is agent for the United States for the Cherokee nation, and Dyer one of the agents in the public factory at Tellico Blockhouse.

The plan hinted at in this extraordinary letter, to be executed under the auspices of the British, is so capable of different constructions and conjectures that your committee at present forbear giving any decided opinion respecting it, except that to Mr. Blount's own mind it appeared to be inconsistent with the interests of the United States and of Spain, and he was therefore anxious to conceal it from both. But, when they consider his attempts to seduce Carey from his duty as a faithful interpreter, and to employ him as an engine to alienate the affections and confidence of the Indians from the public officers of the United States residing among them, the measures he has proposed to excite a temper which must produce the recall or expulsion of our superintendent from the Creek Nation, his insidious advice tending to the advancement of his own popularity and consequence, at the expense and hazard of the good opinion which the Indians entertain of this Government, and of the treaties subsisting between us and them, your committee have no doubt that Mr. Blount's conduct has been inconsistent with his public duty, renders him unworthy of a further continuance of his present public trust in this body, and amounts to a high misdemeanor. They therefore unanimously recommend to the Senate an adoption of the following resolution:

Resolved, That William Blount, esq., one of the Senators of the United States, having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator, be, and he hereby is, expelled from the Senate of the United States.

The question being taken this report was agreed to, yeas 25, nays 1.[1]

The impeachment proceedings against Mr. Blount were proceeded with after the expulsion.

1264. The Senate failed, by one vote, to expel John Smith, charged with participation in a treasonable conspiracy.

A discussion as to whether or not the principles of the procedure of the courts should be followed in action for expulsion.

The Senate allowed a member threatened with expulsion to be heard by counsel, but did not grant his request for a specific statement of charges or compulsory process for witnesses.

The Senate having allowed a member to be heard by counsel, exercised the power of approving his selections.

The written answer of a Senator to charges made against him was returned by the Senate because it contained irrelevant matter.

The Senate ordered a Senator to attend in his place when a report relating to charges against him was to be presented.

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[1] It is evident from the articles of impeachment that Blount was a Senator at the time of the offense. (Second session Fifth Congress, House Journal, p. 151.)

The Senate did not pursue inquiry as to the charge that Senator John Smith had sworn allegiance to a foreign power, the said oath having been taken before his election as Senator.

Nature and limitations of the constitutional power of expulsion discussed.

Discussion of the decision of the Senate in the matter of charges against Humphrey Marshall, a Senator.

On November 27, 1807,[1] the Senate, after debate, adopted after amendment the following resolution proposed by Mr. Samuel Maclay, of Pennsylvania:

Resolved, That a committee be appointed to inquire whether it be compatible with the honor and privileges of this House that John Smith, a Senator from the State of Ohio, against whom bills of indictment were found at the circuit court of Virginia, held at Richmond in August last, for treason and misdemeanor, should be permitted any longer to have a seat therein; and that the committee do inquire into all the facts regarding the conduct of Mr. Smith as an alleged associate of Aaron Burr, and report the same to the Senate.

The following-named Senators were appointed as the committee: John Quincy Adams, of Massachusetts; Samuel Maclay, of Pennsylvania; Jesse Franklin, of North Carolina; Samuel Smith, of Maryland; John Pope and Buckner Thurston, of Kentucky, and Joseph Anderson, of Tennessee.

On December 31,[2] Mr. Adams announced that the committee were ready to report, and made the following motion, which was read and agreed to:

Ordered, That John Smith, a Senator from the State of Ohio., be notified by the Vice-President to attend in his place.

The Vice-President accordingly notified Mr. Smith in the words following:

Sir: You are hereby required to attend the Senate in your place without delay.
By order of the Senate.

GEO. CLINTON,
President of the Senate.

JOHN SMITH, Esq.,
Senator from the State of Ohio.

And Mr. Smith attended.

Thereupon Mr. Adams reported as follows:

Your committee are of opinion that the conspiracy of Aaron Burr and his associates against the peace, union, and liberties of these States is of such a character, and that its existence is established by such a mass of concurring and mutually corroborative testimony that it is incompatible not only with the honor and privileges of this House, but with the deepest interests of this nation, that any person engaged in it should be permitted to hold a seat in the Senate of the United States.

Whether the facts, of which the committee submit herewith such evidence as, under the order of the Senate, they have been able to collect, are sufficient to substantiate the participation of Mr. Smith in that conspiracy, or not, will remain for the Senate to decide.

The committee submit also to the consideration of the Senate the correspondence between Mr. Smith and them, through their chairman, in the course of their meetings. The committee have never conceived themselves invested with authority to try Mr. Smith. Their charge was to report an opinion relating to the honor and privileges of the Senate and the facts relating to the conduct of Mr. Smith. Their opinion, indeed, can not be expressed in relation to the privilege of the Senate without relating, at the same time, to Mr. Smith's right of holding a seat in this body; but, in that respect, the authority

[1] First session Tenth Congress, Senate Journal, p. 197; Annals, p. 39.

[2] Senate Journal, p. 210; Annals, p. 55.

of the committee extends only to proposal, and not to decision. But as he manifested a great solicitude to be heard before them, they obtained permission from the Senate to admit his attendance, communicated to him the evidence in their possession, by which he was inculpated, furnished him, in writing, with the questions arising from it which appeared to them material, and received from him the information and explanations herewith submitted as part of the facts reported. But Mr. Smith has claimed as a right to be heard in his defense by counsel, to have compulsory process for witnesses, and to be confronted with his accusers, as if the committee had been a circuit court of the United States. But it is before the Senate itself that your committee conceived it just and proper that Mr. Smith's defense of himself should be heard. Nor have they conceived themselves bound in this inquiry by any other rules than those of natural justice and equity, due to a brother Senator on the one part and to their country on the other.

Mr. Smith represents himself on this inquiry as solitary, friendless, and unskilled, contending for rights which he intimates are denied him; and the defender of senatorial privileges which he seems apprehensive will be refused him by Senators, liable, so long as they hold their offices, to have his case made their own. The committee are not unaware that, in the vicissitudes of human events, no member of this body can be sure that his conduct will never be made a subject of inquiry and decision before the assembly to which he belongs. They are aware that, in the course of proceeding which the Senate may now sanction, its members are marking out a precedent which may hereafter apply to themselves. They are sensible that the principles upon which they have acted ought to have the same operation upon their own claims to privilege as upon those of Mr. Smith; the same relation to the rights of their constituents which they have to those of the legislature which he represents. They have deemed it their duty to advance in the progress of their inquiry with peculiar care and deliberation. They have dealt out to Mr. Smith that measure, which, under the supposition of similar circumstances, they would be content to find imparted to themselves; and they have no hesitation in declaring that, under such imputations, colored by such evidence, they should hold it a sacred obligation to themselves, to their fellow-Senators, and to their country, to meet them by direct, unconditional acknowledgment or denial, without seeking a refuge from the broad face of day in the labyrinth of technical forms.

In examining the question whether these forms of judicial proceedings, or the rules of judicial evidence, ought to be applied to the exercise of that censorial authority which the Senate of the United States possesses over the conduct of its members, let us assume, as the test of their application, either the dictates of unfettered reason, the letter and spirit of the Constitution, or precedents, domestic or foreign, and your committee believe that the result will be the same; that the power of expelling a member must, in its nature, be discretionary, and in its exercise always more summary than the tardy process of judicial tribunals.

The power of expelling a member for misconduct results, on the principles of common sense, from the interest of the nation, that the high trust of legislation should be invested in pure hands. When the trust is elective it is not to be presumed that the constituent body will commit the deposite to the keeping of worthless characters. But when a man, whom his fellow-citizens have honored with their confidence, on the pledge of a spotless reputation, has degraded himself by the commission of infamous crimes, which become suddenly and unexpectedly revealed to the world, defective indeed would be that institution which should be impotent to discard from its bosom the contagion of such a member; which should have no remedy of amputation to apply until the poison had reached the heart.

The question upon the trial of a criminal cause, before the courts of common law, is not between guilt and innocence, but between guilt and the possibility of innocence. If a doubt can possibly be raised, either by the ingenuity of the party or of his counsel, or by the operation of general rules in their unforeseen application to particular cases, that doubt must be decisive for acquittal, and the verdict of not guilty, perhaps, in nine cases out of ten, means no more than that the guilt of the party has not been demonstrated in the precise, specific, and narrow forms prescribed by law. The humane spirit of the laws multiplies the barriers for the protection of innocence, and freely admits that these barriers may be abused for the shelter of guilt. It avows a strong partiality favorable to the person upon trial, and acknowledges the preference that ten guilty should escape rather than that one innocent should suffer. The interest of the public that a particular crime should be punished is but as one to ten compared with the interest of the party that innocence should be spared. Acquittal only restores the party to the common rights of every other citizen; it restores him to no public trust; it invests him with no public

confidence; it substitutes the sentence of mercy for the doom of justice; and in the eyes of impartial reason, in the great majority of cases, must be considered rather as a pardon than a justification.

But when a member of a legislative body lies under the imputation of aggravated offenses, and the determination upon his cause can operate only to remove him from a station of extensive powers and important trust, this disproportion between the interest of the public and the interest of the individual disappears; if any disproportion exist, it is of an opposite kind. It is not better that ten traitors should be members of this Senate than that one innocent man should suffer expulsion. In either case, no doubt, the evil would be great. But, in the former it would strike at the vitals of the nation; in the latter it might, though deeply to be lamented, only be the calamity of an individual.

By the letter of the Constitution the power of expelling a Member is given to each of the two Houses of Congress, without any limitation other than that which requires a concurrence of two-thirds of the votes to give it effect.

The spirit of the Constitution is, perhaps, in no respect more remarkable than in the solicitude which it has manifested to secure the purity of the Legislature by that of the elements of its composition. A qualification of age is made necessary for the Members, to insure the maturity of their judgment; a qualification of long citizenship, to insure a community of interests and affections between them and their country; a qualification of residence, to provide a sympathy between every Member and the portion of the Union from which he is delegated; and to guard, as far as regulation can guard, against every bias of personal interest, and every hazard of interfering duties, it has made every Member of Congress ineligible to office which he contributed to create, and every officer of the Union incapable of holding a seat in Congress. Yet, in the midst of all this anxious providence of legislative virtue, it has not authorized the constituent body to recall in any case its representative. It has not subjected him to removal by impeachment; and when the darling of the people's choice has become their deadliest foe can it enter the imagination of a reasonable man that the sanctuary of their legislation must remain polluted with his presence until a court of common law, with its pace of snail, can ascertain whether his crime was committed on the right or on the left bank of the river; whether a puncture of difference can be found between the words of the charge and the words of the proof; whether the witnesses of his guilt should or should not be heard by his jury; and whether he was punishable, because present at an overt act, or intangible to public justice, because he only contrived and prepared it? Is it conceivable that a traitor to that country which has loaded him with favors, guilty to the common understanding of all mankind, should be suffered to return unquestioned to that post of honor and confidence, where, in the zenith of his good fame, he had been placed by the esteem of his countrymen, and in defiance of their wishes, in mockery of their fears, surrounded by the public indignation, but inaccessible to its bolt, pursue the purposes of treason in the heart of the national councils? Must the assembled rulers of the land listen with calm and indifference, session after session, to the voice of notorious infamy, until the sluggard step of municipal justice can overtake his enormities? Must they tamely see the lives and fortune of millions, the safety of present and future ages, depending upon his vote, recorded with theirs, merely because the abused benignity of general maxims may have remitted to him the forfeiture of his life?

Such, in very supposable cases, would be the unavoidable consequences of a principle which should offer the crutches of judicial tribunals as an apology for crippling the Congressional power of expulsion. Far different, in the opinion of your committee, is the spirit of our Constitution. They believe that the very purpose for which this power was given was to preserve the Legislature from the first approaches of infection. That it was made discretionary because it could not exist under the procrastination of general rules; that its process must be summary, because it would be rendered nugatory by delay.

Passing from the constitutional view of the subject to that which is afforded by the authority of precedent your committee find that, since the establishment of our present National Legislature, there has been but one example of expulsion from the Senate. In that case the Member implicated was called upon, in the first instance, to answer whether he was the author of a letter, the copy of which only was produced, and the writing of which was the cause of his expulsion. He was afterwards requested to declare whether he was the author of the letter itself, and declining in both cases to answer, the fact of his having written it was established by a comparison of his handwriting, and by the belief of persons who had seen him write, upon inspection of the letter. In all these points the committee perceive the admission of a species of evidence which in courts of criminal jurisdiction would be excluded, and, in the resolution of expulsion, the Senate declared the person inculpated guilty of a high misdemeanor,

although no presentment or indictment had been found against him, and no prosecution at law was ever commenced upon the case.

This event occurred in July, 1797. About fifteen months before that time, upon an application from the legislature of Kentucky, requesting an investigation by the Senate of a charge against one of the Members from that State, of perjury, which had been made in certain newspaper publications, but for which no prosecution had been commenced, the Senate did adopt, by a majority of 16 votes to 8, the report of a committee, purporting that the Senate had no jurisdiction to try the charge, and that the memorial of the Kentucky legislature should be dismissed. There were, indeed, very sufficient reasons of a different kind assigned in the same report for not pursuing the investigation, in that particular case, any further; and your committee believe that in the reasoning of that report some principles were assumed and some inferences drawn which were altogether unnecessary for the determination of that case, which were adopted without a full consideration of all their consequences, and the inaccuracy of which were clearly proved by the departure from them in the instance which was so soon afterwards to take place. It was the first time that a question of expulsion had ever been agitated in Congress since the adoption of the Constitution. And the subject, being thus entirely new, was considered perhaps too much with reference to the particular circumstances of the moment and not enough upon the numerous contingencies to which the general question might apply. Your committee state this opinion with some confidence, because of the sixteen Senators who, in March, 1796, voted for the report dismissing the memorial of the Kentucky legislature, eleven, on the subsequent occasion, in July, 1797, voted also for that report, which concluded with a resolution for the expulsion of Mr. Blount. The other five were no longer present in the Senate. Yet, if the principles advanced in the first report had been assumed as the ground of proceeding at the latter period, the Senate would have been as impotent of jurisdiction upon the offense of Mr. Blount as they had supposed themselves upon the allegation against Mr. Marshall.

Those parts of the fifth and sixth articles, amendatory to the Constitution, upon which the report in the case of Mr. Marshall appears to rely for taking away the jurisdiction of the Senate, your committee suppose, can only be understood as referring to prosecutions at law. To suppose that they were intended as restrictions upon powers expressly granted by the Constitution to the Legislature, or either of its branches, would, in a manner, annihilate the power of impeachment as well as that of expulsion. It would lead to the absurd conclusion that the authority given for the purpose of removing iniquity from the seats of power should be denied its exercise in precisely those cases which most loudly called for its energies. It would present the singular spectacle of a legislature vested with powers of expelling its members, of impeaching, removing, and disqualifying public officers for trivial transgressions beneath the cognizance of the law, yet forbidden to exert them against capital or infamous crimes.

Those two articles were in substance borrowed from similar regulations contained in that justly celebrated statute which for so many ages has been distinguished by the name of the Great Charter of England. Yet in that country, where they are recognized as the most solid foundations of the liberties of the nation, they have never been considered as interfering with the power of expelling a member, exercised at all times by the House of Commons; a power which there, however, rests only upon parliamentary usage, and has never been bestowed, as in the Constitution of the United States, by any act of supreme legislation. From a number of precedents which have been consulted, it is found that the exercise of this authority there has always been discretionary, and its process always far otherwise than compendious in the prosecutions before the judicial courts. So far, indeed, have they been from supposing a conviction at law necessary to precede a vote of expulsion, that, in one instance, a resolution to demand a prosecution appears immediately after the adoption of the resolution to expel. In numerous cases the Member submits to examination, adduces evidence in his favor, and has evidence produced against him, with or without formal authentication; and the discretion of the House is not even restricted by the necessary concurrence of more than a bare majority of the votes.

The provision in our Constitution which forbids the expulsion of a Member by an ordinary majority, and requires for this act of rigorous and painful duty the assent of two-thirds, your committee consider as a wise and sufficient guard against the possible abuse of this legislative discretion. In times of heat and violent party spirit, the rights of the minority might not always be duly respected, if a majority could expel their Members under no other control than that of their own discretion. The operation of this rule is of great efficacy, both over the proceedings of the whole body and over the conduct of every individual Member. The times when the most violent struggles of contending parties occur—when the conflict of opposite passions is most prone to excess—are precisely the times when the numbers are most

equally divided. When the majority amounts to the proportion of two-thirds, the security in its own strength is of itself a guard against extraordinary stretches of power; when the minority dwindles to the proportions of one-third, its consciousness of weakness dissuades from any attempts to encroach upon the rights of the majority, which might provoke retaliation. But if expulsion were admissible only as a sequel to the issue of a legal prosecution, or upon the same principles and forms of testimony which are established in the criminal courts, your committee can see no possible reason why it should be rendered still more imbecile by the requisition of two-thirds to give it effect.

It is now the duty of your committee to apply the principles which they have here endeavored to settle and elucidate to the particular case upon which the Senate have directed them to report. The bills of indictment found against Mr. Smith at the late session of the circuit court of the United States at Richmond (copies of which are herewith submitted) are precisely similar to those found against Aaron Burr. From the volume of printed evidence communicated by the President of the United States to Congress, relating to the trial of Aaron Burr, it appears that a great part of the testimony which was essential to his conviction, upon the indictment for treason, was withheld from the jury upon an opinion of the court that Aaron Burr, not having been present at the overt act of treason alleged in the indictment, no testimony relative to his conduct or declarations elsewhere, and subsequent to the transactions on Blennerhassett's Island, could be admitted. And in consequence of this suppression of evidence the traverse jury found a verdict "that Aaron Burr was not proved to be guilty, under that indictment, by any evidence submitted to them." It was also an opinion of the court that none of the transactions, of which evidence was given on the trial of Aaron Burr, did amount to an overt act of levying war, and, of course, that they did not amount to treason. These decisions, forming the basis of the issue upon the trials of Burr, anticipated the event which must have awaited the trials of the bills against Mr. Smith, who, from the circumstances of his case, must have been entitled to the benefit of their application; they were the sole inducements upon which the counsel for the United States abandoned the prosecution against him.

Your committee are not disposed now to question the correctness of these decisions on a case of treason before a court of criminal jurisdiction. But whether the transactions proved against Aaron Burr did or did not amount, in technical language, to an overt act of levying war, your committee have not a scruple of doubt on their minds that, but for the vigilance and energy of the Government and of faithful citizens under its directions, in arresting their progress and in crushing his designs, they would in a very short lapse of time have terminated not only in a war, but in a war of the most horrible description, in a war at once foreign and domestic. As little hesitation have your committee in saying that, if the daylight of evidence, combining one vast complicated intention, with overt acts innumerable, be not excluded from the mind by the curtain of artificial rules, the simplest understanding can not but see what the subtlest understanding can not disguise—crimes before which ordinary treason whitens into virtue; crimes of which war is the mildest feature. The debauchment of our Army, the plunder and devastation of our own and foreign territories, the dissolution of our national Union, and the root of interminable civil war, were but the means of individual aggrandizement, the steps to projected usurpation. If the ingenuity of a demon were tasked to weave into one composition all the great moral and political evils which would be inflicted upon the people of these States, it could produce nothing more than a texture of war, dismemberment, and despotism.

Of these designs, a grand jury, composed of characters as respectable as this nation can boast, have, upon the solemnity of their oaths, charged John Smith with being an accomplice. The reasons upon which the trial of this charge has not been submitted to the verdict of a jury have been shown by your committee, and are proved by the letter from the attorney of the United States for the district of Virginia, herewith reported. And your committee are of the opinion that the dereliction of the prosecution on these grounds can not, in the slightest degree, remove the imputation which the accusations of the grand jury have brought to the door of Mr. Smith.

Your committee will not permit themselves to comment upon the testimony which they submit herewith to the Senate, nor upon the answers which Mr. Smith has given as sufficient for his justification. Desirous as the committee have been that this justification might be complete, anxiously as they wished for an opportunity of declaring their belief of his innocence, they can neither control nor dissemble the operation of the evidence upon their minds; and, however painful to their feelings, they find themselves compelled, by a sense of duty, paramount to every other consideration, to submit to the Senate, for their consideration, the following resolution:

"Resolved, That John Smith, a Senator from the State of Ohio, by his participation in the conspiracy of Aaron Burr against the peace, union, and liberties of the people of the United States, has been guilty of conduct incompatible with his duty and station as a Senator of the United States. And that he be therefore, and hereby is, expelled from the Senate of the United States."

Mr. Adam also submitted a further report, made in response to a supplemental direction of the Senate, in relation to an allegation that John Smith had taken the oath of allegiance to the King of Spain. But as inquiry had shown the oath to have been taken previously to the election of Mr. Smith, no further order was taken on this charge.

Mr. Smith at this time submitted an answer, but as a portion of this answer contained irrelevant charges against Judge Nimmo, the answer was returned in order that those portions might be expunged.

On January 4 [1] the President of the Senate communicated the revised answer of Mr. Smith in the form of a letter. This letter was read on the 7th, and represented that all the evidence adduced by the committee, excepting two bills of indictment, was either taken ex parte or without allowing Mr. Smith sufficient time to interrogate the witnesses. It asked for the aid of counsel, for time, and for the means of adducing proof in his defense. It admitted that there was no necessity for a legal conviction previous to the expulsion of a Member from the Senate, but contended that proof of the facts charged must be first established in a legal way, and that then the Senate could only exercise its legal right of expulsion.

Mr. Smith thereupon arose and submitted his request in the form of the following motion:

That John Smith be informed specifically of the charges against him; that he be allowed to make a defense against such charges, and have process to compel the attendance of witnesses, and the privilege of being heard by counsel.

After debate on this request, the Senate unanimously agreed to the following resolution:

Resolved, That Mr. Smith be heard by counsel, not exceeding two, to show cause why the report of the committee should not be adopted.

The other requests were not allowed, the debate showing the opinion on the part of Senators that they were not in accordance with the dignity of the Senate and the propriety of proceeding.

On January 13 [2] Mr. Smith informed the Senate that he had engaged Luther Martin and Francis S. Key as his counsel. A question being taken on agreeing to these as counsel, Mr. Key was accepted by the Senate and Mr. Martin was rejected. Subsequently Mr. R. G. Harper was admitted as counsel.

Mr. Smith then by his counsel offered an affidavit setting forth the facts which he claimed he could prove in exculpation, and also submitted a request for an extension of time in which to obtain testimony.

Time was allowed and the case continued, with the presentation of testimony and affidavits, until April 5 and 6,[3] when the case was argued before the Senate by

[1] Senate Journal, pp. 211, 213; Annals, pp. 66–78.

[2] Senate Journal, p. 217; Annals, p. 82.

[3] Senate Journal, pp. 260, 261; Annals, pp. 186–234.

counsel. Thereafter the case was debated at length until April 9,[1] when the vote was taken on the resolution proposed by the committee. And there were yeas 19, nays 10, not the required two-thirds, and the resolution was not agreed to.

1265. In the early days of the secession movement a question arose as to the right to expel a defiant Senator representing a seceding State.—On March 8, 1861,[2] Mr. Lafayette S. Foster, of Connecticut, proposed the following in the Senate:

Whereas L. T. Wigfall, now a Senator of the United States from the State of Texas, has declared in debate that he is a foreigner; that he owes no allegiance to this Government, but that he belongs to and owes allegiance to another and foreign state and government; Therefore

Resolved, That the said L. T. Wigfall be, and he hereby is, expelled from this body.

Mr. Thomas L. Clingman, of North Carolina, moved to amend the resolution by striking out all after the word "whereas" and in lieu thereof inserting:

It is understood that the State of Texas has seceded from the Union and is no longer one of the United States: Therefore

Resolved, That she is not entitled to be represented in this body.

A debate arose over the question, it being contended by Mr. Clingman and others that expulsion was punitive and that it was improper to expel a Senator for words spoken in debate; that if Mr. Wigfall actually was a foreigner it was a question going to qualifications and should be dealt with by another process.

Finally, by a vote of yeas 28, nays 16, the Senate proceeded to executive business.

1266. By a single resolution the Senate expelled several Senators for a treasonable conspiracy against the Government.—On July 10, 1861,[3] Mr. Daniel Clark, of New Hampshire, proposed the following in the Senate:

Whereas a conspiracy has been formed against the peace, union, and liberties of the people and Government of the United States, and in furtherance of such conspiracy a portion of the people of the States of Virginia, North Carolina, South Carolina, Tennessee, Arkansas, and Texas have attempted to withdraw those States from the Union, and are now in arms against the Government; and

Whereas James M. Mason and Robert M. T. Hunter, Senators from Virginia; Thomas L. Clingman and Thomas Bragg, Senators from North Carolina; James Chestnut, jr., a Senator from South Carolina; A. O. P. Nicholson, a Senator from Tennessee; William K. Sebastian and Charles B. Mitchel, Senators from Arkansas, and John Hemphill and Louis T. Wigfall, Senators from Texas, have failed to appear in their seats in the Senate, and to aid the Government in this important crises, and it is apparent to the Senate that said Senators are engaged in said conspiracy for the destruction of the Union and Government, or with full knowledge of such conspiracy have failed to advise the Government of its progress or aid in its suppression: Therefore

Resolved, That the said Mason, Hunter, Clingman, Bragg, Chestnut, Nicholson, Sebastian, Mitchel, Hemphill, and Wigfall be, and they hereby are, each and all of them, expelled from the Senate of the United States.

On July 11 the resolution was debated, and Mr. Milton S. Latham, of California, moved to amend the resolution by inserting before the word "said," in the second line, the words "names of," and by striking out the words "expelled from the

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[1] Senate Journal, p. 263; Annals, pp. 238–323.

[2] Globe, second session Thirty-sixth Congress, pp. 1446–1451; Election Cases, Senate Document 11, special session Fifty-eighth Congress, p. 954.

[3] First session Thirty-seventh Congress, Globe, pp. 40, 62–64; Election Cases, Senate Document 11, special session Fifty-eighth Congress, p. 957.

Senate of the United States," and inserting "stricken from the roll, and their seats declared vacant," so that the resolution will read:

Therefore resolved, That the names of said Mason, Hunter, Clingmam, Bragg, Chestnut, Nicholson, Sebastian, Mitchel, Hemphill, and Wigfall be, and they hereby are, each and all of them, stricken from the roll, and their seats declared vacant.

This amendment was disagreed to, yeas 11, nays 32.

Then the resolution as originally presented was agreed to, yeas 32, nays 10.

1267. For bearing arms against the Government John C. Breckinridge was summarily expelled from the Senate.—On December 4, 1861,[1] Mr. Zachariah Chandler, of Michigan, in the Senate, submitted the following resolution for consideration:

Resolved, That John C. Breckinridge be, and he hereby is, expelled from the Senate.

The Senate proceeded, by unanimous consent, to consider the resolution; and the same having been amended, on the motion of Mr. Trumbull, to read as follows:

Whereas John C. Breckinridge, a Member of this body from the State of Kentucky, has joined the enemies of his country, and is now in arms against the Government he has sworn to support: Therefore

Resolved, That said John C. Breckinridge, the traitor, be, and he hereby is, expelled from the Senate.

On the question to agree to the resolution as amended it was determined in the affirmative, yeas 37, nays none.

1268. "For sympathy with and participation in the rebellion" a Senator was expelled, after examination of his case by a committee.—On December 10, 1861,[2] Mr. Solomon Foote, of Vermont, presented the following resolution, which on the subsequent day was referred to the Committee on the Judiciary, with instructions to inquire into the facts:

Resolved, That Waldo P. Johnson, a Senator from the State of Missouri, by his sympathy with and participation in the rebellion against the Government of the United States has been guilty of conduct incompatible with his duty and station as a Senator; and that he be therefor, and hereby is, expelled from the Senate of the United States.

On January 9, 1862, Mr. Lyman Trumbull, of Illinois, presented the following report:

The Committee on the Judiciary, to whom was referred a resolution for the expulsion from the Senate of Waldo P. Johnson, a Senator from the State of Missouri, submit the following report:

Previous to his election to the Senate Mr. Johnson was known in Missouri as entertaining secession proclivities, and to sympathize and cooperate with the prominent citizens of that State who are now in open rebellion against the Government. He was elected to the Senate by a legislature which has since sought to array the State against the Union. Since his election he is reported to have made a speech evincing a spirit hostile to the Government, which speech was extensively published in the State of Missouri without public contradiction from him. He has not appeared in his seat in the Senate since the session began; and though the resolution for his expulsion was proposed in the Senate on the 10th day of December and referred to this committee on the 12th day of December, 1861, and has been

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[1] Second session Thirty-seventh Congress; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 959.

[2] Second session Thirty-seventh Congress; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 962.

extensively published in Missouri and other parts of the Union, the said Johnson has wholly failed to furnish any reason for his absence, or explanation of the charges of disloyalty urged against him.

The failure of said Johnson for so long a period to appear in his place to discharge the high duties incumbent upon him for the preservation of the Republic in this time of rebellion against its authority, and his silence under the imputations upon his loyalty which, from their publicity, could not have escaped his notice if within a loyal portion of the Union, of themselves furnish strong presumptive grounds against his fidelity to the Government.

His whereabouts at this time the committee have been unable, with actual certainty, to ascertain. They are satisfied that, had he been so disposed, there was nothing to prevent his attendance on the Senate at its commencement; and when last heard from he was reported to have gone voluntarily within the lines of rebels in arms against the Government.

Under these circumstances, the committee are of the opinion that he ought to be expelled from the body, and they accordingly report the resolution back to the Senate with a recommendation that it do pass.

The resolution was agreed to by the Senate, yeas 35, nays 0.

1269. For a letter implying friendship with the foes of the Government Jesse D. Bright was expelled from the Senate.

The nature and method of exercise of the power of expulsion discussed by the Senate.

A Senator was present during consideration of a resolution for his own expulsion, and participated in the debate.

On December 16, 1861,[1] Mr. Morton S. Wilkinson, of Minnesota, presented the following in the Senate:

Whereas the Hon. Jesse D. Bright heretofore, on the 1st day of March, 1861, wrote a letter, of which the following is a copy:

"WASHINGTON, *March 1, 1861.*

"MY DEAR SIR: Allow me to introduce to your acquaintance my friend, Thomas B. Lincoln, of Texas. He visits your capital mainly to dispose of what he regards a great improvement in firearms. I commend him to your favorable consideration as a gentleman of the first respectability, and reliable in every respect.

"Very truly, yours,

"JESSE D. BRIGHT.

"To His Excellency JEFFERSON DAVIS,

"*President of the Confederation of States.*"

And whereas we believe the said letter is evidence of disloyalty to the United States, and is calculated to give aid and comfort to the public enemies: Therefore,

Resolved, That the said Jesse D. Bright be expelled from his seat in the Senate of the United States.

At the same time another letter of Air. Bright, explanatory of his opposition to coercive measures by the Government, and declaring his support of the Union, was presented, and, with the resolution, was referred to the Committee on the Judiciary.

On January 13, 1862,[2] Mr. Edgar Cowan, of Pennsylvania, submitted the following report:

The Committee on the Judiciary, to whom was referred a resolution to expel the Hon. Jesse D. Bright from his seat in the United States Senate, respectfully report:

That they are of opinion that the facts charged against Mr. Bright are not sufficient to warrant his expulsion from the Senate; and they therefore recommend that the resolution do not pass.

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[1] Second session Thirty-seventh Congress, Globe, p. 89; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 964.

[2] Globe, P. 287.

The committee, however, were not unanimous. Mr. Lyman Trumbull, of Illinois, chairman, stated in debate [1] that the letter seemed to imply, not an expression of opinion, but a distinct act of hostility to the Government in time of war.

Speaking on January 21,[2] Mr. Charles Sumner, of Massachusetts, cited the cases of Blount and Smith in support of his contention that in a case of expulsion the Senate was not governed by judicial rules, and was at liberty to exercise a discretion unknown to judicial bodies.

Speaking on January 25,[3] Mr. Garrett Davis, of Kentucky, said:

> Whenever a Member of this House forms opinions, and in his official character and acts carries out those opinions, positively or negatively, in such a manner as to render him an unfit and unsafe member of the Senate, he becomes a proper subject of removal from the body. * * * There is no common law, no statutory law, there is no parliamentary law that binds the Senate to any particular definition of crime or offense in acting in this or any other case of the kind.

Mr. Davis, acting in harmony with these principles, proposed the expulsion fully as much because Mr. Bright opposed the conduct of the Administration as for the writing of the letter. Those opposing expulsion, notably Mr. Edgar Cowan, of Pennsylvania,[4] urged that the issue should be confined strictly to the letter, and that it should be interpreted in view of the state of affairs existing when it was written. Mr. Sumner had conceived that Jefferson Davis and his associates were public, open, unequivocal traitors at the time the letter was written, and that the letter was intended to aid the treason. Mr. Cowan conceived that it was a mere letter of introduction given without treasonable intent.

Mr. James A. Bayard, of Delaware, speaking on February 5,[5] while admitting that by the terms of the Constitution the power of expulsion was absolute in two-thirds of the members, held that it was none the less a judicial action, and the great leading principles of evidence could not be abandoned. Difference of opinion would not justify expulsion. In the case of Smith and Blount they were charged with distinct and specific acts of criminal misconduct. They were also defended by counsel. In this case Mr. Bayard conceived that there was no treasonable intent or act.

The debate on the report extended through January 20–31, and February 4 and 5.[6] Mr. Bright had no counsel, but was present during the debate and participated in it freely.

On March 5 the question was taken on agreeing to the resolution proposed by Mr. Wilkinson, and it was agreed to, yeas 32, nays 14. So Mr. Bright was expelled.

The following was then agreed to:

> *Ordered,* That the Vice-President be requested to transmit to the executive of the State of Indiana a copy of the resolution expelling Jesse D. Bright from the Senate, attested by the Secretary of the Senate.

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[1] Globe, p. 396.

[2] Globe, p. 413.

[3] Globe, pp. 434, 435.

[4] Globe, p. 471.

[5] Globe, pp. 647, 648.

[6] Globe, pp. 391–398, 412–419, 431–435, 447–454, 470, 539, 545, 559–564, 582–592, 622–629, 644–655; Appendix, pp. 37–42.

1270. For expressions hostile to the Government, absence from his seat, and presence within the lines of the enemy, Trusten Polk was expelled from the Senate.

A Member of the Senate being expelled, the Senate notified the governor of his State.

On December 18, 1861,[1] in the Senate, Mr. Charles Sumner, of Massachusetts, submitted the following resolution, which was referred to the Committee on the Judiciary:

Resolved, That Trusten Polk, of Missouri, now a traitor to the United States, be expelled, and he hereby is, expelled, from the Senate.

On January 9, 1862, Mr. John C. Ten Eyck, of New Jersey, presented, from the Committee on the Judiciary, the following report:

The Committee on the Judiciary, to whom was referred the resolution of the Senate for the expulsion of Trusten Polk, a Senator from the State of Missouri report:

That it appears to the satisfaction of the committee that Trusten Polk recently, and since the commencement of the present rebellion, in a letter transmitting pecuniary means to aid in the publication of a secession newspaper in southwestern Missouri, among other disloyal and treasonable expressions used the following: "Dissolution is now a fact; not only a fact accomplished, but thrice repeated. Everything here looks like inevitable and final dissolution. Will Missouri hesitate a moment to go with her Southern sisters? I hope not. Please let me hear from you. I would be glad to keep posted as to the condition of things in southwest Missouri. I like Governor Jackson's position. It looks like adherence to the 'Jackson resolutions.'"

That a copy of this letter was published in full in the Congressional Globe of the 19th of December last, the day after the resolution of expulsion in this case was introduced in the Senate, and has also, both before and since that time, been published and referred to in several other newspapers in Missouri and elsewhere and widely circulated throughout the country, which publication could hardly have failed to come to the notice of Senator Polk; and yet neither he nor any other person in his behalf has appeared before the committee to deny the authenticity of the letter referred to, or attempted in any other way to deny or explain it, so far as the committee are aware; a course of conduct deemed to be wholly incompatible with the idea of his innocence; since an innocent man in his position, according to the first impulses of a true and loyal heart, would not have suffered a moment to elapse without flying to his place to deny, if false, so grave and foul a charge.

That besides this he has not only failed to appear in his seat during the whole time of the continuance of the present session, now a period of six weeks, to perform his duty to his State and to the Union on an occasion of the greatest possible urgency, when the votes as well as counsel of every true and loyal Senator were eminently needed in providing for the public welfare and in putting down a fierce rebellion threatening the very existence of the Union, but, on the contrary, as the committee are fully satisfied on information derived from reliable official and other sources in Missouri, has left his home in St. Louis and gone clandestinely within the lines of the enemy, now in open armed rebellion against the United States, whose Constitution he, as Senator, has solemnly sworn to support.

The committee, under this state of facts, are of opinion that justice to the Senate, to rid its roll of his name as well as the Chamber of his presence; justice to the State of Missouri, whose high commission he has dishonored, and justice to the Union, which he has sought to betray, all require that he should no longer continue a member of this body.

They therefore respectfully report the resolution for the expulsion of Trusten Polk, a Senator from Missouri, back to the Senate, with the unanimous recommendation that the same do pass.

On agreeing to the resolution, there appeared—yeas 36, nays 0.

[1] Second session Thirty-seventh Congress; Election Cases, Senate Document No. 11, special session, p. 960.

Thereupon, on motion of Mr. Lyman Trumbull, of Illinois—

Ordered, That the Vice-President be requested to transmit to the governor of the State of Missouri copies of the resolutions expelling Waldo P. Johnson and Trusten Polk from the Senate, attested by the Secretary of the Senate.

1271. The Senate did not consider Lazarus W. Powell worthy of expulsion because he had formerly counseled his State to be neutral between the Government and its enemies.—On February 20, 1862,[1] in the Senate, Mr. Morton S. Wilkinson, of Minnesota, proposed the following, which was referred to the Committee on the Judiciary:

Whereas Lazarus W. Powell, a Senator from the State of Kentucky, after 11 States had published their ordinances of secession by which to sever themselves from the Government of the United States, had formed a confederation and provisional government, and made war upon the United States, did, on the 20th day of June last, at the city of Henderson, in the State of Kentucky, attend a large Southern States' rights convention, over which he was called to and did preside; and, on taking his seat as president thereof, made a speech, in which he stated the object of said convention, and then appointed a committee, which reported to said convention a long series of resolutions that were unanimously adopted by it. Among those resolutions are the following:

"2. That the war being now waged by the Federal Administration against the Southern States is in violation of the Constitution and laws, and has already been attended with such stupendous usurpations as to amaze the world and endanger every safeguard of constitutional liberty.

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"That the recall of the invading armies and the recognition of the separate independence of the Confederate States is the true policy to restore peace and preserve the relations of fraternal love and amity between the States.

* * * * * * *

"6. That we heartily approve the refusal of Governor Magoffin to furnish Kentucky troops to subjugate the South; and we cordially indorse his recent proclamation defining the position of Kentucky, in accordance with the sentiment of her people, and forbidding the invasion of Kentucky by Federal or Confederate troops.

"7. That, although Kentucky has determined that her proper position at present is that of strict neutrality between the belligerent sections, yet, if either of them invade her soil against her will, she ought to resent and repel it by necessary force."

The pith of Governor Magoffin's proclamation, which that convention so cordially approved, is embodied in this paragraph: "I hereby notify and warn all other States, separate or united, especially the United and Confederate States, that I solemnly forbid any movement upon Kentucky soil, or occupation of any part or place therein, for any purpose whatever, until authorized by invitation or permission of the legislative and executive authorities. I especially forbid all citizens of Kentucky, whether in the State guard or otherwise, from making any hostile demonstration against any of the aforesaid sovereignties; to be obedient to the orders of lawful authorities; to remain quietly and peaceably at home when off of military duty, and refrain from all words and acts likely to provoke a collision, and so otherwise to conduct themselves that the deplorable calamity of invasion may be averted; but, in the meantime, to make prompt and efficient preparation to assume the paramount and supreme law of self-defense, and strictly of self-defense alone."

The closing speech of this convention was made by Senator Powell, and the resolutions passed by it and a summary statement of its proceedings were signed by him as its president.

On the 10th of September last, whilst the legislature of Kentucky was in session in the town of Frankfort, and after her territory had been invaded at two distant points by the Confederate armies, and whilst Humphrey Marshall was employed in organizing and drilling an aimed body of rebels in

[1] Second session Thirty-seventh Congress, Globe, p. 891; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 891.

the contiguous county of Owen, a large Southern States' rights convention assembled and held its sessions in Frankfort for the apparent purpose of overawing the legislature, controlling its deliberations. and deterring it from passing measures to support the Union and the Government of the United States, Lazarus W. Powell was a delegate to that convention from the county of Henderson, and was appointed on its committee of resolutions. Among other resolutions, that committee reported these:

"Resolved, That every material interest of Kentucky, as well as the highest dictates of patriotism, demand that peace should be maintained within her borders, and this convention solemnly pledges the honor of its members to do all in their power to promote this end.

"2. That it is the deliberate sense of this convention, and it is believed of an overwhelming majority of the people of Kentucky, that the best and perhaps the only mode of effecting this great object is by adhering strictly, rigidly, and impartially to her chosen and often declared position of neutrality during the existence of the deplorable war now raging between the sections, taking sides neither with the Government nor with the seceding States, and declaring her soil must be preserved inviolate from the armed occupation of either.

* * * * * * *

"9. That we consider it incompatible with the neutrality avowed by Kentucky to vote money for the prosecution of the civil war, or to tax the people of the State, or augment its debt for a purpose so unwise and for a cause so hopeless as the military subjugation of the Confederate States."

This was a convention of most intense secessionists, and was attended by John C. Breckinridge and many of the leaders of that party from generally over the State. William Preston and R. W. Wooley, esqs., made speeches to it fraught with the rankest treason and denouncing the fiercest war against the United States. Its resolutions were unanimously adopted, and its business closed with the following one, offered by Senator Powell:

"Resolved, That Col. William Preston, George W. Johnson, esq., General Lucius Desha, Capt. Richard Hawes, and Thomas P. Porter, esq., be, and they are hereby, appointed a committee of organization, in order to carry out the purposes of this convention, and full powers are conferred upon them for that object."

Those men were thus commissioned in the cause of conspiracy, treason, and rebellion. By the warrant given them, on the motion of Senator Powell, they went forth and organized or advised and assisted in the organization of armed bands of traitors, and soon thereafter led them into the Confederate camps, where they are yet struggling to consummate the disruption of the Union and the overthrow of the Constitution and laws of the United States. From the beginning of this great rebellion to the present time Senator Powell has neither done nor said anything in Congress or out of Congress to strengthen or sustain the United States in this mighty struggle for national life. Whilst the true and loyal men of his own State were engaged in an arduous and protracted struggle to bring her to perform her duty to the Nation and its government, he not only withheld from them all assistance and sympathy, but gave to the rebels the moral force of his disloyal position and opinions, and all the aid and comfort which he could render them short of the commission of technical treason. His purposes, if not his acts, have been treasonable. Being an ex-governor of the State of Kentucky and one of her Senators in Congress, his example and counsel have doubtless been potential with her people and of mischievous tendency in other States. Under the false and delusive cry of neutrality and peace, and the absurd purpose to protect the soil of the State against invasion from the military force of the United States, he has doubtless assisted to seduce hundreds and hundreds from loyalty and duty into rebellion and treason. He has not supported the Constitution of the United States, but he has sounded the charge to his recruits, and they have made the overt attack upon it. Wherefore—

Be it resolved, That the said Lazarus W. Powell be, and he is hereby, expelled from the Senate.

March 7[1] there was reference to the subject in debate, and on March 12 Mr. Lyman Trumbull, of Illinois, chairman of the committee, reported back the resolution with the recommendation that it do not pass. On March 14,[2] at the conclusion of the debate, Mr. Trumbull gave the reasons for the report:

I consider it due to the committee, whose organ I was in reporting adversely to the passage of this resolution, simply to state, not by way of argument, or of provoking reply, the ground upon which the committee reported adversely to the passage of this resolution. It was not because the committee

[1] Globe, p. 1112.

[2] Globe, p. 1234.

approved of the doctrine of neutrality in Kentucky. In my judgment that was a most mischievous position and one wholly untenable, either in April, or June, or September; but it is known that the people of Kentucky very generally assumed that ground, and the Government of the United States, if they did not recognize the neutrality of Kentucky, we may at least say paid some respect to it. The resolutions that were adopted, in which they declared that the United States had no right to pass its troops over the soil of Kentucky, were, in my judgment, preposterous. It was downright opposition to the constituted authorities of the Government; wholly unjustifiable. I have no excuse for it. I think it is without excuse. But, sir, such was the position of the great body of the people of that State; and many persons now believe that it was owing to this position of neutrality which was then assumed that Kentucky has at last arrayed herself on the side of the Union. I do not think so, but good Union men doubtless did take that position.

Well, sir, the time came when, notwithstanding Kentucky had assumed this false attitude, it was necessary that her people should take sides either with the Government or against those arrayed for its protection. Some men who got upon this neutrality platform left it sooner than others; some in June, if you please; some earlier; some stood on it till September; but when the time came that Kentuckians had to meet this thing face to face, go with the Government or against it, fight for one or the other, then, sir, the traitors arrayed themselves, and undertook to get up a provisional government in the State of Kentucky. Breckinridge and the traitors alluded to by the Senator on my right [Mr. Davis] went into the organization; they joined the rebels; the Senator from Kentucky, whose case is under consideration, came here—came to the Government of the United States to discharge his duties here. He does not agree with me in sentiment; his opinions axe not my opinions; I do not agree with the views that he has so often announced here; but he is entitled to his own opinions, and no man is to be expelled from this body because he disagrees with others in opinion. Since Kentucky assumed this position and took sides with the Union nothing has been shown to satisfy the committee, at least, that the Senator from Kentucky has had any communication or done anything to favor the cause of the rebellion. I think neutrality did favor it; but, sir, that is over now.

On March 13 and 14[1] Mr. Garrett Davis, of Kentucky, urged the expulsion. He began by showing that the legislature of Kentucky bad requested Mr. Powell to resign and urged that he had ceased to represent the will of the loyal people of that State. He also charged that he was against coercing the seceding States and in favor of their recognition. He then proceeded to review his record in view of the events of the war.

On March 14[2] the resolution of expulsion was disagreed to, yeas 11, nays 28.

1272. A Senator having used words which might incite treason, a resolution of expulsion was proposed, but withdrawn after explanation.—In January, 1864,[3] a proposition was made in the Senate to expel Mr. Garrett Davis, of Kentucky, for introducing in the Senate a resolution containing a sentence as follows:

> The people North ought to revolt against their war leaders and take this great matter into their own hands.

Mr. Davis explained that he did not mean thereby to incite insurrection. The resolution of expulsion was withdrawn.

1273. The attempt to expel and the censure of B. F. Whittemore in the Forty-first Congress.

The House provided that a Member whom it was proposed to expel should be heard in his own defense.

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[1] Globe, pp. 1208–1216, 1230–1234.

[2] Globe, p. 1234.

[3] First session Thirty-eighth Congress, Globe, pp. 389–394.

A Member whose expulsion was proposed was permitted to present a written defense, but not to depute another Member to speak in his behalf.

The Speaker, being officially notified that a Member who was addressing the House had resigned, caused him to cease, and declined to recognize him further.

A Member may resign without the consent of the House.

A Member threatened with expulsion having resigned, the House ceased the proceedings of expulsion and censured him.

On February 21, 1870,[1] Mr. John A. Logan, of Illinois, from the Committee on Military Affairs, who were instructed to inquire into the alleged sale of appointments to the Military and Naval Academies by Members of Congress, submitted a report,[2] in writing, accompanied by the following resolution, vi:

Resolved, That B. F. Whittemore, a Representative in Congress from the First Congressional district of South Carolina, be, and is hereby, expelled from his seat as a Member of the House of Representatives in the Forty-first Congress.

The same having been read, together with the testimony accompanying the report, Mr. Benjamin F. Butler submitted the following resolution, which was read, considered, and, under the operation of the previous question, agreed to, viz:

Resolved, That B. F. Whittemore, a Member of this House, be permitted to appear at the bar of the House, on Wednesday next, at 2 o'clock p.m., to be heard in his defense, and show cause, if any he have, why sentence of expulsion should not be passed against him, as recommended by the Committee on Military Affairs.

On February 23 the Speaker[3] ruled that Mr. Whittemore might, under the resolution, be heard either orally or in writing. So his affidavit was presented and read, in denial of the charge. After it had been read, Mr. Benjamin F. Butler, of Massachusetts, desired to be heard in behalf of the accused Member, having been deputed by him to make his defense.

The Speaker ruled that Mr. Whittemore in person was entitled to the floor for one hour, but that he could not depute the gentleman from Massachusetts [Mr. Butler] to act for him. Should the member of the committee give such a direction to the matter as to open discussion, the gentleman from Massachusetts might be recognized in his own right. But to allow any gentleman to appear and address the House on the ground that he had been deputed by the gentleman from South Carolina would take the matter out of the line of parliamentary proceeding. If one Member might be so deputed, fifty might be. The matter was entirely within control of the House, which, by refusing the previous question, could throw the matter open.

The Chair recognized the right of Mr. Whittemore to speak in person as superior to that of the gentleman from Illinois [Mr. Logan], who reported the matter from the committee, this superior right being given by the resolution.

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[1] Second session Forty-first Congress, Journal, p. 373.

[2] The Congressional Globe, p. 1469, shows that Mr. Logan submitted the report as a question of privilege.

[3] James G. Blaine, of Maine, Speaker.

[4] Congressional Globe, p. 1523.

Mr. Whittemore then arose and yielded to Mr. Butler to represent him, which the latter proceeded to do, making the argument.

The point was raised that Mr. Whittemore, being in the position of one accused, was not bound by the hour rule of debate. The Speaker overruled this point, however.

On February 24, as the House was considering the resolution of expulsion, the Speaker laid before the House a communication from B. F. Whittemore, informing the House that he had transmitted to the governor of South Carolina his resignation of his seat in Congress. The same having been read, Mr. Whittemore was about to address the House, when the Speaker decided that, in view of the communication just read to the House, he could not recognize him as any longer a Member of the House or entitled to address the same.

Mr. Whittemore's notice to the Speaker that he had resigned did not reach the desk until after the speech had begun.[1] The Speaker, as soon as he read the notice of resignation, caused Mr. Whittemore to suspend his remarks, and ruled that it was not within the power of the Chair to recognize anyone not a Member of the House. Therefore he ruled that Mr. Whittemore might proceed only by unanimous consent of the House.

Question then arose as to the adoption of the resolution of expulsion. The precedents in the cases of Messrs. Gilbert and Matteson[2] were cited, in both of which the resolutions of expulsion were not passed after the resignations were tendered. It was stated by Mr. Logan as a precedent that in the case of Mr. Matteson the Speaker of the House refused to decide that the resignation was accepted and submitted the question to the House. Finally it was decided that the Member had resigned, and the resolution of expulsion was laid on the table. But resolutions condemning the conduct of the Member were adopted.

It was urged[3] that a member of a parliamentary body could not resign without the consent of that body, since the contrary doctrine would menace the very existence of the body.

The Speaker said:

> The uniform practice of the House of Representatives from the foundation of the Government has been that when the resignation of a Member has been handed in at the Clerk's desk the Chair must then cease to recognize him as a Member. * * * As this case may be cited as a precedent hereafter the Chair begs to make one further remark with regard to the decision as to Mr. Whittemore. It is that during the Thirty-sixth Congress, when there were the highest reasons of State, reasons of national importance against accepting resignations, when the Members from the States then going into rebellion resigned, their right to resign was in no instance questioned.

Mr. John F. Farnsworth, of Illinois, appealed from the decision that Mr. Whittemore should not be recognized as a Member of the House after the tender of his resignation. The appeal was laid on the table.[4]

The resolution of expulsion having been laid on the table, Mr. Logan then

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[1] Globe, pp. 1544–1546.

[2] Who resigned February 27, 1857. See Section 1275 of this chapter.

[3] By Messrs. N. P. Banks and H. L. Dawes.

[4] On March 7, 1880, during consideration of another matter, this decision was commented on by Mr. Henry L. Dawes, of Massachusetts, who believed that the House should have the right to pass on a resignation. Second session Forty-first Congress, Globe, p. 1741.

reported from the Committee on Military Affairs, as a question of privilege, the following resolution, which was adopted by a vote of 187 yeas to 0 nays, 34 not voting.

Resolved, That B. F. Whittemore, late Member from the first district of South Carolina, did make appointments to the Military Academy at West Point and the Naval Academy at Annapolis in violation of law; and that such appointments were influenced by pecuniary considerations; and that his conduct in the premises has been such as to show him unworthy of a seat in the House of Representatives, and is therefore condemned as conduct unworthy of a representative of the people.

1274. The House refused to expel but censured a Member who had accepted money for appointing a cadet at the Military Academy.

A report of a committee is not necessarily signed by all those concurring in it.

An amendment proposing expulsion of a Member was agreed to by a majority vote, but on the proposition as amended a two-thirds vote was required.

The change of a single word in the text of a proposition is sufficient to prevent the Speaker ruling it out of order as one already disposed of by the House.

On March 16, 1870,[1] Mr. William L. Stoughton, of Michigan, as a question of privilege, submitted a report of the Committee on Military Affairs, recommending the adoption of the following resolution:

Resolved, That the House declares its condemnation of the action of Hon. Roderick R. Butler, Representative from the First district of Tennessee, in nominating Augustus C. Tyler, who was not an actual resident of his district, as a cadet at the Military Academy at West Point, and in subsequently receiving money from the father of said cadet for political purposes in Tennessee, as an unauthorized and dangerous practice.

This report was signed by 4 members only, but it was explained that 6 members had concurred in the vote on it, thus making it the report of the majority of the committee.

The minority also presented views, signed by 4 Members, recommending the adoption of this resolution as a substitute:

Resolved, That Roderick R. Butler, a Representative in Congress from the First Congressional district of Tennessee, be, and he is hereby, expelled from his seat as a Member of this House.

When the resolution recommended by the majority came up for consideration, Mr. John A. Logan, of Illinois, moved to amend by substituting the minority resolution. This amendment was agreed to, yeas 101, nays 68—a majority vote.

The amendment having been agreed to, the question recurred on agreeing to the resolution as amended, which had thereby become a resolution of expulsion. The Speaker stated that under the Constitution a two-thirds vote would be required.

There were yeas 102, nays 68—not a two-thirds vote—and the resolution was rejected.

Mr. Stoughton then offered a resolution which was the resolution originally reported by the majority of the committee, with the addition of these words:

and he is hereby censured therefor.

[1] Second session Forty-first Congress, Journal, pp. 481, 485, 487, 498; Globe, pp. 2002, 2031–2037.

Mr. Thomas W. Ferry, of Michigan, made the point of order that the House, upon the proposition of censuring the Member or expelling him, both ideas being separately before the House, had by a majority vote chosen expulsion and rejected censure, failing to finally carry the former by a two-thirds vote. This resolution was therefore not substantially a different proposition.

The Speaker[1] said:

The Chair overrules the point of order. The gentleman might not be able to offer the resolution in precisely the same words, but this is a different resolution, differently worded, and it is a question of privilege, and is in order at any time. * * * The difference of a single word would bring it within the rule of the House.

The resolution of censure was then agreed to, yeas 158, nays 0.

1275. Published charges of corruption sustained by declaration of a Member caused the House to investigate its membership.

A committee selected to investigate charges against Members generally did not ask special authority to proceed against one who was found to be implicated.

Members indicted by the report of a committee were allowed to file written statements to be printed with the reports.

Form of resolution for investigating charges of corruption among Members.

Instance wherein the Member proposing a committee of investigation was appointed chairman.

In proceedings for expulsion the House declined to give the Members a trial at the bar.

A Member against whom was pending a resolution of expulsion was permitted to address the House by unanimous consent.

The written protest of a Member against his proposed expulsion does not go onto the Journal except by order of the House.

Members accused of corruption having resigned, proceedings to expel them were discontinued.

A Member threatened with expulsion having resigned, the House nevertheless adopted resolutions censuring his conduct.

Whether or not it was proper to censure a Member who had resigned was held to be a question for the House and not the Chair.

On January 9, 1857,[2] Mr. William H. Kelsey, of New York, as a question of privilege, presented this resolution, which was agreed to:

Whereas certain statements have been published charging that Members of this House have entered into corrupt combinations for the purpose of passing and of preventing the passage of certain measures now pending before Congress; and

Whereas a Member of this House has stated that the article referred to "is not wanting in truth:" Therefore,

Resolved, That a committee, consisting of 5 Members, be appointed by the Speaker, with power to send for persons and papers, to investigate said charges; and that said committee report the evidence taken, and what action, in their judgment, is necessary on the part of the House, without any unnecessary delay.

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[1] James G. Blaine, of Maine, Speaker.

[2] Third session Thirty-fourth Congress, Journal, p. 201; Globe, pp. 274–276.

The Speaker appointed on this committee Mr. Kelsey, and Messrs. James L. Orr, of South Carolina; H. Winter Davis, of Maryland; David Ritchie, of Pennsylvania, and Hiram Warner, of Georgia.

On February 19, 1857, the committee made several reports [1] affecting severally the following Members: William A. Gilbert, of New York; William W. Welch, of Connecticut; Francis S. Edwards, of New York, and Orsamus B. Matteson, of New York. Each report was accompanied by resolutions for the expulsion of the Member.

Mr. Kelsey submitted a minority report,[2] in which he dissented from the several reports on the ground that, according to the rules of the House and parliamentary law, the committee had no power to institute proceedings against any Member of the body under the resolution by which the committee was appointed. He quoted the rule of Jefferson's Manual: [3]

> When a committee is charged with an inquiry, if a Member prove to be involved, they can not proceed against him, but must make a special report to the House; whereupon the Member is heard in his place, or at the bar, or a special authority is given to the committee to inquire concerning him.

In their replies [4] the accused Members insisted on this rule, quoting the opinions expressed at the time of the investigation of the Graves-Cilley duel. They also insisted that, as they had not been present when the testimony against them was given, they had been deprived of the proper opportunities for confronting their accusers. When the case of Mr. Gilbert was taken up in the House, on February 25, these objections of the accused were considered at length.[5] It was urged by Mr. Schuyler Colfax, of Indiana, among others, that the accused should not be expelled without a public trial at the bar of the House.

Mr. Samuel A. Purviance, of Pennsylvania, moved this resolution [6] as an amendment to the resolutions of expulsion:

> *Resolved,* That this House will forthwith proceed with the trial of Hon. W. A. Gilbert, and that the Sergeant-at-Arms be directed to summon F. F. C. Triplett, James R. Sweeney, and other witnesses to the bar of the House; and that the said Gilbert be heard by himself or counsel.

Mr. Henry Winter Davis spoke at length in defense of the procedure of the committee, and cited as a controlling precedent the action of the Senate in the case of John Smith in 1807, quoting the entire report of Mr. John Quincy Adams in that case.[7] He also quoted the precedents in the Brooks case in the House.

Mr. Purviance's resolution was disagreed to on February 27 by a vote of 110 nays to 82 yeas. The resolutions of expulsion were then considered, and Mr. Gilbert, by unanimous consent, addressed the House,[8] and concluded his remarks by sending to the Clerk's desk to be read a paper in which he protested against the action of the

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[1] House Report No. 243, third session Thirty-fourth Congress.

[2] Page 27 of House Report No. 243.

[3] Jefferson's Manual, Sec. XI.

[4] See replies, Appendix Report House of Representatives No. 243, third session Thirty-fourth Congress.

[5] Third session Thirty-fourth Congress, Globe, pp. 883–900.

[6] Globe, p. 901.

[7] Globe, pp. 902–907.

[8] Journal, p. 553; Globe, p. 925.

House, impeached the proceedings, and finally announced that he resigned his seat in the House.[1]

Mr. James L. Seward, of Georgia, protested against the putting of the paper in the Journal.

The Speaker[2] said:

The paper will not go upon the Journal unless by direct order of the House. The only thing that will appear on the Journal will be the fact stated by the Member from New York, in his place, that he resigned his seat as a Member of this House.

Mr. Gilbert having resigned, the resolutions of expulsion, which recited also the charges, were laid on the table.

Mr. Edwards also resigned, and the resolutions of expulsion were laid on the table.[3]

In the case of Mr. Welch the resolutions of expulsion were amended by, the following substitute, offered by Mr. William Smith, of Maryland:

Resolved, That there has been no sufficient evidence elicited by the committee having charge of this subject and reported to this House in the case of William W. Welch, a Member thereof, and that no further proceeding should be had against said Member.

The case of Mr. Welch was debated at length,[4] both as to the evidence and the propriety of the course of procedure. The opinion of John Quincy Adams, given in a similar case,[5] was quoted:

It is the privilege of every Member to be heard and tried by the House itself.

Mr. Welch was also heard at length in his own behalf. The substitute was adopted by a vote of 119 yeas to 42 nays.

The resolutions in the case of Mr. Matteson were as follows:

Resolved, That Orsamus B. Matteson, a Member of this House from the State of New York, did incite parties deeply interested in the passage of a joint resolution for construing the Des Moines grant to have here and to use a large sum of money and other valuable considerations corruptly for the purpose of procuring the passage of said joint resolution through this House.

Resolved, That Orsamus B. Matteson, in declaring that a large number of the Members of this House had associated themselves together and pledged themselves each to the other not to vote for any law or resolution granting money or lands unless they were paid for it, has falsely and willfully assailed and defamed the character of this House and has proved himself unworthy to be a Member thereof.

Resolved, That Orsamus B. Matteson, a Member of this House from the State of New York, be, and is hereby, expelled therefrom.

Before the consideration of these resolutions[6] had begun, a communication was presented announcing the resignation of Mr. Matteson from the House.

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[1] On February 20 Mr. Thomas L. Clingman proposed as a question of privilege that "such Members of this House as are implicated by the special report of the select committee, submitted yesterday, have leave to file with the Clerk written answers to the allegations contained in said reports, which shall be printed with the said reports, provided that the printing of the reports shall not be delayed thereby."

The Speaker said that this should be submitted to the decision of the House, and the question being put, the proposition was agreed to. (Journal, p. 478; Globe, p. 785.)

[2] Nathaniel P. Banks, of Massachusetts, Speaker.

[3] Journal, p. 566; Globe, p. 952.

[4] Journal, p. 563; Globe, pp. 933–951.

[5] Globe, vol. 6, No. 21, p. 323.

[6] Journal, pp. 555–560; Globe, pp. 927–932.

A motion to lay the resolutions on the table having failed, the Speaker stated that the question recurred upon the resolutions.

Mr. Henry Bennett, of New York, made the point of order that it was not competent for the House to take any further action on the resolutions, on account of the resignation of Mr. Matteson.

The Speaker said:

> The gentleman from New York raises the question of order that the resolutions can not be further considered by the House because the gentleman to whom they refer is no longer a Member of the House. The Chair admits the fact stated by the gentleman from New York, but states that he has no authority to determine that the House has no power to proceed further in the matter. That is a question which the House must determine for itself.

After debate on the appeal, it was laid on the table; and so the decision of the Chair was sustained.[1]

The question next recurred on the resolutions, and the first resolution was agreed to, yeas 145, nays 17. The second resolution was also agreed to, without division. The third resolution was then laid on the table, without division. In the debate the position was taken that as Mr. Matteson was no longer a Member of the House there was nothing to be acted on; but it was urged, on the other hand, that the House might, by acting on the first two resolutions, express its opinion as to whether or not the facts reported by the committee were true.

1276. An investigating committee of the House having taken testimony affecting a Member of the Senate, the House transmitted the same to the Senate.

A Senator's term having expired before a pending resolution of expulsion was agreed to, the Senate discontinued the proceedings.

A citizen who, while a Member of the Senate, had been subjected to investigation, was allowed to submit a paper to be filed and printed with the report.

The Senate declined to permit an ex-Member to print in the Journal or Record a defense of his conduct.

On February 4, 1873,[2] in the Senate, the presiding officer laid before that body the following message:

> IN THE HOUSE OF REPRESENTATIVES, *February 4,1873.*
>
> Mr. Poland, from the select investigating committee, etc., submitted the following, which was agreed to:
>
> "Whereas the evidence taken by a select committee of this House appointed December 2, 1872, for the purpose of examining into charges of bribery of Members of this House, contains matter affecting Members of the Senate: Therefore
>
> *"Resolved,* That the Clerk of the House be directed to transmit to the Senate a copy of all the evidence thus far reported to the House by said committee, together with a copy of this resolution."
>
> Attest:
>
> EDW. MCPHERSON, *Clerk.*

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[1] Journal, p. 556; Globe, pp. 928, 929.

[2] Third session Forty-second Congress, Globe, p. 1076; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 973.

Thereupon Mr. James W. Patterson, of New Hampshire, who was named in the message, proposed this resolution, which was agreed to:

Resolved, That a select committee, consisting of 5 Senators, be appointed by the presiding officer, to whom shall be referred the communication this day received from the House of Representatives in relation to matter affecting Members of the Senate, together with a copy of the evidence accompanying the same, and that the said committee have power to send for persons and papers and to employ a clerk.

On February 5[1] the Chair appointed the committee, Mr. Lot M. Morrill, of Maine, being chairman.

On February 6[2] Messrs. John W. Stevenson, of Kentucky, and John P. Stockton, of New Jersey, severally asked to be relieved from service on the committee, and the Senate by vote in each case refused to excuse them.

On February 27[3] Mr. Morrill, of Maine, from the select committee to whom was referred the communication of the House of Representatives of the 4th instant, in relation to certain matter affecting Members of the Senate, together with a copy of the evidence accompanying the same, submitted a report (No. 519) accompanied by the following resolution:

Resolved, That James W. Patterson be, and he is hereby, expelled from his seat as a Member of the Senate.

On March 1 and 3[3] the propriety of taking up the report was debated, but the Congress expired without action, and Mr. Patterson's term expired.

On March 14, 1873,[4] at the special session of the Senate in the next Congress, Mr. Henry B. Anthony, of Rhode Island, submitted the following:

Whereas at the last session of the Senate a resolution was reported from the select committee on evidence affecting certain Members of the Senate, "that James W. Patterson be, and he is hereby, expelled from his seat as a Member of the Senate;" and

Whereas it was manifestly impossible to consider this resolution at that session without serious detriment to the public business; and

Whereas it is very questionable if it be competent for the Senate to consider the Fame after Mr. Patterson has ceased to be a Member of the body: Therefore,

Resolved, That the failure of the Senate to take the resolution into consideration is not to be interpreted as evidence of the approval or disapproval of the same.

Resolved further, That Mr. Patterson have leave to make a statement, which shall be entered upon the Journal of the Senate and published in the Congressional Record.

On March 25[5] Mr. Anthony modified the resolution by striking out the portion relating to the Journal, but there was opposition to allowing the privilege of publication in the Record to a private individual, and on March 23[6] the resolution was amended to read as follows, and as amended was adopted:

Whereas at the last session of the Senate a resolution was reported from the select committee on evidence affecting certain Members of the Senate, "that James W. Patterson be, and he is hereby, expelled from his seat as a Member of the Senate;" and

Whereas it was manifestly impossible to consider this resolution at that session without serious detriment to the public business; and

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[1] Globe, p. 1099.

[2] Globe, pp. 1136, 1137.

[3] Globe, pp. 2068, 2069, 2184, 2185.

[4] Forty-third Congress, Record, p. 77.

[5] Record, pp. 193–197.

[6] Record, p. 204.

Whereas it is very questionable if it be competent for the Senate to consider the same after Mr. Patterson has ceased to be a Member of the body: Therefore,

Resolved, That the pamphlet entitled "Observations on the report of the committee of the Senate of the United States respecting the Credit Mobilier of America," submitted by Mr. Patterson, be received, filed, and printed with the report of said committee.

1277. A Member being charged with the crime of manslaughter, the House declined to determine whether or not a question of privilege was raised and did not investigate.

It being claimed that a charge of crime against a Member involved a question of privilege, the Speaker submitted the question to the House.

The House has laid on the table a question submitted by the Speaker as to whether or not a question of privilege was involved in a pending proposition.

On May 15, 1856,[1] Mr. Ebenezer Knowlton, of Maine, submitted the following resolution and preamble, claiming the same to be a matter of privilege:

Whereas a difficulty occurred at Willard's Hotel, in this city, on the 8th instant, between Hon. Philemon T. Herbert, a Member of this House from the State of California, and Thomas Keating, a waiter at said hotel, which resulted in the death of said Keating from a pistol shot fired by said Herbert; and whereas upon the examination of said case before Justices Smith and Birch, of the District of Columbia, the said justices were divided in their opinion as to the propriety of allowing said Herbert to obtain bail; and whereas said Herbert was then taken, on a writ of habeas corpus, before Thomas H. Crawford, judge of the criminal court of the District of Columbia, and the decision of said judge was as follows: "That the prisoner enter into a recognizance, with one or more good surety or sureties, in the sum of $10,000, conditioned for his appearance at the next term of the criminal court of the District of Columbia, to be holden on the third Monday of June next, to answer to the charge of manslaughter on Thomas Keating, and not to depart the jurisdiction of the court without the leave thereof;" and whereas the Constitution provides "that each House of Congress shall be the judge of the qualifications of its own Members, and may punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member" Therefore,

Resolved, That the Committee on the Judiciary of this House be, and they are hereby, instructed to take the case of the above-named Philemon T. Herbert into consideration; that they have the power to send for persons and papers, and report to this body at their earliest convenience what action the House shall take in the premises.

Mr. Howell Cobb, of Georgia, raised the question of order that a question of privilege was not involved in the said preamble and resolution.

The Speaker[2] said:

It is not for the Chair to determine whether the facts assumed are true, or whether it be a question of privilege or not. But if it be claimed by the gentleman from Maine that it involves a question of privilege, the Chair will submit the question to the House whether it will entertain the resolution as a question of privilege.

"Is a question of privilege involved therein?" was then submitted to the House, whereupon, on motion of Mr. Alexander H. Stephens, of Georgia, and by a vote of yeas 79, nays 70, the question was laid on the table.[3]

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[1] First session Thirty-fourth Congress, Journal, pp. 975, 976; Globe, p. 1228.

[2] Nathaniel P. Banks, jr., of Massachusetts, Speaker.

[3] On February 24, IS57, on petition of citizens of California, the matter was considered, but the House determined not to investigate the subject. (Third session Thirty-fourth Congress, Journal, p. 531; Globe, p. 843.)

1278. A Senator being indicted for fraud made a personal explanation and withdrew from the Senate pending the trial.—On January 17, 1905,[1] in the Senate, Mr. John H. Mitchell, of Oregon, rising to a question of privilege, said:

Mr. President and Senators, recent events, with which you are all familiar, make it incumbent on me to come into your presence at this time and make answer to charges made against me in the public press and by a grand jury, and which charges, if true, unfit me to occupy this seat longer.

The charges, as spread broadcast through the public press, throughout the length and breadth of the United States—and this is in substance and effect the indictment reported—we to the effect that in January, 1902, in the State of Oregon, I entered into a conspiracy with Binger Hermann, then Commissioner of the General Land Office, and with one S. A. D. Puter, Horace G. McKinley, D. W. Tarpley, Emma L. Watson, Salmon B. Ormsby, Clark E. Loomis, William H. Davis, and others to defraud the United States out of a portion of its public lands, situated in township 11 south, of range 7 east, Walamette Meridian, in the State of Oregon, by means of false and forged applications, affidavits, and proofs of homestead entries and settlement; and, further, it is charged, that in furtherance of said alleged conspiracy, and to effect the objects thereof, said S. A. D. Puter did on the 9th day of March, 1902, pay and deliver to me the sum of $2,000 in money of the United States, the same being paid to me, as asserted by Puter, in two bills of the denomination of $1,000 each, to induce me to use my influence as a Senator with the said Binger Hermann, Commissioner of the General Land Office, to induce him, as such Commissioner of the General Land Office to pass to patent 12 homestead entries, then pending before the General Land Office, covering lands in the State of Oregon, and each and all of which entries, it is alleged, were based upon false and forged homestead applications, affidavits, and proofs, and that in pursuance of such corrupt conspiracy, it is alleged, I did use my influence with said Binger Hermann, Commissioner of the General Land Office, to induce him to pass to patent said 12 homestead entries, knowing they were fraudulent.

These are the charges made against me, and which I am called upon to answer. My answer is as follows:

Having given his answer, Mr. Mitchell concluded:

In conclusion, permit me to declare that the representatives of any government who will tolerate or permit this, much less sanction it, are unworthy of the exalted positions they occupy.

As for myself, I defy them here and now to produce any evidence, worth a moment's consideration, which will connect me in any wrongful manner whatever with any land frauds in Oregon or elsewhere.

Now, having said this much in explanation of and in answer to the charges against me, and thanking you all sincerely for your courteous attention, I will not further intrude on your presence.[2]

1279. The Senate election case of Alexander Caldwell, from Kansas, in the Forty-second Congress.

The election of a Senator being thoroughly tainted with bribery, the Senate was proceeding to unseat him when he resigned.

Discussion of the effect of the participation of the candidate himself in bribery and its relation to the amount and the proven effect.

A Senator having resigned, the Senate desisted from proceedings to declare his seat vacant or to expel him.

On February 17, 1873.[3] Mr. Oliver P. Morton, of Indiana, in the Senate submitted the following report:

On the 11th day of May, 1872, the Senate adopted the following resolution:

"Resolved, That the Committee on Privileges and Elections be authorized to investigate the election of Senator S. C. Pomeroy by the legislature of Kansas in 1867, and the election of Senator Alex-

[1] Third session Fifty-eighth Congress, Record, pp. 959–963.

[2] Mr. Mitchell died before his case assumed such a phase as to call for action by the Senate.

[3] Third session Forty-second Congress, Senate Report No. 451; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 429.

ander Caldwell in 1871; that the committee have power to send for persons and papers; that the chairman or acting chairman of said committee or any subcommittee thereof have power to administer oaths; and that the committee be authorized to sit in Washington or elsewhere during the session of Congress and in vacation."

In obedience to this resolution the Committee on Privileges and Elections have had under consideration the election of Alexander Caldwell to the Senate of the United States in January, 1871, have taken testimony, and beg leave to submit the following report:

It is testified by Mr. Len. T. Smith, a former business partner of Mr. Caldwell, his active friend at the time of his election and during this investigation, that he made an agreement with Thomas Carney, of Leavenworth, by which, in consideration that Mr. Carney should not be a candidate for United States Senator before the legislature of Kansas, and should give his influence and support for Mr. Caldwell, Mr. Caldwell should pay him the sum of $15,000, for which amount notes were given and afterwards paid, at the same time taking from Mr. Carney a written instrument in which he pledged himself in the most solemn manner not to be a candidate for the office of Senator in the approaching election.

This instrument is in the words following:

"I hereby agree that I will not under any condition of circumstances be a candidate for the United States Senate in the year 1871 without the written consent of A. Caldwell, and in case I do to forfeit my word of honor hereby pledged. I further agree and bind myself to forfeit the sum of $15,000, and authorize the publication of this agreement.

"THOS. CARNEY.

"TOPEKA, *January 18, 1871.*"

Mr. Smith's testimony is fully corroborated by that of Mr. Carney, who admits the execution of the paper, the making of the arrangement, the taking of the notes, and the subsequent receipt of the money. The notes for the money were signed by Mr. Smith, but paid by Mr. Caldwell; and one of them, for $5,000, was made contingent upon Mr. Caldwell's election. The substance of the whole agreement, only a part of which was expressed in the writing, was that Mr. Carney should not be a candidate for the Senate against Mr. Caldwell; that he should use his influence for Mr. Caldwell, go to Topeka, meet the legislature, and do all he could to secure his election.

The first question to be considered is: Was this arrangement corrupt? Was it the use of corrupt means on the part of Mr. Caldwell to procure his election? The committee are of opinion that it was corrupt; was against public policy; was demoralizing in its character; directly contributed to destroy the purity and freedom of election, and not to be tolerated by the Senate of the United States as a means of precuring a seat in that body.

To understand the full nature of the transaction we must consider the character and position of Mr. Carney. He had been a governor of Kansas; he had once been elected a Senator of the United States by the legislature of that State, but the election was premature, being at the wrong session; he had been a candidate for the Senate at another time, and had come within 10 votes of being elected. He was well known throughout the State, had a large body of active friends, many of whom were warmly devoted to his political fortunes. His being a candidate would greatly endanger the success of Mr. Caldwell, if not certain to result in his defeat. He was from the same city with Mr. Caldwell, and his candidacy would be the more dangerous on that account. When Mr. Caldwell agreed to give him $15,000 under this arrangement it was an attempt to purchase the votes of the friends of Mr. Carney. He doubtless expected that Mr. Carney, through his influence over his friends, could bring them over to his support. They would naturally become friends to the man with whom Mr. Carney was friendly. It was, at least, a tacit part of this arrangement that Mr. Carney should conceal the mercenary part of the transaction, and place his withdrawal from the canvass and his support of Mr. Caldwell upon personal and political considerations that were honorable to himself and would be attractive to his friends; and this he did. Mr. Carney went to Topeka before the Senatorial election and remained there until it was over, working industriously for Mr. Caldwell, and exerting all his personal and political influence to secure his election. Looking at the transaction in its real character it was a sale upon the part of Mr. Carney of the votes of his personal and political friends in the legislature, to be delivered by him to Mr. Caldwell as far as possible. If it were legitimate for Mr. Caldwell to buy off Mr. Carney as a candidate, it was equally legitimate to buy off all the other candidates and have the field to himself, by which he would exert a quasi-coercion upon the members of the legislature to vote for him, having

no other candidate to vote for. It was an attempt to buy the votes. of members of the legislature, not by bribing them directly, but through the manipulations of another. The purchase money was not to go to them but to Mr. Carney, who was to sell and deliver them without their knowledge. That Mr. Caldwell did procure the votes of members of the legislature, friends of Mr. Carney, ignorant of the fact that Mr. Carney was making merchandise of his political character and influence, and of their friendship for him, for which he was to receive a large sum of money, the evidence leaves no reasonable doubt.

Buying off opposing candidates, and in that way securing the votes of all or the most of their friends, is in effect buying the office. It recognizes candidacy for office as a merchantable commodity, a thing having a money value, and is as destructive to the purity and freedom of elections as the direct bribery of members of the legislature.

A candidate for the Senate without strength or merit may by purchasing the influence and support of all or a part of his competitors and withdrawing them from the canvass succeed in an election, thus not only committing a fraud upon the friends of the candidates who were purchased off, but a greater fraud upon the people of the State, who may be thus saddled with a representative in the Senate of the United States about whom they know little, for whom they care nothing, and who possesses little ability to represent their interests.

Mr. Smith, the friend of Mr. Caldwell, testifies that he paid Mr. Carney the further sum of $7,000 while at Topeka and just before the Senatorial election to meet Mr. Carney's alleged expenses while there, and through fear that Mr. Carney would after all withdraw from the arrangement and become a candidate.

Upon the check for this sum the money was drawn from the bank at Topeka in the evening by one T. J. Anderson, who testified that he gave it to Mr. Carney, and that he was ignorant of the consideration for which it was paid. Other testimony impeaches that of Mr. Anderson and raises a strong presumption that he was engaged in the purchase of votes for Mr. Caldwell, and for which this $7,000 was used, and that for his services he afterwards received the sum of $5,000 from Mr. Caldwell. Mr. Carney swears positively that he did not receive this $7,000 or any part of it, but he indorsed the check at the request of Mr. Smith to enable him to procure the money from the bank; that the money was to be used in procuring votes for Mr. Caldwell, and that a package containing this money, as he believes, was placed by Mr. Anderson on a table in Mr. Carney's room, where it could be and was conveniently carried off by the parties for whom it was intended.

Taking all the testimony together, the probability is that Mr. Carney did not get the $7,000, as no good reason was presented by Mr. Smith why, when Mr. Caldwell was holding Governor Carney's written promise not to be a candidate and Mr. Carney holding notes to be paid by Mr. Caldwell for $15,000, a new arrangement should be made by which Mr. Smith should pay Mr. Carney $7,000 more, making $22,000 in all.

We now come to the consideration of the transaction with Mr. Sidney Clarke. He had been a Member of Congress, had been a candidate for the United States Senate during the preceding canvass before the people, and many members of the legislature were elected upon personal pledges to vote for him for Senator. When the first vote was taken in the separate houses Mr. Clarke received 27 votes, the largest number given for any candidate but one; but the votes satisfied him and his friends that he could not be elected. An arrangement was concluded between Mr. Caldwell and a Mr. Stevens, a friend of Mr. Clarke, at a late hour in the night before the joint convention of the two houses, by which Mr. Caldwell was to pay Mr. Clarke's expenses in the canvass, estimated at from $12,000 to $15,000, and Mr. Clarke was to withdraw in favor of Mr. Caldwell. At a caucus of the friends of Mr. Clarke, held at 9 o'clock on the morning of the joint convention when Mr. Caldwell was elected, Mr. Clarke made a speech and urged them to vote for Mr. Caldwell, and in joint convention his name was withdrawn and all his friends but one voted for Mr. Caldwell. Subsequently in this city Mr. Clarke had several conferences with Mr. Caldwell, in which the latter promised to comply with his engagement with Mr. Stevens and pay Mr. Clarke's expenses, estimated at from $12,000 to $15,000, but never did. Mr. Clarke was unwilling to admit that he had made an agreement to transfer his friends to Mr. Caldwell in consideration of the latter's promise to pay this money, but taking all the testimony together the committee have no doubt that the transaction between him and Mr. Clarke was as has been stated. Mr. Caldwell's subsequent refusal to pay the money to Mr. Clarke does not relieve the character of the transaction, and very probably resulted in the exposure of Mr. Caldwell and the institution of this examination.

There was nothing in the evidence to show that Mr. Clarke's expenses in the Senatorial canvass or in the preceding canvass before the people amounted to half the sum which Mr. Caldwell was to pay him.

Mr. Carney and Mr. Clarke each testifies that Mr. Caldwell told them after the election that his election had cost him $60,000. Mr. Anthony, the mayor of the city of Leavenworth, testified that Mr. Caldwell admitted to him that the election had cost him over $60,000. Mr. Burke, editor of the Leavenworth Herald, and a supporter of Mr. Caldwell in his canvass, testifies that after the election Mr. Caldwell told him that the money he had paid Mr. Carney was not more than 10 per cent of the whole amount which the election had cost him, and on another occasion that the election had cost him more than twice his entire salary.

The committee have had much difficulty in tracing the money transactions; but the evidence shows that various sums, amounting to over $50,000, were drawn under circumstances that make it probable they were used to procure Mr. Caldwell's election. The sum of $15,000, paid to Mr. Carney, has already been stated. The second sum of $7,000, which Mr. Len. T. Smith swears was paid to Mr. Carney, and which Mr. Carney denies receiving, and testifies to circumstances showing it was used for the bribery of members of the legislature, has also been referred to. It is further shown that three or four days before the election took place Mr. Caldwell's agent went into the banking house of Scott & Co., at Leavenworth, and drew the sum of $10,000 upon Mr. Caldwell's check for the a vowed purpose of taking the money to Topeka by the train that morning, which was given as the reason for presenting the check before bank hours. Mr. Jacob Smith, banker at Topeka, testified that at 9 o'clock in the evening before the election took place Doctor Morris, of Leavenworth, a very active friend of Mr. Caldwell, drew $5,000 from his bank, and that Judge Crozier, of Leavenworth, an influential supporter of Mr. Caldwell, and then at Topeka laboring for his election, drew $1,200 from the bank after banking hours at the request of Mr. Smith, which was handed over to Mr. Smith. The testimony left no doubt upon the minds of the committee that the bankers who honored these different checks at Topeka after banking hours understood that the money was to be used for political purposes. The evidence further shows that Mr. T. J. Anderson subsequently received from Mr. Caldwell the sum of $5,000 for his services in the election. A draft for $10,000, drawn by the solicitor of the Kansas Pacific Railroad Company upon the treasurer of that company, was presented at the Kansas Valley Bank, of Topeka, by Mr. T. J. Anderson on the 23d of January, the day before the election, and the money drawn upon it under circumstances which, taken in connection with other testimony, make it probable that the money was used for Mr. Caldwell's election. The committee have no reason to believe that they have traced all the money that was used, and in the foregoing statement have taken no account of several small sums shown to have been paid by Mr. Caldwell for the expenses of his friends while at Topeka.

Mr. William Spriggs, a former treasurer of Kansas, testified in regard to a self-constituted committee of six of Mr. Caldwell's leading friends who met from time to time at Topeka during the day and evening for five or six days before the election to confer and report progress in electioneering for Mr. Caldwell; that during the meetings of this committee it was reported by Mr. Smith what members of the legislature had been secured to vote for Mr. Caldwell, how much was offered to others, and how much was asked by others. We quote from his testimony:

"We usually met at 10 o'clock in the morning. We had a roll of the senate and of the house and kept them, and we would compare notes, and then such a member of the committee would be sent that day or at such a time to see such members of the house and such another one to see somebody else—whoever we thought would be the best man for that particular place; and then we would meet again at such another hour and report what we had done and what success we had had, and in some quite a number of times—I do not know how many. In making the report and comparing notes there was one member of the committee would report; in calling over the names he would come to such and such a man and he would say, "We had better not count that man yet; that is under negotiation and he is a little too high; I think I can bring him down some."'

This witness testified to several interviews with Mr. Caldwell, and we quote from his testimony:

"I will just tell you what Mr. Caldwell said tome about it. He asked me if I knew any members of the legislature that could be influenced by the use of money for their votes, and I told him that I knew two members I believed that had the reputation of having been influenced in their votes on former occasions."

And further on:

"He said if I found any members that wanted a little money for votes to send them to him and to Len. Smith.

"Mr. Caldwell said there was another class of high-toned gentlemen there in the legislature that would not sell their votes, but they put it in this way: That they had been to a pretty heavy expense in carrying their election and they would want their expenses paid, and if I met with any of that class to send them to him or to Len."

The testimony of Mr. Spriggs is very full and shows that the canvass of Mr. Caldwell was thoroughly corrupt and that money was the chief argument relied upon. Among many other things, he stated that T. J. Anderson told him that he had paid Mr. Crocker, a member of the house, $1,000 for his vote; that Mr. Crocker afterwards backed out and handed the money over to a Mr. Carson to be returned to Mr. Anderson; that Carson got on the cars, went home, and kept the money. Carson was afterwards called by the committee and corroborated the statement, admitting that he had received the $1,000 back from Mr. Crocker to be returned to Mr. Anderson, but that he had kept the money himself for his services to Mr. Caldwell. Mr. Carney testifies that in an interview with Mr. Caldwell after the election, in which he was urging him to procure an appointment for one of Mr. Carney's friends who had voted for him, Mr. Caldwell took from his pocket a memorandum book and appeared to run over a list of names, and coming to the man referred to said, "That man has been paid;" and Mr. Carney understood from his manner that he had in this memorandum book a list of members, with the sums paid to each; that Mr. Caldwell told him upon another occasion that he had paid Mr. Bayers the sum of $2,500 for his vote and Mr. James F. Legate the sum of $1,000 for his vote. Mr. Anthony also swears that in a conversation with Mr. Caldwell that gentleman admitted to him that he had paid $2,500 for the vote of Mr. Bayers. There is much testimony showing that Len. T. Smith, Frank Drenning, James L. McDowell, George A. Smith, and T. J. Anderson, among the most active friends of Mr. Caldwell during the canvass, admitted at different times that they had offered money to members of the legislature to vote for Mr. Caldwell, in some cases specifying the members to whom it was offered and paid and in other cases that offers had been made that had not been accepted, and that negotiations were on hand with others which had not been completed. These men have denied before the committee all conversations and admissions of this character and all payment of money to members or offers to pay them, and several members of the legislature who were implicated have expressly denied that they received the money or that offers were made them.

Mr. Caldwell offered testimony showing that Mr. Carney had made threats to have him ousted from the Senate; that Mr. Anthony was hostile to him; that Mr. Burke had a lawsuit with him growing out of money furnished to Mr. Burke about the time of the election; and to contradict several statements of Mr. Clarke. The most important contradictions of the testimony produced against Mr. Caldwell are made by members of the legislature who were themselves implicated or by the agents of Mr. Caldwell who were directly charged with taking a part in these corrupt practices, and there are some contradictions made by witnesses against whom there is no cause of suspicion. But taking the testimony altogether, the committee can not doubt that money was paid to some members of the legislature for their votes and money promised to others which was not paid and offered to others who did not accept it.

By the Constitution each House of Congress is made the judge of elections, returns, and qualifications of its Members.

If a person elected to the Senate has not the constitutional qualifications, or if the election is invalid by reason of fraud or corruption, the jurisdiction to examine and determine is expressly vested in the Senate.

Another clause of the Constitution authorizes the Senate to expel a Member by a two-thirds vote. The causes for which a Senator may be expelled are not limited or defined, but rest in the sound discretion of the Senate.

It has been a subject of discussion in the committee whether the offenses of which they believe Mr. Caldwell to have been guilty should be punished by expulsion or go to the validity of his election, and a majority are of the opinion that they go to the validity of his election and had the effect to make it void. Wherefore the committee recommend to the Senate the adoption of the following resolution:

Resolved, That Alexander Caldwell was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Kansas.

This report was the subject of a long and learned debate, extending from March 10 to 22, 1873.[1] At first the theory of the report in regard to the common law of England was assailed, and it was denied that, even were the English law as stated, it was of effect in a case like this. The doctrine that participation of the candidate in bribery voided the election even though the amount of bribery proven was not sufficient to change the result was strongly antagonized. It was pointed out that Mr. Caldwell had a majority of 25 votes, and that only a few of these at most could be impeached. It was further urged that the Senate might not inquire into the qualifications of the members of the legislature, and one Senator even took the ground that if every legislator had been bribed, their act of electing a Senator would yet be unassailable. On March 13[2] Mr. James L. Alcorn, of Mississippi, proposed for action at a future time this resolution:

Resolved, That the Senate, acting as the judge of the election, returns, and qualifications of its own Members, has the power under the Constitution to reject Senators-elect whose election shall have been proved to the satisfaction of the Senate to have been tainted by bribery, fraud, or intimidation.

On March 21[3] Mr. Orris S. Ferry, of Connecticut, moved—

to amend the resolution by striking out the following words, "was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Kansas," and in lieu thereof inserting "be, and he hereby is, expelled from the Senate of the United States."

The debate continued until March 24,[4] when the Vice-President laid before the Senate a letter from Mr. Caldwell, showing that he had resigned his seat in the Senate.

Thereupon Mr. Morton said:

It is hardly competent for the Senate to expel a man who is not a Member, or to declare a seat vacant that is already vacant by resignation.

Therefore he ceased to press the question.

1280. Instances of expulsion proposed in the Senate but not effected.

On February 27, 1873,[5] a special committee of the Senate who had investigated charges against Senator James W. Patterson, of New Hampshire, reported a resolution for his expulsion. The resolution was not acted on.

1281. In 1862[6] the Senate considered the case of James F. Simmons, Senator from Rhode Island.

July, 2, 1862, near the end of Mr. Simmons's second term in the Senate, a resolution was submitted that he be expelled from the Senate. The preamble stated that it appeared from a report of the Secretary of War that Mr. Simmons had exercised his official influence over certain of the heads of the Departments in procuring an order authorizing a certain person to manufacture rifles in behalf of the Government for the Army and Navy, and that Mr. Simmons had agreed to receive as a compensation for such services the sum of $50,000, and that he had already received two

[1] Special session Forty-third. Congress, Record, pp. 30–38, 41–47, 48–62, 66–77, 80–89, 90–102, 104–113, 118–125, 126–134, 137–154, 154–164.

[2] Record, p. 76.

[3] Record, p. 137.

[4] Record, pp. 164, 165.

[5] Third session Forty-second Congress, Globe, pp. 1872, 1873, 2184.

[6] Election Cases, Senate Document No. 11, Special Session, 58th Cong., p. 970.

promissory notes amounting to $10,000. July 8 the resolution was referred to the Committee on the Judiciary by a vote of 31 yeas to 7 nays. July 14 the committee reported that the facts were substantially as above given, and that they were of opinion that "such a practice is entirely indefensible, and that it was highly improper for a Senator of the United States to have acted thus, even when the Government sustained no loss thereby;" that it was manifest that Congress disapproved of such conduct from the fact that they had promptly passed a law making it a penal offense thereafter; but that to visit a severe penalty upon an act which at the time of its commission was not punishable or forbidden by public law would be retroactive in its effect, and render the step liable to that objection to which all post facto laws are justly subject. The committee unanimously reported back the resolution, accompanied by the statement of facts, that the Senate might take such action as they might think fit. No action was taken. Congress adjourned within three days after the report was made, and Mr. Simmons had resigned his seat in the Senate before the next session.

1282. The Senate case of Joseph R. Burton, in the Fifty-ninth Congress.

A Senator convicted in the courts resigned after the Senate had ordered an inquiry.

Summary and discussion of laws regulating the conduct of Representatives and Senators.

The Congress may by law impose certain restrictions on the conduct of Senators and Representatives without conflicting with the fundamental idea of the Constitution.

There is no necessary connection between the conviction of a Senator under Sec. 1782, R. S., and the right of the Senate to punish one of its Members.

A final judgment of conviction under section 1782, R. S., does not operate ipso facto to vacate the seat of a convicted Senator or compel the Senate to expel him.

Senators can not properly be said to hold their places "under the Government of the United States."

The Senate took steps looking to punishment of a convicted Senator, although an application for rehearing of an appeal was pending.

Instance wherein the Senate was informed by the governor of a State that one of the Senators of that State had resigned.

On May 22, 1906,[1] in the Senate, Mr. Eugene Hale, of Maine, offered the following resolution, which was agreed to:

Resolved, That the Committee on Privileges and Elections be, and are hereby, directed to examine into the legal effect of the late decision of the Supreme Court in the case of Joseph R. Burton, a Senator from the State of Kansas, and, as soon as may be, to report their recommendation as to what action, if any, shall be taken by the Senate.

Mr. Burton had been convicted under sections 3929, 4041, and 1782 of the Revised Statutes, which provide against the use of the mails for fraudulent purposes and forbid Senators or Representatives from receiving compensation for services

[1] First session Fifty-ninth Congress, Record, p. 7211.

rendered before any department, etc., of the United States Government. He had been twice convicted, and this decision was rendered on Mr. Burton's appeal from the second conviction. The Supreme Court refused to reverse the judgment of the circuit court.

The opinion of the court, rendered May 21, 1906,[1] by Mr. Justice Harlan, among other features, examined section 1782, which is as follows:

Sec. 1782. No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States.[2]

1. The first question to be considered is whether section 1782 is repugnant to the Constitution of the United States. This question has been the subject of extended discussion by counsel. But we can not doubt the authority of Congress by legislation to make it an offense against the United States for a Senator, after his election and during his continuance in office, to agree to receive or to receive compensation for services to be rendered or rendered to any person, before a Department of the Government, in relation to a proceeding, matter, or thing in which the United States is a party or directly or indirectly interested.

The principle that underlies section 1782 is not wholly new in our legislative history. For instance, by the act of March 3, 1863,[3] it was declared that Members of Congress shall not practice in the Court of Claims. Later Congress by statute declared that no Member of or Delegate to Congress shall directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States by any officer or person authorized to make contracts on behalf of the United States; and every person violating this section was to be deemed guilty of a misdemeanor and fined $3,000.[4]

Counsel for the accused insists that section 1782 is in conflict with the fundamental idea of the Federal system, namely, that the Government is one of "limited powers, with duties and restrictions imposed, and no authority is lodged anywhere to change those duties or restrictions, except the power reserved by the people." The proposition here stated is certainly not to be disputed; for it is settled doctrine, as declared by Chief Justice Marshall and often repeated by this court, that "the Government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication."[5] We do not, however, perceive that there has been in the statute before us any departure from that salutary doctrine.

It is said that the statute interferes, or by its necessary operation will interfere, with the legitimate authority of the Senate over its members, in that a judgment of conviction under it may exclude a Senator from the Senate before his constitutional term expires; whereas, under the Constitution, a Senator is elected to serve a specified number of years, and the Senate is made by that instrument the sole judge of the qualifications of its members, and, with the concurrence of two-thirds, may expel a Senator from that body. In our judgment there is no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named. While the framers of the Constitution intended that each Department should keep within its appointed sphere of publication, it was never contemplated that the authority of the Senate to admit

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[1] This was the second decision of the court in Senator Burton's case.

[2] 13 Stat., 123, c. 119.

[3] 12 Stat., 765, c. 92; R. S., 1058.

[4] R. S., 3739.

[5] Martin *v.* Hunter, Lessee, 1 Wheat., 304, 343.

to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should in any degree limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it. In order to promote the efficiency of the public service and enforce integrity in the conduct of such public affairs as are committed to the several Departments, Congress, having a choice of means, may prescribe such regulations to those ends as its wisdom may suggest, if they be not forbidden by the fundamental law. It possesses the entire legislative authority of the United States. By the provision in the Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States," it is meant that Congress, keeping within the limits of its powers and observing the restrictions imposed by the Constitution, may, in its discretion, enact any statute appropriate to accomplish the objects for which the National Government was established. A statute like the one before us has direct relation to those objects, and can be executed without in any degree impinging upon the rightful authority of the Senate over its members or interfering with the discharge of the legitimate duties of a Senator. The proper discharge of those duties does not require a Senator to appear before an Executive Department in order to enforce his particular views or the views of others in respect of matters committed to that Department for determination. He may often do so without impropriety, and, so far as existing law is concerned, may do so whenever he chooses, provided he neither agrees to receive nor receives compensation for such services. Congress, when passing this statute, knew, as, indeed, everybody may know, that executive officers are apt, and not unnaturally, to attach great, sometimes perhaps undue, weight to the wishes of Senators. Evidently the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the Government whose favor may have much to do with the appointment to or retention in public position of those whose official action it is sought to control or direct. The evils attending such a situation are apparent and are increased when those seeking to influence executive officers are spurred to action by hopes of pecuniary reward. There can be no reason why the Government may not, by legislation, protect each Department against such evils—indeed, against everything, from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs. A Senator can not claim immunity from legislation directed to that end, simply because he is a member of a body which does not owe its existence to Congress, and with whose constitutional functions there can be no interference. If that which is enacted in the form of a statute is within the general sphere of legitimate legislative, as distinguished from executive. and judicial, action, and not forbidden by the Constitution, it is the supreme law of the land—supreme over all in public stations, as well as over all the people."No man in this country," this court has said, "is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it."[1] I Nothing in the relations existing between a Senator, Representative, or Delegate in Congress and the public matters with which, under the Constitution, they are respectively connected from time to time, can exempt them from the rule of conduct prescribed by section 1782. The enforcement of that rule will not impair or disturb those relations or cripple the power of Senators, Representatives, or Delegates to meet all rightful or appropriate demands made upon them as public servants.

Allusion has been made to that part of the judgment declaring that the accused, by his conviction, "is rendered forever hereafter incapable of holding any office of honor, trust, or profit under the Government of the United States." That judgment, it is argued, is inconsistent with the constitutional right of a Senator to hold his place for the full term for which he was elected and operates, of its own force, to exclude a convicted Senator from the Senate, although that body alone has the power to expel its Members. We answer that the above words, in the concluding part of the judgment of conviction, do nothing more than declare or recite what, in the opinion of the trial court, is the legal effect attending or following a conviction under the statute. They might well have been omitted from the judgment. By its own force, without the aid of such words in the judgment, the statute makes one convicted under it incapable forever thereafter of holding any office of honor, trust, or profit under the Government of the United States. But the final judgment of conviction did not operate, ipso facto, to vacate the seat of the convicted Senator nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment. The seat into which he was originally inducted as a Senator from Kansas could

[1] United States *v.* Lee, 106 U. S., 196, 220.

only become vacant by his death or by expiration of his term of office or by some direct action on the part of the Senate in the exercise of its constitutional powers. This must be so for the further reason that the declaration in section 1782 that any one convicted under its provisions shall be incapable of holding any office of honor, trust, or profit "under the Government of the United States" refers only to offices created by or existing under the direct authority of the National Government as organized under the Constitution and not to. offices the appointments to which are made by the States acting separately, albeit proceeding, in respect of such appointments, under the sanction of that instrument. While the Senate, as a branch of the legislative department, owes its existence to the Constitution and participates in passing laws that concern the entire country, its members are chosen by State legislatures and can not properly be said to hold their places "under the Government of the United States."

We are of opinion that section 1782 does not by its necessary operation impinge upon the authority or powers of the Senate of the United States nor interfere with the legitimate functions, privileges, or rights of Senators.

Mr. Justice Brewer made a dissenting opinion, in which Messrs. Justices White and Peckham concurred; but this dissent did not deal with this feature of the case.

Mr. Burton appealed for a rehearing, which could not be heard and decided before the probable termination of the session of Congress at which Mr. Hale offered the resolution directing the investigation. This appeal had been made at the time Mr. Hale's resolution was agreed to.

On June 5, 1906,[1] the Vice-President laid before the Senate the following telegram,[2] which was read and ordered to lie on the table:

TOPEKA, KANS., *June 4, 1906.*

HON. CHARLES W. FAIRBANKS,

Vice-President of the United States, Washington, D. C.:

Hon. J. R. Burton has this day tendered his resignation as United States Senator from Kansas, and I have accepted the same.

E. W. HOCH, *Governor of Kansas.*

1283. The case of King and Schumaker, in the Forty-fourth Congress. The majority of the Judiciary Committee concluded that a Member might not be tried or punished by the House for an offense alleged to have been committed against a preceding Congress.

In the Forty-third Congress the Committee on Ways and Means made an investigation of the charges that a large sum of money was used to secure the passage through Congress of an increased annual appropriation to the Pacific Mail Steamship Company in the nature of a subsidy. They ascertained from the evidence that about $900,000 was disbursed upon the allegation that it was used in aid of the passage of the act. About $565,000 of this was found to have been paid to the use of persons having no official connection with such legislation. The remaining sum remained in doubt because of the "refusal of William S. King to testify to the truth and to the failure or refusal of John G. Shumaker to present all the facts which the committee believe it was in his power to give." The committee recommended that the evidence taken be transmitted to the Clerk of the House, to be by him laid before the Forty-fourth Congress, and also that a copy be sent to the United States district attorney, to be by him presented to the grand

[1] Record, p. 7821.

[2] Although a motion for a rehearing was before the court and would not probably be acted on before the termination of the existing session of Congress, there had been proceedings in the Committee on Privileges and Elections which suggested that steps looking to expulsion might be taken at once.

jury of the District. These recommendations were carried out, and when the Forty-fourth Congress took the case up for consideration the subject was before the United States court.

Messrs. King and Schumaker were Members of the Forty-fourth Congress, and the Judiciary Committee inquired "what action should be taken by the House in reference to the persons now Members of this House charged with complicity in the alleged corrupt use of money to procure the passage of an act providing for an additional subsidy in the China mail service during the Forty-second Congress and with giving false testimony in relation thereto before the Committee on Ways and Means of the Forty-third Congress. The report [1] of the committee finds as follows:

Your committee are of the opinion that the House of Representatives has no authority to take jurisdiction of violations of law or offenses committed against a previous Congress. This is a purely legislative body and entirely unsuited for the trial of crimes. The fifth section of the first article of the Constitution authorizes "each House to determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member." This power is evidently given to enable each House to exercise its constitutional function of legislation unobstructed. It can not vest in Congress a jurisdiction to try a Member for an offense committed before his election. For such offense a Member, like any other citizen, is amenable to the courts alone. Within four years after the adoption of the first ten amendments to the Constitution, Humphrey Marshall, a Senator of the United States from Kentucky, was charged by the legislature of his State with the crime of perjury, and the memorial was transmitted by the governor to the Senate for its action. The committee to whom it was referred reported against the jurisdiction of the Senate, and say:

"That in a case of this kind no person can be held to answer for an infamous crime unless on a presentment or indictment of a grand jury, and that in all such prosecutions the accused ought to be tried by an impartial jury of the State or district wherein the crime shall have been committed. Until he is legally convicted, the principles of the Constitution and of the common law concur in presuming that he is innocent. And they are also of opinion that, as the Constitution does not give jurisdiction to the Senate, the consent of the party can not give it, and that therefore the said memorial ought to be dismissed."

This report was adopted by a vote of 16 to 7. This is the construction given to said section in the first case presented to either House after its adoption by the statesmen who framed the Constitution, and we think it an authority which should control the case before the committee. We know of no public interest which will be promoted by further investigation. Your committee therefore recommend that the House leave these charges where they now are, in court, to be finally adjudicated and disposed of without any interposition or further action of the House.

Messrs. Scott Lord, William Lawrence, George F. Hoar, and B. G. Caulfield submitted views of the minority, denying that the case of Marshall was parallel to the present cases, where the crimes were not alleged to have been committed in a State court, but related directly to the attempted corruption of Members of Congress of the United States, which crime or crimes, wherever originated, were consummated, as alleged, in the District of Columbia or within the halls of the Capitol. In the State of New York, in the case of George G. Barnard, one of the justices of the supreme court, he was held liable to impeachment for offenses committed by him before he was elected to the term of office which he then held. The senate of that State has asserted the same principle. The Senate of the United States had recently held jurisdiction in a case in which the alleged limitation, if any, forbidding it, is found in the words of the Constitution. The fact that the questions involved as to the guilt of the accused Members had been referred to the courts of the District of Columbia did

[1] House Report No. 815, first session Forty-fourth Congress.

not and could not affect the question of jurisdiction, nor in any manner release the House from its duty in the premises, as had been held in the cases of Kilbourn and Belknap.

George W. McCrary also expressed the opinion in a supplemental report that the House might properly assume jurisdiction in a case where a Member had received money to be used in corrupting legislation in Congress for which offense no indictment had been found, even though the offenses were charged prior to his election.

1284. In 1799 the House declined to expel Matthew Lyon for an offense committed while a Member but before his reelection to the then existing House.—On February 20, 1799,[1] Mr. James A. Bayard, of Delaware, proposed this resolution:

Resolved, That Matthew Lyon, a Member of this House, having been convicted of being a notorious and seditious person, and of a depraved mind, and wicked and diabolical disposition; and of wickedly, deceitfully, and maliciously, contriving to defame the Government of the United States; and of having with intent and design to defame the Government of the United States, and John Adams, the President of the United States, and to bring the said Government and President into contempt and disrepute, and with intent and design to excite against the said Government and President the hatred of the good people of the United States, and to stir up sedition in the United States—wickedly, knowingly, and maliciously, written and published certain scandalous and seditious writings or libels, be therefore expelled from this House.

On February 22 the House considered the resolution. Mr. Bayard contended that the House had unlimited power of expulsion, and could expel a Member for any crime or any cause which, in their discretion, they conceived had rendered him unfit to remain a Member of the body. It was a fallacious doctrine that the House could not take notice of acts done by its Members out of the House.

It appeared from the debate that Mr. Lyon, a Member from Vermont, had been convicted in that State under the recently enacted sedition law. It was urged by Mr. John Nicholas, of Virginia, that Mr. Lyon's constituents, with a full knowledge of his prosecution, had reelected him. Mr. Lyon addressed the House in his own behalf,[2] no special permission being given by the House. The discussion developed into a discussion of the sedition laws.

The question being taken there were yeas 49, nays 45. So two-thirds of the Members present not concurring, the resolution was not agreed to.

1285. After a discussion of the subject of qualifications and expulsion the House laid on the table a question as to the conduct of a Member in the preceding Congress.—On January 15, 1858,[3] Mr. Thomas L. Harris, of Illinois, rising to a question of privilege, presented this resolution:

Resolved, That Orsamus B. Matteson, a Member of this House from the State of New York, be, and is hereby, expelled from this House.

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[1] Third session Fifth Congress, Annals, pp. 2954, 2959–2974; Journal, p. 487.

[2] Mr. Lyon was a Member of the House at the time he was fined and imprisoned. On November 13, 1811, a memorial was presented to the House asking that the fine be repaid. Annals, first session Twelfth Congress, p. 345.

[3] First session Thirty-fifth Congress, Globe, pp. 311, 878–889, 1389–1392; Journal, p. 559.

The preamble of this resolution recited that in the preceding Congress the conduct of Mr. Matteson had been investigated and he had resigned to escape expulsion.[1]

On February 25, the resolution introduced by Mr. Harris was considered at length. It was urged by Mr. Harris that the act of expulsion was proper, not as a punishment but as a purification of the House. The Senate had, in the case of Mr. Blount, of Tennessee, shown that it considered itself competent to expel for an offense committed before the offender had been sworn in as a Member of the body. In the case of Senator John Smith, of Tennessee, the report,[2] made by John Quincy Adams had taken the ground that—

by the letter of the Constitution, the power of expelling a Member is given to each of the two Houses of Congress, without any limitation other than that which requires a concurrence of two-thirds of the votes to give it effect.

In opposition it was contended that the power of expulsion was limited. Mr. Miles Taylor, of Louisiana, held that the House could expel only for disorderly conduct in violation of the rules of order. It was held by others that the House had no right to expel for an offense committed before the Member took his seat, the Wilkes case being cited in support.

By a vote of 93 yeas to 87 nays the House referred the subject to a special committee, which reported on March 22.[3] Messrs. James L. Seward, of Georgia, Galusha A. Grow, of Pennsylvania, and John Huyler, of New Jersey, signed the majority report, which was embodied in this resolution:

Resolved, That it is inexpedient for this House to take any further action in regard to the resolutions proposing to expel O. B. Matteson.

The committee in their report took the ground that the proceedings in the previous Congress constituted no disqualification, and that in Mr. Matteson's case there was no constitutional or legal hindrance to his being elected, and no personal disqualification excluding him either permanently or temporarily from being a Representative. The legislative power to punish Members could not be used in regard to matters having no legal recognition. According to Cushing's Law and Practice of Legislative Assemblies, "Expulsion from a former or from the same legislative assembly can not be regarded as a personal disqualification, unless specially provided by law." The Wilkes case was cited in support of this authority. The power of the House of Representatives in each Congress was ample and complete to punish its Members for disorderly behavior or misconduct. The House of the last Congress had tried Mr. Matteson; but what offense had he committed against this House? With what act of disorderly behavior was he charged? The fact that he had been elected to the Thirty-fifth Congress before the resolutions of censure were passed in the Thirty-fourth Congress, if material, did not, in the committee's opinion, change the case, since the charges against Mr. Matteson were known to the people of his district before they reelected him. With the judgment pronounced by

[1] See section 1275 of this chapter for proceedings at that time.

[2] This report is quoted at length. Globe, p. 886.

[3] First session Thirty-fifth Congress, House Report No. 179.

the House in the Thirty-fourth Congress, its power ended. Mr. Matteson was thenceforth amenable only to the people of his district.

The views of the minority, signed by Mr. Samuel R. Curtis, of Iowa, expressed the opinion that the House had the inherent power to protect itself against external and internal corruption; and that, under the Constitution, the House might expel for whatever reasons might seem necessary to guard against blight, decay, or destruction. The power was plenary; restrained by the two-thirds vote in order to prevent tyrannical exercise. The power to expel was not merely the power to inflict punishment. It was the power to remove an obstacle to the progress of legitimate business and secure a wholesome exercise of the House's function.

The report of the committee was considered on March 27, and during consideration of the resolution recommended by the majority the whole subject was laid on the table, yeas 96, nays 69.

1286. Members being charged with bribery committed several years before the election of the then existing House, the House preferred censure to expulsion, but declined to express doubt as to the power to expel.

Discussion of the power of expulsion in its relations to offenses committed before the Member's election; and in relation to the power of impeachment.

A Member against whom a resolution of expulsion was pending was permitted to address the House as a matter of right.

Charges having been made against the Speaker, he called another Member to the chair and from the floor moved a committee of investigation.

The Speaker being implicated by certain charges, a Speaker pro tempore selected from the minority party was empowered to appoint a committee of investigation.

On December 2, 1872,[1] the Speaker[2] called Mr. Samuel S. Cox, of New York, a member of the minority party on the floor, to the chair, and having taken the floor on a question of privilege[3] addressed the House on the subject of certain charges, made against himself and other Members of the House, in connection with the Credit Mobilier corporation and the Union Pacific Railroad Company. He concluded his remarks by moving a resolution that a special investigating committee of five members be appointed by the Speaker pro tempore to ascertain whether any Members had been bribed.

The Speaker pro tempore[4] named the following committee: Luke P. Poland, of Vermont; Nathaniel P. Banks, of Massachusetts; James B. Beck, of Kentucky; William E. Niblack, of Indiana; and George W. McCrary, of Iowa. On December 3, Mr. Beck asked to be excused, and the question being put the House excused him from service. The Speaker thereupon called Mr. Cox to the chair again, and the latter appointed Mr. William M. Merrick, of Maryland, to the vacancy.

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[1] Third session Forty-second Congress, Globe, pp. 11, 15; Journal, pp. 8, 30.

[2] James G. Blaine, of Maine, Speaker.

[3] The language of the Journal (p. 8) is: "Mr. Blaine, by unanimous consent (Mr. Cox occupying the chair), submitted," etc. As the matter was evidently privileged the unanimous consent was apparently asked to enable the Speaker to participate in debate. See sections 1367–1376 of this volume.

[4] Samuel S. Cox, of New York, Speaker pro tempore.

The committee made its report on February 18, 1873, embodying its findings of fact and recommendations in the following resolutions: [1]

1. Whereas Mr. Oakes Ames, a Representative in this House from the State of Massachusetts, has been guilty of selling to Members of Congress shares of stock in the Credit Mobilier of America for prices much below the true value of such stock, with intent thereby to influence the votes and decisions of such Members in matters to be brought before Congress for action: Therefore,

Resolved, That Mr. Oakes Ames be, and he is hereby, expelled from his seat as a Member of this House.

2. Whereas Mr. James Brooks, a Representative in this House from the State of New York, did procure the Credit Mobilier Company to issue and deliver to Charles H. Neilson, for the use and benefit of said Brooks, 50 shares of the stock of said company at a price much below its real value, well knowing that the same was so issued and delivered with intent to influence the votes and decisions of said Brooks as a Member of the House in matters to be brought before Congress for action, and also to influence the action of said Brooks as a Government director in the Union Pacific Railroad Company: Therefore,

Resolved, That Mr. James Brooks be, and he is hereby, expelled from his seat as a Member of this House.

The statement of facts in the report shows that these transactions occurred before Messrs. Brooks and Ames were elected to the Forty-second Congress. The report says:

In considering what action we ought to recommend to the House upon these facts, the committee encounters a question which has been much debated: Has this House power and jurisdiction to inquire concerning offenses committed by its Members prior to their election, and to punish them by censure or expulsion? The committee are unanimous upon the right of jurisdiction of this House over the cases of Mr. Ames and Mr. Brooks, upon the facts found in regard to them. Upon the question of jurisdiction the committee present the following views:

The Constitution in the fifth section of the first article, defines the power of either House as follows: "Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and with the concurrence of two-thirds expel a Member."

It will be observed that there is no qualification of the power, but there is an important qualification of the manner of its exercise—it must be done "with the concurrence of two-thirds."

The close analogy between this power and the power of impeachment is deserving of consideration.

The great purpose of the power of impeachment is to remove an unfit and unworthy incumbent from office, and though a judgment of impeachment may to some extent operate as punishment, that is not its principal object. Members of Congress are not subject to be impeached, but may be expelled, and the principal purpose of expulsion is not as punishment, but to remove a Member whose character and conduct show that he is an unfit man to participate in the deliberations and decisions of the body, and whose presence in it tends to bring the body into contempt and disgrace.

In both cases it is a power of purgation and purification to be exercised for the public safety, and, in the case of expulsion, for the protection and character of the House. The Constitution defines the causes of impeachment, to wit, "treason, bribery, or other high crimes and misdemeanors." The office of the power of expulsion is so much the same as that of the power to impeach that we think it may be safely assumed that whatever would be a good cause of impeachment would also be a good cause of expulsion.

It has never been contended that the power to impeach for any of the causes enumerated was intended to be restricted to those which might occur after appointment to a civil office, so that a civil officer who had secretly committed such offense before his appointment should not be subject upon detection and exposure to be convicted and removed from office. Every consideration of justice and sound policy would seem to require that the public interests be secured, and those chosen to be their guardians be free from the pollution of high crimes, no matter at what time that pollution had attached.

If this be so in regard to other civil officers, under institutions which rest upon the intelligence and virtue of the people, can it well be claimed that the law-making Representative may be vile and criminal with impunity, provided the evidences of his corruption are found to antedate his election?

[1] Journal, p. 429; Globe, pp. 1462–1468; House Report No. 77, Third session Forty-second Congress.

The committee then discuss the cases of Smith [1] and Marshall in the Senate, of Wilkes in the English Parliament, and of Matteson [2] in the House of Representatives, and continues:

The committee have no occasion in this report to discuss the question as to the power or duty of the House in a case where a constituency, with a full knowledge of the objectionable character of a man, have selected him to be their representative. It is hardly a case to be supposed that any constituency, with a full knowledge that a man had been guilty of an offense involving moral turpitude, would elect him. The majority of the committee are not prepared to concede such a man could be forced upon the House, and would not consider the expulsion of such a man any violation of the rights of the electors, for while the electors have rights that should be respected, the House as a body has rights also that should be protected and preserved. But that in such case the judgment of the constituency would be entitled to the greatest consideration, and that this should form an important element in its determination, is readily admitted.

It is universally conceded, as we believe, that the House has ample jurisdiction to punish or expel a Member for an offense committed during his term as a Member, though committed during a vacation of Congress and in no way connected with his duties as a Member. Upon what principle is it that such a jurisdiction can be maintained? It must be upon one or both of the following: That the offense shows him to be an unworthy and improper man to be a Member, or that his conduct brings odium and reproach upon the body. But suppose the offense has been committed prior to his election, but comes to light afterwards, is the effect upon his own character, or the reproach and disgrace upon the body, if they allow him to remain a Member, any the less? We can see no difference in principle in the two cases, and to attempt any would be to create a purely technical and arbitrary distinction, having no just foundation. In our judgment the time is not at all material, except it be coupled with the further fact that he was reelected with a knowledge on the part of his constituents of what he had been guilty, and in such event we have given our views of the effect.

It seems to us absurd to say that an election has given a man political absolution for an offense which was unknown to his constituents. If it be urged again, as it has sometimes been, that this view of the power of the House, and the true ground of its proper exercise, may be laid hold of and used improperly, it may be answered that no rule, however narrow and limited, that may be adopted can prevent it. If two-thirds of the House shall see fit to expel a man because they do not like his political or religious principles, or without any reason at all, they have the power, and there is no remedy except by appeal to the people. Such exercise of the power would be wrongful, and violative of the principles of the Constitution, but we see no encouragement of such wrong in the views we hold.

As to this general subject of the jurisdictional power of the House, Messrs. Niblack and McCrary preferred to express no opinion, but the entire committee were united upon the following:

The subject-matter upon which the action of Members was intended to be influenced was of a continuous character, and was as likely to be a subject of Congressional action in future Congresses as in the Fortieth. The influences brought to bear on Members were as likely to be operative on them in the future as in the present, and were so intended. Mr. Ames and Mr. Brooks have both continued Members of the House to the present time, and so have most of the Members upon whom these influences were sought to be exerted. The committee are, therefore, of opinion that the acts of these men may properly be treated as offenses against the present House, and so within its jurisdiction upon the most limited rule.

On February 24, before the resolutions of the investigating committee had been acted on by the House, Mr. Benjamin F. Butler, of Massachusetts, from the Com-

[1] For Mr. Adams's report in the Smith case, see Congressional Globe, first session Thirty-fifth Congress, p. 886. Also section 1264 of this chapter.

[2] See section 1275 of this chapter.

mittee on the Judiciary, made a report [1] on the testimony taken by the investigating committee, particularly on the question whether or not it warranted articles of impeachment of any officer of the United States. This report reviewed the argument of the investigating committee on the subjects of impeachment and expulsion, and reached opposite conclusions. The members of the Judiciary Committee who joined with Mr. Butler in this report were Messrs. John A. Bingham, of Ohio; Charles A. Eldredge, of Wisconsin; John A. Peters, of Maine; Lazarus D. Shoemaker, of Pennsylvania, and Daniel W. Voorhees, of Indiana. Mr. Clarkson N. Potter, of New York, dissented from the report; and Mr. Jeremiah M. Wilson, of Indiana, concurred in so much of the report as related to impeachment but expressed no opinion on the subject of expulsion.

The report combats the idea that impeachment and expulsion are similar or analogous proceedings. Impeachment disqualified the impeached from ever after holding office; the expelled Member might be reelected after expulsion. Neither impeachment nor expulsion should be invoked for offenses committed before election. The report continues:

> The plain words of the Constitution seem to us clearly to indicate that the power of expulsion is a protective, not a primitive, provision of the Constitution. It is found in section 5 of Article I: "Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member." Expel for what? For disorderly behavior, i.e., for that behavior which renders him unfit to do his duties as a Member of the House, or that present condition of mind or body which makes it unsafe or improper for the House to have him in it. We submit, with some confidence, that the House might expel an insane man, because it might not be safe or convenient for the House to have him within the legislative Hall. They can also expel a man for disorderly proceedings in the body, or for such acts outside of the body as render it at the time manifestly improper for him to be in the House. But your committee are constrained to believe that the power of expelling a Member for some alleged crime, committed, it may be, years before his election, is not within the constitutional prerogative of the House.
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> We do not overlook the argument presented by the learned committee, upon whose report we are observing, by the phrase: "Every consideration of justice and sound policy would seem to require that the public interests be secured and those chosen to be their guardians be free from pollution of high crimes, no matter at what time that pollution had attached." But the answer seems to us an obvious one that the Constitution has given to the House of Representatives no constitutional power over such considerations of "justice and sound policy" as a qualification in representation. On the contrary, the Constitution has given this power to another and higher tribunal, to wit, the constituency of the Member. Every intendment of our form of government would seem to point to that. This is a Government of the people, which assumes that they are the best judges of the social, intellectual, and moral qualifications of their representatives, whom they are to choose, not anybody else to choose for them; and we, therefore, find in the people's Constitution and frame of government they have, in the very first article and second section, determined that "the House of Representatives shall be composed of Members chosen every second year by the people of the States," not by Representatives chosen for them at the will and caprice of Members of Congress from other States according to the notions of the "necessities of self-preservation and self-purification," which might suggest themselves to the reason or the caprice of the Members from other States in any process of purgation or purification which two-thirds of the Members of either House may "deem necessary" to prevent bringing "the body into contempt and disgrace."
>
> Your committee are further emboldened to take this view of this very important constitutional question, because they find that in the same section it is provided what shall be the qualifications of a representative of the people, so chosen by the people themselves. On this it is solemnly enacted,

[1] Third session Forty-second Congress, House Report No. 81.

unchanged during the life of the nation, that "No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

Your committee believe that there is no man or body of men who can add or take away one jot or title of these qualifications. The enumeration of such specified qualifications necessarily excludes every other. It is respectfully submitted that it is nowhere provided that the House of Representatives shall consist of such Members as are left after the process of "purgation and purification" shall have been exercised for the public safety, such as may be "deemed necessary" by any majority of the House. The power itself seems to us too dangerous, the claim of power too exaggerated, to be confided in any body of men; and, therefore, most wisely retained in the people themselves, by the express words of the Constitution.

The report then discusses the dangers that might arise from the contrary view, the precedents in the Smith, Marshall, and Wilkes cases, and concludes the argument as follows:

Our opinion upon the whole matter, therefore, is that the right of representation is the right of the constituency, and not that of the Representative, and, so long as he does nothing which is disorderly or renders him unfit to be in the House while a Member thereof, that, except for the safety of the House, or the Members thereof, or for its own protection, the House has no right or legal constitutional jurisdiction or power to expel the Member. We see no constitutional warrant for his expulsion upon any other ground, and especially not upon the ground of purgation and purification as set forth in the report of the learned committee, against which your committee most earnestly and respectfully protest.

Your committee do not feel called upon to discuss in this connection the legal consequences following from the doctrine of continuation of the offense in a man once receiving a bribe, because, if it may be laid with a continuando at all, the offense must continue to affect him ever after, and therefore, having once taken a bribe, he is always deemed to be under the effect of it, for the reason that we are inclined to believe that at some time the effect of the bribe might have spent its force, and it would hardly be a safe rule of legal action to undertake to determine whether that would not happen in five years and might happen in ten. Certainly such considerations would not apply to one who had given a bribe, because the virtue thereof all went out of him when he parted with his money, and there was nothing left in him save the loss of it.

For the reasons so hastily stated, and many more which might be adduced, your committee conclude that both the impeaching power bestowed upon the two Houses by the Constitution and the power of expulsion are remedial only, and not punitive, so as to extend to all crimes at all times, and are not to be used in any constitutional sense or right for the purpose of punishing any man for a crime committed before he became a Member of the House, or in case of a civil officer, as just cause of impeachment; but we agree the analogy stated by the learned committee on Credit Mobilier is in so far perfect. Both are alike remedial, neither punitive.

On February 25, 1873,[1] the consideration of the report began in the House. On that day the Speaker said:

The gentleman from Massachusetts, Mr. Ames, affected by this report, desires to be heard. The gentleman is entitled to the floor.

Mr. Ames thereupon sent his remarks to the desk to be read.[2]

On February 26 Mr. Aaron A. Sargent, of California, offered a substitute for the resolutions, which, after modification, was as follows:

Whereas by the report of the special committee herein it appears that the acts charged as offenses against Members of this House in connection with the Credit Mobilier occurred more than five years ago, and long before the election of such persons to this Congress, two elections by the people having intervened; and whereas grave doubts exist as to the rightful exercise by this House of its power to expel a

[1] Third session Forty-second Congress, Journal, pp. 429, 490, 497–499; Globe, pp. 1717, 1723, 1727, 1732, 1816, 1824, 1826, 1830–1833.

[2] Globe, p. 1723.

Member for offenses committed by such Member long before his election thereto, and not connected with such election: Therefore

Resolved, That the special committee be discharged from the further consideration of this subject.

Resolved, That the House absolutely condemns the conduct of Oakes Ames, a Member of thisHouse from Massachusetts, in seeking to procure Congressional attention to the affairs of a corporation in which he was interested, and whose interest directly depended upon the legislation of Congress, by inducing Members of Congress to invest in the stocks of said corporation.

Resolved, That this House absolutely condemns the conduct of James Brooks, a Member of this House from New York, for the use of his position of Government director of the Union Pacific Railroad and of Member of this House to procure the assignment to himself or family of stock in the Credit Mobilier of America, a corporation having a contract with the Union Pacific Railroad, and whose interests depended directly upon the legislation of Congress.

A motion to lay the whole subject on the table was negatived on February 27 by a vote of yeas 58, nays 165.

The question then recurred on the adoption of the substitute, which was agreed to, yeas 115, nays 110.

Thereupon voting began on the original resolutions as amended by the substitute, the first vote being taken on the resolution condemning Oakes Ames. This was adopted, yeas 182, nays 36. Then the resolution condemning James Brooks was agreed to, yeas 174, nays 32.

The resolution discharging the committee having been disagreed to, yeas 104, nays 114, the question recurred on the preamble. Mr. Charles A. Eldredge, of Wisconsin, called for a separate vote on the two propositions of the preamble.

The Speaker ruled that the preamble was not divisible.

The question recurring on the adoption of the preamble, a motion to lay on the table was disagreed to, yeas 78, nays 134. Then the preamble was disagreed to, yeas 98, nays 113.[1]

1287. The Speaker has questioned the right of a Member to discuss as privileged charges relating to his conduct at a period before he became a Member.—On May 23, 1884,[2] Mr. William Pitt Kellogg, of Louisiana, claiming the floor for a question of privilege, after remarks submitted the following:

Whereas in the investigation as to the prosecution of the star route cases before the Committee on Expenditures in the Department of Justice evidence has been given which reflects upon the character of William Pitt Kellogg, a Member of this House: Therefore,

Resolved, That said committee be directed to investigate the subject of said Kellogg's alleged connection with the "star route" service, and whether he received money for services rendered in a matter pending before one of the Departments of the Government, or whether he paid money to any officer of the Government on account of or in connection with said service; and that said committee be authorized to send for persons and papers, etc.

Mr. William R. Morrison, of Illinois, made the point of order, as Mr. Kellogg proceeded with his remarks, that no question of privilege was involved.

The Speaker[3] called attention to the fact that the transactions occurred in 1879, and said:

The Chair has intimated heretofore that this House has no right to punish a Member for any offense alleged to have been committed previous to the time when he was elected as a Member of the

[1] For long and careful debate on the expulsion of Members in connection with this case see Globe, third session Forty-second Congress, pp. 137, 159, 164, 176, 188, 195.

[2] First session Forty-eighth Congress, Journal, p. 1304; Record, pp. 4432–4439,

[3] John G. Carlisle, of Kentucky, Speaker.

House. That has been so frequently decided in the House that it is no longer a matter of dispute. The resolution which the gentleman sends up directs the committee to investigate certain charges made against the Member from Louisiana, but does not state the time when the alleged offense was committed, if at all, so that the resolution may be entirely in order, but the gentleman from Louisiana is discussing matters which he admits occurred several years ago and before his election. He can not proceed to discuss such matters without unanimous consent, as was decided in the Forty-sixth Congress in the case of Mr. Chalmers, of Mississippi.

Mr. Nathaniel J. Hammond, of Georgia, urged that the House should not investigate the conduct of a Member at a time prior to his election to the House. On the other hand, it was urged that the report in the Credit Mobilier cases, as well as in the case of Blount, in the Senate, justified such an investigation. Finally, on motion of Mr. Hammond, by a vote of ayes 82, noes 49, the resolution was referred to the Committee on the Judiciary.

No report appears to have been made.[1]

1288. In the case of Humphrey Marshall, accused of committing a crime before his election, the Senate declined to proceed in the absence of prosecuting action from the constituency.

The Senate held, in 1796, that for a crime alleged to have been committed before his election, but for which the courts had not held him to answer, a Senator should not be tried by the Senate.

On February 26, 1796,[2] the Vice-President laid before the Senate a letter from the governor of Kentucky, with a memorial, making serious charges against the character of Humphrey Marshall, a Senator from Kentucky. On February 29 these papers were, on motion of Mr. Marshall, referred to a select committee, consisting of Messrs. Samuel Livermore, of New Hampshire; James Ross, of Pennsylvania; Rufus King, of New York; John Rutherfurd, of New Jersey, and Caleb Strong, of Massachusetts.

On March 17 the committee submitted a report, which, after being amended by the Senate in slight particulars where personal questions might be raised, stood as follows:

The committee to whom was referred the letter of the governor and the memorial of the representatives of Kentucky, with the papers accompanying them, report:

That the representatives of the freemen of Kentucky state in their memorial that in February, 1795, a pamphlet was published by George Muter and Benjamin Sebastian (who were two judges of the court of appeals), in which they say that Humphrey Marshall had a suit in chancery in the said court of appeals, in which it appearing manifest from the oath of the complainant, from disinterested testimony, from records, from documents furnished by himself, and from the contradictions contained in his own answer, that he had committed a gross fraud, the court gave a decree against him; and that in the course of the investigation he was publicly charged with perjury. That Mr. Marshall, in a publication in the Kentucky Gazette, called for a specification of the charge; to which the said George Muter and Benjamin Sebastian, in a like publication, replied that he was guilty of perjury in his answer to the bill in chancery exhibited against him by James Wilkinson, and that they would plead justification to any suit brought against them therefor. That no such suit, as the said representatives could learn, had been brought. The said representatives further say that they do not mean to give an opinion on the justice of the said charge, but request that an investigation may immediately take place relative thereto.

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[1] See also Section 466 of Volume I of this work.

[2] Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 168.

Your committee observe that the said suit was tried eighteen months before Mr. Marshall was chosen a Member of the Senate, and that previous to his election mutual accusations had taken place between him and the judges of the said court relating to the same suit.

The representatives of Kentucky have not furnished any copy of Mr. Marshall's answer on oath, nor have they stated any part of the testimony, or produced any of the said records or documents, or the copy of any paper in the cause, nor have they intimated a design to bring forward those or any other proofs.

Your committee are informed by the other Senator and the two Representatives in Congress from Kentucky that they have not been requested by the legislature of that State to prosecute this inquiry, and that they are not possessed of any evidence in the case, and that they believe no person is authorized to appear on behalf of the legislature.

Mr. Marshall is solicitous that a full investigation of the subject shall take place in the Senate, and urges the principle that consent takes away error, as applying, on this occasion, to give the Senate jurisdiction; but, as no person appears to prosecute, and there is no evidence adduced to the Senate, nor even a specific charge, the committee think any further inquiry by the Senate would be improper. If there were no objections of this sort, the committee would still be of opinion that the memorial could not be sustained. They think that in a case of this kind no person can be held to answer for an infamous crime unless on a presentment or indictment of a grand jury, and that in all such prosecutions the accused ought to be tried by an impartial jury of the State and district wherein the crime shall have been committed. If, in the present case, the party has been guilty in the manner suggested, no reason has been alleged by the memorialists why he has not long since been tried in the State and district where he committed the offense. Until he is legally convicted, the principles of the Constitution and of the common law concur in presuming that he is innocent. And the committee are compelled, by a sense of justice, to declare that in their opinion the presumption in favor of Mr. Marshall is not diminished by the recriminating publications which manifest strong resentment against him.

And they are also of opinion that as the Constitution does not give jurisdiction to the Senate the consent of the party can not give it; and that therefore the said memorial ought to be dismissed.

Resolved, That the Vice-President of the United States be requested to transmit a copy of the foregoing report to the governor of Kentucky.

A motion to expunge the last clause was disagreed to, yeas 7, nays 16.

On the question to expunge these words "If there were no objections of this sort, the committee would still be of opinion that the memorial could not be sustained," it passed in the negative.

On the question to expunge the following words: "They think that in a case of this kind no person can be held to answer for an infamous crime unless on a presentment or indictment of a grand jury, and that in all such prosecutions the accused ought to be tried by an impartial jury of the State and district wherein the crime shall have been committed. If in the present case the party has been guilty in the manner suggested, no reason has been alleged why he has not long since been tried in the State and district where he committed the offense. Until he is legally convicted, the principles of the Constitution and of the common law concur in presuming that he is innocent"—it passed in the negative.

Also by a vote of yeas 7, nays 17, the Senate decided in the negative a motion to postpone the report of the committee to whom was referred the letter from the governor and the memorial of the Representatives of the State of Kentucky, with the papers accompanying them, together with the motions of amendment made thereon, in order to consider the following resolution:

Whereas the honorable legislature of the State of Kentucky have, by their memorial, transmitted by the governor of the said State, informed the Senate that Humphrey Marshall, a Senator from the said State, had been publicly charged with the crime of perjury, and requested that an inquiry might be

thereupon instituted, in which request the said Humphrey Marshall has united; and it being highly interesting, as well to the honor of the said State as to that of the Senate, and an act of justice due to the character of the said Humphrey Marshall that such inquiry should be had, therefore

Resolved, That the Senate will proceed to the examination of the said charge on the ———— day of the next session of Congress; that, in the opinion of the Senate, a conviction or acquittal in the ordinary courts of justice of the said State would be the most satisfactory evidence on this occasion; but that, if this should not be attainable, by reason of any act of limitation or other legal impediment, such other evidence will be received as the nature of the case may admit and require.

Resolved, That the Vice-President be requested to transmit a copy of the foregoing resolution to the governor of the said State.

On March 22, the Senate by a vote of yeas 16, nays 8, agreed to the report in the form given above.

1289. In the case of William N. Roach, charged with a crime alleged to have been committed before his election, the Senate discussed its power in such a case but took no action.—In 1893[1] the Senate discussed the case of William N. Roach, Senator from North Dakota.

On the 28th day of March, 1893, Mr. Hoar submitted a resolution providing for an investigation of certain allegations charging Mr. Roach with the offense of criminal embezzlement. On the 10th day of April, 1893 a substitute for this resolution was introduced by Mr. Hoax, and on the 14th day of April, 1893, a substitute for the resolutions then pending in said matter was introduced by Mr. Gorman. The resolution and the substitutes were the subject of debate in the Senate, but no action was had or taken thereon.

It appears from the debates that the case presented the question as to the right of the Senate to take cognizance of an accusation against a Senator of an offense committed before his election to the Senate.[2]

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[1] Election cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 809.

[2] First session Fifty-third Congress, Record, pp. 37, 111, 137, 140, 155, 160.

Chapter XLIII

DELEGATES

1290. Each Territory sends to the House a Delegate having the right of debating but not of voting.

The statutes specify the qualifications of the electors of Delegates.

A Delegate is elected by a plurality of votes, and the governor is required to declare the election, in accordance with which a certificate is issued.

Section 1862 of the Revised Statutes says:

> Every Territory shall have the right to send a Delegate to the House of Representatives of the United States, to serve during each Congress, who shall be elected by the voters in the Territory qualified to elect members of the legislative assembly thereof. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debating, but not of voting.[4]

The words "right of debating, but not of voting," were taken from the act of March 3, 1817,[5] but that act in turn had taken them verbatim from the "ordinance for the government of the Territory of the United States northwest of the river Ohio" passed by the Continental Congress July 13, 1787.[6]

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[1] Office of Delegate created by Continental Congress. Section 421 of Volume I.

Early theory and practice in regard to. Section 400 of Volume I.

Status of, elaborately discussed, especially as to qualifications. Section 473 of Volume I. Other discussion of qualifications. Sections 421, 423, 431 of Volume I. Qualifications of Delegate from Hawaii. Section 526 of Volume I.

House investigates the election of a Delegate as in case of a Member. Section 772 of Volume I.

[2] Duty of Speaker as to recognition of, after the Territory has been admitted as a State. Section 408 of Volume I.

[3] As to the expulsion of a Delegate. Section 469 of Volume I.

[4] The House in 1882 passed a bill (H. R. 4162) to define the qualifications of Territorial Delegates, but the Senate did not act on the bill. (First session Forty-seventh Congress, Record, p. 3256.)

[5] 3 Stat. L., p. 363, second session Fourteenth Congress.

[6] 1 Stat. L., p. 52.

1291. Delegates from the Territories have the right to make motions.— On February 22, 1849,[1] Mr. Henry H. Sibley, of Wisconsin Territory, moved that the rules be suspended for the purpose of enabling him to move that the Committee of the Whole House on the state of the Union be discharged from the further consideration of the bill from the Senate (No. 152) entitled "An act to establish the Territorial government of Minnesota."

This motion being decided in the affirmative, two-thirds voting in favor thereof, Mr. Sibley made the motion to discharge the committee, etc., and the House proceeded to consider the bill.

The question being upon agreeing to amendments, Mr. Sibley moved the previous question.

Mr. Nathaniel Boyden, of North Carolina, raised the point of order that a Delegate from a Territory, not having the right to vote, clearly had not the right to move the previous question.

The Speaker[2] stated that—

By the act of March 3, 1817, it is provided—

"That in every Territory of the United States in which a temporary government has been or hereafter shall be established, and which, by virtue of the ordinance of Congress of the 13th of July, 1787, or of any subsequent act of Congress passed or to be passed, now hath or hereafter shall have the right to send a Delegate to Congress, such Delegate shall be elected every second year, for the same term of two years for which Members of the House of Representatives of the United States are elected; and in that House each of the said Delegates shall have a seat with the right of debating, but not of voting.[3]

It is clear that the gentleman from Wisconsin has no right to vote. The Chair has had some doubt whether the gentleman has the right to make a motion. It has, however, been the uniform practice of the House to allow Delegates to make motions. The gentleman from Wisconsin himself made the motion to suspend the rules for the purpose of bringing the question before the House. That is a motion quite as important as the previous question, as it sets aside all the rules of the House relating to the order of business. Gentlemen from the Territories are habitually called for petitions and resolutions, under an express rule of the House, and always have been allowed to move the reference of them.[4] The Chair believes, upon the whole, that delegates from the Territories could not subserve the purposes for which they are sent here unless they have the right to make motions; and as the law does not expressly deny them that right, the Chair is disposed to accord to them the largest liberty.

From this decision Mr. Boyden appealed. The House sustained the Chair.

1292. A Delegate may make any motion which a Member may make, except the motion to reconsider.—On August 20, 1850,[5] Mr. Samuel R. Thurston, of Oregon Territory, by unanimous consent, presented the memorial of the legislative assembly of Oregon, praying for a donation of land to settlers, etc. Mr. Thurston moved that the said memorial be referred to the Committee on Territories. Mr. Jacob Thompson, of Mississippi, made the point of order that, under a decision of the Committee of the Whole,[6] in affirmance of a decision of its Chairman, it was not competent for a Delegate from a Territory to make a motion, and, consequently,

[1] Journal, second session Thirtieth Congress, p. 503; Cong. Globe, p. 581.

[2] Robert C. Winthrop, of Massachusetts, Speaker.

[3] This law of 1817 is now section 1862, Revised Statutes, ed. 1878.

[4] Petitions and resolutions are no longer introduced in this way.

[5] Journal, first session Thirty-first Congress, p. 1280.

[6] The decision in Committee of the Whole was made by Chairman Armistead Burt, of South Carolina. (See Cong. Globe, first session Thirty-first Congress, p. 1607.)

that the motion submitted by the Delegate from Oregon [Mr. Thurston] could not be entertained by the House.

The Speaker[1] stated that, if the point of order made by the gentleman from Mississippi [Mr. Thompson] was an original question, for the first time presented for consideration, he should be strongly inclined to hold, under the provisions of the Constitution and the law of 1817, that the Delegate could not make a motion. But the long-continued practice of the House, commencing with the first organization of Territorial governments, in connection with the express provisions of the rules—one of which provided that the Territories shall be called for resolutions on each alternate Monday during the session—had, in his judgment, settled this question. Unless a Delegate could offer a resolution it would be a useless provision to call his Territory for resolutions; and the Chair was unable to discriminate between motions relating to Territorial business and any others, except a motion to reconsider, which, being dependent upon the right to vote, could not be exercised by a Delegate. The Chair therefore overruled the point of order.

Mr. Armistead Burt having appealed from the decision of the Chair, the ruling was sustained by a vote of 111 yeas to 62 nays.

1293. A Delegate may not object to the consideration of a measure.— On June 6, 1866,[2] Mr. Henry J. Raymond, of New York, from the Committee on Appropriations, reported Senate Joint Resolution No. 69, making appropriation to negotiate treaties with certain Indian tribes.

Mr. Walter A. Burleigh, Delegate from the Territory of Dakota, insisted that the bill, making an appropriation, must have its first consideration in the Committee of the Whole House on the state of the Union.

The Speaker[3] said:

> The Chair is of the opinion that a Delegate is not entitled to make such an objection as will prevent the joint resolution from being now considered. * * * The gentleman is sent here as a Delegate to discuss the merits of all questions in regard to the Territory of Dakota or elsewhere, but he is not entitled to a vote.

1294. On March 2 1901,[4] Mr. John H. Stephens, of Texas, asked unanimous consent for the present consideration of the joint resolution (H. J. Res. 213) setting aside certain lands within the Mescalero Indian Reservation, in New Mexico, for the use of the Indians thereon, and providing for the sale of the residue of the lands therein for the benefit of said tribe of Indians.

Mr. Stephens having stated that the Delegate from New Mexico was opposed to the bill, Mr. Eugene F. Loud, of California, said that he would object, as the Delegate was not in a position to oppose.

1295. A Delegate may call a Member to order in debate.—On January 14, 1811,[5] Mr. Josiah Quincy, of Massachusetts had the floor, and was debating the bill to enable the people of the Territory of Orleans to form a constitution and State government and for the admission of such State into the Union.

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[1] Howell Cobb, of Georgia, Speaker.

[2] Cong. Globe, first session Thirty-ninth Congress, p. 3007.

[3] Schuyler Colfax, of Indiana, Speaker.

[4] Second session Fifty-sixth Congress, Record, pp. 3463, 3464.

[5] Third session Eleventh Congress, Anna] , p. 526.

For words spoken, Mr. George Poindexter, Delegate from Mississippi Territory, called Mr. Quincy to order.

Mr. Joseph Lewis, Jr., of Virginia, asked for a decision as to whether or not "a Delegate, holding a seat in this House by courtesy alone,[1] without a right to vote, has a right to call any Member of the House to order."

The Speaker[2] decided that the Delegate might call the Member to order.

1296. The House declined to allow a Delegate to introduce an interpreter on the floor.—On February 27, 1854,[3] a proposition was made to authorize Hon. Jose M. Gallegos, Delegate from New Mexico, to introduce an interpreter on the floor. Although it was shown that Mr. Gallegos could not understand a word of English, the House did not favor the proposition, and it failed to be agreed to.

1297. Delegates are appointed as additional members of certain committees, where they possess the same powers and privileges as in the House, and may make any motion except to reconsider.

Different views of the House as to the propriety of permitting a Delegate to serve on a committee.

Form and history of section 1 of Rule XII.

Rule XII, section 1, provides:

> The Speaker shall appoint from among the Delegates one additional Member on each of the following committees, viz: Coinage, Weights, and Measures; Agriculture; Military Affairs; Post-Office and Post-Roads; Public Lands; Indian Affairs; Private Land Claims; Mines and Mining, and two on Territories; and they shall possess in their respective committees the same powers and privileges as in the House, and may make any motion except to reconsider.

This rule is in the form of the revision of 1880,[4] except that the Committee on Private Land Claims was added on December 21, 1887,[5] and the number of Delegates on the Committee on Territories was increased to two on February 1, 1892.[6] The form of 1880 was taken from the old rule No. 162, which dated from December 12, 1871,[7] when a rule was adopted giving Delegates places on the Committee on Territories and District of Columbia.[8] The rule was regarded as an innovation, and the propriety of permitting a Delegate to have a place on a committee was questioned.[9] On December 6, 1872,[10] Mr. Jerome B. Chaffee, of Colorado, proposed that Delegates be named on the Committees of Indian Affairs, Mines and Mining, Public Lands, and Private Land Claims; but it was not until March 29, 1876,[11] that the enlargement was actually effected.

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[1] At this time the office of delegate had not been definitely established by the law of 1817. See Section 1291.

[2] Joseph B. Varnum, of Massachusetts, Speaker.

[3] First session Thirty-third Congress, Journal p. 429; Globe, p. 492.

[4] Second session Forty-sixth Congress, Record, p. 205.

[5] First session Fiftieth Congress, Record, p. 146.

[6] First session Fifty-second Congress, Record, p. 735.

[7] Second session Forty-second Congress, Journal, pp. 16, 67; Globe, pp. 11, 117.

[8] At this time the District of Columbia had a Delegate in Congress. Third session Forty-second Congress, Journal, p. 6; second session, Globe, p. 11.

[9] In earlier days, however, without any rule, a Delegate had been made chairman of an important select committee. See section 1299 of this chapter.

[10] Third session Forty-second Congress, Journal, p. 43; Globe, p. 61.

[11] First session Forty-fourth Congress, Record, p. 2035.

1298. Delegates have sometimes been appointed on committees other than those mentioned in Rule XII.—On December 23, 1891,[1] at the time of the appointment of the committees of the House, Mr. Speaker Crisp named Mr. John T. Caine, of Utah, a Delegate, on the committees on Pacific Railroads and Irrigation of Arid Lands, although those were not among the committees specified by Rule XII as committees on which Delegates shall be appointed by the Speaker. On February 8, 1892,[2] the Speaker assigned committee places to Delegates in accordance with Rule XII, Mr. Caine being appointed to Coinage, Weights, and Measures, the Post-Office and Post-Roads, and Private Land Claims. He continued to hold these places with the two to which he was appointed December 23.[3]

1299. A Delegate has been appointed chairman of a select committee.—On December 21, 1811,[4] Mr. George Poindexter, Delegate from Mississippi Territory, moved that the letter of Cowles Mead, speaker of the house of representatives of the Mississippi Territory, with the presentment of the grand jury of Baldwin County, in said Territory, against Harry Toulmin, judge of the superior court of Washington district, be referred to a select committee to consider and report thereon to the House.

The motion being agreed to, Mr. Poindexter was appointed chairman of the committee, and in due time made the report from the committee to the House.

1300. In the earlier practice Delegates appear to have voted in committees; but such is not the later rule.—On February 23, 1884,[5] a proposition was made to allow Delegates the right to vote in committees of which they were members. It was referred to the Committee on Rules, with no result.

1301. On September 3, 1841,[6] in a report on the qualifications of David Levy, Delegate from Florida, the Committee on Elections incidentally say in their report:

> With the single exception of voting, the Delegate enjoys every other privilege and exercises every other right of a Representative. He can act as a member of a standing or special committee and vote on the business before said committees, and he may thus exercise an important influence on those initiatory proceedings by which business is prepared for the action of the House. He is also required to take an oath to support the Constitution of the United States.

1302. An instance wherein a Delegate was appointed a teller.—On January 13, 1904,[7] during consideration of the legislative appropriation bill in Committee of the Whole House on the state of the Union, Mr. J. S. Wilson, Delegate from Arizona, offered an amendment relating to the salaries of certain officials in that Territory.

After debate the question was put on agreeing to the amendment, and tellers were ordered.

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[1] First session Fifty-second Congress, Journal, p. 18.

[2] Record, p. 950.

[3] See Congressional Directory, second session Fifty-second Congress (first edition), p. 137.

[4] First session Twelfth Congress, Journal, pp. 87, 347 (Gales & Seaton ed.).

[5] First session Forty-eighth Congress, Journal, p. 653; Record, p. 1334.

[6] First session Twenty-seventh Congress, House Report No. 10, p. 5.

[7] Second session Fifty-eighth Congress, Record, p. 736.

Thereupon the Chairman[1] appointed as tellers Mr. Henry H. Bingham, of Pennsylvania, the Member in charge of the bill, who had opposed the amendment, and Mr. Wilson, the Delegate, who had proposed it.

1303. Impeachment proceedings have been moved by a Delegate.

A Delegate was appointed chairman of a committee to inquire into the conduct of a judge, and was authorized by the House to cause testimony to be taken.

On April 11, 1808,[2] the Speaker presented to the House sundry resolutions of the legislative council and house of representatives of the Mississippi Territory, instructing George Poindexter, the Delegate in Congress from the said Territory, to impeach Peter B. Bruin, presiding judge of that Territory, on the charges of neglect of duty and drunkenness on the bench.

Thereupon Mr. Poindexter offered this resolution:

Resolved, That a committee be appointed to prepare and report articles of impeachment against Peter B. Bruin, one of the judges of the superior court of the Mississippi Territory; and that the said committee have power to send for persons, papers, and records.

Objection being made to proceeding to impeachment proceedings without further investigation, and especially to doing so on the instance not of a State but of a Territorial legislature, Mr. Poindexter, "at the suggestion of experienced gentlemen," modified his resolution by striking out the words "prepare and report" and inserting in their place "inquire into the expediency of preferring."

On April 18,[3] the House considered the resolution and agreed to a substitute as follows:

Resolved, That a committee be appointed to inquire into the conduct of Peter B. Bruin, judge, etc., and report whether, in their opinion, he hath so acted, in his official capacity, as to require the interposition of the constitutional power of this House; and that the said committee have power to send for persons, papers, and records.

Mr. Poindexter was appointed chairman of this committee, and on April 21,[4] the House by resolution authorized him to have depositions taken according to the terms of this resolution:

Resolved, That George Poindexter, chairman of said committee, be authorized to cause to be taken before a magistrate or other proper officer such depositions in relation to the official conduct of the said judge as, in his judgment, may be material to the inquiry, having first notified the said Bruin of the time and place, or places, of taking such depositions, so that he may give his attendance; and that the depositions so taken be laid before Congress at their next session.

1304. A Delegate resigns his seat in a communication addressed to the Speaker.—On February 21, 1831,[5] Mr. John Biddle, Delegate from the Territory of Michigan, by a letter addressed to the Speaker, communicated his resignation of his seat in the House.

The letter was read, ordered to lie on the table, and appears in full in the Journal.

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[1] James A. Tawney, of Minnesota, chairman.

[2] First session Tenth Congress, Journal, p. 264 (Gales & Seaton ed.), Annals, p. 2068.

[3] Journal, p. 277.

[4] Journal, p. 286.

[5] Second session Twenty-first Congress, Journal, p. 338.

1305. A Delegate who had used insulting language in debate and declined to retract it was, by order of the House, arrested, brought to the bar, and censured by the Speaker.

A declaration by a Member in debate that another Member has knowingly stated that which is false is unparliamentary and censurable.

On February 4, 1869,[1] during consideration of the bill (H. R. 1738) making appropriations for the expenses of the Indian department, Mr. E. D. Holbrook, Delegate from Idaho, was called to order for the use of the following words:

> And after the gentleman having charge of this bill saw fit to silence Delegates here by raising points of order and making assertions which he knew at the time he made them to be unqualifiedly false.

The words having been taken down on the demand of a Member, and the ruling of the Chair having been asked, the Speaker[2] said:

> The Chair rules that these words are out of order, both as being unparliamentary and as being indecorous. Where a Member states that what another Member has said is not true that is not unparliamentary, because it is possible that the Member may have been mistaken. But when a gentleman states that a Member on this floor has declared that which he knew to be unqualifiedly false, that is the most insulting language that can be uttered in a parliamentary body.

Mr. Holbrook having declined to retract, Mr. James A. Garfield, of Ohio, submitted the following resolution:

> *Resolved,* That E. D. Holbrook, Delegate from the Territory of Idaho, having uttered the following words in debate: "and after the gentlemen having charge of this bill saw fit to silence Delegates here by raising points of order and making assertions which he knew at the time he made them to be unqualifiedly false," distinctly in the presence of the House, and having refused to retract the same, be, and he is hereby, immediately arrested by the Sergeant-at-Arms to be brought to the bar of the House and severely censured by the Speaker.

During these proceedings attention was called to a former ruling of the Speaker when Mr. John A. Logan, of Illinois, used similar language, but the Speaker replied that this case must be settled by itself.

The resolution was agreed to under operation of the previous question, and Mr. Holbrook, being brought to the bar in custody of the Sergeant-at-Arms and censured, the Speaker saying:

> Mr. Holbrook, oftentimes in a deliberative body, in the discussion of exciting questions, language is used which, when attention is called to it, is promptly withdrawn. We are all fallible, and hence are liable to yield sometimes to the temptation to indulge in language not seemly or proper; but when the language employed is offensive in its character, and apparently, from the construction of the sentence, intended to be insulting, and when, an opportunity being given for its withdrawal, that opportunity is not taken advantage of, thus reiterating the insult to a fellow-member, uttered upon the floor of the House, it has always been deemed by deliberative assemblies censurable by the body with which both Members are connected. This instance is, in the opinion of the House, of that character, and the House has instructed its Speaker to censure you at its bar. I therefore, by order of the House, pronounce upon you its censure for the language which you have uttered in its hearing. You will resume your seat.

1306. The rules give to the resident commissioner of Porto Rico the status of a Delegate in the House and assign to him an additional place on the Committee on Insular Affairs.

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[1] Third session Fortieth Congress, Journal, pp. 275, 276; Globe, pp. 882, 883.

[2] Schuyler Colfax, of Indiana, Speaker.

Form and history of section 2 of Rule XII.

Section 2 of Rule XII provides that:

The resident commissioner to the United States from Porto Rico shall possess the same powers and privileges as to committee service and in the House as are possessed by Delegates; and shall be competent to serve on the Committee on Insular Affairs as an additional member.

This rule dates from February 2, 1904.[1] In the preceding Congress the House had passed a bill to provide by law for a delegate from Porto Rico, but it failed of enactment.[2]

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[1] First session Fifty-eighth Congress, Journal, p. 233.

[2] Second session Fifty-seventh Congress, Journal, p. 333.

Chapter XLIV.

THE SPEAKER.[1]

1. **Dignity of the office. Sections 1307–1309.**
2. **Duties as presiding officer. Sections 1310–1317.[2]**
3. **Questions not for his decision. Sections 1319–1342.[3]**
4. **Required to preserve order. Sections 1343–1347.[4]**
5. **Intervention of, in cases of extreme disorder in Committee of Whole. Sections 1348–1351.**
6. **Control of galleries, corridors, etc. Sections 1352–1354.**
7. **Appointments by. Section 1355.[5]**
8. **Resignation of. Section 1356.**
9. **Calls another to the chair when a question relating to himself arises. Sections 1357–1366.[6]**
10. **Limitations on his right to participate in debate. Sections 1387–1376.[7]**

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[1] See sections 204–230 of Volume I as to election of Speaker.

Sections 222, 231–234 as to resignation or death of.

[2] As to taking and administering the oath, sections 130–139 of Volume I.

Empowered by statute to administer oaths to witnesses. Section 1769 of Volume III.

As to presentation of petitions by. Section 3315 et seq. of Volume IV.

Issues warrants of arrest only by order of House. Section 287 of Volume I.

As to announcements to the House when he has certified cases of contumacious witnesses. Sections 1609 of Volume II and 1672, 1686, 1691 of Volume III.

The Speaker's vote. Sections 5964–5971 of Volume V.

[3] House and not the Speaker decides as to the prerogatives of the House. Sections 1490, 1491 of Volume II.

The Speaker does not decide as to the constitutional effect of a motion (sec. 3550, Vol. IV) or as to its consistency (sec. 5781, Vol. V).

House and not the Speaker determines as to hearing a person arraigned at the bar, section 1684 of Volume III of this work.

House and not the Speaker determines whether or not a pending resolution reflects on the other House, section 1744 of Volume III.

House and not the Speaker decides as to an abuse of leave to print in the Congressional Record, sections 6983–6985, 7012, 7017 of Volume V.

[4] Orders arrest of a disturber in the gallery. Section 1605 of this volume.

[5] Appointment of committees by. See Chapter CIV, sections 4448–4512, of Volume IV.

Appoints managers of impeachments in some cases. Sections 2388, 2475 of Volume III.

[6] As when the Speaker's seat as a Member is contested (sec. 809, Vol. I), but not when a pending resolution in effect censured his acts, section 2621, Volume III.

[7] Mr. Speaker Colfax left the chair to participate in debate as to the electoral count. Section 1950 of Volume III.

Speaker debates even a question of order from the chair with deference to rights of the House. Section 3043 of Volume IV.

1307. Dignity of the Speaker's office and principles governing its administration.—On December 1, 1823,[1] Mr. Speaker Clay, in taking the chair, thus described the principles regulating the duties of the Speaker:

They enjoin promptitude and impartiality in deciding the various questions of order as they arise; firmness and dignity in his deportment toward the House; patience, good temper, and courtesy toward the individual Members, and the best arrangement and distribution of the talent of the House, in its numerous subdivisions, for the dispatch of the public business, and the fair exhibition of every subject presented for consideration. They especially require of him, in those moments of agitation from which no deliberative assembly is always entirely exempt, to remain cool and unshaken amidst all the storms of debate, carefully guarding the preservation of the permanent laws and rules of the House from being sacrificed to temporary passions, prejudices, or interests.

1308. On March 3, 1893,[2] in presenting the usual resolution of thanks to the Speaker, ex-Speaker Reed [3] said of the office of Speaker:

No factional or party malice ought ever to strive to diminish his standing or lessen his esteem in the eyes of Members or of the world. No disappointments or defeats ought ever to be permitted to show themselves to the injury of that high place. Whoever at any time, whether for purposes of censure or rebuke or from any other motive, attempts to lower the prestige of that office, by just so much lowers the prestige of the House itself, whose servant and exponent the Speaker is. No attack, whether open or covert, can be made upon that great office without leaving to the future a legacy of disorder and of bad government. This is not because the Speaker is himself a sacred creation; it is because he is the embodiment of the House, its power and dignity.

1309. On taking the chair, on March 4, 1871,[4] Mr. Speaker Blaine said:

Chosen by the party representing the political majority in this House, the Speaker owes a faithful allegiance to the principles and policy of that party; but he will fall far below the honorable requirements of his station if he fails to give to the minority their full rights under the rules which he is called upon to administer.[5]

1310. Duties of the Speaker regarding the opening of the session and the reading of the Journal.
Form and history of Rule I, section 1.

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[1] First session Eighteenth Congress, Journal, p. 8.

[2] Second session Fifty-second Congress, Record, p. 2614.

[3] Mr. Reed at this time had been Speaker in the Fifty-first Congress and was yet to be Speaker of the Fifty-fourth and Fifty-fifth Congresses.

[4] First session Forty-second Congress, Globe, p. 6.

[5] On February 2, 1905, a question arose as to the social rank of the Speaker. The President had invited the Speaker to a state dinner to the Supreme Court, and asked him if he would object to a seat below the Attorney-General. The Speaker (Mr. Cannon) replied that were it a private dinner he would be content with any place the host might assign to him; and were he a private individual he would be equally pleased with whatever course the host might take; but he felt that in attending a state dinner as Speaker of the House he might not waive the position to which he was entitled officially. At the dinner in question, the Chief Justice, as the guest of honor, would of course sit on the right of the host. The Vice-President, if there were one, on the left, and the Speaker of the House in the third place. And in the failure of a Vice-President the Speaker should have the second place. Rather than waive this the Speaker asked to be excused from attending. (See Benton's Thirty Years' View, Vol. I, p. 118, for Speaker Macon's assertion of his position.)

The rules of the House, in section 1 of Rule I, prescribe:

The Speaker shall take the chair on every legislative day precisely at the hour to which the House shall have adjourned at the last sitting, immediately call the Members to order,[1] and on the appearance of a quorum, cause the Journal of the proceedings of the last day's sitting to be read,[2] having previously examined and approved the same.[3]

This is the form reported by the Committee on Rules, who made the revision in the Forty-sixth Congress.[4] The substance was derived from old rule No. 1, which dated from the first rules, April 7, 1789,[5] and which, with unimportant changes, forms all of the present rule except the portion relating to the examination and correction of the Journal. That was taken from old Rule No. 5, which dated from December 3, 1811,[6] and May 26, 1824.[7]

1311. Rule as to form in which the Speaker shall put the question and method of determining the result.

Rule for taking a vote by tellers.

Form and history of Rule I, section 5.

The forms for putting the question by the Speaker are specified in section 5 of Rule I:

He shall rise to put a question, but may state it sitting; and shall put questions in this form, to wit: "As many as are in favor (as the question may be) say Aye;" and after the affirmative voice is expressed, "As many as are opposed say No;" if he doubts, or a division is called for, the House shall divide; those in the affirmative of the question shall first rise from their seats, and then those in the negative; if he still doubts, or a count is required by at least one-fifth of a quorum, he shall name one from each side of the question to tell the Members in the affirmative and negative; which being reported he shall rise and state the decision.

This rule, in its present form, dates from the revision of 1880,[8] when it was made up from the old Rules Nos. 3 and 4. The first clause, "He shall rise to put a question, but may state it sitting," was Rule 3, and dated from April 7, 1789.[9] The latter portion of the rule is very nearly verbatim from the old Rule No. 4, which came down from the revision of March 15, 1860.[10] But the form of 1860 was simply the former rule stated more clearly.

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[1] On March 22, 1844 (second session Twenty-eighth Congress, Journal, p. 635; Globe, p. 434), Mr. Garrett Davis, of Kentucky, proposed under suspension of the rules to adopt a rule providing that when the Speaker should have called the House to order, the roll should be called and the names of those present be entered on the Journal. The proposition was defeated, yeas 85, nays 86.

[2] Rule 16 of the Continental Congress (May 26, 1778) was: "Every morning the minutes of the preceding day shall be read before Congress enters on new business."

[3] This being the requirement of the rule the reading can be dispensed with only by a suspension of the rules. (First session Twenty-ninth Congress, Journal, p. 148.)

[4] See Cong. Record, second session Forty-sixth Congress, p. 204. This revision was very complete and thorough, and the report was the unanimous action of the committee, who were: Samuel J. Randall (Speaker), Alexander H. Stephens, J. C. S. Blackburn, James A. Garfield, and William P. Frye. The present classification, order, and numbering date from that revision.

[5] See Journal, first session First Congress, p. 8.

[6] See report No. 38, first session Twelfth Congress.

[7] See Annals, first session Eighteenth Congress, p. 2764.

[8] Second session Forty-sixth Congress, Record p. 204.

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

[10] Cong. Globe, first session Thirty-sixth Congress, p. 1178. The revision of 1860 was important, and the Committee on Rules making it were: William Pennington (N. J.) (the Speaker), Israel Washburn, jr. (Me.), Thomas S. Bocock (Va.), Galusha A. Grow (Pa.), and Warren Winslow (N. C.).

The old rule dated from April 7, 1789, and September 15, 1837. The rule of 1789 provided at first that in case the Speaker doubted or a division was called for, those in the affirmative should pass to the right of the Chair and those in the negative to the left, and if he still doubted or a count was required, the Speaker should name two Members, one from each side, to tell the Members in the affirmative, and then two others, one from each side, to tell those in the negative. After a few months of trial, this rule was modified by doing away with the passing of Members to the right and left of the Chair, and substituting the division by rising.[1] In 1837 Mr. John Bell, of Tennessee, proposed and the House adopted the provision requiring one-fifth of a quorum to order the tellers.[2]

1312. The question, if in order, must be put.—Jefferson's Manual, in Section III, on the general subject relating to privilege, has the following:

> It is a breach of order for the Speaker to refuse to put a question which is in order.

1313. The Speaker decides all questions of order, subject to appeal.

A Member may not speak more than once on an appeal, except by permission of the House.

The Speaker signs all acts, addresses, writs, warrants, and subpoenas. Form and history of Rule I, section 4.

In section 4 of Rule I it is provided:

> He shall sign all acts, addresses, joint resolutions, writs, warrants, and subpoenas of, or issued by order of, the House, and decide all questions of order, subject to an appeal by any Member, on which appeal no Member shall speak more than once, unless by permission of the House.

This form was adopted in the revision of 1880.[3] The first portion, relating to the signing of acts, addresses, etc., was taken from the old Rule No. 8, dating from November 13, 1794,[4] and providing:

> All acts, addresses, and joint resolutions shall be signed by the Speaker; and all writs, warrants, and subpoenas issued by order of the House shall be under his hand and seal, attested by the Clerk.[5]

The portion relating to questions of order is from the old Rule No. 2, dating from April 7, 1789,[6] and provided that the Speaker might "speak to points of order in preference to other Members, rising from his seat for that purpose; and shall decide questions of order, subject to an appeal to the House by any two Members."

On December 23, 1811,[7] the following words were added: "On which appeal no Member shall speak more than once, except by leave of the House."

1314. It is not the duty of the Speaker to decide any question which is not directly presented in the course of the proceedings of the House.— On February 28, 1885,[8] Mr. James B. Belford, of Colorado, claiming that a question of personal privilege was involved, referred to the fact that on the evening before, while he was making a speech, the gentlemen from Indiana, Mr. Thomas M. Browne, had insisted that he should speak from his seat and not from

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[1] Journal, first session First Congress, pp. 9 and 47.

[2] Cong. Globe, first session Twenty-fifth Congress, p. 34.

[3] Cong. Record, second session Forty-sixth Congress, p. 204.

[4] Journal, Third and Fourth Congresses, p. 227 (Gales & Seaton ed.).

[5] The Clerk attests warrants still under section 2 of Rule III. See section 252 of Volume I of this work.

[6] Journal, first session First Congress, p. 9.

[7] See Reports, first session Twelfth Congress, No. 38.

[8] Second session Forty-eighth Congress, Record, p. 2302.

the aisle. Therefore, Mr. Belford asked the Speaker for a construction of the rule relating to this subject.

The Speaker[1] said:

The Chair does not see that the gentleman from Colorado presents any matter of personal privilege. * * * The gentleman is asking the Chair to give an opinion merely upon the construction of a rule which is not now presented as a practical question. There is no matter now before the House involving the construction of that rule. * * * The Chair decides questions as to the construction of the rules when they properly arise in the course of business. It is not the province of the Chair to determine any question which is not directly presented in the course of the proceedings of the House.

1315. The Speaker of his own initiative has submitted to the House for decision a question as to procedure.—On February 28, 1840,[2] the Speaker[3] submitted to the House a question as to how the House should proceed under its rule for the order of business. He stated that he wished a decision of the House to settle its future practice under similar circumstances. Although Mr. Rice Garland, of Louisiana, suggested that the Speaker ought to put his own construction on the rules, and leave the House to pass on an appeal, the House acquiesced in the mode proposed by the Speaker and by vote decided the question submitted.

1316. On March 24, 1880,[4] question not provided for by rule or previous decision arising as to the reading of the Journal, the Speaker[5] said:

It is an accepted parliamentary rule, governing all legislative bodies, and is a practice of the House, that the House shall regulate the manner of its proceedings. The Chair therefore submits the question whether the Journal of yesterday shall first be read.

On March 25[6] Mr. H. Casey Young, of Tennessee, criticised this practice of referring matters to the House for decision.

Thereupon the Speaker cited the precedent of 1840, and also had read sections of Cushing's Law and Practice of Legislative Assemblies to show the English practice.

1317. The Chair is constrained in his rulings to give precedent its proper influence—On January 10, 1842,[7] Chairman George W. Hopkins, of Vinginia, in the course of a ruling made in the Committee of the Whole, said:

A chairman does not sit here to expound rules according to his own arbitrary views. A just deference for the opinions of his fellows should constrain him to give to precedent its proper influence; and until the House shall reverse them, to give them all the consideration which is due to cases heretofore settled by a solemn decision of the House.

1318. It is not the duty of the Speaker to construe the Constitution as affecting proposed legislation.—On April 22, 1878,[8] Mr. John H. Reagan, of Texas, moved that the rules be suspended to pass a bill relating to the construction of certain public works on rivers and harbors.

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[1] John G. Carlisle, of Kentucky, Speaker.

[2] First session Twenty-sixth Congress, Globe, p. 226.

[3] R. M. T. Hunter, of Virginia, Speaker.

[4] Second session Forty-sixth Congress, Record, p. 1838.

[5] Samuel J. Randall, of Pennsylvania, Speaker.

[6] Record, p. 1877.

[7] Second session Twenty-seventh Congress, Globe, p. 112.

[8] Second session Forty-fifth Congress. Journal, p. 921; Record, p. 2713.

Mr. Samuel S. Cox, of New York, made the point of order that under the Constitution, section 8, Article I, regulating commerce between the States, this bill was not in order.

The Speaker[1] overruled the point of order, on the ground that it was not the duty of the Chair to construe the Constitution as affecting or touching any proposed legislation.[2]

The rules were suspended and the bill passed, 166 yeas to 66 nays.

1319. On May 21, 1879,[3] while the House was considering the bill (H. R. 564) relating to coinage and coin, etc., Mr. James A. Garfield, of Ohio, made the point of order that a certain section was in violation of that article of the Constitution which provides that the validity of the public debt of the United States shall not be questioned.

The Speaker[1] said:

> The Chair rules that it is not the duty of the Chair to rule upon the construction of a law. That belongs to the House, and the Chair therefore overrules the point of order.

1320. On March 3, 1859,[4] the House was considering the Senate amendments to the sundry civil appropriation bill, and had reached an amendment providing for reviving the power of the President to issue Treasury notes conferred by the act of December 23, 1857.

Mr. Wilson Reilly, of Pennsylvania, made the point of order that the amendment was out of order, on the ground that it virtually provided for raising revenue, which, under the Constitution, it was not competent for the Senate to originate.

The Speaker[5] said:

> The Chair does not perceive how the question of order could be made upon the amendment. It would devolve upon the Chair the necessity of disposing, by his volition, of an amendment sent here by the Senate of the United States. * * * The Chair decides that he has nothing to do with the question, whether the amendment is in order or constitutional or not. That is a question for the House to determine by their votes.

Mr. Reilly having appealed, the appeal was laid on the table, yeas 122, nays 36.

1321. The competency of the House to take a proposed course of action is a matter for the decision of the House rather than the Speaker.—On April 19, 1852,[6] Mr. James L. Orr, of South Carolina, moved to recommit a report to the Committee on Printing with instructions.

Mr. Willis A. Gorman, of Indiana, made the point of order that it was not competent for the House alone to instruct a joint committee created by act of Congress, and that the motion submitted by Mr. Orr was consequently out of order.

The Speaker[7] overruled the point of order on the ground that it was not his place, but rather that of the House, to decide upon the effect of their action.[8]

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[1] Samuel J. Randall, of Pennsylvania, Speaker.

[2] See also first session Forty-sixth Congress, Journal, p. 347; Record, p. 1501.

[3] First session Forty-sixth Congress, Record, p. 1501.

[4] Second session Thirty-fifth Congress, Journal, pp. 603–605; Globe, p. 1680.

[5] James L. Orr, of South Carolina, Speaker.

[6] First session Thirty-second Congress, Journal, p. 611.

[7] Linn Boyd, of Kentucky, Speaker.

[8] Again, on May 5,, 1852 (first session Thirty-second Congress) Globe, p 1251, Mr. Speaker Boyd affirmed this position.

On appeal, the decision was sustained.

1322. It is for the House and not the Speaker to decide whether or not a Senate amendment to a revenue bill violates the privileges of the House. As to time of making points of order on constitutional questions.

On February 11, 1901,[1] the House had voted to disagree to the Senate amendment, in the nature of a substitute, to the bill (H. R. 12394) to reduce the war revenue, and the pending question was on a motion to ask for a conference with the Senate.

Thereupon Mr. James A. Tawney, of Minnesota, raised a question that the Senate had no constitutional power to originate a substitute for a revenue bill, and therefore that the House could not ask for a conference on this substitute measure without becoming a party to the violation of the Constitution.

In the course of the debate Mr. James D. Richardson, of Tennessee, made the point of order that the question was raised too late, since the House had already considered the Senate amendment and disagreed to it.

The Speaker[2] said:

There are two questions before us—first, the point of order made by the gentleman from Minnesota [Mr. Tawney], which involves the question of the constitutionality of the action of the Senate in its treatment of the bill sent to that body by the House.

A second point of order has been made by the gentleman from Tennessee that the point of order of the gentleman from Minnesota comes too late. The Chair is of opinion, referring to the latter point of order, that the gentleman from Minnesota can make his point at any time, and the Chair would be slow to shut out a point of order involving a constitutional question, especially when the action of the House on a division of the question on which a disagreement was declared on the amendment is in logical harmony with the course taken by the gentleman from Minnesota. It is only left for the Chair to decide whether the other question is one for him to decide or for the House to decide, whether the action of the Senate has violated its constitutional right or not. This question is no longer open in the House of Representatives. It has been decided again and again, in many cases, that when you reach that question it is a decision for the House to make. The question, therefore, before the House is on the second part of the resolution pending, namely, that the House ask for a conference. That is debatable. The gentleman from New York has the floor.

After debate as to the right of the Senate to amend, and as to whether or not the House would, after nonconcurring to the amendment, sacrifice any of its prerogatives by asking for a conference, it was decided, yeas 198, nays 38, to ask a conference.

1323. It is for the House and not the Speaker to decide on the legislative effect of a proposition.—On March 22, 1869,[3] while the House was considering a resolution in regard to the disposal of contested election cases, Mr. Fernando Wood, of New York, rising to a parliamentary inquiry, asked if the resolution would bind the House in its subsequent action as to payment of contestants.

The Speaker[4] said:

That is not a parliamentary inquiry. The Chair must decline to rule on the effect of the resolution. It is for the House to judge as to that.

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[1] Second session Fifty-sixth Congress, Journal, pp. 217, 218; Record, pp. 2258–2262.

[2] David B. Henderson, of Iowa, Speaker.

[3] First session Forty-first Congress, Globe, p. 197.

[4] James G. Blaine, of Maine, Speaker.

1324. On July 8, 1850,[1] the House was considering the report of the committee appointed to consider the conduct of the Secretary of War, the Hon. George W. Crawford, with reference to the Galphin claim, when Mr. Winfield S. Featherston, of Mississippi, moved to amend the resolution pending by adding thereto the following:

> And that the House does not approve of the conduct of the Secretary of War in continuing to be interested in the prosecution of it when it was to be examined, adjusted, and paid by one of the Departments of the Government, he himself being at the same time at the head of another of those Departments; but the House considers that such connection and interest of a member of the Cabinet with a claim pending and prosecuted before another Department would be improper, dangerous as a precedent, and ought not to be sanctioned. And, consequently, that the House also totally dissents from the opinion which the Secretary of War has said the President of the United States expressed to him, viz, "that his (the said Crawford) being at the head of the War Department and the agent of the claimants did not take from him any rights he may have had as such agent, or would have justified him in having the examination and decision of the claim by the Secretary of the Treasury suspended;" and that this House decidedly disapproves of and dissents from the opinion given by the Attorney-General in favor of an allowance of interest on said claim, and from the action of the Secretary of the Treasury in payment of the same.

Mr. William Duer, of New York, objected to so much of the amendment of the gentleman from Mississippi (Mr. Featherston) as related to the conduct of the President and the Secretary of the Treasury and the Attorney-General, and submitted as a point of order that as the House was then engaged in an inquiry into the conduct of the Secretary of War, it was not in order to connect with that inquiry an examination of the conduct of other officers not on trial, and who had not had an opportunity to make a defense; and also that so much of said amendment was out of order, as being on a subject different from that under consideration.

The Speaker[2] overruled the point of order, and decided that the amendment was germane to the subject under consideration, and that the objections of the gentleman from New York were considerations for the House in its decision on the amendment, but could not be entertained as a point of order.

Mr. Duer having appealed, the appeal was laid on the table.

1325. The fact that the subject of a pending bill has already been acted on in another form is a matter for the consideration of the House, but does not justify the Speaker in ruling the bill out.—On February 8, 1897,[3] during consideration of business presented by the Committee for the District of Columbia, Mr. Joseph W. Babcock, of Wisconsin, from that committee, presented House resolution No. 212, to suspend the operation of an act approved February 13, 1895, entitled "An act to amend an act entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' approved June 16, 1880."

Mr. Alexander M. Dockery, of Missouri, raised the point of order that several days before the House had passed legislation repealing that act and prohibiting further payments of judgments.

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[1] First session Thirty-first Congress, Journal, pp. 1116, 1117; Globe, pp. 1359, 1360.

[2] Howell Cobb, of Georgia, Speaker.

[3] Second session Fifty-fourth Congress, Record, p. 1663; Journal, p. 155.

The Speaker[1] said:

The Chair would suggest * * * that the action taken by the House was on an amendment to the appropriation bill. It might very well be that the House might desire to amend the appropriation bill, or, failing in that, it might desire to suspend the act. The action of the House on last Thursday can only be made effective by the action of the Senate. It might well be that the Senate would prefer not to have it on an appropriation bill, either for technical reasons or because of its modification of the appropriation bill. The action now proposed is entirely different. The former action of the House can not become effectual except by the action of the Senate. If the House is satisfied with its action and thinks that that disposed of the question, the present proposition can be met by raising the question of consideration or by finally disposing of the bill after discussion. * * * The House might think it was desirable to have a provision passed which had no reference whatever to the appropriation bill, and it could not be precluded by any action of the Speaker from taking that course. The matter is fully in charge of the House, and if the question of consideration is raised and consideration is refused, why, the House expresses its opinion in that way. If, on the contrary, it considers the bill, its expression may take another form.

1326. Under the early practice the Speakers used to rule subjects out of order because they were already before the House in another form.

In theory, at least, in the early practice a subject laid on the table was not regarded as disposed of adversely.

On January 31, 1826,[2] Mr. Thomas Metcalf, of Kentucky, called up a resolution asking information of the President concerning the proposed Congress at Panama.

Mr. John Forsyth, of Georgia, made the point of order that the resolution was not in order, since the same subject, although stated in different language, was before the House in the form of a resolution offered by Mr. James Hamilton, of South Carolina, and laid on the table December 16.[3]

The Speaker[4] decided that it was not in order to entertain Mr. Metcalf's resolution, since the subject-matter thereof was already before the House in the resolution of Mr. Hamilton.

1327. The fact that the provision of a proposed amendment is contained in a later portion of the bill constitutes no reason why it should be ruled out by the Speaker.—On May 19, 1902,[5] the naval appropriation bill was under consideration in Committee of the Whole House on the state of the Union, when Mr. Ernest W. Roberts, of Massachusetts, offered as an amendment a provision relating to the construction of naval vessels in navy-yards.

Mr. Charles K. Wheeler, of Kentucky, called attention to the fact that this provision was substantially the same as a paragraph in a portion of the bill not yet reached.

The Chairman[6] said:

If certain language is adopted by the Committee of the Whole in one part of the bill and subsequently the same language is reached in another part of the bill, the repetition of the language can be struck out. The Chair thinks the amendment is in order.

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[1] Thomas B. Reed, of Maine, Speaker.

[2] First session Nineteenth Congress, Journal, p. 100; Debates, p. 1208.

[3] The motion to lay on the table did not at that time have its present significance. (See secs. 5389, 5390 of Vol. V of this work.) It was the frequent practice of the Speakers formerly to rule out resolutions or propositions on the ground that the subject-matter thereof was already before the House in another form. (First session Nineteenth Congress, Journal, p. 512, May 4, 1826.)

[4] John W. Taylor, of New York, Speaker.

[5] First session Fifty-seventh Congress, Record, pp. 5643, 5644.

[6] James S. Sherman, of New York, Chairman.

1328. The fact that a proposed amendment is inconsistent with the text or embodies a proposition already voted on, constitutes a condition to be passed upon by the House and not by the Speaker.—On May 19, 1882,[1] the House was considering the bill (H. R. 4167) to enable national banking associations to extend their corporate existence.

Mr. William W. Crapo, of Massachusetts, had offered an amendment as a new section, which was pending.

Mr. Thomas M. Bayne, of Pennsylvania, offered as an amendment to the pending amendment the following:

Provided, however, That said banks may withhold said bonds in whole or in part for one year upon notifying the Secretary of the Treasury of their intention so to do, in which event said bonds shall not be redeemable until the expiration of the year.

Mr. Roger Q. Mills, of Texas, made the point of order that substantially this same proposition had already been voted on.

Mr. Samuel J. Randall, of Pennsylvania, made the point of order that the House by an affirmative vote had determined that the bonds when called should be surrendered by the banks within thirty days.

The Speaker[2] said:

There has been no affirmative vote upon inserting the proposed new section. The vote has been taken merely upon striking out certain words in that provision. While the amendment of the gentleman from Pennsylvania (Mr. Bayne) is essentially different from that already pending, and may be inconsistent with it, the Chair thinks it is for the House to determine whether this proposition shall be adopted or not. The point of order is overruled.

1329. On April 12, 1828,[3] the tariff bill being under consideration, Mr. Andrew Stewart, of Pennsylvania, proposed an amendment.

Mr. George McDuffie, of South Carolina, made the point of order that the amendment could not be received, being inconsistent with one already adopted by the House.

The Speaker[4] decided that it was not the province of the Chair to decide what the effect of the amendment would be.

Mr. McDuffie appealed, but after examination withdrew the appeal.

1330. On December 14, 1900,[5] the bill (H. R. 12394) to amend an act entitled "An act to provide ways and means to meet war expenditures and for other purposes," was under consideration in Committee of the Whole House on the state of the Union, and the section relating to beer was before the committee.

Mr. John K. Stewart, of New York, offered this amendment:

Provided further, That the beer shall be pure beer, made exclusively from malt and hops, so pronounced by inspectors to be appointed by the Government for that purpose, the inspectors to be appointed by the Treasury Department and paid at the rate of $3,000 per year: *Provided further,* That violation of the above provision shall be a misdemeanor, punishable upon conviction by a fine not exceeding $1,000, or imprisonment for not more than one year, or both, in the discretion of the court; and if such beer is found on such inspection to be impure, then a tax of $2 shall be imposed.

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[1] First session Forty-seventh Congress, Record, pp. 4121–4123; Journal, p. 1285.

[2] J. Warren Keifer, of Ohio, Speaker.

[3] First session Twentieth Congress, Debates, p. 2311.

[4] Andrew Stevenson, of Virginia, Speaker.

[5] Second session Fifty-sixth Congress, Record, pp. 319, 320.

Mr. George W. Steele, of Indiana, made the point of order that the amendment was not germane.

After debate the Chairman [1] said:

As the Chair understands, there an two classes of beer contemplated by this amendment, and it provides a different tax for each. It provides the instrumentalities by which beer shall be classified for purposes of taxation. In that portion of the bill referring to cigars there is not only a clause fixing the amount of taxation, but there are provided instrumentalities for carrying out the operations of the law, and also an appropriation to aid in that purpose. It seems to the Chair——

At this point Mr. Sereno E. Paine, of New York, called attention to the fact that the committee had already adopted a proposition fixing one tax on all kinds of beer, and therefore that the amendment could not be in order.

The Chairman concluded:

The Chair thinks the gentleman's position is not tenable, and has no doubt as to the germaneness of this proposition.

1331. On February 7, 1901,[2] during the consideration of the Post-Office appropriation bill in the Committee of the Whole House on the state of the Union, an amendment was offered relating to the discretion of the Postmaster General in using the appropriation for special facilities on trunk lines of railroad.

Mr. Oscar W. Underwood, of Alabama, made the point of order that the proposed amendment was in conflict with the provisions of an amendment just voted on.

After debate the chairman [3] held:

The point of order is made upon this amendment that it would accomplish substantially, if adopted, what has already been provided for in the text of the bill which has just been voted upon.

Now, it is not, certainly, for the Chair to decide as to the effect of this amendment, although the reading of the text of the bill, which has been adopted and the amendment, will commend themselves, so far as that question is concerned, to the committee. The Chair desires to have read from Jefferson's Manual the following:

"If an amendment be proposed inconsistent with one already agreed to, it is a fit ground for its rejection by the House, but not within the competence of the Speaker to suppress as if it were against order; for were he permitted to draw questions of consistence within the vortex of order, he might usurp a negative or important modification, and suppress, instead of subserving, the legislative will."

The Chair concurs in the extract just read from the Manual, and therefore overrules the point of order. The question is on the amendment.

1332. On April 3, 1902,[4] while the bill (S. 1025) to promote the efficiency of the Revenue-Cutter Service was under consideration in Committee of the Whole House on the State of the Union, the following amendment was offered by John F. Lacey, of Iowa:

Add, at the end of section 3, the following: "*Provided,* That the same reduction of pay shall be made for shore duty as in corresponding grades in the Navy."

Mr. James S. Sherman, of New York, raised the question of order "that precisely the same amendment, only in different phraseology," had just been voted down.

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[1] William P. Hepburn, of Iowa, Chairman.

[2] Second session Fifty-sixth Congress, Record, pp. 2098, 2099.

[3] Henry S. Boutell, of Illinois, chairman.

[4] First session Fifty-seventh Congress, Record, p. 3634.

The chairman [1] held:

The motion just voted down was the motion of the gentleman from Colorado to strike out the word "Army," and insert in lieu thereof the word "Navy." The amendment offered by the gentleman from Iowa is to add at the end of the section the following words:

"Provided, That the same reduction of pay shall be made for shore duty as in corresponding grades of the Navy."

The language of the pending amendment is certainly very different from that of the amendment already rejected. The Chair can not say, from anything appearing in the bill or anything that has been submitted, that it is the same amendment. In terms it is a very different amendment. What the effect may be of adopting the amendment is for the committee to consider and not for the Chair to decide. The point of order is therefore overruled.

1333. On March 10, 1902,[2] while the Committee of the Whole House on the state of the Union was considering the bill (H. R. 11728) relating to the rural free delivery service, Mr. John F. Lacey, of Iowa, offered on amendment providing a system of payment by contract.

Mr. Claude A. Swanson, of Virginia, made the point of order that the amendment was not in order, the committee having already by amendment provided that the service should be carried on by salaried carriers and not by contract.

The Chairman [3] said:

The Chair is of the opinion that although the committee may have expressed its intentions in the former paragraph as to the general principle, yet that would not be inconsistent with a wish to experimentally try the contract system as is proposed in this amendment. It is not for the Chair to determine that the committee would hold the two inconsistent. That is for the committee.

1334. On February 26, 1904,[4] the naval appropriation bill was under consideration in Committee of the Whole House on the state of the Union, when Mr. Gilbert M. Hitchcock, of Nebraska, proposed as a new section, but at a place in the bill wherein were included other sections relating to the same subject, the following:

That no money appropriated in this bill for armor shall be used to purchase armor not yet contracted for from any manufacturer or manufacturers who constitute in whole or in part a trust or trade conspiracy to control the price of steel products in violation of the laws of the United States.

Mr. Alston G. Dayton, of West Virginia, made a point of order, and Mr. John Dalzell, of Pennsylvania, elaborated it by pointing out that the amendment would modify conditions prescribed in an amendment already agreed to.

The Chairman [5] said:

It is not within the discretion of the Chair to pass upon the consistency of amendments. This proposed amendment does not limit, relate, nor apply to the $12,000,000 appropriation contained in the paragraph already passed. It seems to the Chair to be merely a limitation upon the appropriation to purchase additional armor not covered by that paragraph, and is therefore in order. The Chair overrules the point of order.

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[1] Marlin E. Olmsted, of Pennsylvania.

[2] First session Fifty-seventh Congress, Record, p. 2590.

[3] Frederick H. Gillett, of Massachusetts, Chairman.

[4] Second session Fifty-eighth Congress, Record, p. 2447.

[5] Marlin E. Olmsted, of Pennsylvania.

1335. On January 11, 1871, while the Senate was considering amendments of the House to the Senate joint resolution (S. Res. 262) authorizing the appointment of Commissioners in relation to the Republic of Dominica, a proposition was made in the form of an amendment to name certain persons as Commissioners. The point of order was made that the text to which both Houses had agreed provided that the Commissioners should be named by the President, and therefore that the proposed amendment was out of order.

The Vice-President [1] said it was correct that the text of the joint resolution had been removed from the consideration of both Houses, both Houses having agreed to it, with the single exception of the amendment now pending between the two Houses.[2]

The amendment proposed now would be inconsistent with a part of the joint resolution which had been agreed to by both Houses, but in Jefferson's Manual the doctrine was laid down which had always been held as parliamentary law:

> If an amendment be proposed inconsistent with one already agreed to it is fit ground for its rejection by the House, but not within the competence of the Speaker to suppress, as if it were against order.

As the text in this case proposed one thing, and the amendment proposed another and inconsistent thing, there might be ground for the Senate to reject it, but not for the Chair to rule it out of order.[3]

1336. On April 20, 1906,[4] the District of Columbia appropriation bill was under consideration in Committee of the Whole House on the state of the Union, when this paragraph was read:

> Court-house, District of Columbia: For the following force necessary for the care and protection of the court-house in the District of Columbia, under the direction of the United States marshal of the District of Columbia: Engineer, $1,200; three watchmen, at $720 each; three firemen, at $720 each; five laborers, at $480 each, and three assistant messengers, at $720 each; in all, $10,080, to be expended under the direction of the Attorney-General.

The words "three assistant messengers, at $720 each" were stricken out on a point of order, and then an amendment was offered as follows:

> Insert "three messengers, at $720 each.

An amendment to this amendment to strike out "three" and insert "seven" was disagreed to, and then the amendment was agreed to.

On April 21,[5] the same paragraph being under consideration, Mr. Edgar D. Crumpacker, of Indiana, proposed this amendment:

> Insert after the words "five laborers, at $480 each" the words "four messengers, $720 each," so that the paragraph in this portion would read "four messengers, $720 each; three messengers, $720 each."

Mr. John J. Fitzgerald, of New York, made the point of order that this amendment proposed in effect to insert a proposition which on the day before the House had disagreed to, when the amendment to strike out "three" and insert "seven" was disagreed to.

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[1] Ex-Speaker Colfax.

[2] This amendment did not relate to the subject of Commissioners.

[3] Third session Forty-first Congress, Globe, p. 430.

[4] First session Fifty-ninth Congress, Record, pp. 5631–5635.

[5] Record, p. 5664.

After debate the Chairman [1] said:

The Chair thinks the amendment offered by the gentleman from Indiana is an independent amendment. Whether it makes consistent text or grammatical text or anything else is not a question of order that the Chair can determine, but is a question of good sense, to be determined by the committee itself. The Chair therefore overrules the point of order.

1337. The Speaker does not rule out a pending legislative proposition, even though the lapse of time may have rendered it futile.—On August 8, 1846,[2] the House was considering a resolution to terminate debate upon the message from the President of the United States, recommending an appropriation of $2,000,000 to aid in settling difficulties with Mexico.

Mr. Garrett Davis, of Kentucky, raised the question of order that the resolution proposed to fix the hour of "2 o'clock this day" as the time at which debate should terminate. That hour having passed the resolution was in itself a nullity, and ought not to be further entertained by the Chair.

The Speaker pro tempore [3] decided that the resolution being in order when offered could not, by mere lapse of time, be rendered out of order, and that while the fact that the hour fixed had passed might be a good reason for voting against it, it was no reason why the Chair should interfere in its regular progress. He therefore overruled the point of order made by Mr. Davis.

Mr. Robert Toombs, of Georgia, having appealed, Mr. James J. McKay, of North Carolina, moved that the whole subject be laid on the table. There were on this motion, yeas 123, nays 26. So the appeal and the resolution were laid on the table.

1338. A question as to whether or not a committee in its report has violated its instructions is passed on by the, House and not the Speaker.—On May 26, 1836,[4] the House was considering the report of a select committee in relation to the disposition of petitions relating to the abolition of slavery in the District of Columbia, when Mr. Stephen C. Phillips, of Massachusetts, submitted, in writing, the following point of order:

Can a committee, specially instructed to report two resolutions, the form of which was given by the House, report another resolution changing the rules and orders of the House in regard to the management of its business and depriving citizens of the privilege of obtaining the usual consideration for petitions upon subjects other than that referred to the committee?

The Speaker [5] stated that it was not within the competency of the Chair to draw within the vortex of order the question raised by the gentleman from Massachusetts. Questions relating to the jurisdiction of the committees of the House or whether they had or had not exceeded that jurisdiction or transcended the authority conferred upon them by the House were for the House and not the Speaker to determine. If gentlemen were of opinion that committees in their reports had exceeded the authority given them by the House, there were other modes of correcting what they had done; as, for example, the report might be recommitted with instructions,

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[1] John Dalzell, of Pennsylvania, Chairman.

[2] First session Twenty-ninth Congress, Journal, p. 1277; Globe, p. 1212.

[3] John W. Tibbatts, of Kentucky, Speaker pro tempore.

[4] First session Twenty-fourth Congress, Journal, p. 882; Debates, p. 4053.

[5] James K. Polk, of Tennessee, Speaker.

or the House, on that, as well as other grounds, might refuse to concur in their report.

The point now raised could not therefore be considered as a point of order to be decided by the Chair. It was in some respects analogous to the case of inconsistent amendments proposed, in which case it was well settled that "if an amendment be proposed inconsistent with one already agreed to it is a fit ground for its rejection by the House, but not within the competence of the Speaker to suppress as if it were against order; for were he permitted to draw questions of consistence within the vortex of order he might usurp a negative on important modifications and suppress instead of subserving the legislative will."

So in this case, if the House should be satisfied that the committee were not clothed with authority, by the order of the House under which they were appointed, to report this resolution, "it may be a fit ground for its rejection by the House, but not within the competence of the Speaker to suppress as if it were against order."

1339. It is for the House and not the Speaker to decide as to the efficiency of a report made in writing by a committee.—On January 12, 1888,[1] the bill (H. R. 1733) to provide for the issue of circulating notes to national banking associations was called up for consideration.

Mr. J. B. Weaver, of Iowa, made the point of order that the report accompanying the bill, containing nothing further than a recommendation of its passage, was not a sufficient compliance with the rule.

After debate, the Speaker[2] said:

> The Chair can only say what has been frequently said before upon similar points—that it is not within the province of the Chair to decide upon the sufficiency of a report made by a committee of the House. All that the rule requires is that a report shall be submitted in writing, without specifying the nature of the report, and if that provision of the rule is complied with the Chair must entertain the report.
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> The argument of the gentleman from Iowa may be a very proper one to address to the House itself upon a motion to recommit the bill for a report containing further and more specific information; but the gentleman will see at once that if the Chair should undertake to decide such questions the reception of all reports would depend upon the judgment of the Chair as to whether they were full or sufficiently explanatory of the measure to which they referred. So that point of order must be overruled.

1340. Discussion and ruling in the Senate as to decisions of questions of order by the presiding officer.

Reference to discussions of the powers of the Vice-President as presiding officer of the Senate and as to calling to order.

On February 25, 1907,[3] in the Senate, a question of order was raised as to an amendment proposed to the pending agricultural appropriation bill, and Mr. Albert J. Beveridge, of Indiana, suggested that the Vice-President might submit the decision to the Senate instead of making a ruling, which would be subject to appeal.

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[1] First session Fifty-sixth Congress, Journal, pp. 375, 376; Record, p. 425.

[2] John G. Carlisle, of Kentucky, Speaker.

[3] Second session Fifty-ninth Congress, Record, pp. 3876–3882.

In the course of the debate which followed, Mr. Jacob H. Gallinger, of New Hampshire, submitted precedents made by former presiding officers of the Senate:

As far back as the Thirty-first Congress, Mr. Howe made a point of order against an amendment proposed by Mr. Conkling, and the point of order, beyond a question, was good, but it was submitted to the Senate. A little later on, in the Forty-sixth Congress, the Senate having under consideration the bill (H. R. 1343) to provide for certain expenses of the present session of Congress, Mr. Plumb offered to amend it by adding "for mileage of Senators at the extra session." Mr. Wallace raised the point of order that the amendment, not having been moved by direction of a standing or select committee of the Senate or in pursuance of an estimate from the head of a Department, was not in order. The question was submitted to the Senate.

In the Forty-third Congress Mr. Allen offered to amend the agricultural appropriation bill by inserting:

"For the purpose of purchasing and distributing seeds and seed grains among the drought-stricken inhabitants of the United States by the Secretary of Agriculture, and in his discretion and under such rules as he may prescribe, the sum of $300,000, or so much thereof as may be necessary, the same to be made immediately available."

Mr. Vilas raised the point of order that the amendment was not moved by direction of a standing or select committee of the Senate or proposed in pursuance of an estimate of the head of some one of the Departments, and was therefore not in order under the first clause of Rule XVI. The then Vice-President, Mr. Stevenson, submitted the question to the Senate.

In the Fifty-third Congress the telegraph cable company matter came up, when Mr. Blackburn raised the question of order, and it was submitted to the Senate by the Vice-President, Mr. Stevenson.

In the Thirty-second Congress a bill to supply deficiencies in appropriations for the year ending June 30, 1852, was pending, and an amendment was proposed to that which it was argued was not a proper amendment. Mr. William R. King, who was a very distinguished Senator and who occupied the chair at that time, submitted the question to the Senate.

In the Fifty-first Congress an amendment to the Indian appropriation bill was offered, and Vice President Stevenson submitted it to the Senate, the same point being made that is made today. In the Fifty-fourth Congress an amendment was offered to the Indian appropriation bill, and Mr. Faulkner, who was a most excellent presiding officer, submitted the question to the Senate.

The pension appropriation bill being under consideration in the Fiftieth Congress, an important amendment was offered to it, and a point of order was raised that it proposed general legislation to a general appropriation bill. The question was submitted to the Senate.

After further debate, the Vice-President[1] ruled:

The Senator from Wyoming [Mr. Warren] makes several points of order against the amendment proposed by the Senator from Indiana [Mr. Beveridge]. The Chair will consider but one, and that is that the amendment proposes general legislation. The rules of the Senate with respect to amendments proposed to appropriation bills are comprehensive and specific. Subdivision 3 of Rule XVI provides that—

"No amendment which proposes general legislation shall be received to any general appropriation bill."

The question arises whether the amendment offered proposes general legislation. The Chair doubts whether there is a Senator within the Chamber who, upon the most casual reading of the amendment proposed, would not hold that it did distinctly and clearly propose general legislation. If it does propose general legislation and is in contravention of the rule, the Chair believes that it is his duty and in the interest of orderly procedure to hold that the point of order is well taken and that the amendment is out of order.

The precedents to which the attention of the Chair has been directed with respect to the submission of questions of order to the Senate have no application to the pending question. The presiding officers have in past years occasionally submitted questions of order to the Senate. It has been done under the authority conferred by Rule XX, in the discretion of the Chair and not from suggestions from the floor. During the present session the Chair has frequently been invited by Senators to submit to the

[1] Charles W. Fairbanks, of Indiana, Vice-President.

Senate points of order on amendments which were not in order, and in every case of such invitation the Chair has felt obliged to decline to do so. To assent to such suggestions is to break down the rules which the Senate has deliberately adopted for the conduct of public legislation.

The Chair feels that it is not for him lightly to break the rules and safeguards which the Senate has adopted for his and its guidance. The Chair, of course, has nothing to do with the merits of the amendment which is proposed. Whether the amendment is one of general public interest or otherwise is a matter with which the Chair can not concern himself. The Senators interested in the amendment are not remediless. The Chair, in holding that under the rule an amendment is not in order, does not kill the amendment. The Senate has provided against such a contingency by the rules which were long since adopted. If a majority of the Senate are of opinion that the ruling of the Chair is not in consonance with the spirit of the rules of the Senate, they may hold that the amendment is in order; or, if the Senate should be of opinion that in the large public interest an amendment should be received regardless of the rule, it is competent for the Senate so to decide, and a majority of the Senate may determine it.[1]

This amendment, which was offered by the Senator from Indiana on the 14th of February, was embodied in a bill introduced by him on the 6th of last December. The Chair is of opinion that if the measure is of such large consequence in the opinion of the Senate, as is now claimed, the Senate could have expressed itself upon that subject long prior to the closing hours of the present session and in an orderly and appropriate way.

For these considerations the point of order is sustained. The Chair would say further that under the rules of the Senate an appeal lies from this decision, and the Chair would invite such an appeal if he is in error in the view he entertains of the force and effect of the rule.

1341. The Speaker held it his duty to proceed in accordance with the mandatory provision of a law in the enactment of which the then existing House had concurred.—On March 1, 1877,[2] the House resumed consideration of the objections to the counting of the vote of Henry N. Solace as a Presidential elector from the State of Vermont, and a resolution relating thereto having been adopted, Mr. Wm. J. O'Brien, of Maryland, claimed the floor to submit a resolution notifying the Senate of the action of the House.

The Speaker[3] stated that he had allowed a vote to be taken on every legislative motion. He had allowed the motion to reconsider to be voted upon whenever it had been made, so that the House might have an opportunity to correct any error it might have committed. The House had had an opportunity to vote on the motion to lay on the table the propositions themselves, and on the motions to reconsider the vote upon those propositions. Now, when the House had advanced to a declaration of its judgment on the objection to counting the vote from the State of Vermont, it was brought to the following paragraph of the [electoral] law (which had been passed in the then existing Congress with the concurrence of the then existing House)[4] as its guide and its mandatory instructions:

When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the question submitted.

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[1] For an interesting discussion of the powers of the Vice-President as presiding officer of the Senate see first session Twentieth Congress, Debates, pp. 278–341. And for a Vice-President's rulings as to calling to order see first session Nineteenth Congress, index to Debates, under "Order." See also first session, Thirty-first Congress, Globe pp. 631, 632, for remarks of Vice-President Fillmore as to the power to call to order.

[2] Second session Forty-fourth Congress, Journal, p. 604; Record, p. 2054.

[3] Samuel J. Randall, of Pennsylvania, Speaker.

[4] 19 Stat. L., p. 227.

The Senate has notified the House of its action upon the objection to counting the vote from Vermont. The House has now reached its judgment upon the objection, and, as far as the Chair is concerned, it is his duty, by the terms of the act, mandatory and ministrial, to notify the Senate to that effect, and he would therefore direct the Clerk accordingly, and that the House is now ready to meet the Senate to proceed with the counting of the electoral votes for President and Vice President.

1342. By request of the House, the Speaker has named himself as one of the members of a commission authorized by law.—On March 2, 1895,[1] a Speaker pro tempore being in the chair, Mr. Joseph W. Bailey, of Texas, offered a resolution providing that the Speaker (Mr. Crisp) be requested to appoint himself as one of the delegates to the international monetary conference provided for by the sundry civil appropriation bill for the year ending June 30, 1896. This resolution was agreed to, and on the same day, when the Speaker announced the three delegates to be appointed on the part of the House, he announced himself as the third. This delegation consisted of two from the majority and one from the minority side of the House.

1343. The Speaker preserves order on the floor and in the galleries and lobby.

Form and history of Rule I, section 2.

The rules of the House, Rule I, section 2, among the duties of the Speaker, provide:

> He shall preserve order and decorum, and, in case of disturbance or disorderly conduct in the galleries, or in the lobby, may cause the same to be cleared.

This is the form established by the revision of the Forty-sixth Congress.[2] The clause "He shall preserve order and decorum" was taken from the old rule No. 2, which dated from April 7, 1789.[3] The latter portion, relating to the galleries and lobby, was old rule No. 9, and dated from March 14, 1794,[4] when a resolution was offered from the floor and adopted, that the Speaker or chairman of the Committee of the Whole should have power to cause the galleries or lobby cleared in case of disorder therein.

1344. The Speaker may name any Member persisting in disorderly conduct.

The parliamentary law provides that the House shall deal with a Member named by the Speaker.

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[1] Third session Fifty-third Congress, Record, pp. 3223, 3251.

[2] Second session Forty-sixth Congress, Cong. Record, p. 204.

[3] See Journal first session First Congress, p. 9. This was the date of the adoption of the first system of rules. The committee who reported them were Nicholas Gilman (N. H.), Elbridge Gerry (Mass.), Jeremiah Wadsworth (Conn.), Elias Boudinot (N. J.), Thornas Hartley (Pa.), William Smith (Md.), Richard Bland Lee (Va.), Thomas Tudor Tucker (S. C.), James Madison (Va.), Roger Sherman (Conn.), Benj. Goodhue (Maw.). All of these, excepting Messrs. Hartley, Lee, and Goodhue, had served in the Continental Congress.

[4] Third and Fourth Congresses, Journal, p. 92 (Gales & Seaton ed.).

Jefferson's Manual, in Section XVII, provides:

If repeated calls do not produce order,[1] the Speaker may call by his name any Member obstinately persisting in irregularity; whereupon the House may require the Member to withdraw. He is then to be heard in exculpation and withdraw. Then the Speaker states the offense committed, and the House considers the degree of punishment they will inflict.[2]

"Sir, I well remember the august and solemn appearance of this body some twenty years ago, when the fathers sat here. Then it was a majestic body indeed. There was something awful in its appearance. The solemn stillness, the gravity of Senators, the propriety of conduct, the silent auditory—all impressed the spectator with a solemn awe when he entered this Chamber or came into its galleries or lobbies. The House of Representatives, too, was silent. If there a voice was heard in the galleries, instantly the eye of the Speaker rested upon the Sergeant-at-Arms, and a messenger or the Sergeant in person immediately repaired to the individual in the gallery and touched him, and there was silence. If a Member sat in an indecorous position, or laid his foot upon his desk, the Speaker sent his page with this message: "The compliments of the Speaker to Mr. ———, and he will please take down his foot;" and he never put it up a second time. There was grandeur about legislation then."

1345. The Speaker represses a Member who is out of order, but except naming him may not otherwise censure or punish him.—On March 15, 1882,[3] while Mr. Frank Hiscock, of New York, had the floor in debate, and was refusing to yield, Mr. Hernando De S. Money, of Mississippi, insisted on speaking, and did proceed to utter sentences, although Mr. Hiscock still refused to Yield. Thereupon the Speaker[4] said:

The Chair wishes to state if gentlemen think they can impose on the House and the Chair by undertaking to make speeches in violation of the rules, the Chair will take pains to reprimand them, at least.

At once Mr. Money, while not objecting to being called to order, raised a question as to the right of the Speaker to reprimand.

The subject was debated on this day, and on the next day Mr. Robert M. McLane, of Maryland, proposed a resolution condemning any attempted exercise of such power. This resolution was withdrawn after the Speaker had made the following statement:

After all that has been said, there should be no misunderstanding the position taken by the Chair. It never has proposed to assume the powers of the House in punishing a Member for any past disorderly conduct; it has only asserted its right as a presiding officer to preserve order and do all that may be necessary within parliamentary usage to secure that end. The duty of the Chair in this respect is one settled not only by long parliamentary usage, but by the imperative terms of the rules of the House. The Chair used the word "reprimamd" in its ordinary and proper sense, not in its technical sense. The meaning of the term "reprimand" is well defined and well understood. To "reprimand" is to check and repress a Member when out of order. Beyond this a presiding officer should not go in administering a reprimand; less than this the Chair can not do and discharge its duty to the House. The Chair never assumed to reprimand a Member for what he had done; that is for the House. The Chair should check, repress, or reprimand a Member while persisting in being out of order. The Chair desires to repeat that in all that took place yesterday; in all that was said, it never undertook to reprimand a Member for any past act;

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[1] This procedure has rarely, if ever, occurred in the House. Members who offend are usually called to order by some other Member or by the Speaker, and when called to order the House in case of flagrant offense takes the matter under consideration.

[2] On February 11, 1857 (Third session Thirty-fourth Congress, Globe, p. 649), Mr. Sam Houston, of Texas, while speaking in the Senate, asked for order, saying:

[3] First session Forty-seventh Congress, Record, pp. 1941, 1967–1969.

[4] J. Warren Keffer, of Ohio, Speaker.

but if to call a Member to order and remind him that he is not in order is to reprimand him, then the Chair simply did what the rules require him to do.

The highest parliamentary reprimand known to the Parliament of England is to mention a member's name, which puts him then in parliamentary disgrace. Our manual of practice allows that to be done here. That was not done on yesterday; nor was any person reprimanded beyond the mere calling him to order and insisting upon the preservation of order. The Chair has the right in extreme cases to order the Sergeant-at-Arms to forcibly preserve order; even to the extent of arresting a Member if he persists in violating order, and may it not first use less violent means?[1]

1346. The mace is the symbol of the office of Sergeant-at-Arms, and is borne by that officer while enforcing order on the floor.

Present form and history of section 2 of Rule IV.

Section 2 of Rule IV provides:

The symbol of his office shall be the mace, which shall be borne by him while enforcing order on the floor.

This rule dates from 1789.[2] It was originally proposed, following the parliamentary usage, that the mace should be placed on the Clerk's table during the sitting of the House and under it when the House should be in committee, but the House recommitted the proposition, and it was not carried.[3] The mace during the sessions of the House is kept in an upright position on a marble pedestal at the right of the Speaker's chair. It is not taken down during a recess, but is taken down, however, when the House resolves into Committee of the Whole and is replaced in position when the Speaker resumes the chair. It is taken from its pedestal and borne by the Sergeant-at-Arms while enforcing order on the floor under direction of the Speaker or chairman of the Committee of the Whole.

The first mace, a representation of the Roman fasces, was made of ebony rods bound transversely with a silver band, and each tipped with a silver spearhead. From the center of the bundle of rods a silver stem supported a globe of silver, upon which was an eagle of massive silver. The height was about 3 feet. This mace was destroyed at the burning of the Capitol on August 24, 1814. For twenty five years a hastily constructed mace of common pine wood, painted, did service; but in 1842 the mace now in use was procured. It is of about the size and nearly the design of the old mace.

1347. The Deputy Sergeant-at-Arms having attempted, without the mace, to enforce an order of the Speaker on a Member, a question of privilege arose therefrom.—On February 7, 1885,[4] Mr. John D. White, of Kentucky, while addressing the House, was called to order, and the Speaker pro tempore directed him to resume his seat.

Mr. White disregarding this order, the Speaker pro tempore directed the Sergeant-at-Arms to see that the order was obeyed by Mr. White.

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[1] On April 3, 1850, Vice-President Millard Fillmore addressed the Senate at length concerning the power of the Vice President to call to order. His conclusion was that he shared this power with the Members of the Senate, and that the duty was even more incumbent on him than on them. (First session Thirty-first Congress, Globe, pp. 631, 632.)

For consideration of this subject by other Vice-Presidents, see Debates, first session Twentieth Congress, pp.278341. Also "Order," in index to debates, first session Nineteenth Congress.

[2] When the first rules were adopted.

[3] See Journal and Annals for first session First Congress, April 13, 1789.

[4] Second session Forty-eighth Congress, Journal, pp. 499–5W; Record, pp. 1419, 1420.

The Deputy Sergeant-at-Arms thereupon proceeded up the aisle without the mace and took hold of Mr. White, who refused to take his seat. The deputy Sergeant-at-Arms thereupon procured the mace and returned up the aisle to Mr. White, who took his seat.

Mr. White then, as a question of personal privilege, stated that the Assistant Sergeant-at-Arms, without authority or semblance of authority, had undertaken to arrest him.

The Speaker pro tempore [1] stated that Mr. White, being called to order by Members and directed by the Chair to take his seat, had disregarded said order, whereupon the Chair had directed the Sergeant-at-Arms to enforce the said order, which was then executed by the said officer.

Later, after the yeas and nays had been taken on a pending proposition, Mr. White claimed the floor on a question of privilege, and stated that a citizen, without any semblance of authority or power, had approached him on the floor of the House and laid violent hands on him and in an offensive manner demanded that he take his seat.

Mr. Nathaniel J. Hammond, of Georgia, made the point of order that the identical matter presented by Mr. White had been passed upon by the Chair; and no appeal from said decision being made, further discussion was out of order.

The Speaker pro tempore sustained the said point of order, and held the question presented by Mr. White not now in order as a question of privilege.

1348. Extreme disorder arising in the Committee of the Whole, the Speaker may take the chair "without order to bring the House into order."

Disorderly words spoken in Committee of the Whole are to be taken down as in the House, but are to be reported to the House, which alone may punish.

Jefferson's Manual has these provisions in relation to disorder in the Committee of the Whole:

In Section XII:

In a Committee of the Whole, the tellers on a division differing as to numbers, great heats and confusion arose, and danger of a decision by the sword. The Speaker took the chair, the mace was forcibly laid on the table; whereupon, the Members retiring to their places, the Speaker told the House "he had taken the chair without an order, to bring the House into order." Some excepted against it; but it was generally approved as the only expedient to suppress the disorder. And every Member was required, standing up in his place, to engage that he would proceed no further in consequence of what had happened in the grand committee, which was done. (3 Grey, 128.)

A Committee of the Whole being broken up in disorder and the chair resumed by the Speaker without an order, the House was adjourned. The next day the committee was considered as thereby dissolved, and the subject again before the House; and it was decided in the House, without returning into committee. (3 Grey, 130.)

In Section XVII:

Disorderly words spoken in a committee must be written down as in the House; but the committee can only report them to the House for animadversion. (6 Grey, 46.)

In Section XXX:

A committee can not punish a breach of order in the House or in the gallery.[2] (9 Grey, 113.) It can only rise and report it to the House, who may proceed to punish.

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[1] Joseph S. C. Blackburn, of Kentucky, Speaker pro tempore.

[2] A rule allows the chairman of the Committee of the Whole to have the gallery cleared. (See section 4704 of Vol. IV, of this work.)

1349. In 1880 the Speaker took the chair to quell disorder in Committee of the Whole, but that being accomplished, yielded the chair to the Chairman, that the committee might rise in due form before the House should adjourn.

On December 31, 1880,[1] the House was in Committee of the Whole House on the state of the Union considering the bill (H. R. 4592) to facilitate the refunding of the public debt, Mr. James W. Covert, of New York, being Chairman.

During the proceedings a controversy arose between Messrs. William A. J. Sparks, of Illinois, and J. B. Weaver, of Iowa, and on account of menacing words and actions of the two Members, the members of the committee generally rose to their feet, and many came to the front, some interposing between the two.

At this point the Speaker took the chair and called the House to order, saying:

The Speaker has taken the chair for the purpose of restoring order, believing that parliamentary propriety and practice justify him in so doing.

The Sergeant-at Arms (by direction of the Speaker), with his mace of office, moved about the floor of the House, and order was restored.

The Speaker then said:

The Speaker will now yield the chair to the Chairman of the Committee of the Whole, order being restored.

Mr. William M. Springer, of Illinois, moved that the House adjourn.

The Speaker[2] said:

The Chair would prefer to have the Committee of the Whole rise in due form.

Mr. Covert, as Chairman of the Committee of the Whole, then took the chair, the committee immediately voted to rise, and, after it had risen and reported, the House adjourned.

1350. A Member having defied the authority of the Chairman in Committee of the Whole, the latter directed the committee to rise, and, after the Speaker had taken the chair, reported the occurrence to the House.

The Committee of the Whole having risen informally because of disorder created by a Member, the Speaker directed the committee to resume its sitting after the Member had explained and when no further action in relation thereto was proposed.

On March 29, 1897,[3] the House was in Committee of the Whole House on the state of the Union considering the tariff bill (H. R. 379). Mr. Henry U. Johnson, of Indiana, who had risen to a point of order, was, after brief debate, directed by the Chairman[4] to take his seat. The gentleman from Indiana not taking his seat, but persisting in his remarks, the Chairman said:

The committee will rise informally until the House can enforce order.

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[1] Third session Forty-sixth Congress, Record, p. 311; Journal, p. 114.

[2] Samuel J. Randall, of Pennsylvania, Speaker.

[3] First session Fifty-fifth Congress, Record, pp. 433, 434; Journal, p. 52.

[4] James S. Sherman, of New York, Chairman.

The Committee of the Whole rose, the Speaker took the chair, and the Chairman reported:

Mr. Speaker, the Committee of the Whole House on the state of the Union having under consideration House bill No. 379, the gentleman from Indiana [Mr. Johnson] declined to recognize the ruling of the Chair and be governed by the rules of the House; and the committee rose for the purpose of enforcing the rules.

Thereupon Mr. Benton McMillin, of Tennessee, made a point of order that the report made by the Chairman of the Committee of the Whole could not be taken cognizance of by proceedings in the House. The committee itself was the proper forum to enforce its orders and direct its business. The Speaker of the House had no control in such matters as had progressed no further than this did.

The Speaker [1] said:

The Chair thinks that when the Committee of the Whole makes report that there has been disorder in the committee the House is competent to attend to administering whatever justice it deems necessary.

Thereupon Mr. Johnson, there being no objection, was allowed to make an explanation.

Then the Speaker said:

The Chair thinks it is proper to say to the House—and the Chair is quite sure that the House will agree—that one of the first duties of a Member is to obey the directions of a presiding officer until they have been reversed by proper authority, because the presiding officer, however humble an individual he may be, does not act of his own volition or of his own motion, but he acts as the representative of the House of which he is Speaker, or of the Committee of the Whole, of which he is Chairman; and certainly the very foundation and basis of order in the House is the recognition of the authority of the one who is appointed to be in authority; and whatever objections any Member may have to the unfortunate methods of procedure, still he will, if he thinks a moment, recognize the necessity of prompt obedience to whomsoever presides over the body.

Now, it is true that our debates—I do not speak of these debates, because I have not heard much of them, but, judging that they are like debates in the past to which I have listened for nearly twenty years, they are somewhat irrelevant. They seem to be a waste of time, and probably a more strict rule than has been the custom of the House with regard to relevancy would be a much better thing. Nevertheless, it would be a long time before the House would accustom itself to that new departure, and it would require very cordial action on the part of all Members to prevent the waste of time. Time is undoubtedly wasted in all these debates, and if there were a month accorded to the House, we should simply have a month more of just the same kind of debate. I speak as a matter of experience, being sorry that it is experience. That being the case, nothing can be done except in the regular way, and if the result of it is that we do not reach some parts of the bill, it is, perhaps, owing to our unfortunate constitution and habits. But what we ought to do is, perhaps, not to strive for an ideal condition of things, but to do about the best we can. That being the case, the Chair really hopes that the gentleman from Indiana will recognize the suitableness of what has been said. * * * If there be no objection, the Committee will resume its sitting.

The Committee of the Whole resumed its sitting.

1351. The Committee of the Whole having risen and reported that its proceedings had been disturbed by disorder, the Speaker restored order and the committee resumed its sitting.—On April 5, 1860,[2] the House resolved itself into the Committee of the Whole House on the state of the Union; and after some time spent therein the Speaker resumed the chair, when Mr. Israel

[1] Thomas B. Reed, of Maine, Speaker.

[2] First session Thirty-sixth Congress, Journal, p. 666.

Washburn, jr., reported that the proceedings of the committee were interrupted by disorder prevailing therein.

The Speaker[1] having restored order, the House again resolved itself into Committee of the Whole House on the state of the Union.

1352. Rigid enforcement of the rule relating to disturbance in the galleries.—In the early history of the House the rule relating to order in the galleries was very rigidly enforced. In 1801[2] a spectator who applauded by clapping his hands was, by direction of the Speaker, taken from the gallery and kept in confinement by the Sergeant-at-Arms for two hours. The confinement of the offender was the subject of some criticism on the floor. On February 11, 1836, during a session of the Committee of the Whole, a spectator in the gallery applauded. The committee having risen, the Chairman communicated this fact to the Speaker, who gave orders to the Sergeant-at-Arms to clear the gallery. It was also proposed by an old Member[3] that a warrant be issued for the arrest of the offender; but this proposition was not carried into execution. In the later history of the House applause in the galleries has been repressed, but not with such extreme strictness.[4]

1353. The Speaker having declined to order the galleries to be cleared, a motion to effect that purpose was offered from the floor and entertained.—On March 1, 1877,[5] during proceedings of the count of the electoral vote, Mr. William J. O'Brien, of Maryland, asked that the galleries be cleared of spectators.

The Speaker not granting the request, although reenforced by the demand of other Members, Mr. Bernard G. Caulfield, of Illinois, moved that the galleries be cleared.

The Speaker[6] entertained the motion, which was put to the House and decided in the negative.[7]

1354. The Speaker has general control of the Hall, corridors, and unappropriated rooms in the House wing of the Capitol.

Form and history of Rule I, section 3.

The rule relating to the control by the Speaker of the Hall and its surroundings is section 3 of Rule I:

> He shall have general control, except as provided by rule or law, of the Hall of the House and of the corridors and passages and of the unappropriated rooms in that part of the Capitol assigned to the use of the House until further order.

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[1] William Pennington, of New Jersey, Speaker.

[2] See Annals of Congress, second session Sixth Congress, pp. 851, 887.

[3] Charles F. Mercer, of Virginia, who served in the House from 1817 to 1839.

[4] On February 9, 1825, at the time of the election of President John Quincy Adams, there were applause and hisses from the gallery and the House suspended its business until the gallery was cleared. Second session Eighteenth Congress, Debates, p. 527)

[5] Second session Forty-fourth Congress, Record, p. 2056.

[6] Samuel J. Randall, of Pennsylvania, Speaker.

[7] The rule in relation to clearing the galleries was substantially the same then as now. As printed in the Record on the above date (p. 2056), it might be inferred that the rule specifically provided that the House could order the galleries cleared. The rule did not, however, provide this in terms. (Journal p. 702.) But of course if the people in the galleries disturbed the proceedings the House might order them out as a matter of privilege.

The origin of this rule was on December 23, 1811,[1] when a rule was adopted containing this sentence relating to the Speaker's duties: "He shall have general direction of the Hall." On May 26, 1824,[2] Mr. John W. Taylor, of New York, from a committee appointed to apportion the rooms among the officers of the House and the standing committees, reported also a resolution that "the unappropriated rooms shall be subject to the order and disposition of the Speaker until the further order of the House."[3] This rule was in existence in 1880[4] when the general revision occurred, and its substance was incorporated in the present form of the rule. In the Forty-ninth Congress[5] the corridors and passages were added to the charge of the Speaker, with the idea, says the report of the Committee on Rules, of restoring to the Speaker an authority which he exercised prior to the revision of 1880.

1355. The statutes require the Speaker to appoint certain visitors and trustees of public institutions.—Certain duties[6] are prescribed for the Speaker by the Statutes. Before the termination of the last session of each Congress he shall appoint a temporary Committee on Accounts, of three Members, to exercise the duties of such committee until after the meeting and organization of the next House of Representatives.[7] At the session of Congress next preceding the annual examinations of the Military Academy he shall appoint three Members of the House as visitors to that institution,[8] and also at the session next preceding the annual examinations at the Naval Academy, three Members of the House as visitors[9] to that institution also. He shall also appoint a Member of the House as consulting trustee for two years of the Reform School of the District of Columbia,[10] two Members of the House as directors for the term of a single Congress, with eligibility for reappointment, of the Columbia Hospital for Women,[11] two Members for a like term with like eligibility for reappointment as directors of the Columbia Institu-

[1] See Reports, first session Twelfth Congress, No. 38. The revision of 1811 was quite extensive, and the Committee on Rules who reported it were Messrs. Burwell Bassett (Va.), Timothy Pitkin (Conn.), Nathaniel Macon (N. C.), Hugh Nelson (Va.), William W. Bibb (Ga.), Josiah Quincy (Mass.), and William Findley (Pa.).

[2] See Annals of Congress, first session Eighteenth Congress, p. 2764.

[3] On January 14, 1876, Speaker Kerr was, by unanimous consent, relieved of "the duty required of him by the rules to regulate the assignment of the committee rooms," and the duty was transferred to the Committee on Accounts for the remainder of the Congress. (First session Forty-fourth Congress, Journal, p. 188.) On January 20, 1817, rooms were allotted to committees by a joint committee of both Houses. (Second session Fourteenth Congress, Annals, pp. 611, 639, Journal, p. 238.) Again, on May 21, 1824, a select committee of the House was appointed to assign rooms. (First session Eighteenth Congress, Journal, pp. 558, 559.)

[4] Cong. Record, second session Forty-sixth Congress, p. 204.

[5] Cong. Record, first session Forty-ninth Congress, pp. 169, 293.

[6] In early years of the House various duties were at times prescribed for the Speaker. Thus in 1820 he made the expenditures for refurnishing the Hall of the House. (First session Sixteenth Congress, Journal, p. 530.) In later times such duties have devolved on other officers.

[7] Supplement Revised Statutes, vol. 2, pp. 413, 414; 28 Statutes at Large, p. 768.

[8] Revised Statutes, section 1327.

[9] Supplement Revised Statutes, Vol. I, p. 217.

[10] Supplement Revised Statutes, Vol. I, p. 104.

[11] Statutes at Large, vol. 17, p. 360.

tion for the Instruction of the Deaf and Dumb.[1] On every alternate fourth Wednesday of December he shall appoint three Members of the House as Regents of the Smithsonian Institution.[2] Annually he appoints two citizens of the District of Columbia as members of the Memorial Association of the District of Columbia.[3]

1356. Mr. Speaker Clay announced to the House his resignation of the Speakership, but his resignation as a Member appears only from the credentials of his successor.—On March 26, 1814,[4] the Speaker laid before the House a letter addressed to him, inclosing the certificate of the election of Joseph H. Hawkins, to serve in this House, as one of the Members of the State of Kentucky, in the place of Henry Clay, resigned.

On January 19, 1814,[5] Mr. Clay, who was Speaker, resigned that office, "the distinguished station of this House, with which I have been honored by your kindness," as he described it. But he did not at the same time, in terms at least, resign his seat. Nor does an inspection of the Journal show that at any time a notice of his resignation was laid before the House until the presentation of the credentials of his successor, on March 26.

1357. Resolutions censuring the conduct of the Speaker being presented unexpectedly, he was excused from deciding a point of order in relation thereto.—On May 31, 1882,[6] Mr. Robert M. McLane, of Maryland, presented a preamble and resolution reciting the proceedings of the House on the prior day, and the refusal of the Speaker to entertain certain motions and appeals, and concluding with this resolution:

Resolved, That the said decisions and rulings of the Speaker and his refusal to allow appeals therefrom were arbitrary, and are hereby condemned and censured by the House.

Mr. Thomas B. Reed, of Maine, moved that the preamble and resolutions be laid on the table.

A point of order being made that the resolutions did not present a question of privilege, the Speaker[7] said in reference to them:

The Chair desires to state that the gentleman from Maryland advised the Chair that he had certain resolutions which he wished to offer; * * * but had the present occupant of the chair had any information that they had a personal application to himself, he would have taken occasion to leave the chair. In this situation, and having made the rulings to which reference is made in these resolutions, the Chair would rather now not rule upon the point of order, but allow the motion of the gentleman from Maine to be submitted to the House.

The preamble and resolutions were then laid on the table, yeas 143, nays 88.[8]

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[1] Revised Statutes, section 4863.

[2] Revised Statutes, section 5581.

[3] 27 Statutes at Large, p. 396.

[4] Second session Thirteenth Congress, Journal, p. 366 (Gales & Seaton ed.).

[5] Journal, p. 240.

[6] First session Forty-seventh Congress, Journal, p. 1384; Record, p. 4398.

[7] J. Warren Keifer, of Ohio, Speaker.

[8] On January 18, 1882 (first session Forty-seventh Congress, Record, p. 491), Mr. Speaker Keifer, because the point of order arose over a proposition to take the appointment of committees from the Speaker, submitted it to the House, and the House decided it.

1358. The Speaker, having remained in the chair while a question relating to himself was pending, was excused from deciding a question of order.—On February 20, 1801,[1] a motion was made and seconded that the House do come to the following resolution:

Resolved, That the Speaker of this House in directing the Sergeant-at-Arms to order and expel from the gallery of this House Samuel Harrison Smith, a citizen of the United States, has assumed a power not given him by the rules of this House, and deprived the said Samuel Harrison Smith of a right which can only be forfeited by disorderly behavior.

It was resolved unanimously that the Speaker[2] be excused from deciding whether the said motion was in order or not.

The question being taken, "Is this motion in order?" it passed in the negative, yeas, 49, nays 54.

1359. The Speaker leaves the chair during the transaction of any business concerning himself, even the reference of a paper.—On December 13, 1843,[3] the Speaker[4] having left the chair and substituted Mr. Linn Boyd, of Kentucky, as Speaker pro tempore, it was, on motion of Mr. Lucius Q. C. Elmer, of New Jersey,

Ordered, That all the documents in the possession of the Clerk of this House relating to the case of John M. Botts, who contests the right of John W. Jones to a seat as a Member of this House; and to the case of William L. Goggin, who contests the right of Thomas W. Gilmer to a seat as a Member of this House, be referred to the Committee of Elections.

1360. The Speaker's seat being contested, he requested that the House relieve him of the appointment of the Committee on Elections; and the request was granted.

The Speaker, by unanimous consent, addressed the House on a subject relating to his election.

A matter concerning himself being before the House, the Speaker called a Member to the chair.

A Member called to the chair by the Speaker was permitted to appoint a committee by vote of the House.

On December 7, 1843,[5] the Speaker[6] by general consent, stated that a memorial having this day been presented by John M. Botts, of the State of Virginia, contesting the right of the Speaker to a seat in the House, it appeared to him proper that he should ask the House that, in any order which might hereafter be taken for the appointment of the standing committees, he might be relieved from that portion of the duty, which might otherwise devolve upon him, of appointing a committee of elections, which would have to pass on his own case. He was impelled to this course both from a sense of justice to his opponent and because of the delicacy of the position in which he was himself placed.

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[1] Second session Sixth Congress, Journal, pp. 194–199 (old ed.), 810 (Gales & Seaton ed.); Annals, p. 1042.

[2] Theodore Sedgwick, of Massachusetts, Speaker.

[3] First session Twenty-eighth Congress, Journal, p. 50; Globe, p. 33.

[4] John W. Jones, of Virginia, Speaker; the same whose seat was contested.

[5] First session Twenty-eighth Congress, Journal, p. 40; Globe, p. 18.

[6] John W. Jones, of Virginia, Speaker.

The Speaker then left the chair and substituted Mr. Samuel Beardsley, of New York, as Speaker pro tempore.

On motion of Mr. William Parmenter, of Massachusetts, it was then

Resolved, That the Speaker be authorized to appoint the standing committees named in the seventy-sixth rule of the House of the Twenty-seventh Congress, except the Committee of Elections.

Mr. George W. Hopkins, of Virginia, then moved that the House proceed viva voce to elect a committee of elections to consist of nine members.

On motion of Mr. Charles H. Carroll, of New York, this motion was amended to provide that the committee be appointed by the Speaker pro tempore, and as amended, the motion was agreed to.

Mr. Beardsley thereupon appointed the committee.[1]

1361. The seat of the Speaker being contested, the Committee on Elections were appointed by resolution of the House.—On December 12, 1887,[2] the Speaker[3] called Mr. Charles F. Crisp, of Georgia, to the chair, and from the floor requested that he be relieved of the duty of appointing the Committee on Elections, in view of the pending contest for his seat in the House.

Thereupon Mr. William S. Holman, of Indiana, offered the following resolution:

Resolved, That at 1 o'clock p. m. to-morrow the House will proceed to elect, by resolution or otherwise, fifteen Members who shall constitute the Committee on Elections for the present Congress.

Mr. Henry G. Turner, of Georgia, proposed the following substitute:

That at I o'clock p. m. to-morrow there shall be selected by the House of Representatives a select committee of fifteen Members, to whom shall be referred the election contest of Thoebe *v.* Carlisle.

After debate the substitute was disagreed to, and the original resolution was agreed to.

On the succeeding day, at the appointed time, Mr. Joseph G. Cannon, of Illinois, a member of the minority, offered a resolution providing that certain Members therein should constitute the Committee on Elections. Mr. Cannon stated that the majority had named the first nine and the last six were named by the minority.

The resolution was agreed to.

From January 17 to 23 the Speaker was away from the House, detained by illness, and during that time the report in the contest was made, and acted on, the House deciding that Mr. Carlisle was entitled to the seat.

1362. Charges being made by a Member against the official conduct of Mr. Speaker Clay, he appealed to the House for an investigation, which was granted.

In asking an investigation of his conduct Mr. Speaker Clay addressed the House from the chair, but immediately left it when the House was to act.

The Speaker having appealed to the House for an investigation, the House ordered his address to be entered on the Journal.

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[1] Mr. Beardsley appears to have belonged to the same political party with the Speaker, that of the majority of the House. (See Globe, p. 1.)

[2] First session Fiftieth Congress, Journal, pp. 44, 49, 438, 442, 504; Record, pp. 42, 51, 519, 629.

[3] John G. Carlisle, of Kentucky, Speaker.

In 1825 the House ordered that the select committee to investigate the conduct of the Speaker should be chosen by ballot.

A Member making charges which result in an investigation, the committee usually call upon him first to present the facts within his knowledge.

On February 3, 1825,[1] the Speaker,[2] rising in his place, made a statement concerning insinuations[3] against himself, implicating his conduct with regard to the approaching election of a President by the House. These charges were made in the public prints under the authority of a Member of the House, and were therefore entitled to grave attention. It might be worthy of consideration whether the character and dignity of the House itself did not require a full investigation and an impartial decision. For if he were base enough to betray the solemn trust which the Constitution had confided to him and by yielding to personal views and considerations compromise the highest interests of his country, the House would be scandalized by his continuance to occupy the chair, and he merited instantaneous expulsion. Without, however, presuming to indicate what the House might conceive it ought to do, on account of its own purity and honor, he hoped that he should be allowed respectfully to solicit in behalf of himself an inquiry into the truth of the charges to which he referred. Standing in the relations to the House, which both the Member from Pennsylvania and himself did, it appeared to him that here was the proper place to institute the inquiry, in order that, if guilty, here the proper punishment might be applied, and if innocent, here his character and conduct might be vindicated. If the House should think proper to raise a committee he trusted that some other than the ordinary mode pursued by the practice and rules of the House would be adopted to appoint the committee.

The Speaker then called Mr. John W. Taylor, of New York, to the chair.[4]

Thereupon Mr. John Forsyth, of Georgia, proposed the following:

Ordered, That the Speaker's communication be entered on the Journal.

Considerable debate arose as to the manner of the presentation. Mr. Charles F. Mercer, of Virginia, thought the better way to have brought the subject before the House would have been for the Speaker to have addressed a letter to the Speaker pro tempore, and that letter might be referred. There seemed to be difficulty about entering an oral address of the Speaker in the Journal. But Mr. Forsyth thought there was no difficulty, and that this address, like the addresses of the Speaker when entering and leaving the speakership,[5] both of which were oral, and both of which

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[1] Second session Eighteenth Congress, Journal, p. 198; Debates, pp. 440–461.

[2] Henry Clay, of Kentucky, Speaker.

[3] Insinuations of a corrupt bargain to support Mr. Adams as President in return for an appointment as Secretary of State.

[4] The Journal has no mention of this, but the Debates record it; and it would seem to be the course demanded by propriety.

[5] These addresses are entered on the Journals as a matter of course, without vote of the House. The remarks of the first Speaker, Mr. Muhlenburg, on taking the chair in 1789, are referred to but not given in full in the Journal; but his farewell remarks at the end of the Congress, in response to the vote of thanks, appear. The address of the second Speaker, Mr. Trumbull, on taking the chair, appears in full, and such is yet the general, though not invariable custom.

were always entered on the Journals, might by the Clerk and Speaker be entered on the Journal without trouble.

The House finally agreed to the order, and the appeal of the Speaker was spread in full on the Journal.

Mr. Forsyth then moved to refer the Speaker's communication to a select committee, and on February 4,[1] after debate, this motion was agreed to, yeas 125, nays 167.

The objection to the reference to a committee was made principally on the alleged ground that no act of the House could result from it; but in reply it was urged that the penalty of expulsion could be visited for a breach of privilege.

It was then—

Ordered, That the committee consist of seven Members, and that it be appointed by ballot.

On February 6,[2] the committee were chosen by ballot, a second ballot being necessary to complete the number. The members were Messrs. Philip P. Barbour, of Virginia; Daniel Webster, of Massachusetts; Louis McLane, of Delaware; John W. Taylor, of New York; John Forsyth, of Georgia; Romulus M. Saunders, of North Carolina, and Christopher Rankin, of Mississippi.

On February 9,[3] the committee reported that they had informed Hon. George Kremer that they would be ready at a particular time to receive evidence touching the charges made by him. In reply Mr. Kremer sent to them a communication, in which he declined to appear before the committee alleging that he could not do so without appearing either as an accuser or a witness, both of which he protested against. In this posture of affairs, the committee could take no further steps. It was of course competent for the House to invest them with the power to send for persons and papers, and by that means enable them to make an investigation. But not knowing any reasons for such an investigation, of their own knowledge, they felt it only their duty to lay before the House the letter of Mr. Kremer, which they added to their report.

1363. A charge by a Member that the Journal of the House had been mutilated by the Speaker was made a question of privilege.

Charges being made against the Speaker, he called a member of the minority party to the chair during their consideration.

Instance wherein a bill was originated in Committee of the Whole House on the state of the Union.

In a rare instance the House committed a bill directly to the Committee of the Whole before sending it to a standing or select committee (footnote).

On March 26, 1850[4] Mr. Preston King, of New York, rose to a question of privilege, which he reduced to writing, as follows, viz:

I charge that the Journal of the House has been mutilated by erasing a motion that I did make, and substituting, by interlineation, one that I did not make, in the Journal of the 13th instant. My motion was to close debate on the California bill; these words are changed, and "message" substituted.

[1] Journal, pp. 201–206; Debates, pp. 463–486.

[2] Journal, p. 208.

[3] Debates, p. 522.

[4] First session Thirty-first Congress, Journal, p. 713.

The said charge having been submitted to the consideration of the House, the Speaker[1] called Mr. Robert C. Winthrop, of Massachusetts, to perform the duties of the Chair.[2]

After debate,[3] and after two propositions had been submitted and considered, Mr. Isaac E. Holmes, of South Carolina, moved that a committee of nine be appointed by the gentleman now presiding over the House, to investigate the charges made against the honorable Speaker by the Hon. Preston King, a Member of this House.

The Speaker (Mr. Cobb), after unanimous consent of the House had been given, made from the floor an explanation of the occurrence. The California message had been committed to the Committee of the Whole House on the state of the Union, but the California bill, to which Mr. King referred, had never appeared in the House, but had originated in the Committee of the Whole during the consideration of the message and was still in the committee. The Speaker explained that Mr. King offered the resolution to close debate on the bill as well as on the message; but when the Speaker came to read the journal before its admission to the House for approval he found that such a resolution to close debate was not privileged, except as it referred to a matter committed to the Committee of the Whole by the House. The bill had not been so committed,[4] and the House had no parliamentary knowledge of it. The Journal as corrected was read to the House. The alteration of the Journal was, he contended, proper, since the resolution had been entertained as a privileged proposition and the alteration had only been made to make it conform to the privileged form.

This motion having been agreed to, the Speaker pro tempore appointed the committee, Mr. Holmes being made chairman.

The special committee, on March 29, 1850[5] made a report exonerating the Speaker. The House unanimously approved the report.

1364. A newspaper having made certain charges against the official character of the Speaker, he called a Member to the chair and moved an investigation, which was voted.

A select committee being authorized to investigate the conduct of the Speaker, they were appointed by the Member called to the chair as Speaker pro tempore.

The report of a select committee on the conduct of the Speaker was voted on by the House, although it contained no order or resolution; and was spread on the Journal without direction of the House.

On February 27, 1879,[6] the Speaker[7] called Mr. John G. Carlisle, of Kentucky, a member of the majority, to the chair, and as a question of privilege presented to

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[1] Howell Cobb, of Georgia, Speaker.

[2] Mr. Winthrop was a member of the minority party (Whig) in the House; the Speaker a member of the majority party (Democratic).

[3] Globe, p. 595.

[4] In rare instances the House has committed a bill directly to the Committee of the Whole before sending it to a standing committee. (See the bill H. R. 243 in index of Journal for first session Forty-second Congress.)

[5] Journal, pp. 738–739.

[6] Third session Forty-fifth Congress, Journal, pp. 541, 672; Record, pp. 1986, 2396.

[7] Samuel J. Randall, of Pennsylvania, Speaker.

the House an extract from a newspaper, purporting to make, on the authority of a certain special agent of the Treasury Department, whose name was given, a charge that the Speaker had used his influence to the advantage of a paper mill in which he was a stockholder by continuing a profitable contract with the Government. The Speaker denied the charge, and offered a resolution providing that a select committee of five be appointed to investigate the matter.

This resolution was agreed to unanimously, and Mr. Carlisle, as Speaker pro tempore, appointed the committee, the chairman and two others from the majority side of the House, and two from the minority side.

On March 3 the committee made an unanimous report, exonerating the Speaker. This report, apparently without order of the House, was inserted in full in the Journal. The report was also voted on by the House and agreed to by the House, although it was a simple statement, without any proposition attached, such as a resolution.

1365. The Speaker of the House being the Vice-President-elect, called a Member to the chair during discussion of a question relating to the electoral count.

A Member called to the chair to preside temporarily was given special authority by the House to appoint a committee.

On February 10, 1869, the counting of the electoral votes showed Ulysses S. Grant, of Illinois, chosen President of the United States, and Schuyler Colfax, of Indiana, Vice-President. It had been ordered that a committee should be appointed on the part of the House to join a similar committee of the Senate, to notify the President-elect and Vice President-elect of their election. There had also arisen a question of privilege relating to the electoral count, and the Speaker (who was also the Vice-President-elect) had left the chair to participate in the debate. On the succeeding day, February 11,[1] the Speaker announced his intention to designate Mr. Henry L. Dawes, of Massachusetts, as Speaker pro tempore[2] during the consideration of the question of privilege, which had come over as unfinished business from the day before.

Before leaving the chair he asked the House to grant authority to the Speaker pro tempore to appoint the committee of notification.

This authority was granted without objection, and Mr. Dawes, having assumed the chair, made the appointment.

1366. During consideration of a resolution to censure a Member for disrespect for the Speaker, the Member likewise assailed the Speaker pro tempore, whereupon the Speaker resumed the chair, while the House acted on the latest breach of privilege.

Pending consideration of a resolution to censure a Member, the Speaker informed the Member that he should retire.

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[1] Third Session Fortieth Congress, Journal, p. 324; Globe, p. 1094.

[2] The Journal says that the Speaker, "by unanimous consent, named Mr. Dawes to perform the duties of the Chair." This must mean the appointment of the committee, since the rule already gave the power of designation.

On July 11, 1832,[1] the House was considering an appeal from a decision of the Chair in relation to a resolution censuring Mr. William Stanbery, of Ohio, for words spoken in debate.

Mr. Stanbery, having the floor in the debate on the appeal, said:

I will make one motion that is in order: I make a motion that you [the Speaker pro tempore] leave the chair.

On demand of Mr. Augustin S. Clayton, of Georgia, the words were taken down and read.

Thereupon Mr. James K. Polk, of Tennessee, offered this resolution:

Resolved, That the words spoken in this House this morning by William Stanbery, a Member from Ohio, and which words have been taken down by the Clerk of the House, and his conduct in the face of the House, were disorderly, and deserve the censure of the House.

The speaker pro tempore,[2] leaving the chair from motives of delicacy, the Speaker[3] took the chair, and decided that the words of Mr. Stanbery were disorderly.

After further debate, participated in by Mr. Stanbery, who insisted that what he had said was parliamentary, the Speaker said that the words having been taken down and admitted, and a resolution of censure having been moved, it was the duty of the Member from Ohio to Withdraw.

After further debate, request was made of Mr. Polk that he withdraw his resolution in order that the House might bring to a conclusion the pending appeal, and the original resolution censuring Mr. Stanbery.

Mr. Polk accordingly withdrew his resolution, and the original resolution of censure was agreed to. The original resolution of censure was for words spoken disrespectfully of the Speaker.

1367. The Speaker may of right speak from the chair on questions of order and be first heard.

Except on questions of order the Speaker may speak from the chair only by leave of the House and on questions of fact.

On occasions comparatively rare, Speakers have called Members to the chair and participated in debate, usually without asking consent or the House.

According to a former custom,, now fallen into disuse, the Speakers participated freely in debate in Committee of the Whole.

The Speaker sits while rendering decisions on points of order or when participating in debate thereon.

Section XVII of Jefferson's Manual has this provision:

But if the Speaker rise to speak, the Member standing up ought to sit down, that he may be first heard. (Town., col. 205; Hale Parl., 133; Mem. in Hakew., 30, 31.) 'Nevertheless, though the Speaker may of right speak to matters of order,[4] and be first heard, he is restrained from speaking on any other

[1] First session Twenty-second Congress, Journal, p. 1134; Debates, pp. 3897–3901.

[2] Clement C. Clay, of Alabama, Speaker pro tempore.

[3] Andrew Stevenson, of Virginia, Speaker.

[4] The Speaker, according to the practice of the House for a long time, sits while rendering decisions or while speaking on points of order.

subject, except where the House have occasion for facts within his knowledge; then he may, with their leave, state the matter of fact.[1]

1368. The seat of the Speaker as a Member being contested, consent of the House was obtained to permit him to speak on the report, although he had called a Member to the chair.

A contestant for a seat being heard on the floor in his own behalf is subject to all the rules of debate applying to the Member.

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[1] This rule was formerly construed to prevent the Speaker from speaking from a place on the floor when a Speaker pro tempore was presiding. It did not apply to Committee of the whole. In later years, in the rare instances when Speakers have left the chair and debated, they have done so without obtaining leave of the House, in explicit terms at least. On April 9, 1864, (first session Thirty-eighth Congress). Journal, p. 505; Globe, p. 1503) Mr. Speaker Colfax left the chair to move the expulsion of Mr. Alexander Long, of Ohio; again, on February 10, 1869 (third session Fortieth Congress, Journal, p. 322; Globe, p. 1066), Mr. Colfax left the chair. On March 16, 1871 (first session Forty-second Congress, Globe, p. 124), Mr. Speaker Blaine left the chair to reply to Mr. Butler, of Massachusetts (the Journal in this case makes no reference to the action, the Globe indicates that no request for the consent of the House was made, while Mr. Blaine—Globe, p. 125—apologized for the proceeding which he justified by the early precedents); on February 4, 1872 (third session Forty-second Congress, Globe, pp. 1092,1115), Mr. Speaker Blaine left the chair without consent to propose and advocate a private bill granting a pension to a daughter of President Taylor, widow of an army officer; and on December 2, 1872, the same Speaker (third session Forty-second Congress, Journal, p. 8; Globe, p. 11) left the chair to move the Credit Mobilier investigation, the Journal indicating that the consent of the House may have been obtained; and on February 4, 1875 (second session Forty-third Congress, Record, p. 899), he debated a proposed amendment to the rules. Of the more recent Speakers, Mr. Crisp, on March 29, 1894 (second session Fifty-third Congress, Record, p. 3335), took the floor without express leave of the House.

On April 19, 1878 (second session Forty-fifth Congress, Record, p. 2665), Mr. Speaker Randall called Mr. Robert B. Vance, of North Carolina, to the chair as Speaker pro tempore, and then from the floor made a personal explanation; on April 9, 1879 (first session Forty-sixth Congress, Record, p. 336), Mr. Speaker Randall participated in debate in the House on a report from the Committee on Rules, and on May 1 (Journal, p. 224; Record, p. 1018) the same Speaker left the chair without consent of the House to present a report from the Committee on Rules. Again, on February 4, 1880 (second session Forty-sixth Congress, Record, p. 1079), Mr. Speaker Randall, without asking consent, left the chair to debate in a case of personal explanation into which his name had been brought by a Member. On June 14, 1906 (first session Fifty-ninth Congress, Record, pp. 8528, 8529), Mr. Speaker Cannon, without asking consent of the House, left the chair to reply to remarks reflecting on his conduct made by a Delegate in debate.

On January 5, 1826, on the subject of a proposed rule relating to the duties of the Speaker in the presentation of memorials, Mr. Speaker Taylor, from the chair, spoke at some length on his understanding of the duty of the Chair (first session Nineteenth Congress, Debates, pp. 880–883).

On January 10, 1896, Mr. Speaker Reed participated briefly from the chair in debate on the theory of the quorum present as related to the rules (first session Fifty-fourth Congress, Record, p. 579).

In the modern practice of the House the Speakers quite frequently vote in Committee of the Whole, but rarely participate in the debate. On March 27, 1906 (first session Fifty-ninth Congress, Record, p. 4355), Mr. Speaker Cannon interposed briefly in reply to a criticism of his conduct by a Member in the debate; but for a quarter of a century such participation in debate had been rare. Mr. Speaker Randall, however, was a frequent participant in debates in Committee of the Whole. (Congressional Record, second session Forty-sixth Congress, p. 1705; third session Forty-sixth Congress, pp. 303, 1525.) In the earlier history of Congress a Speaker (Mr. Dayton) participated in debate in Committee of the Whole to the extent of being called to order by the chairman for improper utterances. (Annals of Congress, first session Fifth Congress, p. 1004.) In fact, the early Speakers frequently debated in Committee of the Whole. Thus Mr. Clay spoke on nine measures in one session. (First session Twelfth Congress. See Annals.)

Also, on February 14, 1826, in Committee of the Whole, Mr. Speaker Taylor spoke on an appeal from the decision of the Chairman, and expressed the opinion that the decision was wrong. (First session Nineteenth Congress, Debates, p. 1358.)

On June 6, 1844,[1] the Speaker[2] having left the chair and substituted Mr. John B. Weller, of Ohio, as Speaker pro tempore, the House proceeded to the consideration of the report of the Committee of Elections upon the memorial of John M. Botts, who contested the right of John W. Jones to a seat as a Member of this House (the consideration of the report having been, on the 31st of May ultimo, postponed until this day), the question being on agreeing to the resolution accompanying the report, which was read, as follows:

Resolved, That John W. Jones is entitled to his seat in this House as a Representative from the Sixth Congressional district in Virginia.

On motion of Mr. George W. Hopkins, of Virginia (by unanimous consent)—

Ordered, That the Speaker of this House, whose right to a seat as a Member of this House is contested, have leave to speak upon this resolution, notwithstanding that clause of the Manual which restrains the Speaker from addressing the House except upon questions of order.

Mr. Garrett Davis, of Kentucky, submitted the inquiry whether Mr. Botts, in debating the resolution, would be subject to the provisions of the rule which declares that "no Member shall occupy more than one hour in debate on any question in the House or in committee."

The Speaker pro tempore decided that, although the word "Member" is used in this rule, it is also in many other rules relative to order and debate, and that any person not a Member of this House who is permitted to appear at the bar and address the House must necessarily be governed by all the rules of debate which are applicable to Members, subject to the rule limiting a speech to one hour.

From this decision Mr. Davis appealed. This appeal was laid on the table by a vote of 102 to 76.

1369. A Member having criticized the past conduct of the Speaker, the House consented that the latter should explain from the chair.—On January 22, 1836,[3] Mr. Henry A. Wise, of Virginia, having the floor in debate, criticized the conduct of the chairman of the Committee of Ways and Means in the preceding Congress, and called upon him to make an explanation.

The former chairman of the Ways and Means Committee being at this time the Speaker of the House,[4] and occupying the chair at the time Mr. Wise made the demand, said that, while considering the proceeding out of order, he had not arrested it, as he was personally referred to. He would make a statement if the House would permit.

The. consent of the House being given, the Speaker, evidently without leaving the chair, made an explanation.

1370. The Speaker has spoken briefly from the chair on a question of privilege relating to himself.—On March 15, 1902,[5] Mr. E. S. Minor, of Wisconsin, rising to a question of privilege, denied the truth of a newspaper report that

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[1] First session Twenty-eighth Congress, Journal, p. 1012; Globe, p. 648.

[2] John W. Jones, of Virginia, Speaker.

[3] First session Twenty-fourth Congress, Debates, pp. 2293, 2294.

[4] James K. Polk, of Tennessee, Speaker.

[5] First session Fifty-seventh Congress, Record, pp. 2876, 2877.

he had, in his duty as a Representative, been threatened with coercion by the Speaker.

At the conclusion of Mr. Minor's remarks, the Speaker [1] said:

The Chair thinks proper to say, in view of the fact that he is referred to in the article read, that so far as the article is concerned and its statements, the averments of the gentleman from Wisconsin are absolutely true. There is not one word or shadow of truth in any statement made in that article.

1371. Instance wherein the Speaker left the chair to reply to a speech reflecting on his conduct.—On June 14, 1906,[2] the House was considering the conference report on the bill (H. R. 12707) to enable the people of Oklahoma and Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of New Mexico and Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States, when Mr. Marcus A. Smith, of Arizona, in the course of debate said:

The less said about the way this original bill has been pressed the better for the history of this Congress, and I refrain from going into that part of it. There is a law in Arizona that if one legislator trades with another on the legislation before that body he is guilty of a very high misdemeanor, and if the governor shall attempt in that benighted land to influence legislation by promises of veto or the withholding of veto to secure other legislation he goes to the penitentiary under the laws of that land.

At the close of Mr. Smith's remarks the Speaker [3] called Mr. John Dalzell, of Pennsylvania, to the chair, and going upon the floor and addressing the House, in the course of his remarks said:

That remark could not have had but one motive and one meaning, and that meaning is that some one in the House has sought to affect legislation in the House as a matter of traffic in order to secure action upon this matter in the Senate or in the House. That imputation implied, so far as it reflects upon the Speaker of this House and, so far as I know or believe, upon any other Member of this House, is unworthy of the gentleman that uttered it and without foundation in fact. If it were necessary to furnish proof of this statement, I look about me here on my own side of the House on Members with whom I disagreed touching the progress of this bill from time to time, and upon that side of the House, and I pause and invite any Member present who has the least intimation, knowledge, or even belief that the statement implied in the insinuation of the gentleman is true to so state.

1372. By leave of the House the Speaker was permitted to make a statement from the chair as to proceedings in the recent joint meeting to count the electoral vote.—On February 10, 1869,[4] after the completion of the electoral count and after the Senate had retired, Mr. Benjamin F. Butler, of Massachusetts, rising to a question of privilege, introduced a resolution relating to certain proceedings in the joint convention.

The resolution having been held to be in order for consideration, the Speaker [5] asked leave of the House to make a statement in relation to what occurred in joint convention.

There being no objection, the Speaker, from his place, made a statement.

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[1] David B. Henderson, of Iowa, Speaker.

[2] First session Fifty-ninth Congress, Record, pp. 8528, 8529.

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

[4] Third session Fortieth Congress, Globe, p. 1064.

[5] Schuyler Colfax, of Indiana, Speaker.

1373. The Speaker sometimes makes a brief explanation from the chair without asking the assent of the House.—On December 18, 1873,[1] Mr. Speaker Blaine, from the chair, explained in debate a proposed rule justifying himself in this action by the fact that he was a member of the Committee on Rules reporting the rule.

1374. On December 10, 1880,[2] Mr. Speaker Randall, from the chair, intervened in a case where a member was making a personal explanation to explain the position of the Chair in the matter.

1375. In very rare cases the Speaker takes the floor to make a motion.—On April 9, 1864,[3] Mr. Speaker Colfax came down from the chair to move a resolution to expel T. Alexander Long, of Ohio; and during the debate which followed there was some criticism of this action of the presiding officer. Mr. Colfax justified his course by citing the fact that during the Congress of 1812 and 1813 Mr. Speaker Clay came down from the chair fifteen times to make speeches on the floor.[4]

1376. On March 16, 1854,[5] Mr. Speaker Boyd, by unanimous consent, gave notice of his intention, at the proper time, to submit an amendment in the nature of a substitute for the bill of the House (H. R. 1) to encourage agriculture, commerce, manufactures, and a other branches of industry, by granting to every man who is the head of a family, and a citizen of the United States, a homestead of 160 acres of land out of the public domain, upon condition of occupancy and cultivation of the same for the period herein specified, and to graduate and reduce the price of the public lands; which was ordered to be printed.

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[1] First session Forty-second Congress, Record, p. 312.

[2] Third session Forty-sixth Congress, Record, p. 80.

[2] First session Thirty-eighth Congress, Globe, pp. 1505, 1626, 1627.

[4] Mr. Speaker Clay spoke frequently in Committee of the Whole, and it seems evident that Mr. Speaker Colfax confused this with participation in debate during sessions of the House itself.

[5] First session, Thirty-third Congress, Journal, p. 518; Globe, p. 646.

Chapter XLV.

THE SPEAKER PRO TEMPORE.

1377. A Speaker pro tempore is appointed by the Speaker or elected by the House.

Form and history of Rule I, sec. 7.

The rule relating to the Speaker's appointment of a Speaker pro tempore is section 7 of Rule I:

He shall have the right to name any Member to perform the duties of the Chair, but such substitution shall not extend beyond an adjournment.[3] *Provided, however,* That in case of his illness, he may make such appointment for a period not exceeding ten days, with the approval of the House at the time the same is made; and in his absence and omission to make such appointment, the House shall, proceed to elect a Speaker pro tempore to act during his absence.

On December 23, 1811,[4] a rule was proposed which included a provision that the Speaker "shall, when pressing occasion calls him from the chair, have the right to name any Member to substitute him and to perform the duties of the Chair temporarily, but such substitution shall not extend beyond an adjournment." As finally adopted in the Twelfth Congress the rule was in these words:

He shall have the right to name any Member to perform the duties of the Chair, but such substitution shall not extend beyond an adjournment.

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[1] The Clerk presides during the election of, section 64 of Volume I.

[2] See also section 229 of Volume 1.

[3] January 14, 1828, Mr. John Randolph, of Virginia, commenting on changes in the usages of the House, said that the old Speakers and old Chairmen of the Committees of the Whole never asked the privilege of calling others to the chair. He recalled seeing Chairman John Cotton Smith continue in the chair seventeen hours. (First session Twentieth Congress, Debates, p. 1004.) The Speakers in later years have usually called only Members of the majority party to preside temporarily, although there are a few exceptions.

On April 16, 1878 (second session Forty-fifth Congress, Record, p. 2576), Speaker Randall called Mr. Eugene Hale, of Maine, a Member of the minority, to the chair during consideration of a bill relating to the government of the District of Columbia. Again on May 6, 1878 (second session Forty-fifth Congress, Record, p. 3211), Mr. Hale was called to the chair.

[4] First session Twelfth Congress, Report No. 38.

On April 28, 1876, Mr. Samuel J. Randall, of Pennsylvania, "at the personal request of the Chair," as he explained, submitted a resolution to amend the rule so that "in case of the personal illness of the Speaker he may make such appointment for a period not exceeding ten days, with the approval of the House at the time the same is made." [1]

In the general revision of 1880 the rule was reported from the Committee on Rules in its present form and adopted.[2]

1378. Form of Speaker's designation of a Speaker pro tempore.—On February 7, 1907,[3] the House was called to order at 12 m. by Mr. Dalzell, who directed the Clerk to read the following communication:

SPEAKER'S ROOM, HOUSE OF REPRESENTATIVES,

Febuary 7, 1907.

I hereby designate Hon. John Dalzell, of Pennsylvania, to act as Speaker pro tempore to-day.

J. G. CANNON.

1379. The Speaker does not always name in open House the Member whom he calls to the chair temporarily during the day's sitting.—On April 22, 1834,[4] during a session of the Committee of the Whole House on the state of the Union, a quorum failed, and the Committee, by direction of the Chairman, rose.

The Speaker being absent, Mr. Jesse Speight, of North Carolina, took the chair as Speaker pro tempore.

A point of order having been raised by Mr. John Quincy Adams, of Massachusetts, the question of Mr. Speight's occupancy of the chair was brought up for discussion on the succeeding day, on a motion to correct the Journal. Mr. Adams held that the proceeding had been irregular, the Speaker pro tempore having really been named by the Chairman of the Committee of the Whole instead of by the Speaker, as the rule required.

The Speaker,[5] after debate had proceeded, said he owed it to himself to explain the circumstances under which he had been in the habit of appointing the Speaker pro tempore to preside in his absence. He did not consider, by the rule, that he was bound to nominate by name to the House the individual whom he selected. It was not a fact that the Chairman of the Committee had nominated Mr. Speight in his absence. It was a fact that he was nominated by himself, and, having been suffering under some indisposition, he had, previous to his leaving the House, who were then in Committee, informed the Clerk of the Member whom he had named. After referring to the practice and usage of the British Parliament on the matters involved, he concluded by saying it was competent for the House to express their decision on them.

The House laid on the table Mr. Adams's motion to amend the Journal.

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[1] Cong. Record, first session Forty-fourth Congress, p. 2826. The Speaker was Michael C. Kerr, of Indiana, who, after a long illness, died before the expiration of his term.

[2] Cong. Record, second session Forty-sixth Congress, p. 204.

[3] Second session Fifty-ninth Congress, Record, p. 2426.

[4] First session Twenty-third Congress, Debates, pp. 3758, 3760, 3762.

[5] Andrew Stevenson, of Virginia, Speaker.

1380. A Speaker pro tempore is sometimes elected for a temporary absence of the Speaker within the legislative day.—On May 15, 1906,[1] when the House met at 12 o'clock, the Speaker was not present, and the House was called to order by the Clerk.

Mr. Sereno E. Payne, of New York, moved that Mr. John Dalzell, of Pennsylvania, be elected Speaker pro tempore. The motion was agreed to, and Mr. Dalzell took the chair.

During the reading of the Journal the Speaker entered the Hall and took the chair.

Mr. John S. Williams, of Mississippi, suggested a question as to the length of time for which the House had elected a Speaker pro tempore; but the point was not pressed.[2]

1381. For an absence extending beyond the legislative day and not caused by illness, the Speaker may designate a Speaker pro tempore only with consent of the House.—On Friday, April 23, 1897,[3] the Speaker,[4] desiring to be absent to attend the ceremonies at the tomb of General Grant, designated Mr. Charles W. Stone, of Pennsylvania, to be Speaker pro tempore for the succeeding week, having previously asked and obtained unanimous consent of the House authorizing him to make the designation. The House had previously constituted a committee, of which the Speaker was made chairman, to attend the ceremonies. The House, by unanimous consent, had previously arranged to adjourn to Monday, and on that day to adjourn again to Thursday, and on Thursday to adjourn again to the succeeding Monday.

1382. In rare instances in the later practice members of the minority party have been called to preside in the Committee of the Whole or as Speakers pro tempore.—Mr. Speaker Blaine, in 1875,[5] called members of the minority party to the chair. Thus, on January 6, Mr. Charles A. Eldridge, of Wisconsin, presided in Committee of the Whole during consideration of the fortifications appropriation bill; on February 9, Mr. Samuel S. Cox, of New York, presided in Committee of the Whole during the consideration of the Private Calendar; and on March 3, 1875, Mr. Samuel J. Randall, of Pennsylvania, was called to the chair as Speaker pro tempore.[6]

On February 22, 1901,[7] during the consideration of pension bills in the House, the Speaker called to the chair for a time Mr. Jasper A. Talbert, of South Carolina, a member of the minority side of the House.

1383. Instance wherein a member of the minority party was designated as Speaker pro tempore for an occasion of ceremony.—On February 25, 1907,[8] the Speaker[9] designated Mr. William A. Jones, of Virginia, a member of

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[1] First session Fifty-ninth Congress, Record, p. 6903.

[2] Section 7 of Rule I provides that in the absence of the Speaker when he has not made a designation "the House shall proceed to elect a Speaker pro tempore to act during his absence."

[3] Cong. Record, first session Fifty-fifth Congress, pp. 826, 840.

[4] Thomas B. Reed, of Maine.

[5] Second session Forty-third Congress, Journal, pp. 131, 498, 499; Record, pp. 284, 1501, 2216.

[6] It is quite common to call a member of the minority to the chair during the pronouncing of eulogies of a deceased member belonging to the minority.

[7] Second session Fifty-sixth Congress, Record, p. 2864.

[8] Second session Fifty-ninth Congress, Record, p. 3917.

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

the minority, as Speaker pro tempore during eulogies on the late John F. Rixey, of Virginia, who had been a member of the minority party in the House.

1384. A Speaker pro tempore sometimes designates another Speaker pro tempore.—On February 12, 1885,[1] Mr. J. C. S. Blackburn, of Kentucky, who had been elected Speaker pro tempore by the House, designated, by written communication, Mr. Richard P. Bland, of Missouri, to act as Speaker pro tempore during an evening session.

1385. In the Senate a temporary President pro tempore sometimes designates another.—On May 28, 1902,[2] in the Senate, the following designation was presented:

UNITED STATES SENATE,
Washington, D.C., May 28, 1902.

To the Senate:

The undersigned, performing the duties of the Chair during the absence of the President pro tempore, names Hon. Jacob H. Gallinger, Senator from New Hampshire, to perform said duties during Wednesday, the 28th day of May, 1902.

O. H. PLATT.

1386. In the absence of the Speaker, the House, unless it adjourn, elects a Speaker pro tempore for the day or part of the day.

A Speaker pro tempore elected only for the temporary absence of the Speaker is not sworn.

It is proper to inform the Senate of the election of a Speaker pro tempore.

In the absence of the Speaker the Clerk calls the House to order.

On February 7, 1846,[3] at five minutes after 10 o'clock, the Speaker not being present, at the request of several Members, the Clerk called the House to order.

Mr. Charles J. Ingersoll, of Pennsylvania, moved that Mr. James J. McKay, of North Carolina, be appointed Speaker pro tempore until the Speaker should arrive.

And the question being put by the Clerk, it was decided in the affirmative.

Mr. McKay accordingly took the chair.

A call of the House was then ordered, during which the Speaker appeared, and took the chair.

The Journal does not record that the Speaker pro tempore was sworn, or that any notice was sent to the Senate.

1387. On several occasions in 1888[4] the House elected Speakers pro tempore in the absence of the Speaker. In each instance the resolution specified that the election was during the "temporary absence of the Speaker," and in each instance a resolution directing the Clerk to inform the Senate was agreed to, but no similar instruction was given in regard to the President.

1388. On May 19 and 20, 1812,[5] the Speaker being indisposed and unable to attend, the House at once adjourned.

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[1] Second session Forty-eighth Congress, Journal, p. 535.

[2] First session Fifty-seventh Congress.

[3] First session Twenty-ninth Congress, Journal, p. 361.

[4] First session Fiftieth Congress, Journal, pp. 2705, 2786, 2868.

[5] First session Twelfth Congress, Journal, p. 346 (Gales & Seaton ed.).

1389. On June 19, 1848,[1] the regular hour of meeting having arrived, the Clerk called the House to order, and stated that in consequence of the indisposition of the Speaker, he could not attend the session of the House and that therefore it became necessary that the House should choose a presiding officer pro tempore.

Thereupon, on motion of Mr. George Ashmun, of Massachusetts—

Resolved, That Mr. Burt, of South Carolina, should preside as Speaker of the House this day.

Mr. Burt accordingly took the chair.

It does not appear that any message was sent to the Senate informing them of the election of a Speaker pro tempore.

1390. A Speaker about to be absent sometimes obtains the consent of the House to name a Speaker pro tempore.

In the earlier practice a Member of the minority party was sometimes named as Speaker pro tempore.

On April 18, 1850,[2] the Speaker stated to the House that he would probably be absent for the next two days, and the House gave its unanimous consent, to the appointment of a Speaker pro tempore. Thereupon the Speaker appointed Mr. Robert C. Winthrop, of Massachusetts. The Speaker was Howell Cobb, of Georgia, a Democrat, and Mr. Winthrop, who was an ex-Speaker, was a Whig.

1391. On Monday, June 2, 1856,[3] the Speaker, by unanimous consent, named Hon. William Aiken, of South Carolina, to perform the duties of the Chair until Thursday next. The Speaker was a Republican, and Mr Aiken a Democrat.

1392. On March 17, 1864,[4] the Speaker, by unanimous consent, was authorized to name a Member, on Friday of each week, who should perform the duties of the Chair at the Saturday sittings of the House.

1393. On March 22, 1867,[5] Mr. Speaker Colfax asked leave of absence for the ensuing day, and also the privilege of designating a Speaker pro tempore. Both requests were granted.

1394. A Speaker pro tempore is not sworn.—On June 20, 1848,[6] the Clerk called the House to order and stated that the Speaker was still so much indisposed as to prevent him from resuming the duties of the Chair.

And thereupon, on motion of Mr. Daniel P. King, of Massachusetts, it was unanimously

Resolved, That Mr. Armistead Burt, of South Carolina, be appointed Speaker pro tempore to discharge the duties of the Chair during the present week, if the Speaker shall remain so long unable to give his attendance.

Mr. Burt, before taking the Chair, suggested that it might be necessary that he should be sworn before entering upon the temporary duties of the office, but it being shown that the Speaker took no other oath than that taken by other Members at the beginning of the session, the only difference between him and the others being that he was sworn first, the point was not pressed.

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[1] First session Thirtieth Congress, Journal, p. 915; Globe, p. 850.

[2] First session Thirty-first Congress, Journal, p. 808.

[3] First session Thirty-fourth Congress, Journal, p. 1078; Globe, p. 1367.

[4] First session Thirty-eighth Congress, Journal, p. 401; Globe, p. 1174.

[5] First session Fortieth Congress, Journal, p. 93; Globe, p. 289.

[6] First session Thirtieth Congress, Journal, p. 923; Globe, p. 855.

On motion of Mr. George Ashmun, of Massachusetts, by leave it was

Resolved, That the Clerk inform the Senate that in the absence of the Speaker, by reason of illness, the House has made choice of the Hon. Armistead Burt, one of the Representatives from the State of South Carolina, as Speaker protempore.

1395. A Speaker pro tempore by designation merely asks consent of the House before appointing committee.—On February 5, 1903,[1] Mr. Theodore F. Kluttz, of North Carolina, announced the death of his colleague, Mr. J. M. Moody, and proposed the usual resolutions providing a committee to take order concerning the funeral.

The resolutions having been agreed to, the Speaker pro tempore,[2] asking and obtaining the consent of the House, appointed the committee.

1396. A Speaker pro tempore by designation merely asks consent of the House before appointing conferees.—On June 12, 1906,[3] the House further insisted on its disagreement to the Senate amendments to the bill (H.R. 12987) relating to regulation of railway rates, and agreed to the further conference asked by the Senate.

Thereupon the Speaker pro tempore[4] (who had not been chosen by the House, but had been temporarily called to the Chair by the Speaker) asked and received the unanimous consent of the House empowering him to name the managers for the House.

1397. On February 18, 1903,[5] the House insisted on its disagreement to the Senate amendments to the army appropriation bill, and asked a further conference.

By unanimous consent the Speaker pro tempore[6] (by designation merely) appointed the conferees.

1398. On February 9, 1903,[7] the House voted to further insist and ask a conference on the disagreeing votes of the two Houses on the bill (S. 1425) to provide for a union railroad station in the District of Columbia.

Thereupon the Speaker pro tempore[8] (by designation merely), by the unanimous consent of the House, appointed the conferees.

1399. A Member called to the Chair during the day's sitting does not usually sign enrolled bills.—On March 29, 1867,[9] Mr. Speaker Colfax announced that he would not be able to be present during the day, and under the rule would designate Mr. George S. Boutell, of Massachusetts, to preside in his absence. He would, however, return to the House during the day to sign enrolled bills.

1400. On December 22, 1869,[10] Mr. Speaker Blaine "named Mr. Henry L. Dawes, of Massachusetts, to perform the duties of the Chair during the remainder of the present day's sitting of the House."

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[1] Second session Fifty-seventh Congress, Journal, p. 209; Record, p. 1772.

[2] John F. Lacey, of Iowa, Speaker pro tempore.

[3] First session Fifty-ninth Congress, Record, p. 8345.

[4] Thomas S. Butler, of Pennsylvania, Speaker pro tempore.

[5] Second session Fifty-seventh Congress, Journal, p. 261; Record, p. 2353.

[6] John Dalzell, of Pennsylvania, not an elected Speaker pro tempore.

[7] Second session Fifty-seventh Congress, Journal, p. 224; Record, p. 1971.

[8] Charles H. Grosvenor, of Ohio, Speaker pro tempore.

[9] First session Fortieth Congress, Globe, p. 441.

[10] Second session Forty-first Congress, Journal, pp. 103, 104.

Soon after several enrolled bills were reported from the Committee on Enrolled Bills, and the Speaker pro tempore signed the same. It does not appear that any question was raised as to this proceeding.

1401. There being doubt about the signing of enrolled bills by a Speaker pro tempore designated by the Speaker, the House proceeded to elect.

A Speaker pro tempore being elected, the Senate and President are informed.

Form of designation of Speaker pro tempore.

On July 7, 1898,[1] the House was called to order at 12 o'clock m. by Hon. Alexander McDowell, its Clerk, who read the following communication:

I hereby designate Hon. Sereno E. Payne, of New York, to preside over the House this day.

T. B. REED, *Speaker.*

JULY 7, 1898.

Mr. Payne took the chair as Speaker pro tempore.

Later in the day, there being doubt whether or not a Speaker pro tempore thus designated, and of whose incumbency neither the President nor the Senate had official knowledge, might sign the enrolled bills, the following proceedings occurred: Mr. William P. Hepburn, of Iowa, being temporarily called to the chair by Mr. Payne, Mr. John Dalzell, of Pennsylvania, offered the following resolutions, which were successively adopted:

Resolved, That Hon. Sereno E. Payne, a Representative from the State of New York, be, and hereby is, elected Speaker pro tempore during the temporary absence of the Speaker.

Resolved, That the Clerk of the House be directed to notify the Senate that the House has elected Hon. Sereno E. Payne, a Representative from the State of New York, as Speaker pro tempore during the temporary absence of the Speaker.

Resolved, That the Clerk be instructed to inform the President of the election of Hon. Sereno E. Payne, a Representative from the State of New York, as Speaker pro tempore of the House of Representatives during the temporary absence of the Speaker.[2]

1402. The Senate, by resolution, empowered its acting President pro tempore to sign enrolled bills.—On May 20, 1902,[3] the Senate agreed to the following resolution:

Resolved, That the Hon. O. H. Platt, a Senator from the State of Connecticut, designated by the President pro tempore to perform the duties of the Chair during his temporary absence, be empowered to sign as acting President pro tempore the enrolled bills and joint resolutions coming from the House of Representatives for presentation to the President of the United States, and that the President be notified hereof.

1403. The Senate, by rule, empowers a presiding officer by designation to sign enrolled bills.—On January 4, 1905,[4] in the Senate, Mr. Orville H. Platt, of Connecticut, presented this resolution:

Resolved, That the Hon. George C. Perkins, a Senator from the State of California, designated by the President pro tempore to perform the duties of the Chair during his temporary absence, be empow-

[1] Congressional Record, second session Fifty-fifth Congress, July 7, 1898.

[2] These resolutions are in form like those adopted May 26, 1890, in a similar case. (See Cong. Record, first session Fifty-first Congress, p. 664.)

[3] First session Fifty-seventh Congress, Record, p. 5664.

[4] Third session Fifty-eighth Congress, Record, pp. 440, 441.

ered to sign as acting President pro tempore the enrolled bills and joint resolutions coming from the House of Representatives for presentation to the President of the United States, and that the President be notified thereof.

In explanation, Mr. Platt said:

I think there is a question as to whether the designation by the President pro tempore of a Senator to act in his place and discharge the duties devolving upon the Chair carries with it the right to sign enrolled bills. The precedent of the Senate is that a resolution should be passed in such a case. In 1892, 1 think, the President pro tempore designated me to act as presiding officer during his absence of perhaps a fortnight. The question then arose as to whether, under such designation, I would have the same power to sign enrolled bills as the President pro tempore has under the rules. There being a doubt about it, a resolution similar to the resolution which I have now presented was prepared and passed at that time.

There is no constitutional power devolved upon the President pro tempore of the Senate to sign enrolled bills, and I do not know of any law which requires him to sign such bills. There may be, but I think there is not; so that he signs bills by virtue of a custom which has sprung up, and that custom has certainly come to be an unwritten law.

The rule authorizes the designation by the President pro tempore of a Senator to act as presiding officer during his absence, who shall perform all the duties of the Chair. It is quite possible that that is of itself sufficient to authorize the Senator acting as presiding officer under such circumstances to sign bills, but on a former occasion it was thought better that there should be an actual authority given by the Senate, and I think it is better that there should be.

After debate the resolution was amended and agreed to, as follows:

Resolved, That whenever a Senator shall be designated by the President pro tempore to perform the duties of the Chair during his temporary absence he shall be empowered to sign, as acting President pro tempore, the enrolled bills and joint resolutions coming from the House of Representatives or presentation to the President of the United States.

1404. A Speaker pro tempore whose designation has received the approval of the House signs enrolled bills and appoints committees.—On April 26, 1880,[1] Mr. Speaker Randall asked and received the consent of the House to name Mr. J. S. C. Blackburn, of Kentucky, as Speaker pro tempore for the next three days. Mr. Speaker Randall stated that it was necessary that messages be sent to inform the Senate and the President of this, and such messages were ordered to be sent. The Speaker pro tempore thus appointed, signed enrolled bills and appointed Members on committees of conference, and also on a select committee.

1405. A Speaker pro tempore being elected by the House, the Senate is notified.—On April 20, 1798,[2] the Speaker being indisposed[3] and unable to attend, it was, on motion,

Resolved, That this House do now proceed, by ballot,[4] to the choice of a Speaker pro tempore, to perform the duties assigned to the Chair, during the absence of the Speaker.

The House accordingly, after some discussion as to the propriety of the action, proceeded, by ballot, to the appointment of a Speaker pro tempore; and the ballots being taken, a majority of the votes of the whole House was found in favor of George Dent, one of the Representatives for the State of Maryland.

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[1] Second session Forty-sixth Congress, Journal, pp. 1115, 1116, 1123; Record, pp. 27,57, 2770.

[2] First session Fifth Congress, Journal, pp. 266, 316; Annals, pp. 1475, 1835.

[3] This was before the present rule relating to sickness of Speaker. (See section 1377 of this chapter.)

[4] Speakers are now elected viva voce (see section 187 of Volume I this work) and Speakers pro tempore by resolution.

After the Speaker pro tempore had been conducted to the chair,

Ordered, That a message be sent to the Senate to notify them of the said appointment; and that the Clerk of this House do go with the said message.[1]

Again, on May 28, 1798, a similar proceeding took place.[2]

1406. When the House elects a Speaker pro tempore for any considerable time, it is usual to notify the Senate and sometimes the President of the United States also.—On June 26, 1876,[3] when the House elected Mr. Milton Sayler, of Ohio, Speaker pro tempore, a resolution was adopted notifying the Senate and President.

1407. On May 18, 1878,[4] the House chose Milton Sayler, of Ohio, Speaker pro tempore, the Speaker having announced that he would be absent for a few days. The House also passed a resolution directing that the Senate be notified. No notification was sent to the President. The Speaker did not ask leave of absence.

1408. On July 5, 1884,[5] the House took a recess, and at the end of the recess, the Speaker being absent, the Clerk called the House to order, and Mr. Samuel J. Randall, of Pennsylvania, offered the following resolution, which was agreed to:

Resolved, That Hon. J. C. S. Blackburn, a Representative from the State of Kentucky, be, and he is hereby, elected Speaker pro tempore during the present absence of the Speaker.

Also a resolution was adopted instructing the Clerk to inform the President of the United States and the Senate of the election of the Speaker pro tempore.

The Speaker pro tempore received a vote of thanks for his services, this being the last day of the session, and adjourned the House sine die.

The Speaker had already received the thanks of the House.

1409. On January 31, 1885,[6] the Clerk having called the House to order in the absence of the Speaker, Mr. Samuel J. Randall, of Pennsylvania, offered a resolution, which was agreed to, electing Hon. J. C. S. Blackburn, of Kentucky, Speaker pro tempore. No other resolution instructing the Clerk to inform the Senate or the President appears from the records to have been adopted, but it appears that at the next sitting of the Senate the Clerk of the House did inform the Senate of the election.

1410. On September 3, 1890,[7] the House having elected a Speaker pro tempore, a resolution was adopted directing the Clerk to notify the Senate and President of this fact.

1411. On March 19, 1886,[8] Mr. Charles F. Crisp, of Georgia, in the absence of the Speaker, took the chair and called the House to order, and before the prayer by the Chaplain or the reading of the Journal, presented to the House a letter from the Speaker (Mr. Carlisle) designating him "to preside as Speaker pro tempore dur-

[1] The present usage is to send a message to the President also.

[2] Second session Fifth Congress, Journal, p. 316, Annals, p. 1835.

[3] First session Forty-fourth Congress, Journal, p. 1154; Record, p. 4156.

[4] Second session Forty-fifth Congress, Journal, p. 1108; Record, pp. 3555, 3556.

[5] First session Forty-eighth Congress, Journal, pp. 1740, 1743, 1749; Record, p. 6155.

[6] Second session Forty-eighth Congress, Journal, p. 407; Record, pp. 1120, 1145.

[7] First session Fifty-first Congress, Journal, p. 1012.

[8] First session Forty-ninth Congress, Journal, p. 982; Record, p. 2534.

ing this day." No action was taken to inform the Senate. This letter of the Speaker was directed to the Clerk of the House.'

1412. On January 5, 1892,[2] the House elected Mr. Benton McMillin, of Tennessee, Speaker pro tempore. A message was sent to the Senate informing that body of the election, but not to the President.

1413. The President pro tempore of the Senate has general power to designate in writing a Senator to perform the duties of the Chair during his absence.—On December 15, 1904,[3] in the Senate, Mr. John C. Spooner, of Wisconsin, chairman of the Committee on Rules., said:

> Subdivision 4 of Rule I of the Senate provides that—
>
> "In event of the death of the Vice-President the President pro tempore shall have the right to name, in writing, a Senator to perform the duties of the Chair during his absence," etc.
>
> That limits the power given to the President pro tempore of the Senate to a vacancy caused by the death of the Vice President. He should have that power however the vacancy is occasioned; and there is a vacancy now.[4] * * * I ask the unanimous consent of the Senate to amend this subdivision of Rule I by striking out in the first line the words "the death of" and inserting in lieu thereof the words "a vacancy in the office of;" so that it will read:
>
> "In the event of a vacancy in the office of the Vice-President the President pro tempore shall have the right to name," etc.

There being no objection, the amendment was agreed to.

1414. In the Senate the process of designating a President pro tempore for the day's sitting has been the subject of much discussion.—On June 9, 1856,[5] and on earlier occasions, the Senate has questioned the right of the Vice President to send to the Senate a written designation of a President pro tempore under the Senate rule, which is substantially the same as the House rule. It was the contention of Senator Thomas H. Benton and others that the designation should be by the Vice-President in the Senate chamber, and that the sending of written designations was liable to abuse. On this occasion the Vice-President sent several to be presented on successive days, but the Senators determined to elect.

1415. On June 2, 1882,[6] in the Senate, the Secretary presented a letter from David Davis, of Illinois, President pro tempore, designating Hon. J. J. Ingalls, of Kansas, to perform the duties of the Chair until adjournment. The rule of the Senate under which this action was proposed was, "the Presiding Officer shall have the right to name a Senator to perform the duties of the Chair, but such substitution shall not extend beyond an adjournment." The question was raised that this language meant a designation in open Senate, and not by letter. The subject was debated all that day, precedents being cited. On the next legislative day the subject was referred to the Committee on Rules.

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[1] Usually designations of a Speaker pro tempore are not only directed to the Clerk, but are read by him to the House, when he calls the House to order. Thus in 1902. (First session Fifty-seventh Congress, Journal, pp. 693, 753, 826.)

[2] First session Fifty-second Congress, Journal, p. 19.

[3] Third session Fifty-eighth Congress, Record, p. 298.

[4] Vacancy caused by the Vice-President, Mr. Roosevelt, becoming President.

[5] First session Thirty-fourth Congress, Globe, p. 1368.

[6] First session Forty-seventh Congress, Record, pp. 4448–4454, 4506.

1416. On December 13, 1883,[1] a proposed rule in regard to the calling of a Senator to the Chair by the presiding officer led to a long debate on the subject in the Senate.

1417. Nature of the office of President pro tempore of the Senate and its relation to the Vice-President.

The President pro tempore of the Senate holds the office at the pleasure of that body.

On January 10, 1876,[2] the Senate agreed unanimously to the following resolutions reported from the Committee on Privileges and Elections:

Resolved, That the tenure of office of the President pro tempore of the Senate elected at one session does not expire at the meeting of Congress after the first recess, the Vice-President not having appeared to take the Chair.

Resolved, That the death of the Vice-President does not have the effect to vacate the office of President pro tempore of the Senate.

Over the following resolution, reported from the same committee, there was long debate:

Resolved, That the office of President pro tempore of the Senate is held at the pleasure of the Senate.

It was urged, in the course of the argument, that the model in view, when both the office of Speaker and President pro tempore were created, was the House of Commons. Hence the makers of the Constitution did not consider it necessary to say that the Speaker should be elected from among the members of the House. The Speaker held his office at the pleasure of the House,[3] and the same rule should apply to the President pro tempore.[4] The resolution was discussed on January 10, 12, and was agreed to on the latter date, yeas 34, nays 15.[5]

1418. A member of the Senate elected President pro tempore was excused from serving by vote of the Senate.—On March 1, 1831,[6] Mr. Tazewell, of Virginia, having been elected President pro tempore of the Senate, asked to be excused from serving.

Opposition being made to excusing Mr. Tazewell, a motion that he be excused was made and carried, yeas 20, nays 14.

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[1] First session Forty-eighth Congress, Record, pp. 140–144, 160–163, 237.

[2] First session Forty-fourth Congress, Record, pp. 311, 360, 373.

[3] Senate Report No. 3, page 8, first session Forty-fourth Congress. This report was submitted by Mr. Oliver P. Morton, of Indiana.

[4] For fuller discussion see also the report of the Committee on Privileges and Elections.

[5] On March 27, 1889, the subject of the tenure of the President pro tempore of the Senate was the subject of elaborate debate in that body. (First session Fifty-first Congress, Record, p. 43.) And after report from a committee it was determined, on March 12, 1890, that it was competent for the Senate to elect a President pro tempore who should hold office during the pleasure of the Senate, and until another was elected. (Record, pp. 1717, 2144–2153.)

On October 13, 1881 (special session Senate, Forty-seventh Congress, Record, pp. 519–521), the Senate removed one President pro tempore by electing another.

[6] Second session Twenty-first Congress, Debates, p. 328.

Chapter XLVI.

THE SPEAKER'S POWER OF RECOGNITION.

1. The rule and practice. Sections 1419–1424.
2. No appeal from. Sections 1425–1434
3. Member once recognized not to be deprived of floor. Sections 1435–1437.
5. Recognition governed by Member's relation to the pending question. Sections 1438–1464.[1]
6. Conditions under which right to prior recognition passes to opponents of a measure. Sections 1465–1479.[2]

1419. The rule as to recognition by the Speaker.—Sections 1 and 2 of Rule XIV [3] provide:

1. When any Member desires to speak or deliver any matter to the House, he shall rise and respectfully address himself to "Mr. Speaker," and, on being recognized, may address the House * * *.

2. When two or more Members rise at once, the Speaker shall name the Member who is first to speak; * * *.

1420. The old parliamentary rule of recognition.—In Section XVII of Jefferson's Manual the rule of recognition is laid down as follows:

If two or more rise to speak nearly together, the Speaker determines who was first up and calls him by name; whereupon he proceeds, unless he voluntarily sits down and gives way to the other. But sometimes the House does not acquiesce in the Speaker's decision, in which case the question is put, "Which Member was first up?" * * * In the Senate of the United States the President's decision is without appeal.

In the House of Representatives, also, according to the later practice, there has been no appeal from the decision of the Chair on a question of recognition.[4]

1421. On April 4, 1834,[5] Mr. John Quincy Adams, of Massachusetts, complained that the Speaker[6] had deprived him of the floor by recognizing Mr. John Y. Mason, of Virginia, to move the previous question. Mr. Mason, in reply, contended that he was fairly entitled to recognition "by the rules of the House"—meaning undoubtedly the usages of the House.

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[1] Member making the objection in the electoral count preferred in debate when the Houses separate to decide. Sec. 1956 of Vol. III.

[2] When a conference report is defeated, recognition passes to opponents. Sec. 6396 of Vol. V.

[3] For history of these rules see secs. 4979, 4978 of Vol. V of this work.

[4] See secs. 4979, 4978 of Vol. V for form of rule when this report was made and now.

[5] First session Twenty-third Congress, Debates, p. 3478.

[6] Andrew Stevenson, of Virginia, Speaker.

1422. The Speaker has authority to name the Member who is entitled to the floor.—On March 3, 1853,[7] Mr. Abraham M. Schermerhorn, of New York, having been recognized by the Chair, Mr. Bernhart Henn, of Iowa, made the point of order that he was not entitled to the floor, not having risen from his seat[2] at the time he addressed the Chair.

The Speaker pro tempore[3] overruled the point of order on the ground that the rules confer authority upon the Speaker to name the Member who is entitled to the floor.

On an appeal the Chair was sustained.

1423. On February 2, 1874,[1] Mr. Speaker Blaine said, in the course of an explanation:

> The rules provide that the Member first addressing the Chair shall be recognized; but where fifteen or twenty address him at the same moment, some other mode of assigning the floor must of necessity be resorted to; and there is none so fair as to award precedence according to the relative importance of the motions.

1424. Discretion as to recognition must be lodged with the presiding officer.—On April 8, 1879,[2] the Speaker's power of recognition was the subject of extended debate in the House and was referred for examination. In response thereto, on April 9, 1879,[6] Mr. James A. Garfield, of Ohio, from the Committee on Rules, made a report, which was acquiesced in by the House, on the subject of the rule of recognition:

> With the exception of the last clause of rule 113,[7] which was adopted in 1805, these rules have remained unchanged for ninety years. In the nature of the case discretion must be lodged with the presiding officer, and no fixed and arbitrary order of recognition can be wisely provided for in advance; and the committee are of opinion that these rules should not be changed.
>
> The practice of making a list of those who desire to speak on measures before the House or Committee of the Whole is a proper one to enable the presiding officer to know and remember the wishes of Members. As to the order of recognition, he should not be bound to follow the list, but should be free to exercise a wise and just discretion in the interest of full and fair debate.[8]

1425. There is no appeal from a decision by the Speaker on a question of recognition.—On February 28, 1881,[1] the question being on a motion of Mr. John Randolph Tacker, of Virginia, relating to disposal of business on the Speaker's table, Mr. George M. Robeson, of New Jersey, moved that the rules be suspended, so as to take from the House Calendar the joint resolution of the House (H. Res. 324) relating to the termination of articles 18 and 21 of the treaty of 1871 with Great Britain relating to the fisheries, and pass the same.

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[1] Second session Thirty-second Congress, Journal, p. 405; Globe, p. 1154.

[2] The point that the Member was out of his seat was made in view of rule 31, which provided then: "When any Member is about to speak in debate, or deliver any matter to the House, he shall rise from his seat and respectfully address himself to 'Mr. Speaker.'" For present form of the rule see sec. 1419 of this work.

[3] Charles E. Stuart, of Michigan, Speaker pro tempore.

[4] First session Forty-third Congress, Record, p 1126.

[5] First session Forty-sixth Congress, Record, pp 299–304.

[6] First session Forty-sixth Congress, Record, p. 340.

[7] This was rule 113 of the system of rules as it existed before the revision of 1880. It is now section 8 of Rule XXIII and does not relate to the subject of recognition.

[8] See sec. 4737 of Vol. IV of this work for form of rule when this report was made and now.

[9] Third session Forty-sixth Congress, Journal, p. 556; Record, p. 2236.

The Speaker [1] held the motion not to be before the House, Mr. Robeson not having been recognized for that purpose.

Mr. Robeson appealed from the decision of the Chair.

The Speaker [2] declined to entertain the appeal, saying:

There is really no power in the House itself to appeal from a recognition of the Chair. The right of recognition is just as absolute in the Chair as the judgment of the Supreme Court of the United States is absolute as to the interpretation of the law.

1426. On June 5, 1882,[3] a question arose as to recognition, the Speaker deciding that Mr. Joseph G. Cannon, of Illinois, was not entitled to the floor.

Mr. Cannon proposed to appeal from this decision.

The Speaker [4] said:

The question of recognition does not admit of an appeal. * * * No appeal of that kind has ever been entertained by any Speaker.

1427. On January 30, 1890,[5] the House was considering the appeal of Mr. Charles F. Crisp, of Georgia, from the decision of the Chair on the preceding day that a quorum was present within the meaning of the Constitution on the vote for the consideration of the contested election case of Smith *v.* Jackson.

After the Journal had been approved, the Speaker recognized Mr. William McKinley, jr., of Ohio, who was proceeding to debate the pending appeal, when Mr. William M. Springer, of Illinois, made the point of order that a quorum had not voted to approve the Journal on the vote just taken, as was required under common parliamentary law,[6] and also that he had a right now to move to expunge from the Journal of yesterday's proceedings all that part of it which related to the statement of the Speaker that certain Members were present and not voting.

The Speaker [7] said:

Whether the gentleman from Illinois would have a right to make a motion to expunge at any time is another question from that he now presents. This question is a question of recognition; and the Chair has recognized the gentleman from Ohio, who has a right to proceed.

From this decision Mr. Springer proposed to appeal, whereupon the Speaker ruled:

The Chair does not think there can be any appeal from a decision upon a question of recognition. That is very well known.[8]

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[1] Samuel J. Randall, of Pennsylvania, Speaker.

[2] For a long time the Speakers have exercised the right to decline to recognize for a motion to suspend the rules, but they do not have any such rights as to motions privileged under the rules and in order.

[3] First session Forty-seventh Congress, Record, pp. 4554, 4555.

[4] J. Warren Keifer, of Ohio, Speaker.

[5] First session Fifty-first Congress, Journal, p. 177; Record, p. 981.

[6] Rules had not been adopted and the House was proceeding under general parliamentary law.

[7] Thomas B. Reed, of Maine, Speaker.

[8] This had long been understood in the House. (See Cong. Record, first session Forty-ninth Congress, p. 7054.) Also ruling by Mr. Springer himself. (First session Forty-ninth Congress, Journal, p. 1778; Record, p. 5208.)

1428. On April 18, 1904,[1] the House had ordered the general deficiency appropriation bill to be engrossed and read a third time. After the third reading, Mr. John A. Moon, of Tennessee, arose.

The Speaker I said:

For what purpose does the gentleman rise?

Mr. Moon stated that he proposed to move to recommit the bill with certain instructions.

The Speaker said: "The gentleman is not recognized for that purpose," and immediately recognized Mr. Sereno E. Payne, of New York, who had arisen.

Mr. Payne thereupon moved to recommit the bill, and on that motion demanded the previous question.

Thereupon Mr. John S. Williams, of Mississippi, raised the question that Mr. Moon was entitled to be recognized, and appealed from the decision of the Chair in recognizing Mr. Payne.

The Speaker said:

The question of recognition is not subject to appeal. If gentlemen will suspend for a moment, the Chair will make it perfectly plain. The gentleman from New York had requested of the Chair to recognize him to make a motion to recommit, and was on his feet for that purpose. The gentleman came to the Chair, as is usual in such cases, and asked for recognition, as other gentlemen have heretofore done on the minority side touching matters of this kind, and as the gentleman from Tennessee [Mr. Moon] himself came. The Chair informed the gentleman from New York that he would be recognized.

Therefore, with the gentleman from New York on his feet, addressing the Chair, and the gentleman from Tennessee also strenuously addressing the Chair, the Chair took occasion not to recognize the gentleman, but asked the gentleman for what purpose he rose. The gentleman proceeded to inform the Chair, and the Chair declined to recognize the gentleman for that purpose and recognized the gentleman from New York, who was upon his feet. * * * The gentleman from New York was not recognized by agreement. He notified the occupant of the chair that he desired to be recognized, was on his feet addressing the Chair at the same time that the gentleman from Tennessee was on his feet. The gentleman from Tennessee addressing the Chair was asked by the Chair for what purpose he rose.

The Chair did not know, and he stated for the purpose of moving to recommit, and the Chair at once said that the gentleman was not recognized, as the Chair had the right and the power to do from a parliamentary standpoint and a fair standpoint. This whole matter is easy of solution. The gentleman from New York moved the previous question; that motion is amendable by any germane amendment, provided a majority of the House does not cut it off by ordering the previous question. The gentleman from New York is recognized. * * * The Chair does not propose to try the question of fact. The Chair saw the gentleman and heard the gentleman; and even if the gentleman had not addressed the Chair, the Chair had the right to decline to recognize the gentleman from Tennessee and to recognize the gentleman from New York. * * * The Chair will state that the gentleman from New York has moved to recommit this bill to the Committee on Appropriations and upon that motion has demanded the previous question. If the previous question is ordered, no amendment to that motion will be in order. If the previous question is refused, then any germane amendment will be in order.

1429. Under the earlier practice of the House there was an appeal from a decision of the Speaker on a question of recognition.—On February 6, 1827,[3] during the discussion of the bill "for the alteration of acts imposing duties on imports," Mr. John Woods, of Ohio, Mr. James Hamilton, of South Carolina, and several other Members rose in their places to address the Chair.

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[1] Second session Fifty-eighth Congress, Record, p. 5050.

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

[3] Second session Nineteenth Congress, Journal, p. 493.

Mr. Hamilton claimed the floor.

The Speaker [1] decided that Mr. Woods was entitled to it.

Mr. Hamilton inquired if he had the right to appeal.

The Speaker replied that he had.

Mr. Hamilton then appealed from the decision of the Chair, which was affirmed by the House, ayes 98, noes 54.

1430. On January 29, 1840,[2] an appeal was taken from a recognition by Mr. Speaker Hunter and the decision of the Speaker sustained.

1431. On June 1, 1840,[3] a controversy occurred between Messrs. F. 0. J. Smith, of Maine, and George H. Proffit, of Indiana, as to who was entitled to the floor. The Speaker [4] awarded the floor to Mr. Proffit. Thereupon Mr. Smith appealed from this decision of the Chair, but later withdrew the appeal in order to save the time of the House. The Speaker not only entertained but invited the appeal.

1432. On March 3, 1857,[5] Mr. William R. Sapp, of Ohio, and Mr. Lemuel D. Evans, of Texas, having risen to address the Chair, the Speaker recognized Mr. Sapp.

Mr. Evans claimed that he was entitled to the floor.

The Speaker [6] decided that Mr. Sapp was entitled to the floor.

From this decision of the Chair Mx. Evans appealed. The appeal was laid on the table.

The record of the debate [7] shows that when Mr. Sapp was recognized Mr. Evans, rising to a question of order, submitted that the gentleman from Ohio had had the floor assigned to him three times while he, Mr. Evans, had been endeavoring to obtain the ear of the Speaker.

The Chair stated that the gentleman from Ohio was entitled to the floor before the House took a recess, and had now a right to claim the floor.

1433. On April 9, 1860,[8] Mr. Warren Winslow, of North Carolina, called up a report made on a previous day by the select committee on the subject of Executive influence and assigned to this day for consideration.

The House having proceeded to the consideration of the report, Messrs. Winslow and John Covode, of Pennsylvania, each claimed the floor.

The Speaker [9] decided that, as Mr. Covode had reported the measure under consideration from the committee, he was entitled under the rule to open the debate.

Mr. Winslow having appealed, the appeal was laid on the table, yeas 125, nays 59.

1434. On March 1, 1861,[10] a Member appealed from a decision of Mr. Speaker Pennington recognizing another Member as entitled to the floor. The Speaker entertained the appeal, but declared that it was not debatable.

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[1] John W. Taylor, of New York, Speaker.

[2] First session Twenty-sixth Congress, Journal, p. 246; Globe, p. 253.

[3] First session Twenty-sixth Congress, Journal, p. 1071; Globe, p. 433.

[4] Robert M. T. Hunter, of Virginia, Speaker.

[5] Journal, third session Thirty-fourth Congress, p. 679.

[6] Nathaniel P. Banks, of Massachusetts, Speaker.

[7] Cong. Globe, third session Thirty-fourth Congress, p. 996.

[8] First session Thirty-sixth Congress, Journal, pp. 695, 696; Globe, p. 1623.

[9] William Pennington, of New Jersey, Speaker.

[10] Second session Thirty-sixth Congress, Journal, p. 440; Globe, pp. 1326, 1327.

1435. A Member may lose his right to the floor if he neglect to claim it before another Member has been recognized.—On January 13, 1836,[1] the House proceeded to the consideration of a resolution offered on a previous day by Mr. Leonard Jarvis, of Maine, relating to the agitation for the abolition of slavery in the District of Columbia.

A motion was made and entertained to lay the resolution, with a pending amendment, on the table, and the yeas and nays were called and ordered on this motion.

Thereupon Mr. Hopkins Holsey, of Georgia, made the point of order that he was on the floor when the subject was last before the House, and that he was entitled to the floor, the motion to lay on the table not being admissible under the circumstances.

The Speaker[2] said that if the gentleman had claimed the floor when the subject was first announced, he would have been entitled to it. But as he had not done so before several gentlemen had arisen and a modification of the resolution had been made, it was now too late to press his right to the floor.

1436. On June 13, 1836,[3] the House was considering the bill providing for the admission of the State of Arkansas into the Union, when Mr. John Quincy Adams, of Massachusetts, proposed an amendment declaratory that nothing in the act should be construed as an assent by Congress to the articles in the constitution of the State relating to slavery.

The amendment being read, Mr. Sherrod Williams, of Kentucky, rose and addressed the Chair, and moved the previous question.

Mr. Adams objected to the right of Mr. Williams to the floor, on the ground that he had not yielded the floor after having submitted his motion to amend, but had remained standing while the Clerk was reading his amendment.

The Speaker[4] decided that as Mr. Adams did not claim the floor until after Mr. Williams had addressed the Chair and made his motion, and the question thereon had been stated, he (Mr. Adams) had lost his right to the floor and that Mr. Williams was entitled to the same.

Mr. Adams having taken an appeal;[5] the decision of the Chair was sustained, yeas 97, nays 87.

1437. After a Member has proceeded with his remarks it is too late to challenge his right to the floor.—On June 9, 1846,[6] Mr. Shelton F. Leake, of Virginia, rose, was recognized by the Speaker, and proceeded to address the House on the resolution declaring William T. Stewart the messenger of the Sergeant-at-Arms.

While he was proceeding in his remarks, Mr. Thomas J. Henley, of Indiana, rose and claimed the floor, on the ground that Mr. Leake, having once addressed

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[1] First session Twenty-fourth Congress, Debates, p. 2178.

[2] James K. Polk, of Tennessee, Speaker.

[3] First session Twenty-fourth Congress, Journal, pp. 997–999; Debates, p. 4291.

[4] James K. Pollk, of Tennessee, Speaker.

[5] Under the later practice of the House there is no appeal from the decision of the Chair on a question of recognition.

[6] First session Twenty-ninth Congress, Journal, pp. 933, 934.

the House on the question, had no right, under the rule which provided that "no Member shall speak more than once on the same question without leave of the House," to proceed with his remarks.

The Speaker[1] decided that Mr. Leake, having risen, been recognized, and having proceeded to address the House, no one claiming the floor, and no one having objected, must be considered as speaking by leave of the House. He therefore overruled the question of order raised by Mr. Henley.

Mr. Henley having appealed, the decision of the Chair was affirmed.

1438. The members of the committee reporting the bill have precedence in the discussion.—On March 31, 1870,[2] during discussion of a report from the Committee on Elections, a question arose as to right to recognition, whereupon the Speaker[3] said:

> The Chair understands the usage in this House to be that whenever a measure is reported from a committee the members of that committee shall have precedence in the discussion of that measure.

1439. In recognizing for general debate the Chair alternates between those favoring and those opposed, preferring members of the committee reporting the bill.—On January 30, 1907,[4] pending a motion that the House resolve itself into Committee of the Whole House on the state of the Union, for consideration of the river and harbor appropriation bill, a question arose as to the division of the time of general debate. In the course of this discussion the Speaker[5] said:

> Under the rules of the House, as the Chair understands it, when the House is in Committee of the Whole House on the state of the Union, the chairman of that committee recognizes gentlemen to speak to the bill, preferring the committee and alternating between those who are in favor of the bill and those who are against the bill. If no one rises against the bill, then it is the practice of the chairman to recognize the membership of the House outside of the committee, and the Chair will say that under a fair construction of this rule the time has been heretofore divided as nearly as could be equally between those who favor the bill and those who oppose it.

1440. On January 15, 1900,[6] a District of Columbia day by special order of the House, the bill (H. R. 5297) relating to the holding of real estate in the Territories by aliens was under consideration, and Mr. John J. Jenkins, of Wisconsin, a member of the Committee on the District of Columbia, had the floor. The debate had been entirely by members of that committee, favoring the measure.

Mr. William Alden Smith, of Michigan, who was not a member of the Committee on the District of Columbia, rising to a parliamentary inquiry, asked who controlled the time in opposition to the measure.

The Speaker[7] replied that after the gentleman from Wisconsin [Mr. Jenkins] had exhausted his hour, the Chair would recognize the gentleman from Michigan [Mr. W. A. Smith] in opposition, if no member of the Committee on the District of Columbia should rise in opposition.

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[1] John W. Davis, of Indiana, Speaker.

[2] Second session Forty-first Congress, Globe, p. 2324.

[3] James G. Blaine, of Maine, Speaker.

[4] Second session Fifty-ninth Congress, Record, p. 1989.

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

[6] First session Fifty-sixth Congress, Record, p. 829.

[7] David B. Henderson, of Iowa, Speaker.

1441. On March 1, 1900,[1] the bill (H. R. 6071) to amend the postal laws relating to second-class mail matter was called up during the call of committees in the morning hour.

Pending arrangement as to the consideration of the bill, Mr. Champ Clark, of Missouri, rising to a parliamentary inquiry, asked who would control the time in opposition to the bill if all the members of the committee reporting it were in favor of it.

The Speaker[2] said:

The Chair will state to the gentleman from Missouri that if there is no one on the committee to resist the bill, the first member claiming recognition to oppose the bill will be recognized for that purpose. It does not necessarily follow that he will control the time, because after he has had his hour and the other side an hour some other gentleman in opposition would be recognized.

1442. In general debate the Speaker recognizes with the purpose of securing alternation of the two sides; but this principle is not insisted on rigidly where a limited time is controlled by Members, as in the forty minutes' debate under section 3 of Rule XXVIII.—On April 11, 1900,[3] the House was considering a resolution reported from the Committee on Rules providing time and conditions for consideration of the bill (H. R. 8245) entitled "An act temporarily to provide revenues for the relief of the island of Porto Rico, and for other purposes," with Senate amendments.

The previous question having been ordered, the debate proceeded for forty minutes under the rule,[4] Mr. John Dalzell, of Pennsylvania, being recognized to control twenty minutes and Mr. James D. Richardson, of the minority, to control twenty minutes.

The debate having proceeded for a time, each side having participated, Mr. Dalzell demanded that Mr. Richardson, who had just surrendered the floor, use his remaining time.

Mr. Richardson raised the point that he should not be compelled to use his time at present, unless the other side proposed to have but a single speech in conclusion.

The Speaker[2] held that Mr. Richardson should proceed, this being a case where there was only twenty minutes of debate on a side and differing from the conditions of general debate.

Later, on the same day, the bill itself (H.R. 8245) being under general debate, there remained under the control of the minority seven minutes and under the control of the majority forty minutes.

Mr. Richardson, for the minority, claimed that if two or three gentlemen were to occupy time on the majority side they should proceed in order to secure alternation as much as possible.

The Speaker said:

The Chair is of the opinion that if two or three gentlemen are to occupy the forty minutes one of them ought to come in at this time.

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[1] First session Fifty-sixth Congress, Record, p. 2455.

[2] David B. Henderson, of Iowa, Speaker.

[3] First session Fifty-sixth Congress, Record, pp. 4031, 4061, 4062.

[4] Section 3 of Rule XXVIII.

1443. Recognitions are alternated between the majority and minority sides of the pending question.—On February 26, 1903,[1] during consideration of the contested election case of Wagoner *v.* Butler, from Missouri, Mr. David A. De Armond, of Missouri, had been recognized and had addressed the House on behalf of the minority contention.

Mr. Marlin E. Olmsted, of Pennsylvania, then took the floor for the majority.

Mr. James M. Robinson, of Indiana, thereupon demanded recognition as ranking minority member of the Committee on Elections.

The Speaker pro tempore[2] said that Mr. Olmsted was entitled to recognition:

The Chair is simply following out the ordinary practice in reference to recognition. The gentleman from Missouri [Mr. De Armond] having just concluded his remarks on one side, the Chair has recognized the gentleman from Pennsylvania [Mr. Olmsted] on the other.

1444. Recognitions are alternated according to differences on the pending question rather than on account of political differences.—On February 28, 1901,[3] the House had resolved itself into the Committee of the Whole House on the state of the Union for the consideration of the bill (H. R. 5499) relating to the Revenue-Cutter Service, and Mr. William P. Hepburn, of Iowa, of the majority side of the House, was recognized by the Chair.

Thereupon Mr. Oscar W. Underwood, of Alabama, made the point of order that the last recognition was on the majority side, and therefore that the minority side were entitled to recognition.

The Chairman[4] said:

With all due respect to the gentleman from Alabama, the Chair does not recognize that any question between the Democratic side and the Republican side enters into this matter. It was announced just before the close of this debate, when the question was last under consideration, that the opponents of the bill had occupied one hour and the friends of the bill thirty-five minutes; and the last recognition was given to the opponents of the bill. Therefore the Chair recognizes the gentleman from Iowa.

1445. A member of the committee having occupied the floor in favor of a measure, a Member opposing should be recognized, even though he be not a member of the committee.—On April 19, 1892,[5] during the consideration of a contested election case, after two members of the Committee on Elections had consecutively addressed the House in favor of the report of the committee, Mr. Henry Bacon, of New York, took the floor to oppose the report.

Mr. Charles T. O'Ferrall, of Virginia, made the point of order that Mr. Bacon was not entitled to recognition until other members of the Committee on Elections who desired to speak had been recognized.

The Speaker pro tempore[6] overruled the point of order, holding that there was no rule of the House giving the committee such preference, and that two Members having spoken in favor of the committee's report it was in accordance with the practice to recognize a Member to oppose it, although the latter was not a member of the committee making the report.

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[1] Second session Fifty-seventh Congress, Record, p. 2724.

[2] John Dalzell, of Pennsylvania, Speaker pro tempore.

[3] Second session Fifty-sixth Congress, Record, p. 3236.

[4] Charles H. Grosvenor, of Ohio, chairman.

[5] First session Fifty-second Congress, Journal, p. 152; Record, pp. 3429, 3430.

[6] Barnes Compton, of Maryland, Speaker pro tempore.

1446. The Member on whose motion a subject is brought before the House is first entitled to the floor in debate.—On January 15, 1849,[1] Mr. Alexander H. Stephens, of Georgia, moved that the rules be suspended for the purpose of enabling him to move that the Committee of the Whole House on the state of the Union be discharged from the further consideration of the annual message of the President of the United States. This motion was agreed to, two thirds voting in favor thereof. The motion to discharge the Committee of the Whole was accordingly made; and the House proceeded to the consideration of the message.

Mr. John A. McClernand, of Illinois, rose for the purpose of debate.

Mr. Stephens claimed the floor.

The Speaker[2] stated that, in accordance with parliamentary courtesy, the Chair must assign the floor to the gentleman from Georgia, Mr. Stephens. That gentleman had made the motion to discharge the Committee of the Whole House on the state of the Union from the further consideration of the President's message, with a view of bringing it before the House. And the Chair decided, therefore, that the gentleman from Georgia was entitled to the floor.

Mr. McClernand still objecting, the Speaker said:

> When a question arises as to who is entitled to the floor when various gentlemen claim it, the question, if any gentleman demands it, must be put to the House, not in the nature of an appeal from the decision of the Chair, but whether the gentleman is entitled to the floor.[3]

Mr. McClernand offering to debate, the Speaker said the question was not debatable. If it were so, the whole time of the House would be taken up deciding who was entitled to the floor.

The question being put, the House decided that Mr. Stephens was entitled to the floor.

1447. The Member reporting a bill from a committee is entitled to recognition to move as to disposition of the bill, although another Member may have risen first.—On January 17, 1843,[4] Mr. Daniel D. Barnard, of New York, from the Committee on the Judiciary, reported a bill repealing the national bankrupt act, which was read a first and second time. Mr. Barnard then, in obedience to instructions from the Committee on the Judiciary, moved that the bill be recommitted to that committee with certain instructions.

At this stage of the proceedings Mr. Hopkins L. Turney, of Tennessee, stated that, as soon as the bill had received its first and second readings and before Mr. Barnard had risen to make the preceding motion, he had risen and addressed the Chair, notwithstanding which the Speaker had given the floor to Mr. Barnard; and that, having first risen and addressed the Chair, he claimed the floor in preference to any other Member for the purpose of making a motion touching the said bill different from the motion submitted by Mr. Barnard, which, he contended, under the circumstances was not in order.

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[1] Second session Thirtieth Congress, Journal, p. 247; Globe, pp. 260, 261.

[2] Robert C. Winthrop, of Massachusetts, Speaker.

[3] Such decisions by the House are not allowed by the present practice.

[4] Third session Twenty-seventh Congress, Journal, p. 211.

The Speaker [1] (admitting the fact that Mr. Turney had risen first and addressed the Chair) stated that it was the invariable practice, in conducting business in the House, after a bill had received its first and second readings, to give the floor to the Member who reported it, that he might move such disposition of the bill as the committee might have directed, notwithstanding another Member might have previously risen and addressed the Chair, and under this practice the Speaker decided the motion of Mr. Barnard in order.

On an appeal taken by Mr. Turney the House sustained the decision of the Speaker.

The record of debate [2] shows that Mr. Turney based his demand for recognition on the fact that Mr. Barnard, although the reporter of the bill, had objected to its second reading,[3] and therefore had forfeited his right to prior recognition.

The Chair, however, held that the Member from New York, Mr. Barnard, was entitled to the preference according to the universal practice of the House. No Member had ever interposed between the reporter of a bill and any motion he might wish to make in regard to it.

1448. The right of the Member reporting the bill to priority in recognition extends also, to other members of the committee which made the report. This usage of the House was expressed by the Speaker [4] on May 13, 1879,[5] who said:

> The members of a committee reporting a bill have a right to the preference.[6]

1449. The chairman of a committee, having in committee opposed a bill, must in the House yield prior recognition to a Member of his committee who has favored the bill.—On July 16, 1886,[7] the House was considering a bill (H. R. 5603) to pension Catharine McCarty, which the President had returned with his objections. The Committee on Invalid Pensions had recommended the passage of the bill over the veto; but the chairman of the committee, Mr. Courtland C. Matson, of Indiana, had not agreed to this report and had concurred in the views of the minority.

Mr. Matson, after brief debate, during which he spoke in favor of sustaining the veto, demanded the previous question.

Mr. Julius C. Burrows, of Michigan, made the point of order that under the parliamentary practice of the House the Member representing the majority of a committee was entitled to be first recognized to demand the previous question on a pending proposition.

After somewhat extended debate, during which it was developed that the chairman of the committee had been recognized to call up a series of bills of which

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[1] John White, of Kentucky, Speaker.

[2] Cong. Globe, third session Twenty-seventh Congress, p. 167.

[3] Under the present rules the second reading of a bill is formal only.

[4] Samuel J. Randall, of Pennsylvania, Speaker.

[5] First session Forty sixth Congress, Record, p. 1312.

[6] Thus it happens that after the recognition of the first Member on the majority side of the committee the first Member on the minority side is recognized, and so on alternating down through the committee. The majority side consists of those favoring the bill, rather than members of the majority party in the House; and the minority side those opposing the majority or wishing to modify the bill as reported.

[7] First session Forty-ninth Congress, Journal, pp. 2225–2227; Record, pp. 7053–7037.

this was one, and also that there had in this case been a competitor for the floor from among those who concurred in the report of the committee, the Speaker pro tempore [1] ruled that Mr. Matson was entitled to the floor, but very soon after he reversed this ruling, saying:

The Chair had been recognizing the gentleman from Indiana, Mr. Matson, the chairman of the Committee on Invalid Pensions, to indicate what pension bills should be taken up and to conduct the proceedings of the House thereon. The gentleman from Indiana had called up the pending bill, and was proceeding with its management, when a point of order was made or a parliamentary question asked in regard to the right of the gentleman from Indiana to recognition. The Chair, at the time, did not comprehend exactly the import of that question. The Chair thought the point made was as to the propriety of recognizing the gentleman from Indiana every time to call up these bills, and did not understand the point to be that the gentleman from Indiana, representing in this case a minority of the committee, had no right to make a report to the House; that only the majority of the committee can make an official report, the minority being recognized merely by the courtesy of the House to submit their views. If the Chair had comprehended the real issue raised, the ruling would have been different, but the confusion in the House was so great that the point did not get into the head of the Chair at the proper time.

The Chair now rules that decision was wrong and retracts it. Hereafter when the majority makes a report the Chair will recognize a member of the majority to conduct the business of the House.

1450. The question as to the extent to which the chairman of the committee reporting a bill should be recognized to offer amendments to perfect it, in preference to other Members.—On January 15, 1894,[2] the House. was in Committee of the Whole House on the state of the Union considering the bill (H. R. 4864) to reduce taxation, to provide revenue for the Government, and for other purposes.

During the consideration of the bill for amendments, which took place under a special order, Mr. Julius C. Burrows, of Michigan, arose and, addressing the Chair, proposed to offer an amendment.

The chairman announced that the gentleman from West Virginia, Mr. William L. Wilson, was recognized.

It was then objected by Messrs. Thomas B. Reed, of Maine, and Julius C. Burrows, of Michigan, that the gentleman from West Virginia, Mr. Wilson, was not on his feet when Mr. Burrows asked recognition; and that the gentleman from West Virginia proposed his amendment as an individual Member and not as the organ of the committee. It was not contended that he might not, as the organ of the committee, have the right, under the practice of the House, to offer committee amendments first; but it was objected that as an individual Member, although chairman of the committee reporting the bill, his right to recognition would not go beyond the privilege of offering the first amendment.

The Chairman,[3] in ruling, said:

The question of recognition is one which the Chair understands to be largely, if not altogether, in the discretion of the Chair; and so long as the present occupant of the Chair has the honor to fill that position he will endeavor to be fair in his recognition of gentlemen for and against the pending amendments or the proposed amendments to the pending bill.

Now, the Chair has understood that it has always been the custom, under the rule of the House and in committee, to permit the gentleman in charge of a bill to first offer amendments, that the text may be

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[1] Roger Q. Mills, of Texas, Speaker pro tempore.

[2] Cong. Record, second session Fifty-third Congress, pp. 831, 887.

[3] James D. Richardson, of Tennessee, Chairman.

perfected. Of course if he offers them in behalf of the committee they are so much more strongly commended to the House. * * *

The Chair wishes to be fair, and will endeavor to recognize gentlemen on both sides of this question during the two weeks that this bill is open for amendments. The only question now presented is the amendment offered by the gentleman from West Virginia, and the Chair applies this ruling to only one amendment. The Chair does not intimate what his ruling will be on the next, but for the present there is but one amendment offered—the amendment offered by the gentleman from West Virginia—and the gentleman from Michigan, Mr. Burrows, desires to offer one. The Chair decides, and he thinks he has discretion to do so, that the gentleman from West Virginia is in order in offering his amendment.

In the course of this ruling the Chair made certain statements in reference to the course pursued during the debate on the tariff bill of 1890, in the Fifty-first Congress, which were the subject of question on the next day, January 16, when precisely the same point arose. In the course of his remarks the Chair said:

Now, what the Chair wants to say is this: It has always been conceded that the chairman of the Committee on Ways and Means, when a tariff bill is pending, has the floor until he offers the amendments which he sends up in behalf of the majority of the committee. That was not controverted during the pendency of the discussion on the McKinley bill. As long as Mr. McKinley offered amendments they were considered; if he let in other amendments in the mean time and then desired to recur to his own amendments the Committee of the Whole permitted him to do so until he was through with the amendments which he desired to offer.

Now, passing away from the question that has just been considered by the Chair and referred to in debate, the question of recognition is absolutely in the discretion of the Chair, as all gentlemen concede. The Chair wants to be fair in exercising this discretion. Shall the Chair stop, before this bill is perfected by the gentlemen who have it in charge, and permit a number of amendments to be offered and possibly adopted to different sections, and then have the Committee on Ways and Means afterwards calling up those different sections for further amendment? The Chair thinks that such a course ought not to be pursued. * * * The Chair thought yesterday, and still thinks, that the gentleman from West Virginia, representing the majority of the committee, has the right to offer these amendments, and the Chair recognizes him.

1451. The Member in charge of the bill is recognized anew after he has presented the bill and it has been read at the Clerk's desk.—On February 10, 1898,[1] Mr. George D. Perkins, of Iowa, asked unanimous consent for the consideration of the bill (H. R. 2196) directing the issue of a duplicate lost check.

Mr. Joseph W. Bailey, of Texas, claimed the floor, but the Speaker ruled that Mr. Perkins was entitled to the floor as the gentleman in charge of the bill.

Mr. Bailey made the point that, while it was entirely proper to recognize the gentleman from Iowa on his bill, yet the asking for unanimous consent did not of itself give him the floor. After unanimous consent was given there must be a new recognition.

The Speaker[2] said then that he would recognize the gentleman from Iowa as a new recognition.

1452. The chairman of the committee which reported a bill is entitled to prior recognition when the Senate amendments thereto are debated.—On July 7, 1852,[3] the Senate amendments to the deficiency appropriation bill were under consideration in Committee of the Whole House on the state of the Union, and the Chairman recognized Mr. George S. Houston, of Alabama, chairman of the Committee on Ways and Means.

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[1] Cong. Record, second session Fifty-fifth Congress, p. 1631.

[2] Thomas B. Reed, of Maine, Speaker.

[3] First session Thirty-third Congress, Globe, p. 1675.

Mr. William A. Sackett, of New York, made the point of order that the gentleman from Alabama had occupied his time when the bill was in the House before, and was not entitled to the floor now.

The Chairman[1] said:

The Chair decides that the Senate having attached to this bill certain amendments, which have been considered by the Committee on Ways and Means and reported back through their chairman, the chairman is entitled to an hour, under the rules, upon those amendments.

Mr. Sackett having appealed, the decision of the Chairman was sustained.

1453. The Chairman of the Committee of the Whole which last reports a bill does not thereby become entitled to prior recognition in debate.— On January 21, 1853,[2] the House was considering a bill relating to the claim of David Myerlie, when a question arose as to who should be recognized to close the debate.

The Speaker[3] said:

The gentleman from Tennessee assumes that the chairman of a committee of the Whole House last reported the bill, and that to him would attach the right to close the debate. The Chair thinks that that has not been the practice in this body. It has uniformly been the practice to allow the Member who originally reported the bill from the standing committee to open and close the debate upon it.

1454. The mover of a proposition is entitled to prior recognition to move to reconsider.—March 3, 1865,[4] Mr. Speaker Colfax stated it as a well understood principle that the mover of a resolution was first entitled to recognition to move to reconsider the vote by which it had been passed.

1455. The control of a bill on the floor having devolved on the ranking member of the committee favoring it, he resigned his right to the introducer of the bill, who was not a member of the committee.—On December 7, 1900,[5] the House was considering the bill (H. R. 3717) making oleomargarine and other imitation dairy products subject to the laws of the State and Territory into which they are transported, and to change the tax on oleomargarine, reported from the Committee on Agriculture. The chairman of that committee having joined the minority in submitting views, the control of the bill on the floor devolved upon Mr. E. Stevens Henry, of Connecticut, the ranking member on the committee of those who favored the bill.

Mr. Henry, having opened the debate, resigned control of the bill to Mr. William W. Grout, of Vermont, who was not a member of the Committee on Agriculture, but who had originally introduced the bill in the House.

The Speaker[6] said:

The gentleman from Vermont, by this arrangement, will be placed in charge of the bill instead of the gentleman from Connecticut, and may make such motion with reference to its consideration in the House as he desires.[7]

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[1] Charles E. Stuart, of Michigan, Chairman.

[2] Second session Thirty-second Congress, Globe, p. 374.

[3] Linn Boyd, of Kentucky, Speaker.

[4] Second session Thirty-eighth Congress, Globe, p. 1412.

[5] Second session Fifty-sixth Congress, Record, p. 140.

[6] David B. Henderson, of Iowa, Speaker.

[7] No objection was made to this arrangement, which probably was within the power of recognition vested in the Speaker.

1456. The opponents of a bill have no claim to prior recognition to make the motion to refer under Rule XVII.

Discretion as to recognition must be lodged with the presiding officer.

On April 27, 1904[1] (the legislative day of April 26), the House had ordered the third reading of the bill (S. 2163) entitled "An act to require the employment of vessels of the United States for public purposes," and the bill was read a third time.

Thereupon, as a parliamentary inquiry, Mr. Alfred Lucking, of Michigan, asked if he could be recognized to move to recommit the bill with instructions.

The Speaker responded in the negative, and thereupon recognized Mr. Charles H. Grosvenor, of Ohio, chairman of the committee which reported the bill, and he submitted a motion to recommit.

Mr. David H. Smith, of Kentucky, raised the question of order that Mr. Lucking was entitled to the recognition.

The Speaker[2] said:

The gentleman from Michigan addressed the Chair, but he was not recognized for the purpose he stated. He was informed by the Chair that he was not. Recognition is now due, under all the rules, to the gentleman in charge of the bill; and therefore the Chair has recognized the gentleman from Ohio (Mr. Grosvenor).

Mr. Lucking, as a parliamentary inquiry, asked if the provision of the rule providing for the motion to recommit was not intended to give the opposition an opportunity to test some questions.

The Speaker said:

The object of the rule was to give the House a chance to cure a mistake, if perchance any had been made in the engrossment of a bill, or a mishap to it. The debate from time to time, as the Chair recalls it, has been along that line. The Chair wishes to be perfectly fair to the gentleman. The present occupant of the Chair, the Speaker of the House, follows the usual rule that has obtained ever since he has been a Member of the House, that the Chair chooses whom he will recognize. That is the universal rule, according to the parliamentary usages. In a body of 386 men it would be impossible to proceed in a practical way and do otherwise, and the Chair will go further and say to the gentleman, to be exactly fair to him, that other things being even, or anything near even, if there be a question, under present conditions, in the closing hours, the Chair has a perfect right, following the parliamentary precedents of all parties, to prefer some one with whom, perchance, the Chair is in sympathy, or upon the Chair's side of the House.

1457. The chairman of the committee in charge of a bill is entitled at all stages to prior recognition for allowable motions intended to expedite the bill.—On March 22, 1904,[3] while the post-office appropriation bill was under consideration in the Committee of the Whole House on the state of the Union under the five-minute rule, Mr. Jesse Overstreet, of Indiana, moved that debate on the paragraph under consideration and the pending amendments be closed.

Mr. Allan Benny, of New Jersey, having raised a question as to recognition, the Chairman[4] said:

The Chair will answer the parliamentary inquiry of the gentleman from New Jersey. The Chair understands the parliamentary rule and usage, which make the rules, to be that the chairman of the

[1] Second session Fifty-eighth Congress, Record, p. 5801.

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

[3] Second session Fifty-eighth Congress, Record, pp. 3533, 3534.

[4] Henry S. Boutell, of Illinois, Chairman.

committee in charge of a bill on the floor of this House is entitled at all stages of the bill to the first recognition for such purpose as he sees fit to expedite the bill under the rule. On any pending amendment there is five minutes debate allowed on each side, and the chairman in charge of a bill may at any time after five minutes debate on each side move to close debate, and anything after that, the Chair understands, proceeds by unanimous consent.

1458. On March 1, 1903,[1] (legislative day of February 26), Mr. J. T. McCleary, of Minnesota, had presented the conference report on the District of Columbia appropriation bill, but had not taken the floor on the motion to agree to the report, when Mr. John J. Fitzgerald, of New York, proposed to move the previous question.

The Speaker[2] recognized Mr. McCleary to proceed in debate.

Mr. Fitzgerald having asked if his motion was not in order, the Speaker said:

The gentleman can not take a Member in charge of the bill from the floor by asking the previous question. That is the prerogative of the gentleman in charge of the bill. The gentleman from Minnesota will proceed.

1459. A Member having obtained the floor to make a preferential motion may not thereupon demand the previous question to the exclusion of the Member in charge of the bill.—On the calendar day of March 3, 1901[3], but the legislative day of March 1, the House was considering Senate amendments to the sundry civil appropriation bill, and a motion to recede and concur in the amendment making provisions for expositions at Buffalo, St. Louis, and Charleston had been decided in the negative.

Thereupon Mr. James S. Sherman, of New York, moved that the House recede and concur with a certain amendment, and on that motion demanded the previous question.

The Speaker[2] said:

The Chair will state that he regards the motion of the gentleman from New York [Mr. Sherman] as in order; but he declines to entertain from the gentleman from New York a demand for the previous question, as the gentleman from Illinois [Mr. Cannon], who has charge of this bill, can not be taken from the floor in that way.

1460. A Member may not, by offering a motion of higher privilege than the pending motion, deprive the member of the committee in charge of the bill of the floor.—On February 28, 1889,[4] the House was considering the Senate amendments to the District of Columbia appropriation bill. On the day before the gentleman in charge of the bill, Mr. Judson C. Clements, of Georgia, had moved that the House insist upon its disagreement to a certain amendment, and on that motion had demanded the previous question.

Thereupon Mr. Samuel Dibble, of South Carolina, made a motion to recede, and thereupon took the floor and claimed the right to debate for one hour.

The House having adjourned, when it met on the following day, Mr. Samuel J. Randall, of Pennsylvania, made the point of order that the recognition of the

[1] Second session Fifty-seventh Congress, Record, p. 2857.

[2] David B. Henderson, of Iowa, Speaker.

[3] Second session Fifty-sixth Congress, Record, p. 3577.

[4] Cong. Record, second session Fiftieth Congress, p. 2454.

gentleman from South Carolina would dispossess the gentleman from Georgia from the control of the bill although there had been no adverse vote of the House so far as that control was concerned.

The Speaker [1] said:

The Chair thinks that it was undoubtedly correct to recognize the gentleman from South Carolina [Mr. Dibble] for the purpose of making the motion to recede from the disagreement, notwithstanding the fact that the gentleman from Georgia had at the time pending a proposition insisting on the disagreement and had demanded the previous question. But the Chair, upon reflection, feels disposed to say that the gentleman from Georgia, under the practice heretofore prevailing in the House, was still entitled to the floor for the purpose of controlling the matter, having charge of the general subject, there having been no adverse action, and therefore the Chair thinks that the gentleman from South Carolina was not then entitled, under this usage, to recognition for the purpose of debate, but the Chair actually recognized the gentleman from South Carolina, and he yielded to the gentleman from Kentucky five minutes.

While the Chair thinks now this action was not strictly in accordance with the practice, the gentleman states that he will not occupy more time than would be allowed if the previous question was ordered, and the Chair will not undertake to reverse the action taken, but the Chair desires that the action taken yesterday shall not be a precedent.

1461. On May 5, 1896,[2] the House was considering the Senate amendments to the naval appropriation bill, and a motion to nonconcur in a certain amendment had been made by Mr. Charles A. Boutelle, of Maine, chairman of the Committee on Naval Affairs, and in charge of the bill.

Mr. Joseph D. Sayers, of Texas, made a motion to concur in the Senate amendment, and upon that motion claimed the floor.

The Speaker [3] ruled:

The Chair thinks that the original motion made in the matter now before the House was the motion of the gentleman from Maine, the chairman of the Committee on Naval Affairs, which was that the House should nonconcur in the Senate amendment. If a vote were to be taken upon that proposition and it were decided in the negative, the Chair would announce that the House had concurred with the Senate. Consequently the motion made by the gentleman from Texas, Mr. Sayers, is simply a preferential method of putting the question, favored because it is supposed to look toward an agreement between the two Houses. The Chair thinks that that rule, which is a rule of ordinary parliamentary law, has little if anything to do with the question as to who has control of the matter, and the custom of the House is so invariable, as well as so entirely suitable, so well founded in good sense, that the committee in charge of the bill shall continue in charge of it until an adverse vote on the part of the House, that the Chair can not see that the making of this preferential motion makes any change in that aspect of the case. The Chair therefore thinks that the gentleman from Maine, Mr. Boutelle, in charge of the bill, has charge of it until there shall be some adverse vote on the part of the House. The Chair recognizes the gentleman from Maine.

Again, on March 3, 1897,[4] the naval appropriation bill being again under consideration, and Mr. Boutelle being in charge of it, an amendment relating to the purchase of armor plate being under consideration, Mr. Albert J. Hopkins, of Illinois, made the point that his motion to recede and concur, being more highly privileged, entitled him to the floor in preference to Mr. Boutelle.

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[1] John G. Carlisle, of Kentucky, Speaker.

[2] Cong. Record, first session Fifty-fourth Congress, p. 4847.

[3] Thomas, B. Reed, of Maine, Speaker.

[4] Cong. Record, second session Fifty-fourth Congress, p. 2953.

The Speaker[1] said:

The gentleman will see on reflection that the business of the House could not be transacted in any other way than by giving the gentleman in charge of the measure control of the floor. While the motion of the gentleman from Illinois takes precedence for the moment, still the gentleman from Maine is in charge of the bill.

1462. On February 25, 1901,[2] the House was considering Senate amendments to the naval appropriation bill, the pending amendment being that relating to the authorization of new vessels.

Mr. John F. Rixey, of Virginia, moved to recede and concur, and on that motion demanded recognition.

The Speaker[3] held that while the motion made by the gentleman from Virginia was entitled to precedence, yet the right to prior recognition for debate belonged to the gentleman in charge of the bill.

1463. On February 25, 1903,[4] the House was considering the bill (S. 4825) to provide for a union railroad station in the District of Columbia, etc., and Mr. Joseph W. Babcock, of Wisconsin, chairman of the Committee on the District of Columbia, and in charge of the bill, made a motion that the House insist on its amendments to the bill.

Mr. Edward Morrell, of Pennsylvania, moved that the House recede, and the motion was entertained as of higher privilege than the motion to insist.

The debate proceeding, Mr. Morrell claimed the right to close.

The Speaker[3] said:

The gentleman from Wisconsin is in charge of the bill and has the floor. The gentleman from Pennsylvania made a preferential motion, but that will not take from the gentleman from Wisconsin, in charge of the bill, the right to close debate.

1464. The fact that a Member has the floor on one matter does not necessarily entitle him to prior recognition for a motion relating to a different matter.—On the calendar day of July 7, 1897,[5] which was a continuation of the legislative day of July 5, the regular order had been demanded by Mr. Jerry Simpson, of Kansas.

Mr. Benton McMillin, of Tennessee, being recognized for a parliamentary inquiry, asked:

Monday being, under Rule XXVIII,[6] a day on which the Speaker can entertain a motion to suspend the rules and pass bills, and to-day being only a continuation of the legislative day of Monday, is it not in order for the Speaker to entertain today a motion to suspend the rules?

The Speaker[1] having replied to this inquiry in the affirmative, Mr. McMillin announced his desire to move to suspend the rules and pass a resolution recognizing Cuban belligerency, when Mr. Nelson Dingley, of Maine, sought recognition

The Speaker said: "The gentleman from Maine is recognized," whereupon Mr. Dingley moved that the House adjourn. This motion prevailed, 134 yeas to 105 nays.

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[1] Thomas B. Reed, of Maine, Speaker.

[2] Second session Fifty-sixth Congress, Record, p. 2991.

[3] David B. Henderson, of Iowa, Speaker.

[4] Second session Fifty-seventh Congress, Record, p. 2659.

[5] Cong. Record, first session Fifty-fifth Congress, p. 2449.

[6] See section 6790 of Vol. V of this work.

1465. A motion to direct or control the consideration of the subject before the House being made by the Member in charge and decided adversely, the charge of the subject passes to the opponents.—On January 15, 1897,[1] Mr. John P. Tracey, of Missouri, from the Committee on Accounts, reported a resolution for the employment of additional folders, and, after brief debate, asked for the previous question.

The House refused the previous question in order that there might be an opportunity to vote upon an amendment suggested by Mr. John F. Lacey, of Iowa.

Mr. Lacey having offered the amendment, and debate having proceeded, Mr. Tracey again asked for the previous question.

Mr. Lacey made the point of order that the gentleman from Missouri could not demand the previous question.

The Speaker[2] decided:

> The gentleman from Iowa was entitled to the control of the discussion after the refusal of the House to order the previous question, but the gentleman did not assume control. * * * On the contrary, the gentleman seems to have left it in the hands of the gentleman from Missouri, who, the Chair supposes, has the right to move the previous question, under the circumstances.

1466. On January 15, 1875,[3] Mr. Henry L. Dawes, of Massachusetts, against the objections of Mr. Charles A. Eldridge, of Wisconsin, demanded the previous question on a report from the Committee on Ways and Means.

The question being taken, ayes 56, noes 73, and the House refused to second the demand.[4]

Thereupon the Speaker[5] said:

> The Chair recognizes the gentleman from Wisconsin [Mr. Eldridge] as the parlimentary sequence of the last vote.

1467. On March 1, 1897,[6] Mr. J. Frank Aldrich, of Illinois, called up a bill relating to the transmitting in the mails of pictures and descriptions of prize fights.

After debate Mr. Aldrich demanded the previous question, which was refused by the House.

Thereupon Mr. Benton McMillin, of Tennessee, rising to a parlimentary inquiry, asked whether the refusal of the House to sustain the demand for the previous question made by the gentleman in charge of the bill did not pass the control of the bill to the opposition.

The Speaker[2] I replied that it did.,

1468. On January 17, 1903,[7] the Committee of the Whole House on the state of the Union had reported the bill (S. 569) to establish a department of Commerce and Labor, with a substitute amendment.

Mr. William P. Hepburn, of Iowa, moved the previous question.

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[1] Cong. Record, second session Fifty-fourth Congress, p. 822.

[2] Thomas B. Reed, of Maine, Speaker.

[3] Second session Forty-third Congress, Record, p. 514.

[4] The second of the previous question is not now required.

[5] James G. Blaine, of Maine, Speaker.

[6] Cong. Record, second session Fifty-fourth Congress, p. 2590.

[7] Second session Fifty-seventh Congress, Record, p. 927.

Mr. John B. Corliss, of Michigan, resisted this motion.

A vote being taken, there were ayes 78, nays 100.

The Speaker pro tempore [1] having inadvertently recognized Mr. Hepburn for a further motion, a question was raised, and the Speaker pro tempore thereupon recognized Mr. Corliss.

1469. The House having disagreed to the recommendation of the committee reporting a resolution, the Speaker recognized an opponent of the committee, but not the original proposer of the resolution.

In awarding recognition the Speaker is ordinarily controlled by the usages of the House.

On March 11, 1904,[2] the House was considering a resolution reported from the Committee on the Post-Office and Post-Roads relating to the conduct of Members in their transactions with certain officials of the Post-Office Department. This resolution had originally been presented on the floor (as involving a question of privilege) by Mr. James Hay, of Virginia, and the House had referred it to the Committee on the Post-Office and Post-Roads.

The committee had reported the resolution with the unanimous recommendation that it be laid on the table.

The House disagreed to the motion to lay on the table.

Thereupon Mr. Samuel W. McCall, of Massachusetts (not a member of the Committee on the Post-Office and PostRoads), was recognized by the Speaker.

Mr. Hay demanded recognition, claiming that as the author of the original resolution he was himself entitled to prior recognition. He said:

I make the point of order that the Committee on the Post-Office and Post-Roads having reported that the resolution introduced by myself lie on the table, and the House having refused to adopt the report of the Committee on the Post-Office and Post-Roads, under the precedents and practice of the House, and under a decision of the Speaker of this House, found in Hinds's Parliamentary Precedents,[3] section 70, the mover of any proposition before the House is first entitled to be recognized by the Chair.

This precedent cited a case in 1849, where a Member who had moved to discharge a committee from the consideration of a subject, was, when the motion had been determined in the affirmative, recognized first as entitled to the floor in debating the subject.

After debate the Speaker [4] said:

The Chair desires to state that the power of recognition is with the Chair, and it is not a debatable matter as to whom the Chair should recognize. There are certain practices touching recognition, well settled—some of them resting in the Digest and others resting in the minds of the older Member—that ordinarily do control and ought to control the action of the Chair touching matters of recognition.

The gentleman from Virginia [Mr. Hay] some weeks ago rose to a question of privilege. The resolution which he presented, contrary to his vote, was referred to the Committee on the Post-Office and Post-Roads. The committee took the resolution, and subsequently reported it to the House with the recommendation that it do lie on the table.

On the question coming up in the House, the House refuses to lay the proposition upon the table. Now, the claim that the gentleman has parliamentary control touching his resolution would be, so far as the Chair is informed, without precedent. If we go back to the time when the gentleman did have

[1] John Dalzell, of Pennsylvania, Speaker pro tempore.

[2] Second session Fifty-eighth Congress, Record, p. 3150.

[3] Now section 1446 of this chapter.

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

charge of his resolution, he has by the action of the House lost control of it, because it was referred to the Committee on the Post-Office and Post-Roads. And the Chair declines to hear discussion touching the Chair's right or power of recognition, because such a practice would lead to interminable debate. The gentleman from Massachusetts is recognized.

1470. On May 8, 1900,[1] Mr. John Dalzell, of Pennsylvania, of the Committee on Ways and Means, called up a report of that committee recommending that House resolution No. 229, requesting of the Secretary of the Treasury information as to returns made by manufacturers of oleomargarine, do lie upon the table.

The question being taken on the motion that the bill do lie upon the table, it was decided in the negative—yeas 81, nays 137.

Thereupon the Speaker[2] recognized Mr. James A. Tawney, of Minnesota, who represented the minority of the Committee on Ways and Means in antagonism to the report, to make the motions for the disposition of the resolution. Mr. Tawney asked for the previous question, and under the operation thereof the resolution was agreed to.

1471. On January 22, 1897,[3] the House had under consideration the bill (S. 90) for the relief of William P. Buckmaster, which had been reported from the Committee of the Whole with the recommendation that it do lie on the table.

The motion for that recommendation having been made in the committee by Mr. Joseph G. Cannon, of Illinois, the Speaker recognized him as in charge of the bill on the floor.

A difference concerning division of time[4] having arisen between Mr. Cannon and Mr. Charles F. Joy, of Missouri, who represented the friends of the bill, Mr. Cannon at once moved that the bill lie on the table.

The motion being defeated, the Speaker[5] ruled that Mr. Joy was entitled to the floor, being in charge of the bill under the vote of the House.

Mr. Joy thereupon, against the objections of Mr. Cannon, demanded the previous question on the engrossment and third reading of the bill.

The House having decided this question in the negative, the Speaker said:

The House refuses to order the previous question. The Chair now recognizes the gentleman from Illinois.

1472. On February 14, 1882,[6] Mr. Godlove S. Orth, of Indiana, from the Committee on Foreign Affairs, reported, with the recommendation that it be laid on the table, a resolution requesting the President to communicate to the House correspondence on file in the State Department with reference to the case of D. H. O'Connor, a citizen of the United States imprisoned in Ireland.

The question being taken on the motion to lay on the table, it was decided in the negative.

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[1] First session Fifty-sixth Congress, Record, p. 5290.

[2] David B. Henderson, of Iowa, Speaker.

[3] Cong. Record, second session Fifty-fourth Congress, p. 1071.

[4] It is a common practice for the Member in charge of a measure to yield of his hour to opponents of the bill, retaining enough for his own use and to enable him to call for the previous question before having to surrender the floor.

[5] Thomas B. Reed, of Maine, Speaker.

[6] First session Forty-seventh Congress, Record, pp. 1133–1140.

The Speaker[1] then recognized Mr. S.S. Cox, of New York, who nad opposed the recommendation of the committee, and Mr. Cox offered an amendment which was ruled out of order.

Mr. William E. Robinson, of New York, also was recognized in favor of the adoption of the resolution.

Then Mr. George M. Robeson, of New Jersey, took the floor in his own right, and after a time yielded it to Mr. Orth for the purpose of moving the previous question on the resolution.

Mr. Cox made the point of order that after the recommendation of the Committee of Foreign Affairs had been negatived, the control of the resolution passed to himself.

The Speaker said:

The Chair will state briefly that it agrees entirely with what has so frequently been said here that where a committee, or where a gentleman controlling a measure, after reporting it loses control of it by an adverse vote of the House, then the other side is entitled to be first recognized to control it. But it does not follow that the other side is at liberty to go into general debate and that the gentleman who might be entitled to control the measure can take it and yield the floor to others, thereby cutting off every other Member of the House from doing what he might otherwise do, that is, demand the previous question.

1473. A motion made by the Member in control of a conference report being decided adversely, it has usually been held that the right to recognition passes to the opponents.

The motion to agree is the pending question on a conference report, the motion to disagree is not admitted.

A conference report being disagreed to, the amendments of the other House then come up for action.

On January 30, 1905,[2] Mr. Lucius N. Littauer, of New York, presented the conference report on the disagreeing votes of the two Houses on the amendments of the Senate to the legislative appropriation bill and asked the previous question on the motion to agree to the conference report.

Mr. Charles L. Bartlett, of Georgia, antagonized the motion for the previous question, which was disagreed to—yeas 121, nays 122.

The Speaker[3] then recognized Mr. Bartlett, saying that the motion for the previous question had been negatived at his instance.

Mr. Bartlett proposed a motion to disagree to the report.

The Speaker said:

The Chair will state that a motion to disagree would seem hardly in order, although what the gentleman desires to get at, perhaps, would come in another form. The question is on agreeing to the conference report, the same being under consideration. Now, if the House refuses to agree to the conference report that disposes of it, and it is equivalent to a disagreement. If, on the contrary, the House agrees to the report, that closes it up and adopts the report, and the only question, as the Chair understands, that can be determined by the House in the present stage of the proceeding, is on agreeing to the report, and a failure to disagree disposes of the report.

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[1] J. Warren Keifer, of Ohio, Speaker.

[2] Third session Fifty-eighth Congress, Record, pp. 1597, 1598.

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

Mr. Bartlett having raised a question as to the effect of the vote about to be taken, the Speaker said:

The Chair understands this, that if the conference report is voted down then the Senate amendments are before the House for such action as the House sees proper to take—to further insist and ask for another conference, or to take such other steps as the House sees proper to take; but the only thing, as the Chair understands it, that can be done at this time is for the House either to agree to the conference report or refuse to agree to it.

1474. On January 29, 1897,[1] Mr. H. Henry Powers, of Vermont, called up the conference report on the bill (S. 1832) relating to the rights of purchasers in the matter of the proposed sale of the Atlantic and Pacific Railroad and after debate demanded the previous question.

The question being put, the House refused to order the previous question.

Thereupon the Speaker[2] recognized Mr. William E. Barrett, of Massachusetts, who had asked the House not to order the previous question.

1475. On February 26, 1901,[3] Mr. Alston G. Dayton, of West Virginia, presented the conference report on the naval appropriation bill, and after brief debate demanded the previous question on the motion to agree to the report.

The question was taken, and on a division demanded by Mr. William P. Hepburn, of Iowa, there were 48 ayes and 76 noes. So the previous question was refused.

Both Messrs. Hepburn and Dayton demanding recognition, the Speaker[4] held that Mr. Hepburn was entitled to the floor.

After debate the report of the conference committee was disagreed to.

Mr. Dayton then having proposed a motion that the House further insist on its disagreement to the Senate amendments and ask for a conference, the Speaker held that Mr. Hepburn was entitled to recognition.

Mr. Hepburn thereupon yielded further control of the bill to Mr. Dayton.

1476. On June 28, 1902,[5] the House had agreed to a partial conference report on the naval appropriation bill, when Mr. George E. Foss, of Illinois, chairman of the Naval Committee and of the conferees, moved that the House recede from its disagreement to the Senate amendment numbered 91, and agree to the same with an amendment.

This motion was opposed by Mr. William W. Kitchin, of North Carolina, a Member of the Committee on Naval Affairs, and by others.

The question being taken there appeared: yeas, 81; nays, 98; so the motion of Mr. Foss was disagreed to.

Thereupon Mr. John J. Fitzgerald, of New York, rising to a parliamentary inquiry, asked if the recognition did not go to the opposition.

The Speaker pro tempore[6] replied that it did.

Thereupon Mr. Fitzgerald proposed to move that the House further insist on its disagreement to the amendment, and ask a further conference.

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[1] Cong. Record, second session Fifty-fourth Congress, p. 1320.

[2] Thomas B. Reed, of Maine, Speaker.

[3] Second session Fifty-sixth Congress, Record, pp. 3084–3087.

[4] David B. Henderson, of Iowa, Speaker.

[5] First session Fifty-seventh Congress, Record, pp. 7605, 7607, 7608.

[6] John Dalzell, of Pennsylvania, chairman.

But it appeaxing that Mr. Fitzgerald was not a Member of the Committee on Naval Affairs, the Speaker pro tempore recognized Mr. Kitchin to make the motion.

1477. On June 21, 1906,[1] the House had disagreed to the conference report on the naval appropriation bill, and was proceeding with the consideration of the Senate amendments to the bill, when Mr. George W. Foss, chairman of the managers, whose attempt to secure the adoption of the report had been defeated, raised a question as to the right to prior recognition in the consideration of the amendments.

The Speaker[2] said:

The gentleman from Illinois [Mr. Foss] has charge of this bill. While this motion is a preferential one, the gentleman does not lose control primarily as the Member in charge of the bill; and in this instance, the gentleman having charge can reserve his time or he can yield to his colleague, and he can test the sense of the House at any time by moving the previous question. In other words, the gentleman has not lost control of the bill at this stage. * * * The fact that a Member makes a motion to concur in an amendment, which is a preferential motion, and would have preference over the motion to disagree, does not entitle him to the floor to debate in the first instance, and does not deprive the gentleman from Illinois of the floor, if he asserts his right, and at this point, the gentleman from Florida having yielded the floor, the gentleman from Illinois is remitted to the position that he might have held in the event that he had asserted it.

All of this is equivalent to saying that the charge of the bill is in control of the gentleman from Illinois to move the previous question at any time that he sees proper to move it, and the gentleman, if he desires the floor, will get it from stage to stage, when a motion is made on this or other amendments.

1478. The defeat of an amendment proposed by the committee does not cause the right to prior recognition to pass from the Member representing the committee in charge of the bill.—On March 7, 1902,[3] Mr. Joel P. Heatwole, of Minnesota, chairman of the Committee on Printing, reported a joint resolution (H. J. Res. 26) providing for the publication of the Special Report on the Diseases of the Horse, with an amendment proposed by the committee.

The question being taken, the amendment was disagreed to by the House.

Thereupon Mr. Oscar W. Underwood, of Alabama, who had opposed the amendment on the floor, demanded recognition, on the ground that, with the defeat of the committee amendment, the control of the measure passed to the opponents.

The Speaker[4] said:

The Chair is of opinion that the defeat of an amendment does not transfer the control of the bill. That is a mere minor detail. The gentleman from Minnesota moves to recommit.

1479. The adoption of an amendment against the advice of the Member in charge of the bill does not cause him to lose his right to prior recognition.—On January 22, 1903,[5] the bill (H. R. 15520) relating to Philippine coinage was under consideration in Committee of the Whole House on the state of the Union, Mr. Henry A. Cooper, of Wisconsin, chairman of the Committee on Insular Affairs, who had reported the bill, being recognized as in charge of the measure.

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[1] First session Fifty-ninth Congress, Record, p. 8881.

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

[3] First session Fifty-seventh Congress, Record, p. 2495.

[4] David B. Henderson, of Iowa, Speaker.

[5] Second session Fifty-seventh Congress, Record, pp. 1082, 1084.

Mr. William A. Jones, of Virginia, having proposed an amendment, which was agreed to after opposition by Mr. Cooper, the suggestion was made by Mr. Charles H. Grosvenor, of Ohio, that the result of the vote on the bill entitled the gentleman from Virginia to be recognized as in control of the bill.

The Chairman [1] said:

The Chair questions the statement of the gentleman from Ohio [Mr. Grosvenor] as to the control of the bill having passed to the gentleman from Virginia simply because of an adverse vote on one amendment to the bill.

Thereafter other amendments were adopted on motion of Mr. Jones.

The Committee of the Whole having risen, and the bill being before the House, Mr. Jones sought recognition to move the previous question.

The Speaker [2] said:

The gentleman from Wisconsin [Mr. Cooper] not having demanded this, the Chair will recognize the gentleman from Virginia for that purpose.

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[1] James A. Tawney, of Minnesota, chairman.

[2] David B. Henderson, of Iowa, Speaker.

Chapter XLVII.

PREROGATIVES OF THE HOUSE AS TO REVENUE LEGISLATION.

1480. Revenue bills must originate in the House, but the Senate may concur with amendments.—The Constitution of the United States in section 7 of Article I provides:

All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills.

1481. In 1807 the House refused to agree to Senate amendments enlarging the scope of a revenue bill.—On February 26, 1807,[1] the House considered the amendments proposed by the Senate to the bill entitled "An act repealing the acts laying duties on salt, and continuing in force, for a further time, the first section of the act entitled 'An act further to protect the commerce and seamen of the United States against the Barbary powers,' " and it was

Resolved, That this House do disagree to the amendments of the Senate; and do adhere to the said bill as the same originally passed this House, and was sent to the Senate for their concurrence.

The same day a message announced that the Senate adhered to their amendment, so the bill was lost.

The record of debates[2] shows that Mr. John Randolph, of Virginia, assailed the Senate amendments because they went beyond amendment of the details of the bill, whereas under the Constitution he believed the Senate had no power to amend a money bill by varying the objects or altering the quantum.

1482. In 1830 a bill affecting the revenue was presented in the Senate and withdrawn, after a discussion of the constitutional question.—On February 23, 1830,[3] in the Senate, Mr. Thomas H. Benton, of Missouri, proposed a bill "to provide for the abolition of unnecessary duties, to relieve the

[1] Second session Ninth Congress, Journal, pp. 611, 613 (Gales & Seaton, ed.).

[2] Annals, pp. 630–636.

[3] First session Twenty-first Congress, Debates, pp. 172, 244, 245.

people from sixteen millions of taxes, and to improve the condition of the agriculture, manufactures, commerce, and navigation of the United States."

One section of this bill proposed to raise the duty on certain articles, and a question arose as to the Constitutional power of the Senate to originate such a measure.

Mr. Daniel Webster, of Massachusetts, having urged that the question was very important and merited a long discussion, Mr. Benton, on March 5, withdrew the bill.

1483. A bill to abolish a duty was refused consideration in the Senate, one objection being that the Senate had no right to originate such a measure.—On February 11, 1831,[1] in the Senate, Mr. Thomas H. Benton, of Missouri, asked leave to introduce a bill for the gradual abolition of the duty on alum salt.

This motion was opposed on two grounds, because a similar bill was on the table of the Senate already, and because the bill belonged to a class of revenue bills which the Senate did not have the right to originate.

Leave to introduce the bill was refused, yeas 17, nays 27.

1484. Early instances of Senate and House participation in revenue legislation.—On February 16, 1833, the bill (S. 121) to amend the act to alter and amend the several acts imposing duties on imports, approved July 14, 1832, was introduced on report from Committee on Finance in the Senate.[2] This bill restored the duty on certain articles of copper and tobacco.[3] It passed the Senate February 22,[4] and being sent to the House, was, on February 27,[5] reported favorably from the Committee on Ways and Means and referred to the Committee on the Whole House on the state of the Union. This bill was not considered further, and should not be confounded with the following: (S. 115) "To modify the act of the 14th of July, 1832, and all other acts imposing duties on imports," introduced by Mr. Henry Clay, of Kentucky, February 12, 1833.[6] Objection was made by Mr. John Forsyth, of Georgia, and others, that the bill was not constitutional, as the Senate did not have the power to originate such a bill.[7] The bill was considered and carried to a third reading, when, on February 26, it was laid on the table,[8] the bill of the House (H. R. 641) being received in the Senate at that time. This House bill had originally been reported on December 27,[9] but, on February 25, on motion of Mr. Robert P. Letcher, of Kentucky, the Senate bill proposed by Mr. Clay had been moved as a substitute and adopted, retaining, however, the House number[10] This bill passed the Senate and became a law.[11]

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[1] Second session Twenty-first Congress, Debates, p. 194.

[2] Second session Twenty-second Congress, Senate Journal, p. 187.

[3] Senate Journal, p. 314.

[4] Senate Journal, p. 204.

[5] House Journal, pp. 405, 434.

[6] Senate Journal, p. 171; Debates, p. 462.

[7] Debates, pp. 473, 479.

[8] Senate Journal, pp. 211–213; Debates, p. 786.

[9] House Journal, p. 105.

[10] House Journal, p. 415; Debates, p. 1772.

[11] House Journal, p. 476.

1485. The Senate having insisted on its right to add a revenue amendment to an appropriation bill, the House declined to proceed further with the bill.

Instance of a conference over the prerogatives of the two Houses respecting revenue legislation.

An instance wherein a conference committee appointed to consider a question of prerogative only originated and reported a bill.

On March 3, 1859,[1] Mr. Galusha A. Grow, of Pennsylvania, as a question of privilege, offered this resolution:

Resolved, That House bill No. 872, making appropriations for defraying the expenses of the Post-Office Department for the year ending 30th June, 1860, with the Senate amendments thereto, be returned to the Senate, as section 13 of said amendments is in the nature of a revenue measure.

Mr. Grow explained that section 13 raised the rate of postage.

Mr. John S. Phelps, of Missouri, contended that the revenue bills which should originate only in the House were such only as were contemplated in this clause of the Constitution.

The Congress shall have power to lay and collect taxes, duties, imposts, and excises.

The question being taken, the resolution was agreed to, yeas 116, nays 78.

The resolution of the House having been received in the Senate, Mr. John J. Crittenden, of Kentucky, proposed the following resolutions, which were agreed to:[2]

Resolved by the Senate of the United States, That the Senate and House, being of right equally competent, each to judge of the propriety and constitutionality of its own action, the Senate has exercised said right in its action on the amendments sent to the House, leaving to the House its right to adopt or reject each of said amendments at its pleasure.

Resolved, That this resolution be communicated to the House of Representatives, and that the bill and amendments aforesaid be transmitted therewith.

This message, with the bill and amendments, having been received in the House,[3] a motion to take them up under suspension of the rules failed, yeas 94, nays 85. Thereupon Mr. Phelps, from the Committee on Ways and Means,[4] reported a new appropriation bill for the Post-Office service, which was passed as H. R. No. 893.

In the Senate objection was made to this bill, and it went to the table, while a discussion arose as to the propriety of the parliamentary action[5] taken by the House.

Mr. Charles E. Stuart, of Michigan, offered this preamble and resolution:

The House of Representatives having, in the opinion of the Senate, departed from the proper parliamentary usages and method of transacting business between the two Houses by its action in regard to the bill of the House (No. 872), entitled "An act making appropriations for the service of the Post-Office Department during the fiscal year ending the 30th of June, 1860:" Therefore

Resolved, That the Senate appoint a committee of conference to meet a like committee on the part of the House of Representatives, for the purpose of consulting as to what action ought to be had by the respective Houses respecting the said bill.

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[1] Second session Thirty-fifth Congress, Journal, p. 571; Globe, pp. 1666, 1667.

[2] Globe, p. 1634.

[3] Globe, p. 1674; Journal, pp. 587, 591.

[4] The Committee on Ways and Means at that time reported appropriation bills.

[5] Globe, pp. 1644–1646.

The resolution being agreed to, Messrs. Stuart, James A. Pearce, of Maryland, and Solomon Foot, of Vermont, were appointed conferees on the part of the Senate.

This message being received in the House,[1] a question arose as to whether the conferees, if a conference should be agreed to, would have before them the bill (H. R. 872), which was before the House. The Speaker[2] ruled that the bill would remain in possession of the House. The House agreed to the conference, and Messrs. J. Letcher, of Virginia; L. O'B. Branch, of North Carolina, and Galusha A. Grow, of Pennsylvania, were appointed conferees.

In the last hours of the session this report was presented to the House[3] from the committee of conference:

> The committee of conference on the disagreement between the two Houses on the resolutions adopted by them, respectively, in relation to the action of the House on the Senate amendments to the bill (H. R. 872) making appropriations, etc., having met, after full and free conference, have agreed as follows:
>
> That while neither House is understood to waive any constitutional right which they may respectively consider to belong to them, it be recommended to the House to pass the accompanying bill, and that the Senate concur in the same when it shall be sent to them.

The conference report having been agreed to, Mr. Letcher introduced the bill, which was numbered H. R. 894, and it was passed.[4] No point of order was made in the House against this proceeding. But in the Senate[5] Mr. Pearce referred to the fact that there was doubt of the power of the conferees to originate and report the bill. The principal objections to the bill were constitutional, however. It was urged, especially by Mr. Robert Toombs, of Georgia, that by passing the bill the Senate would surrender to the House a constitutional prerogative. Mr. Stephen A. Douglas, of Illinois, urged that the public service should not be crippled by a punctilio between the Senate and House; but this failed to move Messrs. Toombs, David C. Broderick, of California, and Judah P. Benjamin, of Louisiana, who interposed their objection to the second reading of the bill. In the midst of a speech by Mr. Toombs the hour of final adjournment arrived, and the Vice President declared the Senate adjourned sine die.[6]

1486. The House having questioned a Senate amendment providing a tax on incomes on a nonrevenue bill, the Senate withdrew the amendment.—On June 30, 1864,[7] Mr. Thaddeus Stevens, of Pennsylvania, submitted the following:

> *Resolved,* That the amendment of the section, being section No. 12, added by the Senate to House bill No. 549, in the opinion of this House, contravenes the first clause of the seventh section of the first article of the Constitution of the United States, and is an infringement of the privileges of this House, and that the said bill, with the amendments, be respectfully returned to the Senate with a message communicating this resolution.

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[1] Globe, p. 1682; Journal, p. 598.

[2] James L. Orr, of South Carolina, Speaker.

[3] Globe, p. 1684; Journal, p. 617.

[4] Journal, p. 618.

[5] Globe, pp. 1661–1663.

[6] In a speech made December 29, 1859, Mr. Grow quoted from the decision of the United States Supreme Court in the case of United States *v.* Bromley (12 Howard, p. 96) to show that legislation affecting postage was revenue legislation. (Cong. Globe, first session Thirty-sixth Congress, pp. 278, 279.)

[7] First session Thirty-eighth Congress, Journal, pp. 963, 968; Globe, p. 3427.

The bill (H. R. 549) further to regulate and provide for the enrolling and calling out of the national forces had been returned from the Senate with amendments, among which was No. 12, providing for a 5 per cent duty on all incomes to meet the cost of paying bounties and enforcing the draft.

Mr. Stevens said:

It is so clearly a violation of the privileges of the House that I think it ought not for a moment to be acquiesced in.

Without further debate the House agreed to the resolution.

The same day a message from the Senate announced that they, on reconsideration, had again passed the bill with all amendments previously concurred in except the section objected to by the House.

1487. After a full but unconclusive conference with the Senate, the House reaffirmed its own exclusive right to originate revenue measures.

There being a difference between the two Houses as to the right of the Senate to originate a revenue bill, the subject was committed to a conference.

A resolution relating to an alleged invasion of the prerogatives of the House presents a question of privilege.

On January 27, 1871,[1] Mr. Samuel Hooper, of Massachusetts, from the Committee on Ways and Means, as a question of privilege, submitted the following:

Resolved, That Senate bill 1083, to repeal so much of the act approved July 14, 1870, entitled "An act to reduce internal taxes, and for other purposes," as continues the income tax after the 31st day of December, 1869, be returned to that body with the respectful suggestion on the part of the House that section 7 of Article I of the Constitution vests in the House of Representatives the sole power to originate such measures.

The Speaker[2] having ruled that this presented a question of privilege, the resolution was agreed to.

The message was received in the Senate on January 30, and on the succeeding day was considered.[3] After debate the Senate adopted a preamble and resolution reciting the action of the House, and continuing:

And whereas the parliamentary law recognized by both Houses of Congress states that when the methods of Parliament are thought by the one House to have been departed from by the other a conference is asked to come to a right understanding thereon: Therefore,

Resolved, That the bill be returned to the House of Representatives, and that the Senate ask a conference on the question at issue between the Houses.

Messrs. John Scott, of Pennsylvania, Roscoe Conkling, of New York, and Eugene Casserly, of California, were appointed conferees on the part of the Senate.

The House agreed to the conference,[4] appointing Messrs. Hooper, William B. Allison, of Iowa, and Daniel W. Voorhees, of Indiana, to represent the House.

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[1] Third Session Forty-first Congress, Journal p. 227; Globe, p. 791.

[2] James G. Blaine, of Maine, Speaker.

[3] Globe, pp. 815, 842–846.

[4] Journal, p. 247; Globe, p. 862.

During the debate Mr. Samuel J. Randall, of Pennsylvania, inquired as to the scope of the conference. The Speaker replied:

When, on a previous occasion, on a post-office appropriation bill, a conference was asked by the Senate, it was granted by the House. The only thing, of course, committed to the conference is the point of difference. The bill will in no wise be in the hands of the conference for action. But the point of difference in 1859 between the two Houses was, at the request of the Senate, allowed to go to a conference committee. And the Chair states that under the uniform usage and courtesy observed between the two branches the usual way is to have a conference.

1488. This conference having failed to agree, on February 27, 1871, Mr. Hooper, for the House managers, submitted the reasons [1] which formed the basis of their action in the joint committee of conference, accompanied by this resolution:

Resolved, That this House maintains that it is its sole and exclusive privilege to originate all bills directly affecting the revenue, whether such bills be for the imposition, reduction, or repeal of taxes; and in the exercise of this privilege, in the first instance, to limit and appoint the ends, purposes, considerations, and limitations of such bills, whether relating to the matter, manner, measure, or time of their introduction; subject to the right of the Senate to "propose or concur with amendments, as in other bills."

The House conferees, in their report, stated that the Senate's request for a conference had been granted as an act of courtesy, the question involved being the privilege of the House. At the meeting of the conference the Senate conferees had submitted and maintained throughout these propositions:

First. That the words "all bills for raising revenue shall originate in the House of Representatives," in the seventh section of the first article of the Constitution, mean only bills the direct purpose of which is to raise revenue by the levy of taxes, imposts, duties, or excises.

Second. That a bill may originate in the Senate to repeal a law or portion of a law imposing such taxes, duties, imposts, or excise, even if the repeal of such repeal [law?] render necessary the imposition of other taxes; and Senate bill (S. 1083) being such an act, it is within the constitutional power of the Senate to originate it.

The committee on the part of the House maintained in reply that, according to the true intent and meaning of the Constitution, it is the right of the House of Representatives to originate all bills relating directly to taxation, including all bills imposing or remitting taxes; and that in the exercise of this right the House of Representatives shall decide the manner and time of the imposition and remission of all taxes, subject to the right of the Senate to amend any of such bills, originating in the House, before they have become a law.

After a long and full discussion the conferees failed to agree, and arranged to report to their respective Houses their disagreement, and such further report as they might decide to make. The House conferees therefore presented a report giving at length the reasons on which they had founded their action. From a careful review of the proceedings of the Constitutional Convention and a consideration of the analogy of the British constitution they derived the opinion that all bills directly affecting the revenue should originate in the House of Representatives. "The practice of the English Commons," says the report, "was to have all tax bills considered by a committee called the ways and means, and all appropriations were considered by a committee on supply. Analogous to this, the first Congress that assembled provided

[1] House Report No. 42.

a Committee of Ways and Means that should originate all revenue measures, whether of taxation or appropriation. The same Congress also borrowed another rule from the Commons, that this class of bills should be first considered in Committee of the Whole House on a day fixed, so that free discussion should be permitted and unlimited amendment allowed.

"Under these rules the right to originate not only tax and tariff bills, but also appropriation bills, was conceded to the House of Representatives until February 22, 1832, when Mr. Clay submitted certain resolutions in relation to the tariff, by which it was proposed to repeal the duties on all articles of importation not coming into competition with similar articles manufactured in the United States, etc."

"These resolutions were referred to the Committee on Manufactures, which committee, on the 30th of March, made a long report, accompanied by a bill proposing an absolute repeal of certain duties." This report led to a long debate on the constitutional power of the Senate to originate revenue bills or repeal duties. Finally, on motion of Mr. Dallas, the bill was laid on the table.[1]

"The question again came up in the Senate in 1833," continues the report, "when, at a time of great political excitement, reaching almost to rebellion, Mr. Clay, with a patriotic purpose, brought forward in the Senate his compromise tariff bill to reduce existing rates of duty on imported articles. The leading minds of the Senate revolted at what seemed to them an unconstitutional exercise of power, and the authority of the Senate under the clause now under consideration was debated by the ablest lawyers of that body."[2]

On February 27 the bill was laid on the table, a House bill for the same purpose having reached the Senate. The House bill was passed. In 1837, also, the Senate passed a bill to authorize the issue of Treasury notes. In the House, the question of the Senate's power being raised, the Senate bill was laid aside and a House bill covering the same object was passed.[3] The report continues:

> The question again appeared in the Senate in 1844, Mr. McDuffie introducing a bill to revive the act of March 2, 1833, known as the compromise tariff act, and modify the existing duties upon foreign imports in conformity to its provisions, the effect of which would be to largely reduce the duties and rates of duty provided for by the tariff act of 1842. The question of power, together with the bill, was referred to the Senate Committee on Finance, and on the 9th of January, 1844, was reported back to the Senate from that committee by Mr. Evans without amendment, accompanied by the following resolution:
>
> *"Resolved,* That the bill * * * is a bill for raising revenue within the meaning of the seventh section of the first article of the Constitution, and can not, therefore, originate in the Senate: Therefore,
>
> *"Resolved,* That it be indefinitely postponed."

After a long debate the resolution was adopted with but four dissenting votes.[4]

The report also refers to the action of the Senate in 1856, when it originated appropriation bills, which were tabled by the House.

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[1] Mr. Clay introduced his resolutions early in January, 1832. For introduction, report, and debate see Congressional Debates, first session Twenty-second Congress, pp. 66, 647, 678.

[2] Congressional Debates, second session Twenty-second Congress, pp. 462, 750.

[3] First session Twenty-fifth Congress, Journal, pp. 77, 79, 212.

[4] First session Twenty-eighth Congress, Globe, pp. 121, 633. For Senate debates at this time see Globe, pp. 162, 168, 176, 180, 186, 205, 222, 673, 674.

Next the report takes up certain citations of laws, fourteen in all, which had originated in the Senate, and which the Senate conferees had claimed were precedents, saying:

They seem to be, generally, bills intended to carry out, in good faith, treaty stipulations and commercial regulations arising under treaties with foreign countries. It is true that two of the acts cited reduced existing rates of duty, which reduction was acquiesced in by the House without raising the question of power. But it seems to your committee that one or two instances of waiver can not be considered as a surrender, on the part of the House, of a great constitutional privilege.

The committee also cite the loan bill in the Twenty-seventh Congress, saying:

The House does not deny the power of the Senate to amend any particular bill relating to revenue whether a loan bill, a tax bill, or an appropriation bill, which is all that was decided in this case.

After citing the action of the House of Commons in 1860 in asserting its paramount authority, both for the imposition and repeal of taxes, the report says:

It is assumed that, because the bill under consideration is for the purpose of absolutely repealing a tax, the Senate has jurisdiction. But it seems to your committee clear that if the Senate can repeal one tax they can repeal another, and thus originate measures affecting the entire system of taxation. If, instead of repealing the income tax, the Senate had originated and passed a measure repealing all laws imposing duties on imports, it would at once become necessary for the House to originate another measure imposing taxes to make up for the deficiency created by this great loss of revenue. It seems to us plain that this would be an interference with the present system of taxation, and virtually the surrender of the power to originate tax measures according to the will of the House. * * *

It seems clear to your committee, therefore, that the only way to preserve, in its fullness, the power to originate bills for raising revenue is to insist upon the right of the House to originate all bills relating directly to the revenue, whether imposing or remitting taxes; that the House should, in the first instance, be the judge of the manner, the measure, and the time of such impositions or remissions.

On March 3, 1871, the resolution recommended by the committee was agreed to by the House, without division, but after debate.[1]

The Senate conferees made to the Senate a report in which they adduced arguments in support of their position that the bill was properly passed by the Senate.[2]

1489. In 1872 the House and Senate, after discussion, disagreed as to limitations of Senate amendments to a revenue bill of the House.—On April 11, 1871,[3] Mr. John Sherman, of Ohio, had reported in the Senate with the unanimous indorsement of the Committee on Finance, the following, which was agreed to without division, on April 12:

Resolved, That the Committee on Finance is hereby instructed, during the recess of Congress, to carefully examine the existing system of taxation by the United States, with a view to propose such amendments to the bills of the House of Representatives repealing certain taxes now pending in the Senate as will simplify, revise, and reduce both the internal taxes and the duties on imported goods now in force, and in such manner that the aggregate of such taxes shall not exceed the sums required to execute the laws relating to the public debt and the current expenditures of the Government, administered with the strictest economy, and so that such taxes may also be distributed so as to impose the least possible burden upon the people.

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[1] Third session Forty-first Congress, Journal, p. 497; Globe, pp. 1928–1930. See also Globe Appendix, pp. 264–268, for speech of James A. Garfield.

[2] Senate Report No. 376.

[3] First session Fifty-second Congress, Globe, pp. 565, 598.

There was little discussion, and apparently none on the question of the privileges of the two Houses.

On April 19, 1871,[1] on motion of Mr. George F. Hoar, of Massachusetts, the House agreed to the following:

Resolved, That the Committee on Rules be directed to consider and report to the House at its next session how far the existing practice of amending, in the Senate, bills for raising revenue, by the addition of enactments not germane to the original bill, is in conformity with the Constitution, and whether any further rules or proceedings are needed to preserve the privileges of the House in the matter.

It does not appear that the committee reported.

On April 2, 1872,[2] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Ways and Means, reported the following resolution:

Resolved, That the substitution by the Senate, under the form of an amendment, for the bill of the House (H. R. 1537) entitled "An act to repeal existing duties on tea and coffee," of a bill entitled "An act to reduce existing taxes," containing a general revision, reduction, and repeal of laws imposing import duties and internal taxes, is in conflict with the true intent and purpose of that clause of the Constitution which requires that "all bills for raising revenue shall originate in the House of Representatives;" and that therefore said substitute for House bill No. 1537 do lie upon the table.

And be it further resolved, That the Clerk of the House be, and is hereby, directed to notify the Senate of the passage of the foregoing resolution.

The resolution was debated at length, with reference to the principle of government involved in the compromise which resulted in the adoption of the provision of the Constitution,, and with reference to past precedents and to the proper construction of the terms of the constitutional provision. Mr. James Brooks, of New York, contributed as unwritten history the fact of which he was personally cognizant, that Mr. Clay, when he introduced the revenue reduction bill in the Senate in 1832, did not intend or expect it to pass, but did so solely for the purpose of causing a debate which should so instruct and influence the House of Representatives that they would take action. This was what happened, and as soon as the House, on the motion of his personal friend, Mr. Letcher, had passed the bill, Mr. Clay abandoned his Senate bill. In discussing the construction of the language of the Constitution, Mr. James A. Garfield, of Ohio, said:

What then, is the reasonable limit to this right of amendment? It is clear to my mind that the Senate's power to amend is limited to the subject-matter of the bill. That limit is natural, is definite, and can be clearly shown. If there had been no precedent in the case, I should say that a House bill relating solely to revenue on salt could not be amended by adding to it clauses raising revenue on textile fabrics, but that all the amendments of the Senate should relate to the duty on salt. To admit that the Senate can take a House bill consisting of two lines, relating specifically and solely to a single article, and can graft upon them in the name of an amendment a whole system of tariff and internal taxation, is to say that they may exploit all the meaning out of the clause of the Constitution which we are now, considering, and may rob the House of the last vestige of its rights under that clause. * * * Now I will not say, for I believe it can not be held, the mere length of an amendment shall be any proof of invasion of privileges of the House. True we sent to the Senate a bill of three or four lines, and they have sent back a bill of twenty printed pages. I do not deny their right to send back a bill of a thousand

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[1] First session Forty-second Congress, Journal, p. 194; Globe, p. 802.

[2] Second session Forty-second Congress, Journal, p. 620; Globe, pp. 2105, 2248, 2318, 2716.

pages as an amendment to our two lines. But I do insist that their thousand pages must be on the subject-matter of our bill.[1]

The resolution reported by Mr. Dawes was agreed to by a vote of yeas 153, nays 9.

On April 8 the resolution of the House came up in the Senate, and was referred to the Committee on Finance. On April 10 that committee reported it back, Mr. John Sherman, of Ohio, saying that it was the first time in the history of the country that the power of the Senate to propose amendments to revenue bills had been questioned. The Committee on Finance desired that the matter be referred for further examination to the Committee on Privileges and Elections. This action was taken, and on April 24 that committee made an elaborate report.

This report,[2] which was submitted on behalf of the committee by Mr. Matt. H. Carpenter, of Wisconsin, began with a review of the circumstances attending the controversy, and proceeded:

Assuming that a bill to abolish a certain duty or tax is a bill for raising revenue within the meaning of the Constitution, as the House of Representatives determined in regard to the bill abolishing the tax upon incomes, the power of the Senate in regard to it is regulated by the provision of the Constitution.

The Senate may propose or concur with amendments as on other bills, and the right of the Senate to put upon it the amendments with which it was returned to the House is, in the opinion of your committee, clearly conferred by this provision.

Without the provision of the Constitution under consideration, it will be conceded that such a bill might have originated in either House of Congress, and originating, as in this case, in the House of Representatives, the Senate might amend it in any particular and to any extent. But this provision of the Constitution is a limitation upon the power of the Senate which must be obeyed by the Senate to its full extent, but should not be extended beyond the fair scope and plain import of the phraseology employed. What, then, is the restriction laid upon the Senate? Simply and only this: The Senate shall not "originate" a bill for raising revenue, that being the exclusive prerogative of the House of Representatives. But, excepting only the origination of the bill, the Senate possesses the same power in regard to bills for raising revenue as in regard to any other bills; or, to quote the language of the Constitution, it may amend a bill for raising revenue as it may amend "any other bill."

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[1] In the preceding Congress (third session Forty-first Congress, Appendix of Globe, p. 265) Mr. Garfield went into this subject very elaborately. In that speech Mr. Garfield reviewed the English usage, the circumstances attending the adoption of the clause in the Constitution of the United States, and the following precedents of Congress: In the House on January 25, 1789 (First Congress, Annals, Vol. I, pp. 592, 593, 597, 603, 605, 607), where Madison, Livermore, Gerry, Lawrence, and Tucker, contended that the sole right of originating money bills belonged to the House; in the Senate in 1833 (Twenty-second Congress, Debates, Vol. IX, Pt. 1, pp. 462, 473, 477, 478, 722), where the tariff bill introduced by Mr. Clay was discussed and tabled, Messrs. Webster, Clay, Dickerson, and Forsyth denied the right of the Senate to originate a revenue bill; in the House in 1837 (Twenty-fifth Congress, Debates, Vol. XlV, Pt. 1, pp. 1152–1153, 522), when a Senate bill authorizing the issue of Treasury notes was, on September 30, discussed in Committee of the Whole and considered an invasion of the prerogatives of the House. As a result of the discussion the Senate bill was laid aside and a House bill on the same subject passed. This latter bill passed the Senate; in the Senate in 1842–43 (Twenty-eighth Congress), when, from January 19 to May 31, 1843, Mr. McDuffie's bill to revive the compromise tariff of 1833 was debated and by a vote of yeas 33, nays 4, was decided to be such a bill as could not originate in the Senate; and in the Senate in 1855 (Thirty-fourth Congress, Globe, January, 1856, pp. 160, 161, 162, 375, 376), where the Senate, in opposition to the influence of Messrs. Seward and Sumner, originated two general appropriation bills which were afterwards tabled by the House.

[2] Second session Forty-second Congress, Senate Report No. 146.

The report goes on to examine this contention in the light of English parliamentary history, which the framers of the Constitution had in mind when they gave to the Senate the power, not allowed to the House of Lords, of amending a money bill. The Constitution, in giving the power to amend, gave it in the fullest sense of the term, so as to include any amendment which might be in order under the rules of the Senate. A bill raising revenue might be amended like any other bill. The report then continues:

In opposition to this conclusion it has been urged that to permit the Senate to ingraft, by way of amendment, a general tariff bill upon a bill of the House laying a duty on peanuts, is entirely to disregard the spirit of the clause of the Constitution before quoted. In reply it may be said, however, that any other construction of this constitutional provision would deny to the Senate the power to amend a House bill laying a duty on peanuts so as to lay a duty upon English walnuts; that is, would deny to the Senate the power of making to the bill anything more than mere formal amendments.

The report then goes on to advance the theory that the framers of the Constitution expected that the Senate would sit in practically continuous session, and that the provision relating to revenue bills was to prevent them taking up that subject while the other House was absent by giving to the other House the origination of such bills.

It is conceded in the report that the Senate can not propose an amendment raising revenue to any bill coming from the House, but only to a bill raising revenue. This brings forward the phrase "raising revenue." The report discusses that phrase as follows:

Suppose the existing law lays a duty of 50 per cent upon iron. A bill repealing such law, and providing that after a certain day the duty upon iron shall be only 40 per cent, is still a bill for raising revenue, because that is the end in contemplation. Less revenue will be raised than under the former law, still it is intended to raise revenue, and such a bill could not constitutionally originate in the Senate, nor could such provisions be ingrafted, by way of amendment, in the Senate upon any House bill which did not provide for raising—that is, collecting—revenue. This bill did not provide that the duty on tea and coffee should be laid at a less rate than formerly, but it provided simply that hereafter no revenue should be raised or collected upon tea or coffee. To say that a bill which provides that no revenue shall be raised is a bill "for raising revenue" is simply a contradiction of terms. * * * To say that a bill which does not provide for raising any revenue must originate in the House because its operation may affect the revenue is not only to say what the Constitution does not say, but is to strip the Senate of jurisdiction it is conceded to possess and which it has exercised at every session of Congress since the Constitution was adopted. A bill creating an office and fixing the salary of the officer affects the Treasury to the extent of such salary, but is not a bill for raising revenue.

After observing that the Constitution intended to restrict the Senate as to bills raising revenue, but not as to bills appropriating money, the report concludes:

Your committee are therefore of opinion that the House bill under consideration was not a bill for raising revenue within the meaning of the Constitution; and therefore, while the Senate might have amended it so as to abolish duties altogether upon other articles, the Senate had no right to ingraft upon it, as it did in substance, an amendment providing that revenue should be collected upon other articles, though at a less rate than previously fixed by law. That amendment would have become a provision in the act for raising revenue, because revenue at a certain rate would have been collected by the operation of the act.

It is due, however, to the Senate to say that its departure from the true principle in this case was owing to a desire to conform to the views of the House of Representatives, as expressed by the House, in relation to the Senate bill abolishing the tax upon incomes, and thus to preserve harmony between the two Houses. But since the House of Representatives, exalting its prerogative, asserts upon one occasion what it denies upon another, it has become necessary to review the question in the light of principle and

seek for a solution of the difficulty in conformity with the Constitution, to which, it is hoped, the House will assent, and to which it is the duty of the Senate to adhere whether the House shall assent or dissent.

The report concludes with no recommendation for action. except that the report be transmitted to the House of Representatives.

1490. In 1874 the House declined to take issue with the Senate over an amendment of that body authorizing certain Government obligations.

It is for the House and not the Speaker to pass on a question relating to the constitutional prerogatives of the House.

On April 14, 1874,[1] the House proceeded to the consideration of the bill of the Senate (S. 617) to fix the amount of United States notes and the circulation of national banks, and for other purposes.

The bill in its first section provided "that the maximum amount of United States notes is hereby fixed at $400,000,000." The second section provided for the issue of forty-six millions in circulation in addition to the circulation already allowed the national banks, etc.

Mr. James A. Garfield, of Ohio, made the point of order that the bill was a charge upon the people, as it provided for issuing a class of obligations, to pay every one of which obligations was by its very terms a charge upon the people. Therefore it was a bill which should not originate in the Senate.

The Speaker[2] said:

> The point, the gentleman from Ohio will observe, is one which the Chair has never ruled upon, because it is not for the Chair to say what the Senate of the United States may or may not properly do. On all points where the House has disagreed from the Senate on matters affecting its privilege and prerogative it has been by vote of the House.

Mr. Garfield thereupon moved that the Clerk be instructed to return the bill to the Senate with the message that the bill did not properly originate in the Senate. And on this question the yeas were 57 and the nays 179. So the House declined to agree to the motion.

1491. In 1883 the House raised, but did not press, a question as to certain Senate amendments relating to the revenue.

A question being raised as to certain revenue amendments of the Senate, it was held in order to refer the constitutional question to the House conferees, in case there should be a conference.

It being alleged that the constitutional prerogatives of the House were invaded by certain Senate amendments to a bill, the question of privilege was raised before the bill came up for consideration.

It is for the House and not the Speaker to decide whether or not the constitutional prerogatives of the House have been invaded.

On February 27, 1883,[3] Mr. Nathaniel J. Hammond, of Georgia, as a question of privilege, submitted this resolution:

> *Resolved,* That the substitute of the Senate to bill (H. R. 5538) entitled "An act to reduce internal-revenue taxation, and for other purposes," under the form of an amendment to the bill of the House

[1] First session Forty-third Congress, Journal, p. 800; Record, pp. 3075, 3076.

[2] James G. Blaine, of Maine, Speaker.

[3] Second session Forty-seventh Congress, Journal, p. 512; Record, pp. 3336, 3337.

(H. R. 5538) entitled "An act to reduce internal-revenue taxation," containing a general revision and repeal of laws imposing both import duties and internal taxes, is in conflict with the true intent and purposes of that clause of the Constitution which requires "all bills for raising revenue shall originate in the House of Representatives," and that therefore said bill so amended do lie upon the table.

And be it further resolved, That the Clerk of the House be, and is hereby, directed to notify the Senate of the passage of the foregoing resolution.

The bill (H. R. 5538) was on the Speaker's table, and the House had agreed to a special order for considering the Senate amendments at a future time.

Mr. William H. Calkins, of Indiana, made the point of order that Mr. Hammond's resolution was not in order either to be offered or considered until the bill to which it referred was brought before the House for consideration.

After debate, the Speaker [1] said:

The resolution offered by the gentleman from Georgia is offered by him for the purpose of raising the question of constitutional privilege, a question involving the constitutional prerogatives of the House in the formation of revenue bills. And in practice this has been always held to be a matter of high privilege. The only question raised now by the point of order of the gentleman from Indiana is as to the matter of time of raising the question, and it is suggested that the bill is not before the House for consideration, and hence that it is too soon to make the point of order raised by the gentleman from Georgia. In argument it is said that the House does not know officially what the bill contains for the purpose of determining this question.

The Chair does not take that view of the matter at all. The bill has been returned to the House by the official direction of the Senate. It goes, under the rules of the House, it is true, to the Speaker's table, but the House has taken notice of it there, has ordered it to be printed, and it is before the House for its action. It is sufficient to say that if the matter was under consideration once in the House, under the rules, in the opinion of the Chair, it would then be too late to raise this question of constitutional privilege against it, so that the House must look to the bill to determine that question before it proceeds to consider it at all. Under the practice, points of order must be made on bills, amendments, etc., before consideration commences, or they are waived, and to make such points of order Members must take notice of the contents of such bill, etc.

If the bill in dispute were brought up before the House and its consideration entered upon, under the practice of the House, it would be then too late to raise the question of constitutionality against it.

The Chair thinks this is a matter for the House to determine, and for the purpose of learning, if the House has not been advised upon the contents of the bill against which the constitutional question is raised, the bill can be read, or so much of it as may be necessary, for the purpose of determining whether it is a bill on which the question of constitutional privilege can properly be raised. It is not for the Chair to decide whether the prerogatives of the House have been invaded or not; it is for the House; and therefore the Chair now thinks that the resolution of the gentleman from Georgia is in order for consideration, and so rules.

One word further. It is said the precedents are against the consideration of such a resolution before the measure is brought before the House for consideration. The Chair has hastily looked to one or two instances with reference to similar resolutions, and finds that one of a similar character was offered by the gentleman from Massachusetts, Mr. Dawes, in April, 1872, which involved a revenue bill, as this does, and the resolution was offered and entertained and considered by the House before the bill was taken up for consideration. * * * Several cases of a similar character to the one before the House have arisen in the history of the Congress of the United States, but only enough of them have been examined to show that the practice has not been uniform.

During consideration of the resolution, Mr. Dudley C. Haskell, of Kansas, offered the following as a substitute: [2]

Whereas House bill No. 5538, entitled "An act to reduce internal-revenue taxation, and for other purposes," under the form of an amendment in the Senate to Title 33 of the Revised Statutes, which

[1] J. Warren Keifer, of Ohio, Speaker.

[2] Journal, p. 513; Record, pp. 3340–3344.

provides for duties on imports, has been so modified and changed by the introduction of new provisions, containing, among other things, a general revision of the statutes referred to so as both to increase and reduce duties on imports, and in many instances to repeal and in others to amend the laws imposing import duties; and,

Whereas in the opinion of this House it is believed that such changes and alterations are in conflict with the true intent and purpose of the Constitution, which requires that all bills for raising revenue shall originate in the House of Representatives: Therefore,

Resolve, That, if this bill shall be referred to a committee of conference, it shall be the duty of the conferees on the part of the House on said committee to consider fully the constitutional objections to said bill as amended by the Senate and herein referred to, and to bring the same, together with the opinion of the House in regard thereto, before said committee of conference, and if necessary, in their opinion, after having conferred with the Senate conferees, said conferees on said committee may make report to the House in regard to the objections to the said bill herein referred to.

Mr. John G. Carlisle, of Kentucky, made the point of order against the proposed substitute, for the reason that it not only proposed to submit the question of constitutional privilege of the House to such conference, but also to consider the subject-matter of such Senate amendment.

During the debate which followed, other points were urged: By Mr. Nathaniel J. Hammond, of Georgia, that the proposition was to instruct conferees in advance of a disagreement and in advance of a declaration by the House that its privileges had been violated; by Mr. Joseph S. C. Blackburn, of Kentucky, that it was proposed to give to the committee of conference a double power and duty, relating both to the constitutional prerogative and to the bill; by Mr. Edward S. Bragg, of Wisconsin, that it was not in order to refer an undisputed question of privilege to a committee composed in part of Members of the other branch.

The Speaker said:

The Chair may say in answer, so far as it is necessary to answer the question made by the gentleman from Wisconsin, Mr. Bragg, and it is necessary to do it only so far as affects this question, that it is quite competent on presenting a matter which is clearly in opposition to the action of the Senate, and in the first instance, to declare a disagreement and ask for a conference.

The Chair is perfectly well satisfied that the proposed substitute would not be in order if it undertook to do anything more in the first instance than to provide for a disagreement with the Senate on the constitutional right of the House or of the two Houses, and then to refer that disagreement and other subjects connected with the bill to a committee of conference.

Committees of conference are not appointed, as has been suggested, by virtue of joint rules of the two Houses, because, as the Chair understands, there have been no joint rules of the two Houses recognized by either House for a number of years. Committees of conference have grown up in practice; either House may ask a conference on any matter of disagreement. The Chair does not think that upon a matter about which there is no disagreement, and none proposed by the action of the House with the Senate, a conference could properly be asked for. Nor does the Chair think that under the guise of providing for a conference other rules of the House may be overridden. If this resolution is subject to the construction that it sends the bill to the conference committee, in case the Senate should agree to it, then it would have to be held that under the right to provide for a committee of conference we could override our rules in reference to the manner of proceeding to business on the Speaker's table, and we could override Rule XX,[1] which requires that a Senate amendment to a revenue or appropriation bill shall be first considered in Committee of the Whole on the state of the Union, and, without declaring a disagreement in the Senate amendment, send it directly to a committee of conference. If this proposed substitute would do that, the Chair would hold it to be not in order.

But before coming to consider what the plain meaning of the language is, the Chair desires to call attention to the precedent, as it is claimed, which arose in March, 1859. On an examination of that

[1] See section 4796 of Vol. IV of this work.

case, which involved the constitutional right of the Senate to originate a post-office appropriation bill,[1] it will be found that a resolution very similar, certainly in effect, to the proposed substitute was adopted in the House by a very large vote, and a conference was agreed to by the Senate. The conferees on the part of the two Houses met and considered only, as the Globe of that time will show, the question of constitutional difference between the two Houses, and reported upon that. Without undertaking to settle the question one way or the other, the conference committee made a report declaring in effect that neither House receded from its position on the subject, and then, as it was the day before the expiration of the Congress, recommended in the latter clause of the report that each House should waive any constitutional right which they respectively considered to belong to them and that the House should pass the bill which was brought to the House.

The history of those proceedings shows, however, that after this bill was brought to the House it was not treated at all as a bill brought there by the conference committee. Mr. Letcher, of Virginia, a member of the conference committee on the part of the House, after the report was received and before it was acted upon, obtained unanimous consent to introduce the precise bill which was recommended by the committee of conference. It was introduced by unanimous consent, read a first and second time as an original bill, and subsequently that bill passed as a House bill upon a suspension of the rules. It was not treated as any matter offered to the House properly by the committee of conference. The committee of conference certainly transcended to some extent its duties by recommending the House to take up a bill, that subject not having been referred to the committee; but it was a mode of getting out of the difficulty and saving an appropriation bill in the expiring hours of Congress. Thus in this particular case we find a precedent only for a resolution of the House referring the constitutional question to a committee of conference, the House having first declared its opinion that the Senate had not the right to originate the particular bill.

Now, a fair reading of this proposed substitute leads the Chair to hold that it provides only for referring to a conference committee the constitutional objections to the bill, such as grow out of the alleged violation of the Constitution by the Senate of the United States in passing an impost bill as a part of or an amendment to an internal revenue bill of the House. The second clause of the preamble clearly provides for a disagreement with the Senate upon this constitutional question. The Chair, giving this substitute the construction it has indicated, holds that the substitute is in order, and therefore overrules the point of order made by the gentle-an from Kentucky.

Mr. Hammond, of Georgia, having appealed, the appeal was laid on the table on motion of Mr. Thomas B. Reed, of Maine.

The substitute was adopted[2]—yeas 144, nays 120—and then the resolution as amended by the substitute was agreed to-yeas 139, nays 122.

When the conferees reported on the bill no mention of the constitutional question was made in the report,[3] and the bill with the Senate amendments became a law.

1492. Instance wherein a Senate amendment affecting the revenue was not objected to until the stage of conference.—On March 1, 1905,[4] in the Senate, the post-office appropriation bill was under consideration, when this amendment was agreed to without any debate as to whether or not it affected the revenue:

SEC. 3 [2]. That hereafter the rate of postage on packages of books or merchandise mailed at the distributing post-office of any rural free delivery to a patron on said route shall be 3 cents for each pound or any fraction thereof. This rate shall apply only to packages deposited at the local post-office for delivery to patrons on routes emanating from that office, or collected by rural carriers for delivery to the office from which the route emanates, and not to mail transmitted from one office to another, and shall not apply to packages exceeding 5 pounds in weight.

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[1] This is hardly accurate. The Senate had placed on the post-office appropriation bill passed by the House an amendment raising the rate of postage. See section 1485 of this chapter.

[2] Journal, pp. 513, 515; Record, pp. 3349, 3350.

[3] Journal, p. 568; Record, p. 3710.

[4] Third session Fifty-eighth Congress, Record, p. 3733.

On the same day,[1] the bill having been received in the House, all the amendments of the Senate were disagreed to,[2] and a conference was asked, Messrs. Jesse Overstreet, of Indiana, John J. Gardner, of New Jersey, and John A. Moon, of Tennessee, being conferees.

On March 1[3] the Senate agreed to the conference.

On March 3[4] the conference report was presented and agreed to, with the above amendment of the Senate disagreed to.

1493. The Senate having added a revenue amendment to an appropriation bill, the House returned the bill to the Senate, which reconsidered and struck out the amendment.—On February 16, 1905,[5] Mr. Sereno E. Payne, of New York, chairman of the Ways and Means Committee, rising to a question of privilege, offered for immediate consideration the following:

Resolved, That the amendment No. 208, added by the Senate to the House bill H. R. 18329, in the opinion of this House contravenes the first clause of the seventh section of the first article of the Constitution of the United States, and is an infringement of the privileges of this House, and that the said bill, with the amendments, be respectfully returned to the Senate with a message communicating this resolution.

Mr. Payne said:

Mr. Speaker, the bill in question is the annual agricultural appropriation bill. The amendment is in these words:

"That paragraph 234 of the act of July 24, 1897, entitled 'An act to provide revenue for the Government and encourage the industries of the United States,' shall not be held to be affected by the provisions of section 30 of said act."

Paragraph 234 of the tariff bill referred to provides for a duty of 25 cents a bushel on wheat imported into the United States. Section 30 provides for a drawback of 99 per cent of the tariff paid on imported articles which enter into the manufacture of articles afterwards exported from the United States. In other words, the amendment abolishes the drawback clause in the Dingley bill on wheat imported into the United States and afterwards manufactured into flour and exported.

Now, I do not intend to discuss at all the merits of this amendment. Whether it is wise or otherwise is a question not to be considered. The important question is whether that clause of the Constitution of the United States which declares that all bills for raising revenue shall originate in the House of Representatives shall be cherished as one of the privileges handed down to us by the Constitution of the United States, and whether we will resent any infringement from any source of that clause of the Constitution of the United States. [Applause.] Mr. Speaker, as the Members know, this is no new question in the House of Representatives, and the House has uniformly insisted on its right guaranteed to it by this clause of the Constitution of the United States, and the Senate has frequently conceded it. In 1831, February 11, in the Senate, Mr. Thomas H. Benton asked leave to introduce a bill for the gradual abolition of the duty on alum salt. This bill was opposed on two grounds, the latter ground because it belonged to a claw of revenue bills which the Senate did not have the right to originate. After debate, leave to introduce the bill was refused—yeas 17, nays 27—and in that case the Senate affirmed the right of the House.

On June 30, 1864, Mr. Thaddeus Stevens introduced a resolution, and the resolution which I have offered to-day is substantially a copy of the one introduced by Mr. Stevens, in regard to the bill to regulate and provide for enrolling and calling out of the national forces, which had been returned from

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[1] Record, p. 3808.

[2] The constitutional question was not raised in the House because of lack of time, and because of the belief that under the circumstances it would be better to give the Senate conferees an opportunity to recede.

[3] Record, p. 3757.

[4] Record, pp. 3979–3982.

[5] Third session Fifty-eighth Congress, Record, pp. 2730–2736.

the Senate with amendments, one of which provided for a 5 per cent duty on all incomes to meet the cost of paying bounties and enforcing the draft. Mr. Stevens said:

"It is so clearly a violation of the privilege of the House that I think it ought not for a moment to be acquiesced in."

Without further debate the House agreed to the resolution. The same day a message from the Senate announced that the Senate, on reconsideration, had again passed the bill with all amendments previously concurred in, except the amendment objected to by the House of Representatives.

In April, 1872, Mr. Dawes, of Massachusetts, reported a resolution in substance as follows:

"Resolved, That the substitution by the Senate, under the form of an amendment, for the bill of the House (H. R. 1537) entitled 'An act to repeal existing duties on tea and coffee' of a bill entitled 'An act to reduce existing taxes,' containing a general revision, reduction, and repeal of laws imposing import duties and internal taxes, is in conflict with the true intent and purpose of that clause of the Constitution which requires that all bills for raising revenue shall originate in the House of Representatives, and that therefore said substitute for House bill No. 1537 do lie upon the table—" and also directing the Clerk to notify the Senate of the passage of the resolution.

The House will notice that the original bill sent from the House of Representatives provided for the abolition of the duty on tea and coffee. It was a bill in relation to the revenue; but the House believed that it was not a bill raising revenue in the sense expressed by the Constitution of the United States, and therefore that the Senate, under their general power of amendment to bills raising revenues, could not incorporate a general tariff bill as a substitute for this bill of the House. This resolution gave rise to an important debate, in which any gentlemen indulged, some of whom have since become Senators and now are in the Senate of the United States, and all of whom took grounds that this bill was an infringement of the constitutional right of the House. Mr. James A. Garfield reviewed the English usage, the circumstances attending the adoption of the clause in the Constitution of the United States, and cited many precedents of Congress. For instance, in the House on June 25, 1789 (First Congress, Annals, vol. 1, pp. 592, 593, 597, 603, 605, 607), the First Congress, Madison, Livermore, Gerry, Lawrence, and Tucker contended that the sole right of originating money bills belonged in the House—this was on an appropriation bill—but that this clause covered also all appropriation bills, because an appropriation bill was an appropriation of the moneys raised by the revenue powers of the Government, and therefore was included; and since that time, as we all know, the appropriation bills of the Government—the supply bills—have originated uniformly in the House of Representatives, with perhaps a single exception, which I will note later, and which failed to become law.

Also in the Senate in 1833 (Twenty-second Congress, Debates, vol. 9, pt. 1, pp. 462, 473, 477, 478, 722), where the tariff bill introduced by Mr. Clay was discussed and tabled, Messrs. Webster, Clay, Dickerson, and Forsythe denied the right of the Senate to originate a revenue bill. In the House in 1837 (Twenty-seventh Congress, Debates, vol. 14, pt. 1, pp. 1152, 1153, 522), where a Senate bill authorizing the issue of Treasury notes was, on September 30, discussed in Committee of the Whole and considered an invasion of the prerogatives of the House. As a result of the discussion, the Senate bill was laid aside and a House bill on the game subject passed. This latter bill passed the Senate. In the Senate in 1842–3 (Twenty-eighth Congress) where, on January 19 to May 31, 1843, Mr. McDuffie's bill to revise the compromise tariff of 1833 was debated and by a vote of yeas 33, nays 4, was decided to be such a bill as could not originate in the Senate. In the Senate in 1855 (Thirty-fourth Congress, Globe, January, 1856, pp. 160, 161, 162, 375, 376), where the Senate, in opposition to the influence of Messrs. Seward and Sumner, originated two general appropriation bills, which were afterwards tabled by the House.

The resolution was agreed to by a vote of yeas 163, nays 9. The resolution was referred to the Committee on Privileges and Elections, and an exhaustive report was made by Mr. Matthew H. Carpenter, of Wisconsin. The following is the concluding clause of the report:

"Your committee are therefore of opinion that the House bill under consideration was not a bill for raising revenue within the meaning of the Constitution; and, therefore, while the Senate might have amended it so as to abolish duties altogether upon other articles, the Senate had no right to engraft upon it, as it did in substance, an amendment providing that revenue should be collected upon other articles, though at a less rate than previously fixed by law. That amendment would have become a provision in the act for raising revenue, because revenue at a certain rate would have been collected by the operation of the act."

On June 14, 1878, Mr. Joseph G. Cannon, of Illinois, as a question of privilege, offered a resolution returning a bill to establish post routes, originating in the House of Representatives, reciting:

"That the amendments thereto be returned to the Senate, as a portion of said amendments are in the nature of and constitute a revenue bill."

The amendments complained of gave the franking privilege to Members of Congress, reduced the rate on second-class mail from 3 to 2 cents a pound, adding a provision for a tax of $1 upon the publisher of a foreign newspaper before he should be permitted to use the mails to send his paper at the 2-cent rate, etc. Another provision relieved the railroads of certain duties in regard to delivering the mails. The resolution was agreed to, yeas 169, nays 68. The Senate appointed a committee of conference to confer with a like committee on the part of the House touching the matters of difference between the two Houses indicated by said House resolution. The House appointed a like committee and each committee reported to their respective Houses that they were unable to agree. The attempt to reconcile the two Houses failed and the bill failed. The House subsequently passed a bill without the objectionable amendments, and that was not passed in the Senate.

On March 3, 1859, Mr. Galusha A. Grow introduced a similar resolution in regard to the post-office appropriation bill, that the same be returned to the Senate, as section 13 of said amendments is in the nature of a revenue measure. That resolution was agreed to in the House and the bill finally failed. Similar action was taken January 27, 1871, in the House, on motion of Mr. Samuel Hooper, of Massachusetts. * * *

Mr. Allison was then a Member of the House. On February 23, 1830, in the Senate, Mr. Thomas H. Benton proposed a bill to provide for the abolition of unnecessary duties, etc. One section of this bill proposed to increase the duties on certain articles, and the question arose as to the constitutional power of the Senate to originate such a measure. After discussion, Mr. Benton withdrew the bill.

There was also a report made in the Forty-eighth Congress by Mr. Randolph Tucker, of Virginia, on the question of changing revenues under the treaty-making, power of the Constitution. It was a lengthy, able, and exhaustive report, written by one of the ablest lawyers whom it has been my privilege to meet during my service in this House, and it showed most conclusively the exclusive power of the House of Representatives to originate revenue bills. I believe that in all the history of the treaty-making of the United States, a question in respect to or touching upon the question of revenue, or where appropriation has been required to carry out the effect of the treaty, it has been the uniform practice, with a single exception, to submit those treaties and those matters to the House of Representatives; and the treaties have not gone into effect until the House of Representatives have joined in the proper legislation to change the revenue or to make the appropriation.

Now, Mr. Speaker, I might cite other precedents. They are numerous, and they are all to the same effect. Our predecessors have held inviolate the right of the House of Representatives to originate revenue bills. It is guaranteed to us by the Constitution. It is higher than any question that can arise in regard to tariff or to tariff change. It is higher than a question of duty on wheat or duty on any other of the four thousand articles that are covered by a revenue measure. It is the sacred right left us by the framers of the Constitution as representing the people, as coming from the body of the people, and as being nearer to the people than the other body, to originate these bills, and none of them can be originated and none should be originated, and none will be originated in the other body if the House of Representatives stand by their right and by their privileges as guaranteed by the Constitution of the United States.

After further debate the resolution was agreed to, yeas 263, nays 5.

On February 17,[1] in the Senate, the message from the House was considered. Mr. Henry C. Hansbrough, of North Dakota, said:

Here, Mr. President, is another question that has never been judicially determined. In the only case that I am able to find which reached the Supreme Court touching the power granted by section 7, Article I, of the Constitution, the court say:

"The case is not one that requires either an extended examination of precedents or a full discussion as to the meaning of the words in the Constitution—'bills for raising revenue.' What bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt by any general statement to cover every possible phase of the subject." (167 U. S., 202.)

[1] Record, pp. 2766–2770.

Mr. Joseph B. Foraker, of Ohio, said:

I do not believe the position taken by the House in this matter is a correct one. That is to say, I do not believe the constitutional provision that bills for raising revenue shall originate in the House precludes the Senate from originating measures that merely affect the revenue, certainly when they affect reductions in the revenue, or when they affect, as here, the revenue only by providing for a construction of a law that is in force, as I understand this amendment does, governing the disbursement of revenues already raised by paying out the same for drawbacks. This is no time, with the pressure we are all working under, to enter upon a discussion of this very important subject, but this is a question that will arise from time to time in connection with the questions that are arising about tariff between this country and our insular possessions, and sooner or later we must discuss it.

I wish to take advantage of this opportunity to say that I assent because of the peculiar conditions surrounding it, but at the proper time I hope to be able to address the Senate upon the proposition I have tried to enunciate, namely, that the constitutional provision does not prohibit us from legislating so as to reduce revenue or to construe a statute that is in force in the way we proposed by this amendment.

Mr. John T. Morgan, of Alabama, said:

Mr. President, I think that the House in sending this resolution here, although it is couched in very respectful terms, has entirely transcended its authority under the Constitution. The House has no right to return to the Senate a proposition of any kind upon the ground that the action of the Senate was unconstitutional. It might ask a conference upon it with great propriety, and have the judgment of both Houses taken upon the constitutionality of that provision.

I maintain, Mr. President, that the action of the Senate in the passage of this amendment to the agricultural appropriation bill was altogether right and constitutional. The House has been in the habit of sending us bills called "bills of revenue," or "bills to raise revenue," or "tariff bills," or "tax bills," internal and external, or "customs bills," accompanied with provisions such as the one contained herein upon which the objection in this case rested, as follows "An act to provide revenue for the Government and to encourage the industries of the United States."

That is the title of the act in which we find the provision that it is now said we are trying to change in an unconstitutional way. The title of that act indicates very clearly its purposes, being twofold and, as I contend, entirely distinct. One is to raise revenue and the other is to encourage industries. When a bill is enacted into law for that purpose there can be no doubt that two propositions are contained in it. One is the revenue proposition and the other is the proposition to encourage industries.

It so happens that the tariff on wheat—25 cents a bushel—is a revenue measure, and that we have no right to change perhaps by a bill originating in the Senate. But the corresponding or correlative proposition of refunding 99 per cent of that tariff, when it is received upon wheat that is brought in, and the tariff has been paid to the Government, when it is exported to foreign countries, is simply a proposition for the encouragement of manufactures. That is not a revenue proposition. It is giving away the revenue after it has been paid into the Treasury. It gives it back to the miller if he grinds the wheat bought from a foreign country and imported into the United States and exports it for sale and for consumption abroad.

Now, there is a distinct proposition which encourages the miller at the expense of the wheat grower. That is a matter which ought to be rectified, if it can be done; and the Senate of the United States has just as much right to act upon that proposition as the House has. We do not disturb the 25 cents a bushel tariff on wheat. We merely say the giving back of that 25 cents, or of 99 per cent of it, to the mill owner is a matter we have a right to deal with. That is the encouragement of industry, and solely that. You can not say that you are raising revenue when you give 99 cents out of the dollar back to anybody as a condition of trade. That feature of the case is not the raising of revenue; it is the giving away of money from the Treasury of the United States to encourage manufactures.

Just as long as the House sends us bills that contain these distinct propositions and so announces in the title of the act itself, I feel entirely at liberty, under my view of the Constitution of the United States, to vote upon propositions to strike out so much of the express provisions of a bill as is intended merely to encourage manufactures without affecting in the slightest degree the tariffs or the revenues of the country.

Mr. John C. Spooner, of Wisconsin, said:

Mr. President, I wish to say a word, and only a word, about this matter. I never supposed when the act was passed that the drawback clause included wheat and some other items. But I can not agree with the Senator from Alabama, and I do not quite agree with the Senator from Ohio, although I do not care to enter into a discussion of the question. I think the clause of the Constitution which says "all bills for raising revenue shall originate in the House of Representatives" uses the word "raising" in a generic sense. I do not think it means simply raising duties. Oftentimes revenue is raised by lowering duties. I think it means, in a strict sense, affecting revenue. * * * Concerning revenue. The Constitution does certainly confer upon the House by that clause an exclusive right, so far as this class of measures is concerned. Tariff bills can not originate in the Senate. That is an impossibility.

This is an agricultural appropriation bill. There was not an item in it which dealt with the revenue, and I think it was entirely without the right of the Senate to include in it the amendment to which the House objects. As construed it amounted to free wheat for export. Whether the Attorney-General has correctly construed the law or not is a question of opinion. He has construed it one way, as Attorney-General Olney construed it the other way. Attorney-General Griggs and Attorney-General Moody construed it differently from the construction placed upon it by Attorney-General Olney.

It is not the function of Congress to construe acts of Congress. That is the function of the judicial department of the Government. Congress and legislatures may pass acts of legislative construction, but they are operative only to change the law from the passage of the legislative act of construction; they are not retroactive so as to bind as to the past.

So this proposition which has passed here absolutely changes the law. It is not simply a matter of construction, but it says: "That paragraph 234 of the act of July 24, 1897, entitled, etc., shall not be held to be affected by the provisions of section 30 of said act."

Section 30 being the general drawback section.

I think, Mr. President, the House was not called upon to nonconcur in the amendment and ask, as in ordinary cases, for a conference. That would have admitted the right of the Senate to incorporate the amendment. If the Senate might make this amendment it is difficult to limit the power of the Senate in incorporating amendments which affect the revenue. * * * I think the House of Representatives, in a very respectful and dignified way, has called our attention to a real invasion of its constitutional privilege and that the Senate is proceeding to do in a dignified and proper way what it ought to do in eliminating this amendment from the bill.

On motion of Mr. Spooner the passage and engrossment of the bill was reconsidered and the objectionable amendment was disagreed to. The bill was then engrossed, read a third tune, and passed; and then returned to the House of Representatives.

1494. The Senate having passed a bill with incidental provisions relating to revenue, the House returned the bill, holding it to be an invasion of prerogative.

Arguments in the Senate as to the limits of the prerogatives of the House in relation to revenue legislation.

On December 14, 1905,[1] in the Senate, Mr. Nelson W. Aldrich, of Rhode Island, from the Committee on Finance, reported the bill (S. 1475) supplemental to an act entitled "An act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans," approved June 28, 1902, and making appropriation for isthmian canal construction, and for other purposes, with an amendment striking out all after the enacting clause and inserting the following:

That the 2 per cent bonds of the United States authorized by section 8 of the act entitled "An act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans," approved

[1] First session Fifty-ninth Congress, Record, p. 383.

June 28, 1902, shall have all the rights and privileges accorded by law to other 2 per cent bonds of the United States, and every national banking association having on deposit, as provided by law, such bonds issued under the provisions of said section 8 of said act approved June 28, 1902, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of 1 per cent each half year upon the average amount of such of its notes in circulation as are based upon the deposit of said 2 per cent bonds: and such taxes shall be in lieu of existing taxes on its notes in circulation imposed by section 5214 of the Revised Statutes.

The amendment was agreed to and the bill as amended was passed. The question as to the right of the Senate to originate revenue legislation was not introduced in the debate.

On the next day, December 15,[1] the bill was sent to the House by message from the Senate, and went to the Speaker's table. Soon thereafter Mr. Sereno E. Payne, of New York, called attention to the fact that the revenue provision of the bill constituted an infringement on the constitutional prerogatives of the House, referred to the summary of precedents given in the preceding Congress in a similar case, and proposed the following resolution, which was agreed to unanimously by the House:

Resolved, That the bill S. 1475, in the opinion of the House, contravenes the first clause of the seventh section of the first article of the Constitution, and is an infringement of the privileges of this House, and that the said bill be taken from the Speaker's table and be respectfully returned to the Senate with a message communicating this resolution.

On the same day[2] the action of the House was transmitted by message to the Senate.

Before the bill (S. 1475) was reported or acted on by the Senate, the House had sent to the Senate a bill (H. R. 480) supplemental to an act entitled "An act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans," approved June 28, 1902, and making appropriation for isthmian canal construction, and for other purposes. This House bill had contained, among other provisions, one similar to the provision of the bill S. 1475. The Senate had stricken the provision from the House bill, having embodied it in somewhat different form in their own bill. The House having disagreed to the Senate amendments to the House bill, the difference was committed to a conference, who reported on December 19, 1905.[3] This conference report, which was agreed to in both Houses on the day of its presentation, restored the provision originally embodied in the House bill, but did so not in the original House language, but in the language of the bill S. 1475.

While the conference report was under consideration in the Senate, Mr. Nelson W. Aldrich, of Rhode Island, said[4] that, in his opinion, the bill S. 1475 was not a revenue measure:

The section, as it came from the House, and as it is proposed to be adopted in the conference report, is an amendment of section 13 of the refunding act of March, 1900, which originated in the Senate and was sent to the other House, where it was received and passed without the constitutional question having been raised. All the provisions of the refunding act were placed in the bill by the Senate, and to this there was no objection. Other important measures affecting taxation of banks have originated in the Senate without protest.

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[1] Record, p. 452.

[2] Record, p. 432.

[3] Record, pp. 581–585.

[4] Record, p. 581.

Last year, when the isthmian canal bill, so-called, was before the Senate, a similar provision to that now in controversy was inserted in that bill at the suggestion of the Finance Committee. That bill went to the other House and no constitutional objection was raised. By the rules of the House of Representatives all revenue bills—all bills relating to or affecting revenue—are referred to the Committee on Ways and Means. All bills relating to the taxation of national banks have been uniformly referred to the Committee on Banking and Currency, showing very dearly that the House itself in its practice has not held bills of this nature to be revenue bills. In the very last session—and I suppose I am at liberty to speak of what occurred in that House as shown by the public records—a bill was introduced by a Member from Connecticut [Mr. Hill] containing substantially the same provisions that are now incorporated in this first section. That bill was referred by the action of the House to the Committee on Banking and Currency; it was reported back by the Committee on Banking and Currency with additional provisions as to the taxation of national banks; it was taken up for consideration without a question being raised as to its charter; taken up without any claim that it was entitled to the privileges of a revenue bill; and it was discussed for weeks. No point was ever raised as to the jurisdiction of the Committee on Banking and Currency, nor was there any claim or suggestion on the part of anybody that the bill was a revenue bill. The claim is now made for the first time that the prerogatives of the House are invaded by legislation of this kind.

Mr. John C. Spooner, of Wisconsin, argued [1] more elaborately in the same line:

If the House of Representatives is correct in its view that the bill is a bill "for raising revenue," within the meaning of section 7 of Article I of the Constitution, certainly the bill is properly returned and must rest here. If the House of Representatives is wrong, the Senate has no right to yield its jurisdiction. No department of the government has any right to surrender any portion of the power or responsibility with which the Constitution has clothed it. It is vital, both as to the National Government and to the State governments, that the line of demarcation drawn by the framers of the Constitution of the United States and of the various States between the three independent and coordinate branches of the Government shall be observed always with the utmost strictness, to the end that neither shall, in the slightest degree, invade the other. * * * Assertion was made in the House, in advocacy of the resolution for the return of the bill, that at the last session the Senate invaded the prerogative of the House and upon its being resented had receded. In my judgment, at the last session of Congress the Senate transcended its rights under the Constitution and invaded the prerogative of the House. That was in the amendment to the agricultural appropriation bill by which the Senate enacted a construction of the tariff act in its relation to drawbacks. The Secretary of the Treasury had construed the drawback clause as including wheat and was admitting it free of duty. That was a question of construction. The Senate adopted an amendment to the appropriation bill declaring the drawback provisions not to include wheat.

It is not the function of legislatures to construe the laws. That is a judicial function. It may be persuasive in the court, but it is not binding upon the court; and where such an act is passed and the court is of opinion, as to past transactions, that the legislative construction is not the sound one, it stands by the judicial construction, but from the passage of the construing act it works a change in the law. Therefore the House rightly objected, in my opinion, to the amendment by the Senate to the tariff act, and the Senate did only its duty in receding from the proposition. But there is no similarity whatever between that amendment and the action here complained of.

But, Mr. President, if the House of Representatives, 357 of whose Members voted for this resolution challenging the power of the Senate-rising to make it more solemn—is right, then the Senate is deprived of a legislative jurisdiction which from the foundation of the Government it has exercised, and it is weakened in its legislative power to the detriment of the public interest. Now a word as to the obvious purpose of the bill which has been returned unconsidered. I apprehend that very few will be found to characterize it as a "tax bill." Certainly from a constitutional standpoint it is not a "bill for raising revenue."

What is its manifest object?

Under existing law the 2 per cent canal bonds heretofore authorized could, when issued, be used as a basis for national-bank circulation. Under existing law the tax upon that circulation would be 1 per cent. The law which is made by this bill to apply to the canal bonds relates to 2 per cent bonds, and

[1] Record, pp. 581–584.

to encourage their purpose and use as a basis for bank circulation reduces the tax from 1 per cent to one-half of 1 per cent. So the bill which was returned to us was simply a bill bringing these 2 per cent canal bonds upon the same basis in respect of taxation with all 2 per cent bonds of the Government.

Is it possible, Mr. President, that it can with reason be said that the object of this bill is to "raise revenue" for the support of the Government?

The question is this: Is the bill, which was introduced as a separate proposition by the Senator from Colorado [Mr. Teller], and which the Senate passed, a revenue bill within the meaning of section 7 of the first article of the Constitution?

"All bills for raising revenue shall originate in the House of Representatives."

This brings us to the question: What is a "revenue bill" within the meaning of the Constitution?

The definition is well settled, thus:

"Revenue laws: Laws made for the direct and avowed purpose of creating and securing revenue or public funds for the service of the Government." (Anderson's Law Dictionary, p. 899.)

This embraces clearly all bills passed in the exercise of the taxing power, whether in the form of customs duties or internal-revenue taxation, for the purpose of raising money for the support of the Government.

This definition excludes, and the constitutional provision was intended to exclude, bills passed in the exercise of constitutional powers other than the taxing power, even if they operated to raise revenue, or even if they imposed incidentally a tax or taxes to secure the more efficient and successful exercise of the power.

Such bills or laws have never been, either in practice or judicially, deemed "revenue" bills or laws.

Congress enacts laws from time to time which operate to raise revenue. The post-office laws operate to raise revenue. Congress frequently changes the post-office laws so as to raise more revenue. But it has not been contended for many years—it was once—that those were revenue bills within the meaning of this clause of the Constitution.

The power to create national banks is a power which exists in Congress. It is not the sole prerogative of either House. It is not the taxing power. It is legislation which Congress may enact under the money power; and the Supreme Court of the United States has so decided. The taxation imposed from the beginning upon the circulation of national banks is purely incidental to the exercise by the Congress, in creating national banks, in supplying the people with the circulation of national banks, of a distinct power vested by the Constitution in either House. * * *

Mr. President, the definition of "revenue laws" which I read to the Senate is taken from Mr. Justice Story (see United States *v.* Mayo, 1 Gall, 398, and Story on Constitution, sec. 880), and the Supreme Court, in the case of United States *v.* Norton, 91 United States, 568, had occasion to consider carefully the question as to what is meant by the phrase "revenue bill," or what the word "revenue" as used in section 7 of Article 1 of the Constitution means. This was a post-office money-order case. It was a criminal case, but the court was obliged in deciding it to pass upon the question whether it was a "revenue law" or not, because, as it determined that it was or that it was not, the law, it was claimed, would be valid or invalid. They say:

"In no just view, we think, can the statute in question be deemed a revenue law.

"The lexical definition of the term 'revenue' is very comprehensive. It is thus given by Webster: 'The income of a nation, derived from its taxes, duties, or other sources, for the payment of the national expenses.'

"The phrase 'other sources' would include the proceeds of the public lands, those arising from the sale of public securities, the receipts of the Patent Office in excess of its expenditures, and those of the Post-Office Department, when there should be such excess, as there was for a time in the early history of the Government. Indeed the phrase would apply in all cases of such excess. In some of them the result might fluctuate, there being excess at one time and deficiency at another.

"It is a matter of common knowledge that the appellative 'revenue laws' is never applied to the statutes involved in these classes of cases.

"The Constitution of the United States, Article 1, section 7, provides that 'all bills for raising revenue shall originate in the House of Representatives.'

"The construction of this limitation is practically well settled by the uniform action of Congress. According to that construction it 'has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which incidentally create revenue.'

(Story on the Constitution, sec. 880.) 'Bills for raising revenue' when enacted into laws become revenue laws. Congress was a constitutional body sitting under the Constitution. It was, of course, familiar with the phrase 'bills for raising revenue' as used in that instrument and the construction which had been given it.

"The precise question before us"—

That is, as to what was meant by a "revenue bill" under this clause of the Constitution—"came under the consideration of Mr. Justice Story, in the United States *v.* Mayo (1 Gall., 396). He held that the phrase 'revenue laws,' as used in the act of 1804, meant such laws 'as are made for the direct and avowed purpose of creating revenue or public funds for the service of the Government.' The same doctrine was reaffirmed by that eminent judge in the United States *v.* Cushman, 426."

These views commend themselves to our judgment.

Here is an interesting and original discussion of the question, and I will take but a moment with it before I bring to the attention of the Senate a decision by the Supreme Court of the United States declaring this very section involved between the Senate and the House not to be a revenue bill within that clause of the Constitution invoked by the House. I read from the case of the United States on the relation of Oran C. Michels *v.* Thomas L. James, postmaster of the city of New York, 13 Blatchford's Circuit Court Reports, 207. After quoting the clause, "All bills for raising revenue shall originate in the House of Representatives," the court says:

"Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts, or excises for the use of the Government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens, of the benefit of good government."

That is a well thought out distinction and definition.

"It is this feature which characterizes bills for raising revenue"—

Taxes levied throughout the United States upon all coming within the purview of the act to raise revenue for the general uses of the Government and all of the people—

"It is this feature which characterizes bills for raising revenue. They draw money from the citizen; they give no direct equivalent in return. In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them. Their immediate responsibility to their constituents and their jealous regard for the pecuniary interests of the people, it was supposed, would render them especially watchful in the protection of those whom they represented. But the reason fails in respect to bills of a different class. A bill regulating postal rates for postal service provides an equivalent for the money which the citizen may choose voluntarily to pay. He gets the fixed service for the fixed rate, or he lets it alone, as he pleases and as his own interests dictate. Revenue, beyond its cost, may or may not be derived from the service and the pay received for it, but it is only a very strained construction which would regard a bill establishing rates of postage as a bill for raising revenue, within the meaning of the Constitution. This broad distinction existing in fact between the two kinds of bills, it is obviously a just construction to confine the terms of the Constitution to the case which they plainly designate. To strain those terms beyond their primary and obvious meaning, and thus to introduce a precedent for that sort of construction, would work a great public mischief. Mr. Justice Story, in his Commentaries on the Constitution (sec. 880), puts the same construction upon the language in question, and gives his reasons for the views he sustains, which are able and convincing. In Tucker's Blackstone only, so far as authorities have been referred to, is found the opinion that a bill for establishing the post-office operates as a revenue law. But this opinion, although put forth at an early day, has never obtained any general approval; but both legislative practice and general consent have concurred in the other view."

Mr. President, I now ask the attention of the Senate to the case of Twin City Bank *v.* Nebeker, 167 U.S., 196, which is upon the precise question, and is unanimous and conclusive. I will take the time to read a portion of the statement of the case in order that Senators may see how controlling is the decision. In this case the plaintiff bank brought suit against Nebeker, then Treasurer of the United States, "to recover from the defendant in error the sum of $73.08, alleged to have been paid by the former under protest to the latter, who was at the time Treasurer of the United States, in order to procure the release of certain bonds, the property of the bank, which bonds, the declaration alleged, were illegally and wrongfully withheld from the plaintiff by the defendant. The plaintiff went into liquidation"—that is, the bank—"in the manner provided by law, on the 23d of June, 1891, and on the 25th of August,

1891, deposited in the Treasury of the United States lawful money to redeem its outstanding notes, as required by section 5222 of the Revised Statutes of the United States. After making such deposit the bank demanded the bonds which had been deposited by it to secure its circulating notes, and of which defendant had possession as Treasurer of the United States. The defendant refused to deliver them unless the bank would make a return of the average amount of its notes in circulation for the period from January 1, 1891, to the date when the deposit of money was made—viz, the 25th of August—1891and—pay a tax thereon. The bank then made a return of the average amount of its notes in circulation for the period from January 1 to June 30, 1891, and paid to the defendant $56.25, protesting that he had no authority to demand the tax, and delivered to him a protest in writing setting forth that, in making the return and in paying the tax, it did not admit the validity of the tax or defendant's authority to exact or collect it, but made the return and payment solely for the purpose of procuring the possession of the United States bonds belonging to it, which defendant had refused to release until such return and payment were made, and further protesting that it was not liable to the tax or any part of it. The bank's agent then made another demand upon defendant for the bonds; but he refused to deliver them until a return should be made of the average amount of its notes in circulation for the period from July 1 to August 25, 1891, and a tax paid thereon. Its agent then delivered such return to defendant and paid him $16.83, at the same time delivering a written protest in the same form as the one above mentioned. These transactions were with the defendant himself, and the money was paid to him in person.

"The Journals of the House of Representatives and the Senate of the United States for the first session of the Thirty-eighth Congress were put in evidence by plaintiff. The bank claim that these Journals show that the national-bank act originated as a bill in the House of Representatives; that when it passed the House it contained no provision for a tax upon the national banks, or upon any corporation, or upon any individual, or upon any property, nor any provisions whatever for raising revenue, and that all the provisions that appear to authorize the Treasurer of the United States to collect any tax on the circulating notes of national banks originated in the Senate by way of amendment to the House bill."

Which is the fact. The court say:

"The provision relating to taxation, which, it is alleged, was inserted by way of amendment in the Senate, appears as section 5214 of the Revised Statutes."

I am told by my friend the Senator from Iowa [Mr. Allison] that that is the very section involved here.

Mr. ALLISON. The same section.

Mr. SPOONER. The same section.

Now the court says:

"The contention in this case is that the section of the act of June 3, 1864, providing a national currency secured by a pledge of United States bonds, and for the circulation and redemption thereof, so far as it imposed a tax upon the average amount of the notes of a national banking association on circulation was a revenue bill within the clause of the Constitution declaring that 'all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills' (Article I, section 7); that it appeared from the official journals of the two Houses of Congress that while the act of 1864 originated in the House of Representatives, the provision imposing this tax was not in the bill as it passed that body, but originated in the Senate by amendment, and being accepted by the House became a part of the statute; that such tax was, therefore, unconstitutional and void; and that consequently the statute did not justify the action of the defendant."

The question could not, I think, be more clearly presented to the court than it is upon this statement of fact. The court say:

"The case is not one that requires either an extended examination of precedents or a full discussion as to the meaning of the words in the Constitution 'bills for raising revenue.' What bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject. It is sufficient in the present case to say that an act of Congress providing a national currency, secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking associations organized under the statute, is clearly not a revenue bill which the Constitution declares must originate in the House of Representatives.

"Mr. Justice Story has well said that the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes

in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." (1 Story on Constitution, sec. 880.)

That was the language of Mr. Justice Story long ago, incorporated in this opinion and expressly affirmed, and also in the Ninety-first United States, by unanimous decision of the Supreme Court. The court continues:

"The main purpose that Congress had in view was to provide a national currency based upon United States bonds, and to that end it was deemed wise to impose the tax in question. The tax was a means for effectually accomplishing the great object of giving to the people a currency that would rest primarily upon the honor of the United States and be available in every part of the country. There was no purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the Government. "

Now, Mr. President, I do not intend to take further time. Here is to be found, under the strongest possible sanction, a definition of the word "revenue," as used in this constitutional provision, made a great many years ago by Judge Story, practically adopted by both bodies ever since, sustained by a number of decisions which I have not stopped to even note, and lastly sustained in language too plain for dispute by the Supreme Court of the United States. Nothing can be plainer than that this bill and kindred. bills do not fall within that definition.

There seem to be no answer to the suggestion of the Senator from Rhode Island [Mr. Aldrich] that if section 1 as sent to us by the House of Representatives is a revenue bill within the meaning of section 7 of article I of the Constitution we have a right under that clause to add to it a tariff bill or amendments to the internal-revenue law. An attempt to treat the bill as a revenue bill for such a purpose could not fail to excite derision.

The conference report was agreed to by the Senate, and later by the House. No further action was proposed in the Senate at this time on the question of prerogative.

1495. The Senate having added certain revenue amendments to a non-revenue House bill, the House ordered the bill to be returned to the Senate.

The two Houses being at variance over a question of constitutional prerogative, the differences were submitted to a committee of conference.

On June 14,1878,[1] Mr. Joseph G. Cannon, of Illinois, as a question of privilege, offered the following resolution:

Resolved, That the House bill (No. 4286) to establish post routes in the several States therein named, with the Senate amendments thereto, be returned to the Senate, as a part of said amendments are in the nature of and constitute a revenue bill.

Mr. Cannon specified amendments as follows:

Section 11 gives the franking privilege to all Members of Congress and certain Department officers, clearly making it a revenue measure in the contemplation of the Constitution. The case in the Thirty-fifth Congress was for an increase of postage; this is for decreasing postage on matter forwarded through the mails. * * *

Sections 12 to 19, inclusive, provide what shall constitute second-class mail matter. A large portion of it is now by law charged 3 cents a pound. This provides the whole of it shall go at 2 cents a pound.

The next section provides for a tax of $1 upon every publisher in the United States before he shall be permitted to use the mail to send his papers at the 2-cent rate, a provision that is unknown to the law—a revenue provision. * * *

Again, section 18 allows foreign newspapers to be sent by the publisher or his agent through the mails at 2 cents a pound. * * *

[1] Second session Forty-fifth Congress, Journal, p. 1303; Record, pp. 4606–4613.

Again, sections 24 and 25 of this bill provide that an entirely new class of matter that never was permitted to go through the mails may go through the mails at 1 cent an ounce, changing the law and reaching out to gather revenue for the Department; a revenue to go into the Treasury. * * *

Mr. Cannon also called attention to a section subsidizing steamers, and another relieving railroads of certain duties in regard to delivering the mails.

The resolution was debated at length, attention being called to the fact that the bill, as it passed the House originally and was sent to the Senate, was neither a revenue bill nor an appropriation bill, but simply a post routes bill. The Senate, therefore, had not exercised their constitutional function of amending a revenue bill, but had originated revenue provisions.

The resolution was agreed to, yeas 169, nays 68.

On the same day, in the Senate,[1] the resolution of the House was received and considered. Various propositions were made—one that the Senate insist on its amendments and ask a conference. But it was objected that a conference might not take place in this manner when the House had not acted on the Senate amendments. Finally, Mr. Thomas W. Ferry, of Michigan, proposed a preamble reciting the circumstances and the following resolution:

Resolved, That a committee of conference be appointed to confer with a like committee on the part of the House touching the matters of difference between the two Houses indicated by said House resolution, and invite the House to agree to such conference.

It was objected that a conference might not be held except in case of disagreeing votes, but in reply Jefferson's Manual was quoted to show that conferences might be asked in cases of difference of opinion.

The resolution and preamble were agreed to by the Senate, and the action was reported to the House, where, on June 15, the request of the Senate for a conference was agreed to. The conferees of the two Houses were Senators T. W. Ferry, of Michigan, S. J. Kirkwood, of Iowa, and S. B. Maxey, of Texas; Representatives J. G. Cannon, of Illinois, W. R. Morrison, of Illinois, and A. M. Waddell, of North Carolina.

On June 17[2] the conferees submitted written reports to their respective Houses, stating that they had been unable to agree, and asking a new committee. The further conference was ordered by both Houses and the new conferees were appointed, the same ones being reappointed, except that Senator A. S. Paddock, of Nebraska, took the place of Mr. Ferry, and Representative John G. Carlisle, of Kentucky, the place of Mr. Morrison.

On June 18[3] the conferees reported as follows:

The committee of conference * * * have met, and after full and free conference have been unable to agree touching the matter of difference between the two Houses indicated by said resolution.

The conferees on the part of the Senate propose to waive the discussion as to the question of privilege at issue between the two Houses, and to take up the House bill with the Senate amendments thereto and consider them for the purpose of 1ring a report upon the several matters embraced therein.

The conferees on the part of the House decline to agree to this proposition, for the reason that they do not, in their opinion, possess any power under the resolution of the House to consider the bill or amendments without an enlargement thereof.

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[1] Journal, pp. 1310, 1311, 1334; Record, pp. 4592, 4596, 4680.

[2] Journal, p. 1394; Record, pp. 4719, 4767.

[3] Journal, p. 1410; Record, pp. 4787, 4824.

The attempt to reconcile the two Houses failed with this conference, and the bill did not become a law.

The House subsequently passed, under suspension of the rules, a post-route bill embodying the unobjectionable amendments of the Senate.

1496. In 1889 Senate amendments to a House revenue bill were questioned in the House as an infringement of the House's privilege.—On February 15, 1889,[1] Mr. Roger Q. Mills, of Texas, as a question of privilege, from the Committee on Ways and Means, to whom was referred the amendment of the Senate to the bill (H. R. 9051) to reduce taxation and simplify the laws in relation to the collection of the revenue, reported the same, accompanied by a report and the following resolution:

Resolved, That the substitution by the Senate, under the form of an amendment, for the bill of the House (H. R. 9051), entitled "An act to reduce taxation and simplify the laws in relation to the collection of the revenue," of another and different bill, containing a general revision of the laws imposing impost duties and internal taxes, is in conflict with the true intent and purpose of section 7, Article I, of the Constitution, and that said bill and substitute be returned to the Senate with the respectful suggestion that said section vests in the House of Representatives the sole power to originate such a measure.

In their report the committee say:

The House bill was passed on the 21st day of July, 1888, and transmitted to the Senate on the 23d day of the same month. It was referred to the Committee on Finance on the 25th day of July, and by that committee reported back to the Senate on the 4th day of October, 1888, with the recommendation that the enacting clause be stricken out and that an entirely new bill be substituted. The Senate, without reading the House bill, proceeded to consider the substitute, with occasional interruptions, until the adjournment of Congress.

When Congress reassembled in December last the consideration of the substitute was resumed, and on the 22d of January the final vote upon the measure was taken in the Senate, the House bill having never been read except by title. The bill of the House contained 67 pages; the Senate substitute contains of the same print 179 pages; the House bill embraces certain specified items of our revenue; the Senate substitute proposes an original revision of our entire revenue system.

The report then goes to discuss the constitutional question, citing the action of the Senate in 1844 and the precedents of the Forty-first and Forty-seventh Congresses.

On February 22 Mr. Mills called up the resolution, but the House, by a vote of yeas 89, nays 144, refused to consider it. The resolution and the bill do not appear again.

1497. Instances wherein the Senate has acquiesced in the Constitutional requirement as to revenue bills, while holding to a broad power of amendment.—On January 5, 1903,[2] in the Senate, Mr. Henry Cabot Lodge, of Massachusetts, in the course of debate on a Senate bill to suspend the duty on coal for a period of ninety days, said:

It is a bill to suspend for ninety days the duties on coal imported into the United States. I am perfectly aware, of course, that no such bill can originate in this body and that this body can take no action upon such a measure until it comes over to it from the House. I introduce the bill simply because I desire to call attention here and elsewhere to the subject, and to ask for it the prompt consideration of the Senate Committee on Finance.

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[1] Second session Fiftieth Congress, Journal, pp. 507, 589; Record, pp. 1936, 2208; Report No. 4055.

[2] Second session Fifty-seventh Congress, Record, p. 484.

Mr. Charles A. Culberson, of Texas, said:

I desire to say that it seems to me the Senator from Massachusetts, who has just taken his seat, misconceives the provision of the Federal Constitution with reference to revenue bills. The Constitution provides that all bills for "raising" revenue must originate in the House of Representatives, but I do not understand that by that clause the origination of bills in the Senate which have an entirely opposite purpose, or, in other words, the purpose of cutting off absolutely revenue derived from a specific article is prohibited.

On January 8, 1903,[1] the Senate considered the following resolution:

Resolved, That the Committee on Finance be instructed to prepare and report a bill amending "An act to provide revenue for the Government and to encourage the industries of the United States," approved July 24, 1897, so that the tariff duty shall be removed from anthracite coal and the same be placed on the free list.

In the course of the debate Mr. Nelson W. Aldrich, of Rhode Island, said:

The precedents in the Senate and in the House, as well as the restrictions of the Constitution itself, from my standpoint, preclude that action. I understand, of course, that the Senator from Missouri may hold a different view. A different view has been announced by Senators upon the other side of the Chamber. But I submit to the Senate that an attempt to afford relief, which, as the Senator says, is demanded at once, through a method which would only precipitate a discussion here and elsewhere as to the constitutional rights of the Senate and as to the constitutional prerogative of the House of Representatives—a discussion which in its very nature would outlast the coal famine—is not a practical method of securing results. The House of Representatives has always affirmed the position to the contrary, and the Senate has universally yielded, whatever might have been the individual opinions of Senators as to that contention.

Mr. George F. Hoar, of Massachusetts, after citing the precedent in the House, when Mr. Hooper, of Massachusetts, submitted a report, said:

The greatest constitutional authority in this country—save Marshall, as we all agree on both sides—Mr. Webster, declared in the Senate that, whatever might be the opinion of the Senate on this question, it was in the nature of the case absolutely clear that it was a matter which must be settled always by the sole opinion of the House of Representatives, and that, whatever the Senate might think, the House was the sole constitutional judge of the extent, meaning, and scope of that constitutional provision.

A little reflection will show that Mr. Webster was clearly right. We can not refuse to consider a House bill on such a subject, because we are bound to consider their bills, and we do not deny that they have the right to originate them. So, of course, we can not interfere with their bills. On the other hand, the House has a perfect right to refuse to consider bills which it regards as bills for raising revenue, when they come from the Senate, on the constitutional ground that we have nothing to do with that subject in its origin, and we can not help ourselves.

So practically the Constitution has tied our hands, and the worst thing that can happen to the cause of relieving the present distress of the people by getting free coal, either for a time or permanently, is what the Senator from Missouri has caused to happen, as far as he can—that is, the stirring up of a controversy between the two Houses of Congress.

On January 21[2] Mr. John C. Spooner, of Wisconsin, said:

I have a conviction, Mr. President, that it is not in the power of the constitution of the Senate to originate a bill which increases a tariff rate, or reduces a tariff rate, or removes a tariff rate; and for the purpose of securing from the committee a report upon that subject—and it would be as well for that purpose to secure a report upon this resolution as any other measure—with the consent of the Senator from Missouri, I move the reference of the resolution to the Committee on Finance.

After brief debate the motion of Mr. Spooner was agreed to.

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[1] Record, pp. 592, 594.

[2] Record, p. 1031.

1498. On February 17, 1879,[1] while the Senate was considering a bill of the House relating solely to the internal revenue, Mr. Stanley Matthews, of Ohio, proposed an amendment regulating the duty on tea and coffee. Mr. James B. Beck, of Kentucky, objected that such an amendment, affecting as it did the tariff, was not proper to a bill strictly confined to the internal revenue. After debate on the constitutional question the Senate decided, ayes 22, noes 16, that the amendment was in order.

1499. In the Forty-seventh Congress[2] the Senate originated and passed a bill (S. 22) to provide for the appointment of a commission to investigate the question of the tariff and internal-revenue laws. After this bill had been debated in the Senate a bill of identical title (H. R. 2315) was introduced in the House, and was under debate in the House when the Senate bill came over. The House continued with its own bill and passed it.[3] Then the Senate passed[4] the House bill and it became a law.

1500. Discussion by a committee of the House of the constitutional right of the Senate to originate bills appropriating money from the Treasury.—On March 11, 1880,[5] the bill (S. 1157) entitled "An act authorizing the Secretary of the Treasury to purchase additional lots of ground adjoining the new building for the Bureau of Engraving and Printing" was reported from the Committee on Public Buildings and Grounds. A question having arisen as to the clause of the bill making an appropriation, it was referred to the Committee on the Judiciary[6] with instructions to inquire into the right of the Senate under the Constitution to originate bills making appropriations of money belonging to the Treasury of the United States.

On February 2, 1881, Mr. J. Proctor Knott, of Kentucky, from the Committee on the Judiciary, submitted a report[7] recommending the adoption of this resolution:

Resolved, That the Senate had the constitutional power to originate the bill referred, and that the power to originate bills appropriating money from the Treasury of the United States is not exclusive in the House of Representatives.

The minority of the committee, Messrs. Hurd, House, Ryon, Lapham, and Williams, filed dissenting views, recommending these resolutions:

Resolved, That the seventh section of article 1 of the Constitution, which provides that "All bills for raising revenue shall originate in the House of Representatives," confers exclusive power upon the House to originate bills appropriating money from the public Treasury.

Resolved, That the Senate bill which has been referred to this committee be returned to the Senate of the United States with a copy of these resolutions.

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[1] Third session Forty-fifth Congress, Record, pp. 1478–1482.

[2] First session Forty-seventh Congress, Record, p. 2342.

[3] Record, p. 3687.

[4] Record, pp. 3695, 3742.

[5] Second session Forty-sixth Congress, Record, p. 1484.

[6] The members of the Committee on the Judiciary were J. Proctor Knott, of Kentucky; John T. Harris, of Virginia; David B. Culberson, of Texas; Frank H. Hurd, of Ohio; John F. House, of Tennessee. John W. Ryon, of Pennsylvania; Hilary A. Herbert, of Alabama; Jeptha D. New, of Alabama; N. J. Hammond, of Georgia; Elbridge G. Lapham, of New York; George D. Robinson, of Massachusetts; Thomas B. Reed, of Maine; Wm. McKinley, of Ohio; Charles G. Williams, of Wisconsin, and Edwin Willits, of Michigan.

[7] Report No. 147, third session Forty-sixth Congress.

The report and the views of the minority were ordered printed, but no further action was taken either on them or on the bill in question.[1]

Both the majority and minority submitted exhaustive arguments in support of their respective positions. The majority contended that if the words of the Constitution were to be taken in their ordinary acceptation, it was difficult to conceive how there could possibly be two opinions, for the distinction between raising revenue and disposing of it after it had been raised was sufficiently obvious to be understood by even the commonest capacity. It was true that from the time the Constitution was framed there had been an impression, more or less general, that this clause had a much broader signification than its terms implied. Many, including Mr. Madison, Mr. Webster, and Justice Storey, had seemed to regard the expression "bills for raising revenue" as synonymous with the term "money bills." The committee then examines the use of the term "money bills," especially with reference to the usages of the British Parliament, where money has long been raised and expended by the same bills. In Massachusetts, where the constitution provided that "money bills" should originate in the House of Representatives, the supreme court had given the opinion that this did not preclude the origination of appropriation bills by the Senate. Both at the time of the formation of our Constitution, as well as since, the appropriation of the revenue was in England a mere incident to measures by which it was granted to the Crown and brought into the exchequer. The House of Commons claimed and exercised the exclusive right both to raise and appropriate the revenue. With this example in their minds the framers of our Constitution, had they intended to confine the origination of appropriation bills to the House, would have done so in perfectly plain and unequivocal terms. In the debates on the Constitution the policy of investing the House with the exclusive privileges of the English Commons in regard to "money bills" was persistently urged, and it was to be assumed that the refusal to do this was significant of an intention not to give to the House the exclusive privilege. In the Senate in 1856 the question of originating some of the general appropriation bills was discussed, and such bills were framed and sent to the House. These bills were laid on the table in the House, not because of a contention that the Senate had transgressed the constitutional privilege of the House, but because similar bills had already passed the House. The committee decline to discuss the policy of the principle, but only refer to its strict constitutional basis.

The minority, in their views, gave six reasons:

1. That the word "revenue" meant money received into the Treasury for public uses, and the words "raising revenue" must include bills appropriating money to the use of the Government, as well as bills providing for levying and collecting taxes. This was shown from the English precedents, where the essential act to constitute the money raised revenue was the grant, without which not one dollar could be used for the national expenses.

2. The proceedings of the Constitutional Convention showed very clearly that the term "revenue" was intended to be used in its ordinary sense of appropriating as well as collecting money for uses of the Government. The committee review these proceedings carefully in support of this position, and also examine the English

[1] Third session Forty-sixth Congress, Journal, p. 309; Record, p. 1146.

precedents. Incidentally dissent is expressed as to the decision of the supreme court of Massachusetts.

3. The speeches in the conventions of the different States called for the consideration of the Constitution; the writings of the friends of that instrument, published for the purpose of securing its adoption; the expressions of members of the Constitutional Convention, and the opinions of the ablest commentators on the Constitution all showed that the phrase "bills for raising revenue" was the equivalent of "money bills," which in the English Government at the time of the framing of our Constitution included bills of appropriation. The minority give citations in support of this.

4. From the time of the first Congress appropriation bills had, with few exceptions, originated in the House. By unvarying usage all general appropriation bills had originated in the lower branch of Congress. The action of the Senate in 1857 [1856] emphasized this rule. The first appropriation bill provided in its opening section the sources from which the money should be drawn, and afterwards directed the purposes to which it should be applied. In one of the first bills for the imposition of duties it was provided that out of the proceeds a sum of $600,000 should be set aside annually for the public expenditure, and in almost every general appropriation bill until 1813 it was declared that out of that $600,000 the sums set aside for particular purposes should be paid. These enactments were in manifest analogy to similar legislation in the British Parliament and show plainly that the early opinion was universal that the House of Representatives possessed the same power over money bills which belonged to the House of Commons.

5. The minority cite the terms of the Constitution itself in confirmation of their view.

6. The immediate representatives of the people should have the control of the purse, and the power of originating appropriation bills was a trust which should be retained.[1]

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[1] On February 8, 1888, during the consideration of the bill (S. 371) to aid in the establishment of common schools, the constitutional power of appropriation was debated at some length in the Senate. (First session Fiftieth Congress, Record, pp. 1046–1055.)

On May 15, 1888, the Senate debated the constitutional right of the House in the origination of appropriation bills, and also the subjects of amendments to such bills by the Senate. (First session Fiftieth Congress, Record, pp. 4151–4158.)

On January 7, 1856, during the prolonged contest over the election of a Speaker in the House, and while the House, from its disorganized condition, was unable to transact any business, Mr. Richard Brodhead, jr., of Pennsylvania, presented in the Senate a proposition that the Committee on Finance be directed to inquire into the expediency of reporting the appropriation bills, with a view of obtaining a more speedy action on them than could be obtained by awaiting the action of the House. After a debate involving to some extent the constitutional right of the Senate to originate these bills, the resolution was agreed to. On February 4, Mr. Robert M. T. Hunter, of Virginia, from the Committee on Finance, reported that they had had the resolution under consideration and had deemed it best for the Senate to instruct them by the adoption of this resolution:

Resolved, That the Committee on Finance be instructed to prepare and report such of the general appropriation bills as they may deem expedient.

On February 7 this resolution was agreed to after a debate on the constitutional question involved, Mr. William H. Seward, of New York, making an especially strong plea against departing from the practice since the foundation of the Government. (First session Thirty-fourth Congress, Globe, pp. 160, 349, 375.)

But while there has been dispute as to the theory, there has been no deviation from the practice that the general appropriation bills (as distinguished from special bills appropriating for single, specific purposes) originate in the House of Representatives.

1501. In 1885 the House, after learned debate, declined to investigate the power of the Senate to originate bills appropriating money.

Whenever it is asserted on the floor that the privileges of the House are invaded, the Speaker entertains the question.

On January 23, 1885,[1] Mr. Frank H. Hurd, of Ohio, as a question of privilege, submitted the following:

> Whereas certain bills appropriating money from the Treasury of the United States, originating in the Senate, have passed that body and have been sent to this House for its concurrence, which are now upon the Speaker's table, to wit, Senate bill No. 398, entitled "A bill to aid in the establishment and temporary support of common schools," and many others; and
>
> Whereas it is asserted that these bills are in violation of the privilege of this House to exclusively originate bills for raising revenue: Therefore be it
>
> *Resolved,* That the Committee on the Judiciary be hereby directed to inquire into the power of the Senate to originate bills appropriating money from the Treasury of the United States, and report to this House at as early a day as practicable.

Mr. J. Frederick C. Talbott, of Maryland, made the point of order that the resolution did not present a question of privilege.

The Speaker[2] said that whenever it was asserted on the floor of the House that the rights or privileges of the House had been invaded or violated, it was the duty of the Chair to entertain the said question, at least to the extent of submitting it to the House. Therefore he overruled the point of order.

The House then proceeded to the consideration of the resolution, Mr. Hurd offering in its support an elaborate constitutional argument.

After debate, Mr. Albert S. Willis, of Kentucky, moved to lay the resolution and preamble on the table.

This motion was agreed to, yeas 128, nays 123.

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[1] Second session Forty-eighth Congress, Journal, pp. 316, 317; Record, pp. 948–962.

[2] John G. Carlisle, of Kentucky, Speaker.

Chapter XLVIII.

PREROGATIVES OF THE HOUSE AS TO TREATIES.

1. Suggestions of the House as to treaties. Sections 1502–1505.[1]
2. Conflicts with Senate and Executive. Sections 1506–1519.
3. Functions of the House as to revenue treaties. Sections 1520–1533.
4. House exacts a share in making Indian treaties. Sections 1534–1536.
5. Opinion of the Supreme Court as to explanations of treaties. Section 1537.

1502. Instances of the action of the House in carrying into effect, terminating, enforcing, and suggesting treaties.—On March 2, 1835,[2] the House, by a unanimous vote, and after debate, agreed to the following resolutions:

Resolved, That in the opinion of this House the treaty with France of the 4th of July, 1831, should be maintained, and its execution insisted on.

Resolved, That contingent preparations ought to be made to meet any emergency growing out of our relations with France.

1503. On February 19, 1833,[3] a bill (H. R. 741) "to carry into effect the convention between the United States and His Majesty the King of the Two Sicilies" was reported from the Committee on Foreign Affairs. This bill became a law.

1504. On June 3, 1874,[4] the Committee on Foreign Affairs reported to the House a joint resolution (H. J. Res. 107) providing for the termination of the treaty between the United States and His Majesty the King of the Belgians. This resolution passed the House, and became a law.

1505. In 1879,[5] the House passed a joint resolution (H. J. Res. 117) providing for a treaty with the Republic of Mexico.

1506. In 1816 the House, after discussion with the Senate, maintained its position that a treaty must depend on a law of Congress for its execution as to such stipulations as relate to subjects constitutionally intrusted to Congress.

An instance wherein the enacting words of a bill were declaratory as well as legislative in form.

Under the early practice the conference reports made to the two Houses were not identical.

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[1] Notice of abrogation of a treaty made by joint resolution, section 6270 of Volume V.

[2] Second session Twenty-third Congress, Journal, pp. 499–581; Debates, p. 1634.

[3] Second session Twenty-second Congress, Journal, pp. 361, 491.

[4] First session Forty-third Congress, Journal, pp. 1097, 1251; Record, p. 4507.

[5] First session Forty-sixth Congress, Journal, p. 584.

On January 4, 1816,[1] the House, in Committee of the Whole House, proceeded to the consideration of the bill of the House "to regulate the commerce between the Territories of the United States and His Britannic Majesty according to the convention concluded on the 3d day of July, 1815." Mr. John Forsyth, of Georgia, chairman of the Committee on Foreign Relations, stated that the bill was intended to carry into effect those parts of the treaty which required legislative interposition. The present discriminating duties on tonnage and importations were abrogated by the provisions of the treaty, and the present bill was for the purpose of conforming American law to the provisions of the treaty.

Mr. William Gaston, of North Carolina, made the point that the treaty since its ratification had become the law of the land, and therefore the pending bill seemed to him to be nugatory and unmeaning. On the succeeding day, January 5, in order to try the principles of the bill, Mr. Gaston moved that it be indefinitely postponed.

On January 8,[2] Mr. Forsyth replied, stating that the constitutional principle had been settled in 1795, when the House had enunciated the principle that "when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress." This doctrine evidently applied not only to appropriations but to all cases over which power was specially given by the Constitution to the legislative department. Mr. Forsyth reviewed then instances where Congress had legislated in obedience to this broad principle. It was further urged[3] by Mr. Philip P. Barbour, of Virginia, that a treaty was the supreme law of the land so far as the States were concerned, but that this superiority did not extend over the Constitution and laws of the United States. Were there not such a check upon the treaty-making power the harmony between the departments of the Government would be broken down, and the treaty-making power would swallow up all the rest.

On the other hand, Mr. Thomas R. Gold, of New York, urged[4] that a treaty required the aid of an act of Congress for its validity no more than an act of Congress required the aid of a treaty. If the treaty's reduction of the impost on British tonnage were not valid until an act of Congress should be passed what became of the most important act the Government ever passed—the declaration of war with Great Britain? The law declaring that war had not been repealed by Congress, and unless the treaty of peace abrogated it—i. e., was supreme to it—we were still at war. On a succeeding day Mr. John C. Calhoun elaborated[5] this argument also.

The motion to postpone the bill was decided in the negative,[6] yeas 60, nays 81.

But the discussion still continued on the constitutional question up to the taking of the question on the third reading of the bill on January 9, when it passed to a third reading, yeas 86, nays 69.[7]

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[1] First session Fourteenth Congress, Journal, p. 124 (Gales & Seaton ed.); Annals, pp. 454–457.

[2] Annals, pp. 473–477.

[3] Annals, pp. 478–481.

[4] Annals, pp. 482–485.

[5] Annals, pp. 526–532.

[6] Annals, p. 489.

[7] Journal, p. 142; Annals, p. 545.

And on the question of the passage the constitutional debate was again renewed, and on January 13[1] the bill passed, yeas 86, nays 71.

In the Senate the bill was, on January 18,[2] opposed for two reasons. Mr. James Barbour, of Virginia, stated that the Senate had already sent to the House a bill, the result of unanimous action by the Senate, declaring that all laws in opposition to the treaty should be held as null and void. The principle on which the Senate had acted was that, while the treaty operated to repeal any commercial regulations incompatible with its regulations, yet a declaratory act would remove all doubts and difficulties. It seemed to him that it would have been more decorous for the House to have acted on the Senate bill. But by the present proceedings an issue had been made up. Mr. Barbour then went on to argue that the treaty-making power was supreme over commerce, and that no legislative sanction was necessary in this case.

The debate was extended, various Senators speaking, among them Mr. Nathaniel Macon, of North Carolina, who upheld the principle contended for in the proposition of the House.

On January 19[3] the Senate rejected the bill of the House, yeas 10, nays 21.

On January 20 and February 4[4] the House considered the Senate bill "concerning the convention to regulate commerce between the territories of the United States and His Britannic Majesty." On the same day amendments were agreed to which in effect substituted for the text of the Senate bill the provisions of the bill passed by the House, and which the Senate had rejected. The bill was then passed by the House. The yeas and nays on the amendments were, yeas 81, nays 70.

The Senate disagreed to the amendments and the House insisted and asked a conference, naming as its conferees Messrs. Forsyth, William Lowndes, of South Carolina, and Henry St. George Tucker, of Virginia. The Senate joined as conferees Messrs. Rufus King, of New York, James Barbour, of Virginia, and W. W. Bibb, of Georgia.[5]

On February 19[6] the House conferees reported to their House. Their report, after stating that the disagreement between the Houses related to their respective constitutional powers, continues:

> In the performance of this duty the committee of the House of Representatives are inclined to hope that it will sufficiently appear that there is no irreconcilable difference between the two branches of the Legislature.
>
> They are persuaded that the House of Representatives does not assert the pretension that no treaty can be made without their assent, nor do they contend that in all cases legislative aid is indispensably necessary, either to give validity to a treaty or to carry it into execution. On the contrary, they are believed to admit that to some, nay, many, treaties no legislative sanction is required, no legislative aid is necessary.
>
> On the other hand, the committee are not less satisfied that it is by no means the intention of the Senate to assert the treaty-making power to be in all cases independent of the legislative authority. So far from it, that they are believed to acknowledge the necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create States, or to cede territory, if, indeed, this power exists in the Government at all. In some or all of these cases, and probably in many others, it is conceived to be admitted that the legislative body must act in order to give effect and operation to a treaty; and if in any case it be necessary, it may confidently be asserted that there is no difference

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[1] Journal, p. 159; Annals, p. 674.

[2] Annals, pp. 46–89.

[3] Annals, p. 89.

[4] Journal, pp. 200, 281; Annals, pp. 719, 897.

[5] Journal, pp. 335, 350; Annals, pp. 136, 960.

[6] Journal, p. 364; Annals, pp. 1014–1023.

of principle between the two Houses; the difference is only in the application of the principle. For if, as has been stated, the House of Representatives contend that their aid is only in some cases necessary, and if the Senate admit that in some cases it is necessary, the inference is irresistible that the only question in each case that presents itself is whether it be one of the cases in which legislative provision is requisite for preserving the national faith or not.

This appears to the committee to be by no means an unimportant point gained. Its influence upon the feelings with which the two bodies will naturally approach questions of this description may be of no trivial consequence; for as every case, according to this course of reasoning, would appear to rest upon its own foundation, there is less danger of its being drawn into precedent and therefore less occasion for solicitude in regard to it. It is a view of the subject, therefore, calculated to harmonize and to enable us to yield at all times to the application of another principle which the committee deem of the utmost consideration on all such occasions.

The committee allude to the principle which inculcates the propriety of always taking care if we do err to err on the safe side. Should Congress fail to legislate where legislation is necessary, either the public faith must be broken or, to avoid that evil, the executive branch of the Government must be tempted to overstep the boundaries prescribed by the Constitution. If, on the contrary, Congress should legislate where legislation is not necessary, the act could only be drawn into precedent in a case precisely similar; because upon the principle assumed, "that each case rests upon its own circumstances," it never could serve as a precedent, save where those circumstances are the same. Nor is it indeed unimportant to mention that there is little danger of much respect being paid to precedents upon great constitutional questions. Conscience will always burst the trammels of precedent unless restrained by reason.

The committee therefore believe that it is safer in every doubtful case to legislate, and by the joint act of the whole Congress give authority to the execution of the stipulations of a treaty by the executive, than to leave a doubtful case, without the sanction of the legislature, to tempt the executive to overleap its proper bounds, or to endanger the public faith by a failure to perform the provisions of a treaty which has received a constitutional ratification.

After referring to the passage of the bill by the Senate in the first instance as an act which manifests unequivocally the conviction of the Senate, either that the treaty did require legislative aid or that the case was at least doubtful, the report continues:

Both Houses having thus united in the opinion that a legislative act is necessary, the Senate having clearly assented to the propriety of passing a law, the committee waive any argument on the necessity of a legislative act. It only remains to consider whether the scheme of the House of Representatives or the bill of the Senate is best calculated to effect the object of legislation. The committee will succinctly offer the reasons which, as they believe, support the correctness of the amendments of the House of Representatives.

The first amendment proposed to strike out the word "declared," the insertion of which, in the enacting clause of the law, has not appeared to the House to be justified by the usages of the legislative body * * *. It forms, in their estimation, a sufficient objection to the phraseology alluded to, that it departs from the accustomed style of the acts of the Congress of the United States. * * * The retention of the words "and declared" was considered by the Senate expedient, with a view of giving to the bill a declaratory as well as an enacting form. It was said, also, that they were not unprecedented, that they were to be found in the acts of Congress not declaratory in their nature, and might be considered as not affecting the character of the present bill. Believing these words to be mere surplusage, not changing the character or impairing the force of the legislative act, that they have been introduced into previous acts of Congress; that no agreement could take place between the two Houses without permitting them to remain, your committee consented to recommend to the Houses to recede from the first amendment to the Senate's bill.

The report discusses further the other amendments, which only go to perfect the bill and do not involve the constitutional features of the disagreement.

The Senate conferees, who submitted their report to the Senate on February 27,[1] say:

> The conferees of the Senate did not contest but admitted the doctrine that of treaties made in pursuance of the Constitution some may not and others may call for legislative provisions to secure their execution, which provision Congress in all such cases is bound to make. But they did contend that the convention under consideration requires no such legislative provisions, because it does no more than suspend the alien disability of British subjects in commercial affairs in return for like suspension in favor of American citizens; that such matter of alien disability falls within the peculiar province of the treaty power to adjust; that it can not be securely adjusted in any other way, and that a treaty duly made and adjusting the same is conclusive, and by its own authority suspends or removes antecedent laws that are contrary to its provisions.
>
> That even a declaratory law to this effect is matter of mere expediency, adding nothing to the efficacy of the treaty, and serving only to remove doubts wherever they exist.
>
> The conferees of the Senate therefore insisted on retaining the word "declared," in addition to the usual formula of enactment, because it imparts to the bill passed by the Senate the character of a declaratory law, a quality without which any law would in this case be inadmissible.

The Senate agreed to the report of their conferees as soon as it was presented, the amendments proposed being concurred in.

The House, on February 24,[2] agreed to the recommendations of the conferees, yeas 100, nays 35.

1507. In 1820 the House considered, but without result, its constitutional right to a voice in any treaty ceding territory.—On April 3, 1820,[3] the House proceeded in Committee of the Whole House on the state of the Union to consider the following resolutions, submitted by Mr. Henry Clay, of Kentucky, then Speaker:[4]

> *Resolved,* That the Constitution of the United States vests in Congress the power to dispose of the territory belonging to them, and that no treaty, purporting to alienate any portion thereof, is valid without the concurrence of Congress.
>
> *Resolved,* That the equivalent proposed to be given by Spain to the United States in the treaty concluded between them, on the 22d day of February, 1819, for that part of Louisiana lying west of the Sabine, was inadequate, and that it would be inexpedient to make a transfer thereof to any foreign power or renew the aforesaid treaty.

In discussing the right of the House of Representatives to express its opinion on the arrangement made in that treaty, Mr. Clay contended that in acting on the subjects committed by the Constitution to the charge of Congress the treaty-making power should have the concurrence of Congress. The House had uniformly maintained this right to deliberate on those treaties in which their cooperation was asked by the Executive. This was illustrated in the proceedings on the Jay treaty, in 1795, and later on the convention of 1815 with Great Britain. In the latter case, although a compromise was the final result, the House substantially maintained its contention. It was to be admitted that a treaty might fix disputed limits of territory without the cooperation of Congress, for the object in such cases was only to make

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[1] Annals, pp. 160, 161.

[2] Journal, pp. 396, 397; Annals, pp. 1048–1050, 1057.

[3] First session Sixteenth Congress, Annals, pp. 1719–1781.

[4] The Annals (p. 1691) would indicate that Mr. Clay offered these resolutions in the House, but the Journal of March 28 does not contain any reference to them (pp. 343–346). At that time original propositions were offered in Committee of the Whole.

certain what was before uncertain. This was to be distinguished from a proposition to cede away whole provinces.

Mr. William Lowndes, of South Carolina, urged that the resolution went much farther than the contention of the House in 1795, and declared that there was not time for so long a discussion as would be necessary.

Mr. John Rhea, of Tennessee, opposed the resolutions, contending that there was no power vested in Congress by the Constitution to alienate territory of the United States, and that the treaty-making power was confided to the Executive and the Senate.

The discussion consumed the time of the House until April 5, when the House passed finally to other business without any decision on the resolutions.

1508. In 1868, after discussion with the Senate, the House's assertion of right to a voice in carrying out the stipulations of certain treaties was conceded in a modified form.

In 1868 the House declined to assert that no purchase of foreign territory might be made without the sanction of a previously enacted law.

On May 18, 1868,[1] Mr. Nathaniel P. Banks, of Massachusetts, from the Committee on Foreign Affairs, reported the bill (H. R. 1096)—

to enable the President of the United to fulfill the treaty between the United States and Russia, of March 30, 1867.

The report, after reviewing the history and nature of the treaty-making power under our Constitution, proceeds to review the instances where this power has come in conflict with the authorities of other branches of the Government, beginning with the Creek treaty of 1790, and noting the precedents of 1794, when a question arose between the President and House concerning the correspondence relating to that treaty; the treaty of 1819, the Spanish treaty of 1831, and the French treaty, and quotes the opinions of commentators on the Constitution—Jefferson, Story, and Kent. The report then proceeds with the following views as to the power of the House:

A treaty, then, is a contract between the United States and the sovereign power of a foreign government; and if within the authority conferred upon the treaty-making power by the Constitution both the House of Representatives and the Senate are solemnly bound to give effect to the conditions of the treaty by proper legislation. In the discharge of this duty the House has an unquestionable right to all the information connected with the subject, if not inconsistent with the public interest or safety. It can not be doubted that the House was entitled to the information it demanded in 1794, unless, upon other grounds, its communication would have been prejudicial to the Government. It must be remembered that this was the first occasion in which the treaty-making power was discussed by Congress, and that this was but one of several difficult and delicate questions considered and decided, for the first time, by the different branches of the Government. The information then called for has never been refused as to any subsequent treaty. Mr. Hamilton, who was regarded by Mr. Jefferson as the author of the President's message, afterwards expressed his regret that a qualified answer had not been returned. It is now conceded that the House is entitled to consider the merits of a treaty that it may determine whether its object is within the scope of the treaty power; but, if it be not inconsistent with the spirit and purpose of the Government, Congress is bound to give it effect, by necessary legislation, as a contract between the Government and a foreign nation. If, on the contrary, it is found to be in conflict with the fundamental principles, purposes, or interests of the Government, it would be justified, not merely in withholding its aid, but in giving notice to foreign nations interested that it would not be regarded as binding

[1] Second session Fortieth Congress, House Report No. 37.

upon the nation, in passing laws for its abrogation, and preparing the State for whatever consequences might attend its action.

This was the course pursued by the Government in 1798 in regard to the three treaties of alliance, commerce, and consular representation concluded with France in 1778, the first treaties negotiated by this Government with any foreign nation, and which were concluded immediately upon the recognition of American independence by France. The House would be justified in such action in regard to any treaty which should change the character of the Government; bring into the Union and confer political powers upon large populations incapable of self-government, whose participation in its affairs would imperil our institutions and endanger the peace and safety of the people; which should alienate territory, surrender political power to any other Government, civilized or uncivilized; bind the Government to engage in the wars of other nations, or surrender the rights of the nation on the high seas in any part of the world; which should admit as States of the Union distant foreign nations or Indian tribes, conferring upon them representative powers, as was proposed under the confederation with regard to the Delaware Indians; reestablish slavery, annul the institution of marriage, or interdict the Christian religion. In such case the House would be justified in aiding in its rejection or its abrogation by any act within its power. But when a treaty is limited to objects consistent with the interests of the Government, which can not be attained except by the treaty-making power, its first and highest duty is to enact such measures as are necessary to carry the treaty into effect. To say that a treaty is not a treaty until approved by the House is to make the House a part of the treaty-making power. To say that the House has no rights in regard to foreign treaties, except when they are referred to the House by its provisions, is to admit that the House is not a part of the Government.

Mr. Cadwallader C. Washburne, of Wisconsin, in behalf of himself and Mr. George W. Morgan, of Ohio, presented minority views, contending that the House had the right to withhold the appropriation needed to carry the treaty into effect, and cited authorities in support of this contention—Jefferson, Madison, and the Supreme Court.

The report having been made to the House, the subject, especially in its constitutional aspects, was debated at length from June 30 to July 14, 1868.[1] On the latter date the bill was reported from the Committee of the Whole with two amendments. The first amendment, which had been adopted on motion of Mr. William Loughridge, of Iowa, proposed to insert the following preamble and additional section:

Whereas the President of the United States, on the 30th of March, 1867, entered into a treaty with the Emperor of Russia, by the terms of which it was stipulated that in consideration of the cession by the Emperor of Russia to the United States of certain territory therein described, the United States should pay to the Emperor of Russia the sum of $7,200,000 in coin; and whereas it was further stipulated in said treaty that the United States shall accept of such cession, and that certain inhabitants of said territory shall be admitted to the enjoyment of all the rights and immunities of citizens of the United States; and whereas the subjects thus embraced in the stipulations of said treaty are among the subjects which by the Constitution of the United States are submitted to the power of Congress, and over which Congress has jurisdiction; and it being for such reason necessary that the consent of Congress should be given to said stipulation before the same can have full force and effect; having taken into consideration the said treaty, and approving of the stipulations therein, to the end that the same may be carried into effect; Therefore,

SECTION 1. *Be it enacted,* That the assent of Congress is hereby given to the stipulations of said treaty.

This amendment was agreed to, yeas 89, nays 49.

[1] Second session Fortieth Congress, Globe, pp. 3620, 3658, 3661, 3804, 3809, 3883, 4052–4055; Appendix, pp. 305, 382, 385, 421, etc.

The second amendment, which had been adopted on motion of Mr. Thomas D. Eliot, of Massachusetts, proposed to add the following proviso to the bill:

Provided, That no purchase in behalf of the United States of any foreign territory shall be hereafter made until after provision by law for its payment; and it is hereby declared that the powers vested by the Constitution in the President and Senate to enter into treaties with foreign governments do not include the power to complete the purchase of foreign territory before the necessary appropriation shall be made therefore by act of Congress.

This amendment was disagreed to by the House, yeas 78, nays 80.

The bill, which consisted, besides the amendment adopted, of a simple enactment appropriating the money, was then passed by the House and went to the Senate, where, on July 17,[1] the Senate concurred with the Committee on Foreign Relations in striking out all of the bill except the simple proposition for appropriating the money. With these amendments, the bill was returned to the House, where the amendments of the Senate were disagreed to, and the bill was sent to conference, Messrs. Banks, Loughridge, and Samuel J. Randall, of Pennsylvania, being the House conferees, and Messrs. Charles Sumner, of Massachusetts, O. P. Morton, of Indiana, and J. R. Doolittle, of Wisconsin, the Senate conferees.

The conference report, which was signed by all the conferees, was presented in the House on July 23, and provided that the Senate agree to the preamble with the insertion, after the words "Emperor of Russia" where they first occur, the following: "And the Senate thereafter gave its advice and consent to said treaty," and with the further amendment striking out all of the preamble after the words "immunities of citizens of the United States;" and inserting the words, "and whereas said stipulations can not be carried into full force and effect except by legislation to which the consent of both Houses of Congress is necessary." The conference report also struck out the following section of the bill proper: "That the assent of Congress is hereby given to the stipulations of said treaty."

Thus the result of the conference was the amended preamble, and the section of the bill reduced to the form in which it was originally reported from the House Committee on Foreign Affairs, viz, a simple clause appropriating the money for the purchase in accordance with the treaty.

The report[2] was debated at some length in the House, the House conferees explaining that they were forced to waive the extreme contention of the House, because to have insisted on it would have been to defeat the appropriation. The report was agreed to, yeas 91, nays 48.

In the Senate the report was agreed to without debate.

1509. President Washington, in 1796, declined the request of the House that he transmit the correspondence relating to the recently ratified treaty with Great Britain.

Discussion of the right of the House to share in the treaty-making power.

In 1796 the House affirmed that when a treaty related to subjects within the power of Congress it was the constitutional duty of the House to deliberate on the expediency of carrying such treaty into effect.

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[1] Globe, p. 4159.

[2] Globe, pp. 4392, 4404.

The House declared in 1796 that its constitutional requests of the executive for information need not be accompanied by a statement of purposes.

On March 24, 1796,[1] the House agreed to this resolution:

Resolved, That the President of the United States be requested to lay before this House a copy of the instructions to the minister of the United States, who negotiated the treaty with the King of Great Britain (communicated by his message of the 1st instant), together with the correspondence and other documents relative to the said treaty; excepting such of the said papers as any existing negotiation may render improper to be disclosed.

This treaty had been communicated to both House and Senate by the President for information, on March 1. The resolution calling for the additional papers was the subject of a long debate, beginning on the 7th of March. The extent to which the House had the right to share in the treaty-making power was discussed at length, as well as the question of how much right to call for information was involved in the House's constitutional prerogative of making appropriations to carry into effect the provisions of treaties.[2]

The resolution was finally agreed to, yeas 62, nays 37, and Messrs. Livingston and Gallatin were appointed a committee to wait on the President with the resolution.

On March 30[3] President Washington transmitted to the House a message in which he stated at length his reasons for declining to transmit the papers. He said that to admit the right of the House of Representatives to demand and receive as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

It does not occur—

he continues,

that the inspection of the papers called for can be relative to any purpose under the cognizance of the House of Representatives except that of an impeachment, which the resolution has not expressed.

After discussing the intention of the constitutional convention when it framed the clause relating to treaties, the President concludes:

As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty, as the treaty with Great Britain exhibits in itself also the objects requiring legislative provision, and on these the papers called for can throw no light; and as it is essential to the due administration of the Government, that the boundaries fixed by the Constitution between the different departments should be preserved; a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbid a compliance with your request.

On April 7,[4] at the close of a long discussion, the House agreed to the following resolutions, the vote on each being 54 yeas to 37 nays:

Resolved, That it being declared by the second section of the second article of the Constitution, "That the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," the House of Representatives do not claim

[1] First session Fourth Congress, Journal, p. 480 (Gales & Seaton ed.); Annals, pp. 394, 426–782.

[2] Annal pp. 426–782.

[3] Journal, pp. 487–489.

[4] Journal, p. 499. The Annals (p. 771) show that the resolutions were proposed by Thomas Blount, of North Carolina, and supported by James Madison, of Virginia. Annals, pp. 782, 783.

any agency in making treaties; but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress; and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as, in their judgment, may be most conducive to the public good.

Resolved, That it is not necessary to the propriety of any application from this House, to the Executive, for information desired by them, and which may relate to any constitutional functions of the House; that the purposes for which such information may be wanted, or to which the same may be applied, should be stated in the application.

In relation to the treaty with Great Britain, as well as in relation to several other treaties, the House came to the resolution that it was expedient to pass the laws necessary to carry it into effect.[1]

1510. The House has requested the President to lay before it information as to the carrying out and the violation of treaties, and the information has been furnished.—On January 2, 1797,[2] the House, after some debate as to the propriety of the request, agreed to this resolution:

Resolved, That the President of the United States be requested to cause to be laid before this House information what measures have been taken for carrying into effect the treaty between the United States and the Dey and Regency of Algiers, and also whether any, and what, further legislative aid may be necessary for that purpose.

On January 3 Mr. Parker, of the committee appointed to wait on the President with the resolution, reported that the President was already preparing to send the papers when the resolution was passed and would transmit them as soon as they should be made out.

1511. On December 17, 1802,[3] on motion of Mr. John Randolph, of Virginia—

Resolved, That the President of the United States be requested to cause to be laid before this House such information in possession of the Department of State as relates to the violation, on the part of Spain, of the twenty-second article of the treaty of friendship, limits, and navigation between the United States and the King of Spain.

Messrs. Randolph and Huger were appointed a committee to present the foregoing resolution to the President of the United States.

On December 22 President Jefferson transmitted the information.

1512. In 1822 the House called generally and specifically for papers relating to the treaty of Ghent and obtained them, although the Executive advised against their publication.—On January 17, 1822,[4] the House proceeded to the consideration of a resolution requesting of the President

all the correspondence which led to the treaty of Ghent which has not yet been made public.

After debate as to the propriety of leaving to the President the option of communicating such only of the correspondence as he might think it not improper to disclose, the House, on motion of Mr. William Lowndes, of South Carolina, agreed to this amendment:

and which, in his opinion, it may not be improper to disclose.

The resolution as amended was agreed to.

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[1] Journal, pp. 511, 512, 529–531; Annals, pp. 939–1291.

[2] Second session Fourth Congress, Journal, pp. 634, 636 (Gales & Seaton ed.); Annals, pp. 1763–1767.

[3] Second session Seventh Congress, Journal, pp. 253, 257 (Gales & Seaton ed.); Annals, pp. 281, 285.

[4] First session Seventeenth Congress, Annals, p. 733.

1513. On April 19, 1822,[1] the House agreed to this resolution:

Resolved, That the President of the United States be requested to cause to be communicated to this House, if not injurious to the public good, any letter or communication which may have been received from Jonathan Russell, esq., one of the ministers of the United States who concluded the treaty of Ghent, after the signature of that treaty, and which was written in conformity to the indications contained in said minister's letter, dated at Ghent 25th December, 1814.

On May 4[2] President Monroe, in a message to the House, after explaining the circumstances of the letter, said:

On full consideration of the subject, I have thought it would be improper for the Executive to communicate the letter called for unless the House, on a knowledge of these circumstances, should desire it, in which case the document called for shall be communicated.

On May 7[3] the House called for the letter, although the propriety of such a course was questioned.

The letter was promptly transmitted to the House.[4]

1514. The House sometimes requests the Executive to negotiate a treaty, although the propriety of the act has been questioned.—On May 15, 1826,[5] Mr. Edward Livingston, of Louisiana, offered these resolutions:

Resolved, That the President of the United States be requested to inform this House whether any arrangement has been made with the Government of Great Britain in consequence of the resolution of this House of the 23d of December, 1823, requesting that a negotiation should be opened for the cession of certain keys on the Bahama Banks.

Resolved, That the President be requested to open a negotiation with the Spanish Government for the cession of a proper situation for a light-house on one of the double-headed shot keys, to be used solely for the purpose of such light-house.

On May 16 the resolutions were considered, and Mr. Livingston explained that the resolution of 1823 requested the President to open negotiations for the cession of a part of the island of Abaca, and that the President had done so, but the efforts of our minister in London had been without avail.

The first resolution was agreed to without division, but there was objection to the second, Mr. John Forsyth, of Georgia, urging that, in spite of the precedent, it was irregular for the House to request the President to exercise any of his constitutional powers. The second resolution was then laid on the table.

1515. On February 28, 1823,[6] on motion of Mr. Charles F. Mercer, of Virginia, and by a vote of 131 yeas to 9 nays, the House agreed to this resolution:

Resolved, That the President of the United States be requested to enter upon, and to prosecute from time to time, such negotiations with the several maritime powers of Europe and America, as he may deem expedient for the effectual abolition of the African slave trade, and its ultimate denunciation as piracy, under the law of nations, by the consent of the civilized world.

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[1] First session Seventeenth Congress, Journal, pp. 468, 471; Annals, pp. 1617, 1619.

[2] Journal, p. 554; Annals, p. 1791.

[3] Journal, pp. 576, 585; Annals, p. 1877.

[4] Journal, p. 599; Annals, p. 1891.

[5] First session Nineteenth Congress, Journal, pp. 567, 576; Debates, pp. 2634–2638.

[6] Second session Seventeenth Congress, Annals, pp. 1147–1155; Journal, p. 280.

1516. On December 3, 1833,[1] the President, in his annual message, stated that he had—

the satisfaction to inform you that a negotiation which, by desire of the House of Representatives, was opened some years ago with the British Government for the erection of light-houses on the Bahamas, has been successful.

1517. On April 3, 1876,[2] the House agreed to this resolution:

Whereas it is alleged that at the present time there are over 100,000 Chinese on the Pacific coast, many of whom have been brought thither under contracts for servile labor, and that their numbers are being constantly increased, to the great detriment of the laboring men of the coast and in derogation of the treaty stipulations existing between the United States and the Empire of China: Therefore,

Be it resolved, That the President be, and he is hereby, requested to open negotiations with the Chinese Government for the purpose of modifying the provisions of the treaty between the two countries and restricting the same to commercial purposes.

A concurrent resolution of similar intent was[3] introduced later, but was referred and not acted on.

1518. In 1848 President Polk declined on constitutional grounds to honor the unconditional request of the House for a copy of the instructions to the minister sent to negotiate a treaty with Mexico.—On January 4, 1848,[4] the House, by a vote of 146 yeas to 15 nays, agreed to the following resolution, which was offered by Mr. William L. Goggin, of Virginia:

Resolved, That the President of the United States be requested to communicate to this House any instructions which may have been given to any of the officers of the Army or Navy of the United States, or other persons, in regard to the return of President General Antonio Lopez de Santa Ana, or any other Mexican, to the Republic of Mexico, prior or subsequent to the order of the President or Secretary of War, issued in January, 1846, for the march of the Army from the Neuces River, across the "stupendous deserts" which intervene, to the Rio Grande; that the date of all such instructions, orders, and correspondence, be set forth, together with the instructions and orders issued to Mr. Slidell, at any time, prior or subsequent to his departure from Mexico, as minister plenipotentiary of the United States to that Republic.

Resolved further, That the President be requested to communicate all the orders and correspondence of the Government in relation to the return of General Paredes to Mexico.

On January 13 President Polk communicated to the House a portion of the information called for, but in relation to another portion, took the following grounds:

The resolution calls for the "instructions and orders issued to Mr. Slidell at any time prior or subsequent to his departure for Mexico, as minister plenipotentiary of the United States to that Republic." The customary and usual reservation contained in calls of either House of Congress upon the Executive for information relating to our intercourse with foreign nations has been omitted in the resolution before me. The call of the House is unconditional. It is that the information requested be communicated, and thereby be made public, whether, in the opinion of the Executive (who is charged by the Constitution with the duty of conducting negotiations with foreign powers), such information when disclosed would be prejudicial to the public interest or not. It has been a subject of serious deliberation with me whether I could, consistently with my constitutional duty and my sense of the public interests involved and to be affected by it, violate an important principle, always heretofore held sacred by my prede-

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[1] First session Twenty-third Congress, Journal, p. 11.

[2] First session Forty-fourth Congress, Record, p. 2158.

[3] First session Forty-fourth Congress, Record, p. 3087.

[4] First session Thirtieth Congress, Journal, pp. 193, 194–197, 233, 566, 567, 570; Globe, pp. 103, 166–170, 203–207, 461, 463.

cessors, as I should do by a compliance with the request of the House. President Washington, in a message to the House of Representatives of the 30th of March, 1796, declined to comply with a request contained in a resolution of that body, to lay before them "a copy of the instructions to the minister of the United States who negotiated the treaty with the King of Great Britain, together with the correspondence and other documents relative to the said treaty, excepting such of the said papers as any existing negotiations may render improper to be disclosed." In assigning his reasons for declining to comply with the call, he declared that "the nature of foreign negotiations requires caution, and their success must often depend on secrecy; and, even when brought to a conclusion, a full disclosure of all the measures, demands, and eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate—the principle on which that body was formed confining it to a small number of Members. To admit, then, in the House of Representatives, a right to demand and to have, as a matter of course, all the papers respecting a negotiation with a foreign power, would be to establish a dangerous precedent." In that case the instructions and documents called for related to a treaty which had been concluded and ratified by the President and Senate, and the negotiations in relation to it had been terminated. There was an express reservation, too, "excepting" from the call all such papers as related to "any existing negotiations" which it might be improper to disclose. In that case President Washington deemed it to be a violation of an important principle, the establishment of a "dangerous precedent," and prejudicial to the public interests, to comply with the call of the House. Without deeming it to be necessary on the present occasion to examine or decide upon the other reasons assigned by him for his refusal to communicate the information requested by the House, the one which is herein recited is, in my judgment, conclusive in the case under consideration.

Indeed, the objections to complying with the request of the House, contained in the resolution before me, are much stronger than those which existed in the case of the resolution of 1796. This resolution calls for the "instructions and orders" to the minister of the United States to Mexico, which relate to negotiations which have not been terminated, and which may be resumed. The information called for respects negotiations which the United States offered to open with Mexico immediately preceding the commencement of the existing war. The instructions given to the minister of the United States relate to the differences between the two countries out of which the war grew, and the terms of adjustment which we were prepared to offer to Mexico in our anxiety to prevent the war. These differences still remain unsettled; and to comply with the call of the House would be to make public, through that channel, and to communicate to Mexico, now a public enemy engaged in war, information which could not fail to produce serious embarrassment in any future negotiation between the two countries. I have therefore communicated to Congress all the correspondence of the minister of the United States to Mexico which in the existing state of our relations with that republic can, in my judgment, be at this time communicated without serious injury to the public interest.

Entertaining this conviction, and with the sincere desire to furnish any information which may be in possession of the Executive Department, and which either House of Congress may at any time request, I regard it to be my constitutional right and my solemn duty, under the circumstances of this case, to decline compliance with the request of the House contained in their resolution.

Debate at once arose over this message, Mr. John Quincy Adams, of Massachusetts, saying that he believed that the House was right in asserting its position in 1796, and urging that it should maintain its position now, that it had a right to the information. The subject was debated at length on this day, and again on January 19 and March 14 and 15; but no further action seems to have been taken.

1519. On July 17, 1848,[1] the House agreed to the following resolution:

Resolved, That the President be requested to communicate to this House (if not inconsistent with the public interest) copies of all instructions given to the Hon. Ambrose H. Sevier and Nathan Clifford, commissioners appointed to conduct negotiations for the ratification of the treaty lately concluded between the United States and the Republic of Mexico.

[1] First session Thirtieth Congress, Journal, pp. 1051, 1145; Globe, pp. 943, 1025.

On August 2, the President (Mr. Polk) responded in a message in which he said:

I avail myself of this occasion to observe that, as a general rule, applicable to all our important negotiations with foreign powers, it could not fail to be prejudicial to the public interest to publish the instructions to our ministers until some time had elapsed after the conclusion of such negotiations.

In the present case the object of the mission of our commissioners to Mexico has been accomplished. The treaty, as amended by the Senate of the United States, has been ratified. The ratifications have been exchanged, and the treaty has been proclaimed as the supreme law of the land. No contingency occurred which made it either necessary or proper for our commissioners to enter on any negotiations with the Mexican Government further than to urge upon that Government the ratification of the treaty in its amended form.

1520. The House has at times advised the Executive in regard to treaties affecting the revenue.—On December 13, 1869,[1] the House, on motion of Mr. John A. Peters, of Maine, agreed to the following resolution, after declining, by a vote of yeas 43, nays 129, to lay it on the table:

Resolved, That the sentiment of this House accords with the opinion expressed in the message of the President of the United States, that a renewal of a treaty of reciprocal trade with the British provinces on this continent would be wholly in favor of the British producer, and should not in our present condition be favorably considered.

1521. On March 3, 1869,[2] the last day of the Congress, Mr. Robert C. Schenck, of Ohio, from the Committee of Ways and Means, reported the following resolution:

Resolved, That while this House does not admit any right in the Executive and treaty-making power of the United States to conclude treaties or conventions with any foreign government by which import duties shall be mutually regulated, it is, however, of the opinion, and recommends to the President, that negotiations with the Government of Great Britain should be renewed and pressed, if possible to a definite conclusion regarding commercial intercourse and securing to our own citizens the rights claimed by them in the fisheries on the coasts of the British provinces of America, and the free navigation of the St. Lawrence River from its source to the sea.

This resolution was referred to the Committee of the Whole House on the state of the Union.

1522. On April 23, 1879,[3] the House, on motion of Mr. Fernando Wood, of New York, and without debate, agreed to the following:

Resolved, That the President be respectfully requested to consider the expediency of entering into a convention with the Government of France for the negotiation of a treaty which shall secure a more equal interchange of the products and manufactures of each country and serve to cement closer relations of amity, trade, and commerce.

1523. In 1871 the House asserted its right to a voice in carrying into effect treaties on subjects submitted by the Constitution to the power of Congress.—On April 20, 1871,[4] under suspension of the rules, and without debate or division, the House agreed to the following:

Resolved, That it being declared by the second section of the second article of the Constitution "that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," the House of Representatives do not claim any

[1] Second session Forty-first Congress, Journal, pp. 54, 55; Globe, p. 99.

[2] Third session Fortieth Congress, Journal, p. 521; Globe, p. 1877.

[3] First session Forty-sixth Congress, Journal, p. 190; Record, p. 741.

[4] First session Forty-second Congress, Journal, p. 200; Globe, p. 835.

agency in making treaties; but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on the law or laws to be passed by Congress; and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good.

1524. In 1880 the House declared that the negotiation of a treaty affecting the revenues was an invasion of its prerogatives.—On January 19, 1880,[1] Mr. William D. Kelley, of Pennsylvania, moved to suspend the rules and agree to the following resolution:

Resolved, That it is the sense of this House that the negotiation by the Executive Department of the Government of a commercial treaty whereby the rates of duty to be imposed on foreign commodities entering the United States for consumption should be fixed would, in view of the provision of section 7 of article 1 of the Constitution of the United States, be an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives.

Mr. Benjamin Wilson, of West Virginia, opposed the resolution on the ground that the Foreign Affairs Committee were examining the subject,[2] and action should be deferred until their report.

But the House agreed to the resolution, yeas 175, nays 62.

1525. In 1881 the House Committee on Foreign Affairs, discussing the treaty-making power, concluded that the House had no share in it.—On February 14, 1881,[3] Mr. George A. Bicknell, of Indiana, from the Committee on Foreign Affairs, submitted the following report on the House joint resolution (H. J. Res. 132) relating to the treaty-making power:

This resolution affirms that the treaty-making power of the United States "does not extend to treaties which affect the revenue, or require the appropriation of money to execute them; but that in such cases the consent of the law-making power of the Government is required, which includes, as one of its branches, the House of Representatives."

It is assumed in the preamble of this resolution that article 1, section 7, of the Constitution, which declares that "all bills for raising revenue shall originate in the House of Representatives," is in conflict with the subsequent provisions in article 2, section 2, and in article 6 of the Constitution, which declares that the President, "by and with the advice and consent of the Senate, provided two-thirds of the Senators present shall concur," shall have power to make treaties, and that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

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[1] Second session Forty-sixth Congress, Journal, pp. 261, 323, 324; Record, pp. 394, 532.

[2] Reference here seems to be made to the consideration of the fishery provisions of the treaty of Washington. The Committee on Foreign Affairs reported on June 9, 1880. (H. Rept. 1746, second session Forty-sixth Congress, p. 4.) In the course of this report they say: "The decisions of our highest law tribunal go so far as to say that in all matters within the purview of Congress, as, for instance, the tariff, as on hemp in the case of Tyler *v.* Morton (Curtis's Reports, vol. 2, p. 454), no treaty should intervene to prevent the action of the Federal legislation as to imposts on foreign articles. The question as to the right of the treaty-making power to affect duties on imports is not a new question. The Constitution in delegating such a power did not, however, interfere with that of Congress to regulate commerce and impose duties. It is not necessary to discuss here and now how far Congress may participate in the matter of reimposing duties on fish, which were made free by the Washington treaty, as whatever power the Federal Government had to make the treaty as to imposts may of right be controlled by Congress. This part of our constitutional duty it is not proposed to assume by the bill reported. No one can question the power of Congress to control the revenues to be derived from fish and fish oil."

[3] Third session Forty-sixth Congress, House Report No. 225.

In the opinion of your committee there is no conflict in these provisions. The words "all bills for raising revenue," in section 7 of article 1 of the Constitution, do not embrace treaties; a treaty is not a bill for raising revenue, and the requirement that "all bills for raising revenue shall originate in the House of Representatives" is not a limitation upon the treaty-making power, but is only a condition imposed on the ordinary law-making power of the Government. The President and the two Houses of Congress constitute the ordinary law-making power of the Government; the President and two-thirds of the Senators present constitute the treaty-making power. Neither of these powers has anything to do with the other, and to require the consent of the House of Representatives to make a treaty valid would violate the Constitution by making the House of Representatives a branch of the treaty-making power.

The first clause of section 8 of article 1 of the Constitution declares that "Congress shall have power to lay and collect taxes, duties, imposts, and excises." It is sometimes asserted that this clause impairs the force of the subsequent grant of the treaty-making power to the President and Senate already referred to.

Provisions apparently conflicting, in the same writing, must be construed so as to give effect to all of them if possible; but if that is not possible, then the latest clearly-expressed intention must prevail. And it will be observed that if the mere grant of power in section 8 of article 1 excludes all the subjects mentioned in that section from the treaty-making power, the latter power will be confined within very narrow limits. Under that construction the President and Senate could not make a commercial treaty with a foreign nation, because said section 8 gives power to Congress "to regulate commerce with foreign nations," and no treaty could be made to promote the general welfare because the same section gives power to Congress to provide "for the general welfare."

Treaties, however, for the general welfare, and commercial treaties and reciprocity treaties affecting duties, have often been made.

It seems clear to your committee that section 8 of article 1 of the Constitution refers exclusively to the ordinary law-making power, but section 2 of article 2 creates the extraordinary treaty-making power, in which the House of Representatives can not participate.

The making of treaties is the exercise of the supreme power of the State (Vattel, 192). Ordinarily it belongs to the executive department, but wherever it may be placed by a written constitution, it is a supreme power, subject to no limitations except such as are expressed in the Constitution, or are necessarily implied from the nature of the subject-matter, or from the distribution of the constitutional powers. (Halleck, 189; Wheaton, 457.)

A treaty can not be construed so as to destroy other powers given in the Constitution, or to change the form of Government, or to renounce the national sovereignty, or to alienate the entire national domain. (Story, sec. 1508.) It has been asserted that treaties altering the rules of trade and navigation may require the sanction of the legislature (Wheaton, 457), and in 1816 a question was made whether a certain treaty changed the revenue and whether an act of Congress was necessary to reinforce it, and such an act was passed (3 Stat., 354); but it seems to be agreed by American writers on public law that a treaty within constitutional limits and free from fraud, and not renouncing the national sovereignty or giving up the national domain, is binding upon Congress, and that a refusal by Congress to carry the treaty into effect might be regarded by the other party as just cause of war. (See authorities already cited, and 2 Peters, 314; 6 Peters, 375.) But within our own jurisdiction, in case of a conflict between a valid treaty and a valid act of Congress, they both being the law of the land, it seems that the later law would govern. The resolution under consideration (H. J. Res. 132) affirms a proposition which, under existing constitutional provisions, can not be sustained. Your, committee therefore recommend that the same be not adopted.

In the House on the same day that this report was presented the joint resolution was laid on the table [1] without debate.

1526. In 1884 and 1886 the Ways and Means Committee assumed that the right of the House to a voice in making treaties affecting the revenue had been conceded.—On June 17, 1884,[2] Mr. Abram S. Hewitt, of New York, from the Committee on Ways and Means, made a report on the convention

[1] Third session Forty-sixth Congress, Journal, p. 400; Record, p. 1568.

[2] First session Forty-eighth Congress, House Report No. 1848.

between the United States and Mexico, in which the following principles are laid down:

Under the Constitution the right to negotiate treaties is vested in the executive power, subject to the ratification of the Senate. The intervention of the House of Representatives is not required, unless the treaty calls for the exercise of powers which, by the Constitution, are vested in the Congress. Commercial treaties dealing with questions of revenue, which, by the Constitution, are subject to the control of the Congress, could not be carried into effect without affirmative action of the legislative branch of the Government. It is true the question has been raised whether it would not be competent for the President and Senate alone to enter into treaties which would change the laws for the collection of revenue; but the practice has been uniform, and the House has always insisted that where the rates of duty are changed by treaty the approval of the Congress is necessary for its execution. In the case of the treaty under consideration, however, this question does not arise, for the reason that the Senate, before ratifying the convention, adopted the following amendment:

"The present convention shall take effect as soon as it has been approved and ratified by both contracting parties according to their respective constitutions, but not until laws necessary to carry it into operation shall have been passed by both the Congress of the United States of America and the Government of the United Mexican States, and regulations provided accordingly, which will take place twelve months from the date of the exchange of ratifications to which article 10 refers."

The adoption of this amendment by the Senate is a substantial admission, in the nature of a precedent, which may be expected hereafter to govern treaties affecting the revenue.

1527. On May 25, 1886,[1] the Committee on Ways and Means reported adversely the bill (H. R. 1513) to carry into effect the reciprocity treaty with Mexico. This treaty contained a clause making its validity dependent on the law-making power, and the report of the committee, as well as the minority views, assume this as a recognition by the treaty-making power of the right of the Congress to have a voice in treaties relating to the revenue.

1528. After long and careful consideration, the Judiciary Committee of the House decided, in 1887, that the Executive branch of the Government might not conclude a treaty affecting the revenue without the assent of the House.—On January 15, 1884,[2] Mr. Roger Q. Mills, of Texas, presented and the House agreed to the following:

Resolved, That the Judiciary Committee be directed to report to the House whether the President, by and with the advice and consent of the Senate, can negotiate treaties with foreign Governments by which the duties levied by Congress on importations can be changed or abrogated.

On March 3, 1885,[3] at the end of the Congress, and when there was no time for action by the House, Mr. J. Randolph Tucker, of Virginia, chairman of the Judiciary Committee, made a very elaborate and able report on this subject. The remaining members of the committee sign a statement accompanying, stating that they have not had time to examine the important question, and that they are not to be considered as assenting or dissenting from the report or its conclusions.

The report offers the following resolution, as the conclusion to which the arguments come:[4]

Resolved, That the President, by and with the advice and consent of the Senate, can not negotiate treaties with foreign Governments by which the duties levied by Congress can be changed or abrogated, and such treaties to be operative as law must have the sanction of an act of Congress.

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[1] First session Forty-ninth Congress, Report No. 2615.

[2] First session Forty-eighth Congress, Journal, p. 316; Record, p. 412.

[3] Second session Forty-eighth Congress, Journal, p. 814; House Report No. 2680.

[4] In 1884–85 (second session Forty-eighth Congress, Record, pp. 175, 231, 506, 548) this subject was discussed at length in the Senate.

Mr. Tucker, after quoting those articles of the Constitution bearing on the treaty-making power, says it will not be denied that the power to make treaties is exclusively vested in the President and Senate; but he denies that this power is absolute and unlimited, even as to the rightful subjects within its scope. He says:

The question then recurs, What limitations are there on the power of the President and Senate to make treaties? Or, to limit the inquiry to the terms of the resolution referred to us, Can a treaty (so called) made by President and Senate repeal existing tax laws or impose taxation propro vigore, or make it imperative on the House of Representatives to pass laws conforming to the terms of the treaty relative to taxation?

A treaty is a contract, or agreement between nations. It binds each nation when made by its lawful authority. If not so made it is not binding at all. The agency through which the national faith is bound must be authorized to bind it. The power to make some contracts may be exclusive and even absolute, but the question still remains, what contracts may be made? When, therefore, it is asserted that the President and Senate alone have authority to make treaties, it does not follow that it may by treaty do anything which is a possible subject of contract. What subjects the treaty power embraces is untouched by the conclusion of the exclusive authority to make treaties being vested in the President and the Senate.

What limitations exist as to the subjects within the treaty power are to be determined by the circumstances.

Vattel declares a treaty is not valid which is contrary to a former one with another nation. (Vattel, Book II, chap. 12, secs. 164, 165, p. 196; 2 Phil. International Law, 75.)

So he declares that no treaty is binding on a nation which is pernicious to the nation for whose safety the Government is constituted a trustee. (Vattel, Book II, chap. 12, sec. 160, pp. 194–195.)

It is from the fundamental laws of each State that we must learn where resides the authority that is capable of contracting with validity in the name of the State. (Id., section 154, p. 193.)

It is therefore beyond question that a treaty is invalid which destroys the Constitution of the nation, or the rights of its people thereby secured. A treaty can not violate the Constitution of the nation. It is a sound principle of international law, on the high authority just cited, that the government of a nation can not annul the Constitution from which its authority is derived.

But it is also a clear constitutional doctrine. The language of the Constitution of the United States, which gives the character of "supreme law" to a treaty, confines it to "treaties made under the authority of the United States." That authority is limited and defined by the Constitution itself. The United States have no unlimited but only delegated authority. The power to make treaties is bounded by the same limits which are prescribed for the authority delegated to the United States by the Constitution. To suppose that the power to make treaties with foreign nations is unlimited by the restraints imposed on the power delegated by the United States would be to assume that by such treaty the Constitution itself might be abrogated and the liberty of the people secured thereby destroyed. The power to contract must be commensurate with and not transcend the powers by virtue of which the United States and their Government exist and act. It can not contract with a foreign nation to do what is unauthorized or forbidden by the Constitution to be done. The power to contract is limited by the power to do. (3 Story Com. on Const., sec. 1501.)

It is on this principle that a treaty can not take away essential liberties secured by the Constitution to the people. The treaty power must be subordinate to these. A treaty can not alien a State or dismember the Union, because the Constitution forbids both.

In all such cases the legitimate effect of a treaty is to bind the United States to do what they are competent to do and no more. The United States by treaty can only agree with another nation to perform what they have authority to perform under the constitutional charter creating them. The treaty makes the nexus which binds the faith of the Union to do what their Constitution gives authority to do. A treaty made under that authority may do this; all it attempts to do beyond it is ultra vires—is null and can not bind them.

We advance to a further limitation. Can a treaty do what the Constitution has expressly delegated to another department the exclusive and independent authority to do? Or can a treaty compel a department to do what the Constitution submits to its exclusive and absolute will? And is not the obligation of the treaty conditioned upon its free action in those things which the Constitution confides to it as an exclusive and independent department?

If a treaty has any operation to supersede legislative action, or to constrain it, it would follow that by treaty a State might be admitted to the Union. Congress alone has that power. The treaty between the United States and Texas did not propose to make her a member of the Union, and the admission was made by the action of Congress.

Congress has power to naturalize foreigners. A treaty can not do so without or contrary to the will of Congress. So as to bankruptcy, patents, copyright, coinage of money, etc.; so as to the Army, Navy, postal service, exclusive legislation in the District of Columbia. If a contract may be made with a foreign nation as to all these subjects which is obligatory on the United States, then it follows that foreign intervention in all our internal concerns may supersede under treaty stipulations all the powers of Congress intrusted to it by the Constitution. The cases of the power to tax and to appropriate money to public objects is a stronger case than any other against the construction which gives this supremacy to the treaty power. The same results follow as to the powers of the President and of the judiciary. These, too, may be subordinated by treaty to the supreme control of foreign nations through the action of the treaty-making power under this construction. Treaties may not usurp the chair of the Executive and the bench of the judges.

The report then goes on to an analysis of the terms of the Constitution, the English precedents, including the treaty of Utrecht, which, in respect to a clause respecting reciprocity of commerce, was never sanctioned by parliamentary consummation, and to a view of the debates during the framing of the Constitution, and of the precedents of the House, those of 1796 and 1816. The report made in the Senate in 1844 [1] by Mr. Rufus Choate, of Massachusetts, and the action of President Jackson in 1834, in regard to the French treaty.[2]

The report also quotes the law writers and commentators on the Constitution.

1529. On January 22, 1887,[3] Mr. Nathaniel D. Wallace, of Louisiana, submitted as a question of privilege a resolution reciting that the President and Senate had ratified a convention with Hawaii, which convention, unlike the preceding one of the same kind, was not subject to the approval of Congress, and further setting forth that the new convention provided for the admission of certain articles into the United States free of duty. Therefore the resolution provided for the investigation of the subject by the Committee on the Judiciary.

The point of order being made that the resolution was not privileged, the Speaker [4] held that such subjects, referring to the constitutional prerogatives of the House, had always been considered as privileged.

The resolution was agreed to and on March 3 Mr. J. Randolph Tucker, of Virginia, chairman of the Committee on the Judiciary, reported from that committee the following resolutions:

That the President, by and with the advice and consent of the Senate, can not negotiate a treaty which shall be binding on the United States whereby duties on imports are to be regulated, either by imposing or remitting, increasing or decreasing them, without the sanction of an act of Congress; and that the extension of the term for the operation of the original treaty or convention with the Government of the Hawaiian Islands, proposed by the supplementary convention of December 6, 1884, will not be binding on the United States without like sanction, which was provided for in the original treaty and convention, and was given by act of Congress.

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[1] First session Twenty-eighth Congress, Journal of Senate, p. 445.

[2] Annual Register, 1834, Public Documents, p. 352; Stat. L., pp. 574–576.

[3] Second session Forty-ninth Congress, Journal, pp. 349, 852; Record, pp. 914, 2721; House Report No. 4177.

[4] John G. Carlisle, of Kentucky, Speaker.

That the President is respectfully requested to withhold final action upon the proposed convention and to condition its final ratification upon the sanction of an act of Congress, in respect of the duties upon articles to be imported from the Hawaiian Islands.

Accompanying these resolutions was a report similar to that in the preceding Congress. It appears, however, that in this case, the report was authorized by the committee, and it does not appear that there was dissent. The report was made too late for action by the House.

1530. On January 31, 1902,[1] the following resolution was reported from the Committee on Rules and agreed to by the House:[2]

Whereas it is seriously claimed that under the treaty-making power of the Government, and without any action whatever on the part of the House of Representatives or by Congress, reciprocal trade agreements may be negotiated with foreign governments that will of their own force operate to supplant, change, increase, or entirely abrogate duties on imports collected under laws enacted by Congress and approved by the Executive for the purpose of raising revenue to maintain the Government: Now, therefore, be it

Resolved by the House of Representatives, That the Committee on Ways and Means be directed to fully investigate the question of whether or not the President, by and with the advice and consent of the Senate, and independent of any action on the part of the House of Representatives, can negotiate treaties with foreign governments by which duties levied under an act of Congress for the purpose of raising revenue are modified or repealed, and report the result of such investigation to the House.

No report on this subject was made at this session of Congress.

1531. The House maintains that customs duties may not be changed otherwise than by an act of Congress originated by itself.

Approvals by Congress of reciprocity treaties affecting customs duties.

Discussion of the prerogatives of the Senate as to treaties affecting customs duties.

On November 16, 1903,[3] the House proceeded, in Committee of the Whole House on the state of the Union, to the consideration of the bill (H. R. 1921) to carry into effect a convention between the United States and the Republic of Cuba signed on the 11th day of December, in the year 1902:

Be it enacted, etc., That whenever the President of the United States shall receive satisfactory evidence that the Republic of Cuba has made provision to give full effect to the articles of the convention between the United States and the Republic of Cuba, signed on the 11th day of December, in the year 1902, he is hereby authorized to issue his proclamation declaring that he has received such evidence, and thereupon, on the tenth day after exchange of ratifications of such convention between the United States and the Republic of Cuba, and so long as the said convention shall remain in force, all articles of merchandise being the product of the soil or industry of the Republic of Cuba which are now imported into the United States free of duty shall continue to be so admitted free of duty, and all other articles of merchandise being the product of the soil or industry of the Republic of Cuba imported into the United States shall be admitted at a reduction of 20 per cent of the rates of duty thereon, as provided by the tariff act of the United States approved July 24, 1897, or as may be provided by any tariff law of the United States subsequently enacted. The rates of duty herein granted by the United States to the Republic of Cuba are and shall continue during the term of said convention preferential in respect to all like imports from other countries: *Provided,* That while said convention is in force no sugar imported from the Republic of Cuba, and being the product of the soil or industry of the Republic of Cuba, shall be admitted into the United States at a reduction of duty greater than 20 per cent of the rates of duty

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[1] First session Fifty-seventh Congress, Journal, p. 287; Record, p. 1178.

[2] On January 29, 1902, Mr. Shelby M. Cullom, of Illinois, had made in the Senate a speech on this subject. (First session Fifty-seventh Congress.)

[3] First session Fifty-eighth Congress, Record, p. 260.

thereon, as provided by the tariff act of the United States approved July 24, 1897, and no sugar the product of any other foreign country shall be admitted by treaty or convention into the United States while this convention is in force at a lower rate of duty than that provided by the tariff act of the United States approved July 24, 1897: *And provided further,* That nothing herein contained shall be held or construed as an admission on the part of the House of Representatives that customs duties can be changed otherwise than by an act of Congress originating in said House.

SEC. 2. That so long as said convention shall remain in force the laws and regulations adopted or that may be adopted by the United States to protect the revenues and prevent fraud in the declarations and proofs that the articles of merchandise to which said convention may apply are the product or manufacture of the Republic of Cuba shall not impose any additional charge or fees therefor on the articles imported, excepting the consular fees established, or which may be established, by the United States for issuing shipping documents, which fees shall not be higher than those charged on the shipments of similar merchandise from any other nation whatsoever; that articles of the Republic of Cuba shall receive, on their importation into the ports of the United States, treatment equal to that which similar articles of the United States shall receive on their importation into the ports of the Republic of Cuba; that any tax or charge that may be imposed by the national or local authorities of the United States upon the articles of merchandise of the Republic of Cuba embraced in the provisions of said convention subsequent to importation and prior to their entering into consumption into the United States shall be imposed and collected without discrimination upon like articles whencesoever imported.

The report[1] of the Committee on Ways and Means, submitted by Mr. Sereno E. Payne, of New York, began as follows:

The enactment of this bill into law is necessary to give effect to the convention providing for reciprocal trade between this country and Cuba.[2] This results not merely because the convention itself provides that it "shall not take effect until the same shall have been approved by the Congress," but because the Constitution gives no power to the President and the Senate to make a convention or treaty changing the rates of revenue. That power is expressly lodged in the Congress. (Sec. 8, Article I, of the Constitution.) Section 7 of the same article provides that "all bills for raising revenue shall originate in the House of Representatives." lt is not intended here to cite authorities or advance reasons on this proposition. The records of Congress abound with unrefuted arguments on the affirmative of this contention, and the practice of Congress has been uniformly in the same direction. The reciprocity treaties with Great Britain in reference to our trade relations with Canada and with Hawaii were by their terms each dependent upon the passage by the Congress of appropriate legislation reducing the duties and making provision for the carrying into effect of their terms.[3] Every treaty requiring the payment of money, from the Jay treaty to the treaty of Paris with Spain, has been referred to the Congress to make the necessary appropriation of money. Foreign countries in making treaties with us are bound to take notice of this requirement of our Constitution, and, whether it is expressed in the treaty or not, the whole matter is subject to the necessary legislation by the Congress.

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[1] House Report No. 1, Record, pp. 274–276. Mr. S. B. Cooper, of Texas, filed individual minority views, holding that it "was plainly a subterfuge to contend that this is a bill of the House when its only purpose and effect is to ratify a treaty or law already perfected in form by the other branch of Congress, and practically already ratified in that branch, under the treaty-making power conferred by the Constitution, which treaty or law the House is now simply called upon by the majority to accept as a fait accompli, without any voice as to the wording of the original document, and even without the privilege of amending or modifying the terms laid down by its constructors. It certainly appears an unconstitutional proceeding thus to tie the hands of the House of Representatives in a matter of legislation affecting the revenue."

[2] For text of this treaty see Executive Document No. 2, first session Fifty-eighth Congress. This treaty provided: "This convention shall not take effect until the same shall have been approved by Congress."

[3] Both Canadian and Hawaiian treaties had clauses requiring legislation of Congress, and acts were passed in accordance therewith. (See 10 Stat. L., pp. 587, 1092; 13 Stat. L., p. 566; 19 Stat. L., p. 200.) The Mexican reciprocity treaty also had a similar clause, but the legislation failed and the treaty did not become effective. (24 Stat. L., p. 988; 25 Stat. L., p. 1370.)

The convention to which this bill refers is by its terms not to "take effect until the same shall have been approved by the Congress." If, in the judgment of Congress, the terms of the treaty are to become the law of the land, it is necessary, both by the terms of the convention and by force of the express requirement of the Constitution, that Congress pass the requisite legislation authorizing the change in our revenue laws.

To render the convention valid it is necessary to enact into law the language of the proviso of Article VIII: "And no sugar the product of any other foreign country shall be admitted by treaty or convention into the United States while this convention is in force at a lower rate of duty than that provided by the tariff act of the United States approved July 24, 1897." To enact these words into law would be to admit, by implication, that duties could be lowered by treaty or convention. Your committee can not consent to this proposition, nor is it believed that such an admission would be sanctioned by any Member of the House. The bill therefore adds the following saving clause at the conclusion of this proviso:

"*And provided further,* That nothing herein contained shall be held or construed as an admission on the part of the House of Representatives that customs duties can be changed otherwise than by an act of Congress originating in said House."

This proviso, in the judgment of your committee, preserves the contention of the House as to its rights and prerogatives under the Constitution.

The bill was debated November 16 [1] and succeeding days and passed the House without amendment.[2]

In the Senate on December 14 and 16,[3] Mr. Joseph W. Bailey, of Texas, discussed at length the constitutional question, holding the initiatory action of the Senate unconstitutional. On December 16 Mr. John C. Spooner, of Wisconsin, also discussed the question in controversy with Mr. Bailey.

Mr. Bailey laid down three propositions:

My first proposition is that—

The House of Representatives alone has the right to originate revenue bills; and neither the President alone nor the President and the Senate jointly possesses that power.

My second proposition is that—

The Constitution commits the treaty-making power of the Government to the President and the Senate; and the House of Representatives has no right to approve or to disapprove a treaty.

My third proposition is that—

The President and the Senate, acting in conjunction with the House of Representatives, can not validate an invalid law or treaty; and that what is null and void from the beginning must remain null and void to the end.

Mr. President, in declaring that all revenue bills must originate in the House of Representatives I merely repeat the very language of the Constitution, and it follows as a corollary from that that neither the President alone nor the President and the Senate acting together can initiate such a measure.

Mr. Bailey, in the course of the discussion of his propositions, said:

In 1843 the President of the United States negotiated what is commonly known as the "Zollverein commercial treaty," and transmitted it to the Senate for its ratification. That treaty was referred to the Committee on Foreign Relations, and from that committee, on the 14th day of June, Senator Choate, of Massachusetts, submitted a report in which he states the case against the President's right and power to negotiate a treaty of this kind so much better than I could hope to state it that I shall ask the Secretary to read it.

I commend this report [4] to the careful attention of all Senators, but I especially commend it to the attention of the Senators from Massachusetts. I do not need to remind them that Rufus Choate was not a strict-construction Democrat, who insisted upon the cold letter of the Constitution. He was a Whig,

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[1] Record, pp. 260–276, 293–312, 323–349, 361–389.

[2] Journal, p. 81; Record, pp. 388, 389.

[3] Second session Fifty-eighth Congress, Record, pp. 178–194, 277–286.

[4] See section 1532 of this chapter.

and a leader in the party which had elected the President who had negotiated this treaty and urged its ratification. But over and above his political affiliations he was a profound lawyer, whose learning and eloquence are still cherished by the Massachusetts bar, even if his advice is not followed by the Massachusetts Senators.

Mr. John C. Spooner, of Wisconsin, during the debate, said:

That the question the Senator has discussed as to the power of the President and the Senate by treaty alone to change tariff rates was not raised by this treaty, because it is part of the agreement itself that it should not take effect until it had been approved by Congress. I did not say, nor do I say, nor do I think that if that provision had not been in the treaty the treaty would have been unconstitutional, although I assume, for the purposes of argument, and I should be strongly inclined to the opinion, that it would have remained executory until legislation originating in the House had given effect to it.

* * * * * * *

I certainly can not agree that where a treaty is of such a character that it can not become effective until Congress has supplied the legislation to carry it into effect it becomes a perfect obligation, unless there is a provision in the treaty itself that it shall not become effective until it has been approved by Congress. The Constitution itself is written into the treaty and if it can not take effect under the organic law without affirmative action by Congress, that is in the body of the treaty. The nations must take notice of the limitations upon the treaty-making power.

If the Senator will pardon me a moment, Wheaton says:

"The treaty, when thus ratified, is obligatory upon the contracting states, independently of the auxiliary legislative measures which may be necessary on the part of either in order to carry it into complete effect. Where, indeed, such auxiliary legislation becomes necessary, in consequence of some limitation upon the treaty-making power, expressed in the fundamental laws of the State, or necessarily implied—"

As the Senator from Texas thinks in this case—

"from the distribution of its constitutional powers—such, for example, as a prohibition of alienating the national domain—then the treaty may be considered as imperfect in its obligation until the national assent has been given in the forms required by the municipal constitution."

And so it is said by Mr. Story; and so it is said in Foster *v.* Neilson by Chief Justice Marshall; and so it is said by Mr. Justice McLean, who, in the case of Turner *v.* The American Baptist Union, expressed himself as follows:

"A treaty under the Federal Constitution is declared to be the supreme law of the land. This unquestionably applies to all treaties where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and can not, be, the supreme law of the land where the concurrence of Congress is necessary to give it effect."

That is either where it provides as a part of the agreement that it shall not take effect until approved by Congress or where it is provided as a part of the Constitution that it shall not take effect until approved by Congress. Justice McLean continues:

"Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the Constitution, as money can not be appropriated by the treaty-making power. This results from the limitations of our Government."

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The point of the Senator's argument was that the House was no part of the treaty-making power. That is true. A treaty which the President and the Senate may lawfully enter into would be no better if it provided for approval by the House, but would be an attempt to confer by contract a power upon the House which under the Constitution it does not possess, which it claimed long ago in President Washington's day, but which it abandoned then and has never since asserted.

But a provision that the treaty shall not take effect until approved by Congress is a valid provision unless the Senator takes the narrow view of the word "approved," that it involves a ratification of the treaty by the House and by the Senate as legislative bodies. You will find the word "approved" in the provision of the Dingley Act as to commercial treaties. If that word means what the Senator seems to think it does, it is bad; there is no sense in it. If it means what I think it means, until the House, where it relates to duties, shall approve by legislation the duty provisions of the treaty, it is entirely harmonious with my contention that it is constitutional. It is a different proposition from that which the Senator was making a moment ago.

In the course of the debate, Mr. Eugene Hale, of Maine, said:

But when you come to an event which it is declared is absolutely indispensable to the operation of the treaty, an act by Congress, what better can you have than that? I can see none, and that is the reason why I am going to vote for this bill, that all the rights of the great body of popular Representatives of the Government are preserved.

I do not agree with certain Senators here that the President and the Senate can ride roughshod over the popular branch, and that the power, which is given in terms to negotiate treaties undermines and destroys the fundamental proposition that revenue measures must originate in the House. I do not agree with Senators in that. My education in the House and all my thought and reflection since have been in the other direction. I shall vote for this bill because it has been so amply guarded in that direction that the right of the House is maintained, and the treaty is dependent upon a single event which must be initiated and started and adopted by the House and the Senate as Congress.

On December 16,[1] Mr. George F. Hoar, of Massachusetts, said:

The Constitution provides for two methods of legislation. It declares that bills passed in accordance with the Constitution and treaties shall be the law of the land. They have equal authority, and the latest bill or treaty is the latest declaration of the law and repeals all others in conflict with it. Then the Constitution proceeds to say, not that measures or even laws for raising revenue shall originate in the House, but that bills for that purpose shall do so—that is, in substance, that when the method of doing this is by majority vote the method of accomplishing it is by statute, the origin of which is a bill, the popular branch shall have the sole prerogative of originating it. But the Constitution leaves untouched, by any suggestion of a provision, direct or indirect, the otherwise unlimited authority to make any kind of law by treaty.

It is true there are many treaties which, while pledging the faith of the Government, require an act of Congress to give them effect, just as there are many laws which, while pledging the faith of the Government, require a supplementary act of Congress to give them effect. A law providing for a public debt and authorizing the Secretary of the Treasury to sign the evidences of the public debt requires a future law making an appropriation for its payment, but it is operative and pledges the faith of the Government to the public creditor, and it becomes the bounden duty of both Houses to make the appropriation, just as much as it becomes the bounden duty of both Houses to carry into effect any other provision of the Constitution whatever. So in the matter of the salaries of judges. But it is not necessary to carry the illustration further.

There may be treaties affecting revenue—and it makes no difference, as I agree with the Senator from Wisconsin, whether their effect is the diminution or the raising of revenue—which require future legislation to carry them into effect. It is not necessary to illustrate that. And there may be treaties which require no further legislation to carry them into effect. For instance, suppose, being in the habit of charging $100 head money on every passenger brought into the United States, we should make a treaty with Spain in these words: "Hereafter no officer of the United States shall receive or exact any head money from any passenger coming from Spain." That would be a complete, perfect enactment. It would be the law of the land, by the express provision of the Constitution, requiring no farther act of Congress to give it effect or to provide any mechanism for carrying it out. I hold that such a treaty, although it affects revenue and never has been in the House, is as absolutely, by the plain meaning of the Constitution, the law of the land as if those same words were put into a statute enacted by both Houses.

The bill, on December 16, was passed by the Senate without amendment, yeas 57, nays 18.[2]

1532. In 1844 the Senate took the view that the constitutional method of regulating duties was by act of Congress rather than by treaty.

Argument that duties are more properly regulated with the publicity of Congressional action than by treaties negotiated by the Executive and ratified by the Senate in secrecy.

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[1] Record, p. 277.

[2] Record, p. 286.

On June 14, 1844,[1] in executive session of the Senate, Mr. Rufus Choate, from the Committee on Foreign Relations, to whom had been referred the convention with Prussia and the other states of the Germanic Association of Customs and Commerce, reported the same adversely. In the report the committee says:

That the Senate ought not to advise and consent to the ratification of the convention aforesaid.

In submitting this report the committee do not think it necessary to say anything on the general object sought to be accomplished by the convention, or on the details of the actual arrangement; not to attempt to determine, by the weight and measure of the reciprocal concessions, which Government, if either, has the best of the transaction. These subjects have not escaped their notice, but they propose to confine themselves to a very brief exhibition of another and single ground, upon which, without reference to the particular merits of the treaty, they advise against its ratification.

The committee, then, are not prepared to sanction so large an innovation upon ancient and uniform practice in respect of the department of Government by which duties on imports shall be imposed. The convention which has been submitted to the Senate changes duties which have been laid by law. It changes them either ex directo and by its own vigor, or it engages the faith of the nation and the faith of the Legislature through which the nation acts to make the change. In either aspect it is the President and Senate who, by the instrumentality of negotiation, repeal or materially vary regulations of Commerce and laws of revenue which Congress had ordained. More than this, the executive department, by the same instrumentality of negotiations, places it beyond the power of Congress to exceed the stipulated maximum of import duties for at least three years, whatever exigency may intervene to require it.

In the judgment of the committee the Legislature is the department of Government by which commerce should be regulated and the laws of revenue be passed. The Constitution, in terms, communicates the power to regulate commerce and to impose duties to that department. It communicates it, in terms, to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress. They infer this from the language of the Constitution, from the nature and principles of our Government, from the theory of Republican liberty itself, and from the unvaried practice, evidencing the universal belief of all, in all periods and of all parties and opinions. They think, too, that, as the general rule, the representatives of the people sitting in their legislative capacity, with open doors, under the eye of the country, communicating freely with their constituents, may exercise this power more intelligently, more discreetly, may acquire more accurate and more minute information concerning the employments and the interests on which this description of measures will press, and may better discern what true policy prescribes and rejects, than is within the competence of the executive department of the Government.

To follow, not to lead; to fulfill, not to ordain the law; to carry into effect, by negotiation and compact with foreign governments, the legislative will, when it has been announced, upon the great subjects of trade and revenue; not to interpose with controlling influence, not to go forward with too ambitious enterprise—these seem to the committee to be the appropriate functions of the Executive.

Holding this to be the general rule upon the subject, the committee discern nothing in the circumstances of this case, nothing in the object to be attained or in the difficulties in the way of obtaining it, which should induce a departure from this rule. If Congress think the proposed arrangement a beneficial one, it is quite easy to pass a law which shall impose the rates of duty contemplated by it, to take effect when satisfactory information is conveyed to the President that the stipulated equivalents are properly secured.

Upon this single ground, then, the committee advise that the treaty be rejected. It may help to reconcile the Senate to this conclusion if they add that they do not regard the stipulated concessions of the foreign contracting power as in any degree equivalent to the considerations by which we obtain them. * * *

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[1] Senate Executive Journal, 1841–1845, pp. 333–334.

On June 15, 1844, by a vote of yeas 26, nays 18, the treaty was laid on the table.

On February 26, 1845,[1] the Committee on Foreign Relations, to whom had been referred a message of the President, submitting arguments as to the merits of the convention rather than as to the constitutionality of the question involved, made a second report,[2] in which was reiterated the reason of the former report, and which then continues:

The committee have experienced no change of these views. The fact of the President and Senate being invested with authority to control Congress in a sphere so appropriate to its jurisdiction furnishes no sufficient cause for the exertion of the authority, unless for peculiar reason of injury to be avoided or advantage realized which legislation may not reach with the same facility or effect. Retaliatory regulation, when required, for example, may be best arranged or obviated by treaties. In such cases the cooperation of Congress may always be expected, with no impairment of harmony between the departments.

The question has been debated how far Congress would be bound to give effect, in cases requiring its cooperation, to regulations by treaty on subjects put within its express province by the Constitution. Whichever may be the better opinion, the doubt supplies reason enough against putting the question to trial in other circumstances than those in which the concurrence of Congress may be safely assumed. And the reason is the stronger for this forbearance from the fact that in the contingency of conflict it would be not the interests only, but the faith, too, of the nation which might be compromised, as this would have been committed by the adoption of the treaty regulations.

The condition of the Government at this point is of peculiar delicacy as regards the arrangement of its imposts. Parties have been arrayed with vehemence and the greatest sensibility awakened on the subject. Regulation by treaty in these circumstances would doubtless be carried into effect by the House of Representatives. But the temper in which the supposed intrusion might be expected to be received would be anything but cordial or placid. Ought not the occasion to be considerable, the motive urgent, to warrant the exercise of the authority at this cost? This is a topic requiring only to be displayed, not dwelt on.

It is further to be considered, if we were to have separate regulation of duties with the various powers which might invite or desire this course of action, how inconveniently diversified and mottled our tariff system might soon become, whilst we should be precluded from simplifying and restoring it to uniformity and symmetry by engagements we were not at liberty to retire from, or which we could only retract at the hazard of disturbing harmony and possibly inciting changes of tariff unfavorable to our interests.

We have at this time treaty stipulations with twenty-one foreign States, engaging that their articles of produce or manufacture, respectively, shall be liable to the payment of no higher or other duties on importation into the United States than shall be payable on the like articles from other countries. We say that this pledge does not preclude us from changes of our rates of duty for equivalents without letting other powers to participation, unless in the render of the same equivalents by these other powers. Let this view be granted to be correct. Is it not true, nevertheless, that others might be found to contest this construction, and, whilst they could not prevail on us to abandon it, might still seek occasion of dissatisfaction on our refusal, possibly to the extreme of introducing change to our disadvantage in their tariffs? The consequence may not be hazarded on light inducements in any event.

If we make regulations of reduction and favor in regard to articles from a foreign country, unless (the instances of which are rare) they are peculiar to that country, the operation will not be confined to these articles, but extend to 0 of the same class from all countries, or, it may be, have the effect to derange the established channels of trade, not in these classes of articles only, but much larger classes in connection with these, as having formed their associates in importation from the same country. The committee do not feel required to expand and assign their full development to views of this character. They regard it their duty, however, to bring them to the attention of the Senate, for a better and wiser consideration, with the expression of the opinion that they are worthy of that consideration. The effect of granting reductions of impost on the revenue of the country is, in this view, not to be confined to

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[1] Senate Executive Journal, 1841–1845, pp. 406–410.

[2] This second report was submitted not by Mr. Choate, but by Mr. William S. Archer, of Virginia.

the mere estimate of the articles to be introduced from the country with which the stipulation for the reduction has been made. The reduction must affect the articles of the same claw from all countries, and, of course, the revenue which the duties on them will afford.

Such, in a condensed form, are the views which the committee entertain as regards the general question of the propriety and policy of interference by regulations of treaty with the tariff arrangements of the Government. The power under the Constitution to interfere is not contested. The possible occurrence of occasions in which it may be advisable to exert it is not disputed. But the opinion is intended to be expressed that the occasions should be marked by the promise of very superior advantage, or lie out of the convenient reach of the exertion of the ordinary power of Congress.

1533. Discussion by a Senate committee as to the jurisdiction of the Senate over revenue treaties.

Provisions of the tariff act of 1897 in reference to reciprocity treaties.

On December 15, 1902,[1] the Senate removed the injunction of secrecy from the following report made at the preceding session by Mr. S. M. Cullom,[2] of Illinois, from the Committee on Foreign Relations:

The Committee on Foreign Relations, having adopted the following report of a subcommittee appointed to consider the question of the jurisdiction of the Senate to act upon the reciprocity treaties now pending in that body, submits the same for the consideration of the Senate.

The subcommittee to whom was referred the question whether the Senate has jurisdiction to act upon the reciprocity treaties transmitted to the Senate, and now pending in that body, begs leave respectfully to report as follows:

Section 4 of the tariff act of 1897, commonly known as the Dingley Act, provides

"SEC. 4. That whenever the President of the United States, by and with the advice and consent of the Senate, with a view to secure reciprocal trade with foreign countries, shall, within the period of two years from and after the passage of this act, enter into commercial treaty or treaties with any other country or countries concerning the admission into any such country or countries of the goods, wares, and merchandise of the United States and their use and disposition therein, deemed to be for the interests of the United States, and in such treaty or treaties, in consideration of the advantages accruing to the United States therefrom, shall provide for the reduction during a specified period, not exceeding five years, of the duties imposed by this act, to the extent of not more than twenty per centum thereof, upon such goods, wares, or merchandise as may be designated therein of the country or countries with which such treaty or treaties shall be made as in this section provided for; or shall provide for the transfer during such period from the dutiable list of this act to the free list thereof of such goods, wares, and merchandise, being the natural products of such foreign country or countries, and not of the United States; or shall provide for the retention upon the free list of this act during a specified period, not exceeding five years, of such goods, wares, and merchandise now included in said free list as may be designated therein; and when any such treaty shall have been duly ratified by the Senate and approved by Congress, and public proclamation made accordingly, then and thereafter the duties which shall be collected by the United States upon any of the designated goods, wares, and merchandise from the foreign country with which such treaty has been made shall, during the period provided for, be the duties specified and provided for in such treaty, and none other."

It will be observed that the treaties contemplated by this section are those which the President of the United States, "by and with the advice and consent of the Senate, with a view to secure reciprocal trade with foreign countries, shall enter into within the period of two years from and after the passage of this act," such treaties to be operative if they shall provide for a reduction of duties imposed by the act during a specified period, not exceeding five years, and to an extent of not more than 20 per cent. The section contains other similar limitations.

The act was approved July 24, 1897. The pending treaties were negotiated by the President and transmitted to the Senate within two years from the passage of the act, but have not been ratified by

[1] Second session Fifty-seventh Congress, Senate Document No. 47.

[2] While Mr. Cullom was a Member of the House a resolution on this subject was pending. Second session Fortieth Congress, Globe, p. 3885.

the Senate within the time limited by section 4, although the time fixed by the treaties for the exchange of ratifications has been extended by agreement between the parties thereto.

It is difficult to discover the theory upon which this section was drawn. It certainly was not drawn upon the theory that such treaties require, as a condition precedent to their becoming effective, the approval of Congress, and that the act gave conditionally that approval in advance, for the section provides that when such treaties shall have been duly ratified by the Senate and approved by Congress, and proclamation made accordingly, then and thereafter the duties which shall be collected, etc., * * * shall be the duties specified and provided for in such treaty, and none other.

The single question submitted to the subcommittee for examination and report is whether the treaties not having been ratified by the Senate within two years from July 24, 1897, are still within its jurisdiction.

Section 2 of article 2 of the Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

The President and the Senate are, under the Constitution, the treaty-making power. The initiative lies with the President. He can negotiate such treaties as may seem to him wise, and propose them to the Senate for the advice and consent of that body, which is as free and independent in its action upon the same as the President is in exercising his power of initiative and negotiation.

The power of the President and the Senate is derived from the Constitution. There is under our system no other source of treaty-making power. The Congress is without power to grant to the President or to the Senate any authority in respect of treaties, nor does the Congress possess any power to fetter or limit in any way the President or the Senate in the exercise of this constitutional function. It can not enlarge or in any wise limit or attach conditions to the exercise of the treaty-making power.

Whether the treaty is one which is self-executing, or one which requires legislation by the Congress to give it effect, it must first in any event be negotiated by the President and ratified by the Senate. Whether he will negotiate a treaty and when, and what its terms shall be, are matters committed by the Constitution entirely to the discretion of the President, and whether the Senate will advise and consent to it, with or without amendment, is a matter committed entirely to the discretion of the Senate.

If a treaty be such as to require legislative action, and when entered into by the President and ratified by the Senate does not meet the approval of Congress, it has the power to withhold the legislation requisite to give it effect, but with the preliminary steps of negotiation and ratification the Congress has nothing whatever, under the Constitution, to do.

The subcommittee is clearly of the opinion therefore that nothing contained in section 4 constitutes any valid restriction upon the jurisdiction and power of the Senate to act upon the commercial treaties now pending.

Whether such treaties operate without the approval of Congress, to change tariff duties theretofore fixed by law, is a question not involved, and upon which the subcommittee expresses no opinion.

The fact that the Senate as a legislative body concurred with the House of Representatives in the enactment of the tariff act of 1897, including section 4, is without weight upon the subject, for the obvious reason that it is impossible for the Senate by participation, deliberate or inadvertent, as a legislative body in such an enactment to disable itself in the slightest degree from exercising the power conferred upon it by the Constitution to act upon treaties negotiated by the Executive.

It is entirely competent for the Senate to amend these treaties so as to provide that they shall not take effect without the approval of Congress. Several treaties have thus provided, among others that with the Hawaiian Government in 1876. Such an amendment can not be objected to by the governments which have entered into these treaties with the United States, because they were known to be entered into with reference to the provisions of section 4.

The subcommittee therefore recommend, without reference to the merits thereof, that each of said treaties be amended by the Senate by inserting therein the following additional provision:

"This treaty shall not take effect until the same shall have been approved by the Congress."

1534. Even in the case of an application for papers relating to an Indian treaty, President Jackson asserted the Executive prerogative as opposed to the contention of the House.—In 1832 the Committee on the Public

Lands were instructed by a resolution of the House to inquire concerning the lease of a certain tract of land reserved by treaty with the Chickasaw tribe of Indians. In the course of this investigation the committee called on the Secretary of War for a copy of a certain treaty with these Indians and a copy of the journal of the commissioners negotiating the treaty and such other papers as might be in the Department touching the subject before the committee. The committee accompanied their request with the statement that it was made subject to the judgment of the President as to whether or not the communication could be made without injury to the public service.

On March 2, 1832,[1] Secretary of War Lewis Cass transmitted the information required, but accompanied this with an exposition of the views of President Jackson, who did not wish this compliance to be made a precedent. The Secretary says:

> The Constitution has assigned to the different departments of the Government their appropriate duties. To the President and Senate it has given the treaty-making power. And although there is, in many important particulars an obvious difference between the treaties concluded with the civilized nations of the world and the compacts formed with the various Indian tribes, subject to the jurisdiction of the General Government or of the respective States, still the latter, as well as the former, have, by the usage of the Government since its establishment, been negotiated and ratified by the same authority and under the same general provision of the Constitution, and many of them expressly require the action of the Senate.
>
> The same principle, therefore, which regulates one of these subjects must regulate the other whenever any question arises involving the exercise of an authority connected with either. Upon the preservation of the Constitution, as well in its partition of duties as in its limitations upon their exercise, depends, in the opinion of the President, the stability of this Government which the people have established.
>
> In considering the application made by the committee the President does not perceive that a copy of any part of the incomplete and unratified treaty of 1830 can be "relative to any purpose under the cognizance of the House of Representatives, except that of impeachment, which the resolution has not expressed." If this quotation, which gives the view taken of this subject by General Washington in his message to the House of Representatives of March 30, 1796, applied to the circumstances of a call for the papers relating to a ratified treaty in the process of execution, and for the faithful performance of which an appropriation was required, it will apply with much more force to the present application, which calls for a paper that will be wholly inoperative until the parties have again met and completed their arrangements, which at present gives no rights, and can "change" none, and which has not and ought not yet be submitted to the coordinate branch of the treaty-making power for their concurrence.
>
> That circumstances may not yet arise in which the papers relating to a ratified or an unratified treaty should be transmitted to either House of Congress upon their application the President is not prepared to deny; more particularly when such ratified "treaty stipulates regulations on any of the subjects submitted by the Constitution to either House of Congress," and when "it must depend for its execution as to such stipulations on a law or laws to be passed by Congress."
>
> Such are the views of the President upon this subject—a subject connected with the relative duties of the executive and legislative departments of the Government and which may hereafter involved, as it has heretofore involved, consequences of the highest importance. He is therefore anxious that his sentiments upon the general subject, not less than the reasons of his course in this particular case, should be distinctly made known and understood. Precedents established for good purposes are easily perverted to bad ones, and while, therefore, he assents to the application which has been made in this particular case, he does so under his own views of its peculiar circumstances, and not because the committee has a right to call for the information or he is bound to furnish it.

[1] House Report No. 488, pp. 14, 15, first session Twenty-second Congress.

1535. After long discussion the House, in 1871, successfully asserted its right to a voice in approving Indian treaties.—In a report made to the House on July 20, 1842,[1] by the Committee on Indian Affairs[2] the committee discussed the nature of treaties with the Indians as related to the power of the House over such subjects:

There is scarcely a point of resemblance between the relations of this Government with an Indian tribe and a foreign independent nation. The Indian tribes are not regarded as foreign nations by the Constitution, for, amongst the enumeration of the powers of Congress by that instrument there is one which gives it authority "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." Our relations with these tribes and the business of negotiating with them is not entrusted to the Department of State, whose duty it is to conduct negotiations with foreign Governments. By the act of Congress which established the War Department the execution of all duties relating to our Indian affairs was devolved upon it. The laws of the United States for many purposes extend over and are in force in the Indian Territory. No person is permitted to trade in the Indian country without a license from the superintendent of Indian affairs. The President may prohibit the introduction of goods or of any particular article into the country belonging to any Indian tribe either by citizens of the United States, foreigners, or any other tribe. The whole of the country occupied by the tribes who have removed west of the Mississippi is annexed to the judicial district of the United States to which it is contiguous. The jurisdiction of our courts extends to crimes committed in the Indian country, and Congress has always claimed to exercise the power of protecting the Indians. Indeed, the Indian tribes can not in any sense be regarded as independent nations, the wardship exercised over them by the Government of the United States being entirely incompatible with their independence. There is no reason, therefore, for regarding our negotiations with them in the light and subject to the rules which prevail in relation to the treaties negotiated with foreign nations.

1536. In 1870[3] the Indian appropriation bill (H. R. 1169) failed because of adherence by both House and Senate after two unsuccessful conferences. The point of difference was the refusal of the House to appropriate to carry out the stipulations of certain treaties. The House took the ground that the Indian treaties did not stand on the same grounds under the Constitution as did the treaties with foreign nations. In short, the House denied the right of the President and Senate to bind the Government by a treaty with Indians. The Senate held that the right had been recognized by the House and the Supreme Court from the organization of the Government until the present Congress, and declined to yield what it conceived to be one of its prerogatives.

A new bill was then passed in the House (H. R. 2413) without provision for payment of certain treaty stipulations. The Senate amended it in accordance with their contention, and a disagreement arose, which in the last hours of the session was composed by a provision of the conference report as follows:

That nothing in this act contained, or in any of the provisions thereof shall be construed as to ratify, approve, or disaffirm any treaty made with said tribes, bands, or parties of Indians, since the 20th of July, 1867, or affirm or disaffirm any of the powers of the Executive and Senate over the subject.

Mr. Henry L. Dawes, of Massachusetts, said in presenting the report that it merely postponed the question at issue. The report was agreed to, and the bill became a law.[4]

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[1] Second session Twenty-seventh Congress, House Report No. 960.

[2] This committee: Messrs. James Cooper (Pa.), Robert L. Caruthers (Tenn.), Thomas C. Chittenden (N. Y.), Augustus R. Sollers (Md.), William Butler (S. C.), Harvey M. Watterson (Tenn.), Wm. A. Harris (Va.), John B. Weller (Ohio), and John C. Edwards (Mo.).

[3] Second session Forty-first Congress, Globe, pp. 4971, 5008, 5111, 5572, 5606, 5609.

[4] Journal, p. 1292, Globe, p. 5656.

The conflict between the two Houses was renewed in 1871, when the Indian appropriation bill (H. R. 2615) came up for consideration. The difficulties were submitted to a conference composed, on the part of the House, of Messrs. Aaron A. Sargent, of California; James B. Beck, of Kentucky, and Sidney Clarke, of Kansas. On the part of the Senate the conferees were Messrs. Cornelius Cole, of California; James Harlan, of Iowa, and John P. Stockton, of New Jersey.

On March 1 they agreed to a conference report, which all the conferees signed, and which included, among other provisions, the following:

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further,* That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

In the Senate the report was assailed by Mr. Garrett Davis, of Kentucky, and others as a surrender of a great principle, but the report was agreed to in both Houses without division.[1]

1537. The meaning of a treaty may not be controlled by subsequent explanations sanctioned by a majority vote only of the Senate.—In the case of Fourteen Diamond Rings *v.* The United States,[2] Chief Justice Fuller, in delivering the opinion of the court, discussed the following joint resolution, which had been passed by the Senate:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the United States and the inhabitants of said islands.[3]

The Chief Justice says:

> But it is said that the case of the Philippines is to be distinguished from that of Porto Rico because on February 14, 1899, after the ratification of the treaty, the Senate resolved that it was not intended to incorporate the inhabitants of the Philippines into citizenship of the United States nor to permanently annex those islands.
>
> We need not consider the force and effect of a resolution of this sort, if adopted by Congress, not like that of April 20, 1898, in respect of Cuba, preliminary to the declaration of war, but after title had passed by ratified cession. It is enough that this was a joint resolution; that it was adopted by the Senate by a vote of 26 to 22, not two-thirds of a quorum; and that it is absolutely without legal significance on the question before us. The meaning of the treaty can not be controlled by subsequent explanations of some of those who may have voted to ratify it. What view the House might have taken as to the intention of the Senate in ratifying the treaty we are not informed, nor is it material; and if any implication from the action referred to could properly be indulged, it would seem to be that two-thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated.

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[1] Third session Forty-first Congress, Journal, p. 456; Globe, pp. 1811, 1822.

[2] 183 U. S., pp. 179–180.

[3] Record, Fifty-fifth Congress, third session, vol. 32, p. 1847.

Chapter XLIX.

PREROGATIVES OF THE HOUSE AS TO FOREIGN RELATIONS.

1538. In 1811 the House originated and the Senate agreed to a resolution declaring the attitude of the United States on a question of foreign policy.

Instance wherein two Members; of the House were directed to take a confidential message to the Senate.

On January 5, 1811,[1] a joint resolution was proposed, which, after amendment was on January 8, engrossed, read a third time, and passed in this form:

Taking into view the present state of the world, the peculiar situation of Spain, and of her American provinces, and the intimate relations of the territory eastward of the River Perdido, adjoining the United States, to their security and tranquility: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States can not see, with indifference, any part of the Spanish provinces adjoining the said States eastward of the River Perdido pass from the hands of Spain into those of any other foreign power.

A committee of two Members of the House was appointed to carry this resolution to the Senate. Their message was received confidentially in the Senate on January 9, and on January 11 it was passed with an amendment, in which the House concurred.[2]

This resolve was enrolled and signed by the President.[3]

1539. The House has declared its "constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well in the recognition of new powers as in other mat-

[1] This occurred in the Eleventh Congress, but the injunction of secrecy not being removed until the next Congress, the record appears in the Journal (supplemental) First session Twelfth Congress, pp. 490–497 (Gales & Seaton ed.).

[2] Annals, Third session Eleventh Congress, pp. 374, 376, 377.

[3] Journal (supplemental) First session Twelfth Congress, p. 520 (Gales.& Seaton ed.). 1006

ters."—On April 4, 1864,[1] the House originated and passed by a vote of yeas 109, nays 0, a joint resolution as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress of the United States are unwilling, by silence, to leave the nations of the world under the impression that they are indifferent spectators of the deplorable events now transpiring in the Republic of Mexico; and they therefore think fit to declare that it does not accord with the policy of the United States to acknowledge a monarchical government erected on the ruins of any republican government in America under the auspices of any European power.

This resolution was in the Senate referred to the Committee on Foreign Relations, and on May 27[2] a motion to discharge the committee failed, yeas 5, nays 23. The Senate, however, sent to the State Department for documents and correspondence relating to affairs in Mexico, and on June 28[3] and 29 considered the propriety of printing them.

On May 23[4] Mr. Henry Winter Davis, of Maryland, presented the following resolution,, which was agreed to by the House:

Whereas the following announcement appeared in the Moniteur, the official journal of the French Government:

"The Emperor's government has received from that of the United States satisfactory explanations as to the sense and bearing of the resolution come to by the House of Representatives at Washington relative to Mexico. It is known, besides, that the Senate has indefinitely postponed the examination of that question, to which, in any case, the executive power would not have given its sanction."

Therefore,

Resolved, That the President be requested to communicate to this House, if not inconsistent with the public interest, any explanations given by the Government of the United States to the Government of France respecting the sense and bearing of the joint resolution relative to Mexico, which passed the House of Representatives unanimously on the 4th of April, 1864.

On May 25[5] President Lincoln transmitted the correspondence.

This correspondence[6] contained a letter from Wm. H. Seward, Secretary of State, to Wm. L. Dayton, minister to France, transmitting a copy of the resolution of the House, with this explanation:

This is a practical and purely executive question, and the decision of its constitutionality belongs not to the House of Representatives, nor even to Congress, but to the President of the United States. * * * While the President receives the declaration of the House of Representatives with the profound respect to which it is entitled, as an exposition of its sentiments upon a grave and important subject, he directs that you inform the Government of France that he does not at present contemplate any departure from the policy which this Government has hitherto pursued in regard to the war which exists between France and Mexico.

The correspondence having been referred, Mr. Davis reported from the Committee on Foreign Affairs on June 27, 1864,[7] the report beginning as follows:

The Committee on Foreign Affairs have examined the correspondence submitted by the President relative to the joint resolution on Mexican affairs with the profound respect to which it is entitled, because of the gravity of its subject and the distinguished source from which it emanated.

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[1] First session Thirty-eighth Congress, Journal, p. 464; Globe, p. 1408.

[2] Globe, pp. 2521, 2522.

[3] Globe, pp. 3339, 3359.

[4] House Journal, p. 689.

[5] House Journal, p. 701.

[6] House Executive Document No. 92, First session Thirty-eighth Congress.

[7] First session Thirty-eighth Congress, House Report No. 129.

They regret that the President should have so widely departed from the usage of constitutional governments as to make a pending resolution of so grave and delicate a character the subject of diplomatic explanations. They regret still more that the President should have thought proper to inform a foreign government of a radical and serious conflict of opinion and jurisdiction between the depositories of the legislative and executive power of the United States.

No expression of deference can make the denial of the right of Congress constitutionally to do what the House did with absolute unanimity, other than derogatory to their dignity.

They learn with surprise that in the opinion of the President the form and term of expressing the judgment of the United States on recognizing a monarchial government imposed on a neighboring republic is a "purely executive question, and the decision of it constitutionally belongs not to the House of Representatives, nor even to Congress, but to the President of the United States."

This assumption is equally novel and inadmissible. No President has ever claimed such an exclusive authority. No Congress can ever permit its expression to pass without dissent.

It is certain that the Constitution nowhere confers such authority on the President.

The precedents of recognition, sufficiently numerous in this revolutionary era, do not countenance this view; and if there be one not inconsistent with it the committee have not found it.

All questions of recognition have heretofore been debated and considered as grave questions of national policy, on which the will of the people should be expressed in Congress assembled, and the President, as the proper medium of foreign intercourse, has executed that will. If he has ever anticipated its expression, we have not found the case.

The declaration and establishment of the Spanish-American colonies first brought the question of the recognition of new governments or nations before the Government of the United States; and the precedents then set have been followed ever since, even by the present Administration.

The correspondence now before us is the first attempt to depart from that usage, and deny the nation a controlling deliberative voice in regulating its foreign policy.

The report then goes on to cite the precedents. First comes the action in the Seventeenth Congress, in 1821 and 1822, led by Mr. Henry Clay, of Kentucky, which resulted in the passage of a bill recognizing the South American governments. President Monroe invited and acquiesced in the participation of Congress in this action.

Again in 1836 the recognition of Texas was preceded by resolutions by the two branches of Congress, and President Jackson, while pointing out that it had not been settled where the power of recognizing new governments lay, expressed the opinion that no issue would arise between the legislative and executive branches, and also that it would seem to be within the spirit of the Constitution and most safe that recognition, when probably leading to war, should be exercised after a previous understanding with the body by whom alone war could be declared.[1] The independence of Texas was recognized by law.

In 1862 the independence of Haiti was recognized by a clause in an appropriation bill.

The report further discusses the attitude of the Administration of John Quincy Adams in relation to the attitude of the United States to the South American republics, and also the action of the Executive and Congress in relation to the Panama mission.

At the conclusion of its report the committee recommended a declaratory resolution.[2] which was not acted on at that time, but on December 15, 1864,[3] Mr.

[1] Message of President Jackson, December 21, 1836, Messages and Papers of the Presidents, Vol. III, p. 267.

[2] First session Thirty-eighth Congress, Journal, p. 908.

[3] Second session Thirty-eighth Congress, Journal, pp. 49, 53–57; Globe, pp. 48, 65.

Davis again reported the resolution from the Committee on Foreign Affairs, in form as follows:

Resolved, That Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States as well in the recognition of new powers as in other matters; and it is the constitutional duty of the President to respect that policy, not less in diplomatic negotiations than in the use of the national force when authorized by law; and the propriety of any declaration of foreign policy by Congress is sufficiently proved by the vote which pronounces it; and such proposition, while pending and undetermined, is not a fit topic of diplomatic explanation with any foreign power. * * *

Mr. John F. Farnsworth, of Illinois, moved that the resolution lie on the table, and that motion was agreed to, yeas 69, nays 63. Mr. Davis at once asked to be relieved of his position as chairman of the Committee on Foreign Affairs, and on this request a debate arose as to the purport of the resolution. He said that at the last session the House had passed a resolution declaratory of the policy of the Government with reference to the republics of America. The resolution had not passed the Senate. Soon after the House acted the Secretary of State had virtually apologized to the French Government for the action of the House and had impeached the authority of Congress to interfere in the foreign affairs of the Government.

On December 19 Mr. Davis presented the resolution again, and after modifying it by using the words "Executive Departments" instead of "President" the subject was brought to a vote by a motion to lay the resolution on the table. This resolution was disagreed to, yeas 50, nays 73. The first branch of the resolution down to and including the words "authorized by law" was then agreed to, yeas 119, nays 8. The remainder was agreed to, yeas 68, nays 59.

1540. The joint resolution of 1898 declaring the intervention of the United States to remedy conditions existing in the island of Cuba originated in the House.—In April, 1898,[1] the House originated a joint resolution which, after amendment by the Senate, was passed in this form and approved by the President on April 20, 1898: [1]

Whereas the abhorrent conditions which have existed for more than three years in the island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battle ship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Habana, and can not longer be endured, as has been set forth by the President of the United States in his message to Congress of April 11, 1898, upon which the action of Congress was invited: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, First. That the people of the island of Cuba are, and of right ought to be, free and independent.

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished to leave the government and control of the island to its people.

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[1] Second session Fifty-fifth Congress, Journal, pp. 451, 452.

[2] 30 Stat. L., P. 738.

1541. The House has usually had a voice in the recognition of the independence of a foreign nation, when such recognition has affected relations with another power.—On April 4, 1820,[1] in Committee of the Whole, House on the state of the Union, Mr. Henry Clay, of Kentucky (the Speaker), submitted this resolution:[2]

Resolved, That it is expedient to provide by law a suitable outfit and salary for such minister or ministers as the President, by and with the advice and consent of the Senate, may send to any of the Governments of South America which have established and are maintaining their independence of Spain.

On May 10[3] the resolution was debated in Committee of the Whole, and agreed to by the House, yeas 80, nays 75.

1542.—On February 9, 1821,[4] during the consideration of the general appropriation bill, Mr. Henry Clay, of Kentucky, offered in the House the following amendment:

For an outfit and one year's salary to such minister as the President, by and with the advice and consent of the Senate, may send to any Government of South America which has established and is maintaining its independency of Spain a sum not exceeding eighteen thousand dollars.

This proposed amendment had been offered in Committee of the Whole on February 6, and after long debate had been decided in the negative, 77 to 73. It was debated again in the House when Mr. Clay offered it to the bill as reported. It was urged that a similar measure the last session had not resulted in any action of the Executive, and that in this case also the money, if appropriated, would lie idly in the Treasury. It was objected also that the amendment was improper as tending to embarrass the Executive. The vote being taken, the amendment was disagreed to, yeas 79, nays 86.

On February 10 Mr. Clay offered in the House this resolution:

Resolved, That the House of Representatives participates with the people of the United States in the deep interest which they feel for the success of the Spanish provinces of South America, which are struggling to establish their liberty and independence; and that it will give its constitutional support to the President of the United States whenever he may deem it expedient to recognize the sovereignty and independence of any of the said provinces.

The propriety of this resolution was debated at length. It was opposed as an improper interference on the part of the House in Executive functions, and the last clause was criticized as conceding to the Executive alone a power which belonged rather to him in conjunction with Congress.

The two clauses of the resolution were divided for the vote, and the first was agreed to, yeas 134, nays 12. The second was agreed to, yeas 87, nays 68. The whole resolution was then agreed to.

Mr. Clay and Mr. Allen were appointed a committee to present the resolution to the President.

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[1] First session Sixteenth Congress, Annals, p. 1781.

[2] In these earlier days matters of legislation were often originated in Committee of the Whole House on the state of the Union. Such is not the modern usage.

[3] Annals, pp. 2223–2229; Journal, p. 513 (Gales & Seaton ed.).

[4] Second session Sixteenth Congress, Journal, pp. 210, 213–215 (Gales & Seaton ed.); Annals, pp. 1042–1055, 1071–1077, 1081–1092.

On February 19 Mr. Clay reported "that the committee had, according to order, presented the resolution to the President; that the President assured the committee that, in common with the people of the United States and the House of Representatives, he felt great interest in the success of the provinces of Spanish America which are struggling to establish their freedom and independence; and that he would take the resolution into deliberate consideration, with the most perfect respect for the distinguished body from which it had emanated."

1543. On March 28, 1822,[1] the House, with 1 negative vote, agreed to the following resolutions:

Resolved, That the House of Representatives concur in the opinion expressed by the President, in his message of the 8th of March, 1822, that the American provinces of Spain, which have declared their independence, and are in the enjoyment of it, ought to be recognized by the United States as independent nations.

Resolved, That the Committee on Ways and Means be instructed to report a bill appropriating a sum, not exceeding $100,000, to enable the President of the United States to give due effect to such recognition.

1544. On July 4, 1836,[2] the Committee on Foreign Affairs reported the following resolutions:

Resolved, That the independence of Texas ought to be acknowledged by the United States whenever satisfactory information shall be received that it has in successful operation a civil government capable of performing the duties and fulfilling the obligations of an independent power.

Resolved, That the House of Representatives perceive with satisfaction that the President of the United States has adopted measures to ascertain the political, military, and civil condition of Texas.

The resolutions were agreed to by the House, the former, yeas 128, nays 20; the latter, yeas 113, nays 22.

1545. Arguments in the Senate that the power of recognizing foreign governments is vested in the President.—On December 18, 1903,[3] in the Senate, Mr. John T. Morgan, of Alabama, proposed the following resolutions, which were a subject of debate rather than action in the Senate:

Resolved, That neither the President, nor the President and the Senate as the treaty-making power of the United States, has the lawful power to wage or declare war against any foreign power without the consent of Congress, when such country is at peace with the United States, and when its diplomatic relations with the United States are unbroken, and when its diplomatic representatives are recognized by the President as the representatives of a friendly power. And the consent of the Senate, as a part of the treaty-making power, to a war waged by the President against such a nation, under such circumstances, can not confer upon him such lawful authority under the Constitution of the United States, or under the laws of nations, or under the neutrality law of the United States.

2. That a state of war exists between Colombia as an organization in the Colombian Department of Panama that claims to have accomplished the secession of Panama from Colombia and to have established its independence and sovereignty through the recognition of the President of the United States and of some European and Asiatic states; and that claims also to have established a republic under the flag and the name and title of the Republic of Panama. And Colombia refuses to recognize the validity of the act of secession and the independence or the sovereignty of any government so organized on the Isthmus of Panarna, and is engaged in military and naval operations to assert and enforce her claim of the supreme right of government in and over the territory described in her laws and constitution as the Department of Panama.

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[1] First session Seventeenth Congress, Journal, p. 407; Annals, p. 1382.

[2] First session Twenty-fourth Congress, Journal, pp. 1218–1220; Debates, p. 4621.

[3] Second session Fifty-eighth Congress, Record, p. 361.

3. That, if Colombia is not prevented by some powerful foreign nation, she is manifestly able to maintain her present effort to repress the said secession organization and to restore her sovereignty over said Department of Panama. And the President of the United States having entered into treaty relations with the persons who claim to have seceded from Colombia and assert the powers of supreme government in and over the territory included in such Department of Panama, and having made agreements with the secessionists relating to the right and privilege of constructing and owning in perpetuity a ship canal across the Isthmus of Panama, all based on the following stipulation, namely:

"The United States guarantees and will maintain the independence of the Republic of Panama."

Said stipulation is in effect a declaration of war with Colombia, and is not within the limits of any power conferred upon the President by act of Congress or the Constitution, or by the laws of nations.

4. That the President has no lawful right or power, without the consent of Congress, and under the conditions that exist in Panama, to use the military and naval forces of the United States to prevent Colombia from enforcing her claim to the proper exercise of her sovereignty and to execute her laws in the Department of Panama by any form of coercion that is consistent with the laws of nations and is not in conflict with any right of the United States.

5. That the Senate repeats its resolution of 1889, in the following words:

"Resolved, etc., That the Government of the United States will look with serious concern and disapproval upon any connection of any European government with the construction or control of any ship canal across the Isthmus of Darien or across Central America, and must regard any such connection or control as injurious to the just rights and interests of the United States and as a menace to their welfare.

"SEC. 2. That the President be, and he is hereby, requested to communicate this expression of the views of the Government of the United States to the governments of the countries of Europe."

6. That the United States, in the Revised Statutes, has defined neutrality and the penalties for its violation as follows:

"SEC. 5286. Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of high misdemeanor, and shall be fined not exceeding $3,000 and imprisoned not more than three years."

The intervention by the President, with armed forces of the United States, and without the authority of Congress, to prevent the exercise of military or civil authority by Colombia, with whom we are at peace, for the assertion or exercise of her sovereignty and the enforcement of her constitution and laws over the Department of Panama is contrary to said law of neutrality enacted by the Congress of the United States, and is contrary to the laws of nations.

On December 19[1] this resolution was debated by Mr. Edmund W. Pettus, of Alabama.

On January 4, 1904,[2] the resolution was generally debated, among others by Mr. Louis E. McComas, of Maryland, who said:

Mr. President, I emphatically take that position which has so often been taken by this Government from its earliest history. Our Supreme Court looks alone to the Executive for the recognition of all new governments. That is true in the judicature of all the great nations; but in a republic like our tripartite division of power it is the essential thing that the Executive should have the power of recognition; that the courts should follow the Executive, and that Congress at intervals in session should follow the Executive. I answer with great confidence that it is a question for the Executive, and the President properly put it in the conclusion of his admirable message when he said:

"In conclusion, let me repeat that the question actually before this Government is not that of the recognition of Panama as an independent republic. That is already an accomplished fact. The question, and the only question, is whether or not we shall build an isthmian canal."

The question whether or not a de facto government be recognized by our Government and enter into relations with it is a question for the Executive. The question of the recognition of a de facto government likely to endure is an Executive question pure and simple, and is necessarily exclusively

[1] Record, pp. 399–402.

[2] Record, pp. 425–441.

an Executive question, and as much so in our country as in other countries where the same rule also obtains.

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Story and John Randolph Tucker well state the reasons why the President is properly vested with the power to determine whether the representatives of an insurgent power shall be recognized. He can do nothing more than to give official recognition, but that official recognition, in case of a dismemberment by revolution, is binding upon the courts, and the President will have to answer for the wisdom of the decision. Mr. Tucker well states the strong reasons why this power in the President must be exclusive of any like power in the Senate.

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Mr. President, I said that the new Republic of Panama is the child of a revolution, as is our Government and that of every government on this hemisphere to the south of us. It is idle, therefore, to criticise the promptness of our recognition of that Government by the United States. A document I have here, but will not read, contains the long roll of the recognitions by this Government of other governments from its foundation until a recent date. It is a long roll of prompt and speedy recognitions, and it shows what might be expected, that the United States has been swift, wherever it safely could, to recognize in this world a new republic.

Mr. Fish, our Secretary of State, telegraphed our minister, Mr. Washburn, to recognize the French Republic, not waiting until the provinces had been heard from, but as soon as Gambetta and his friends had proclaimed it in the Hotel de Ville in Paris. So earnest were we that, although that Government was disputed and war to crush it followed, bloody and monumental in its cruelty, three telegrams bad gone from our Secretary of State under President Grant, recognizing the Republic when war against the Republic was impending by the Commune in Paris.

Mr. Blaine telegraphed Mr. Adams, now an honored Member of the other House, then our minister at Brazil, on the second day of the existence of the Republic of Brazil, to recognize that Republic.

On January 5,[1] Mr. Henry Cabot Lodge, of Massachusetts, gave an exhaustive review of the precedents of the State Department as to the recognition of new governments:

My proposition now is as to the recognition of a state and government. That I hold to be an Executive function. The precedents are uniform to a most extraordinary degree. The position has been held by every Secretary of State, I think, without exception; it has been held by the Supreme Court in the cases I have read that the Executive recognition is the only recognition admitted by the courts, and I do not think it is possible to go beyond that. If I was guilty of an inconsistency with that doctrine when I voted for the resolution that the Cubans are and of right ought to be free and independent, I plead guilty, and do not think it is a matter of much consequence. I do not think it was a recognition of any state or government. So that I do not precisely see that it touches my argument the least in the world or is in the least inconsistent with the doctrine laid down by all the authorities.

The other method of recognition in the Constitution is by the clause which gives the President the right to nominate ambassadors, ministers, and consuls. Recognition has almost invariably occurred in what Mr. John Quincy Adams pointed out to be the best and most proper way—the reception of a minister from the state seeking independence—but the power of the President to nominate a minister where no such office bad been created by Congress and which, therefore, implies his ability to recognize in that way, has been established beyond a doubt.

I have heard the right of the President to nominate a minister to Panama questioned because no such office had been created by Congress, and I thought it would not be amiss to call the attention of the Senate to the practice in that respect.

On December 22, 1791, President Washington sent a message to the Senate nominating Gouveneur Morris, Thomas Pinckney, and William Short as ministers to Paris, London, and The Hague, respectively. There were no provisions of law for any such officers.

Various motions declaring that there was no need for these missions were debated and were rejected, and the nominations of Morris and Pinckney were confirmed.

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[1] Record, pp. 459–469.

A similar motion was made that there was no occasion for a minister to The Hague, and that was postponed until the following Monday, when it was taken up and defeated, and immediately after the nomination of a minister to The Hague was confirmed.

On the 16th of April, 1794, Washington nominated John Jay as envoy extraordinary to Great Britain. Mr. Pinckney was minister plenipotentiary, but he was not envoy extraordinary, which office did not exist.

President Washington therefore nominated Mr. Jay to an office which had no existence. He was confirmed by the Senate. On the 6th of February, 1799, John Adams nominated Rufus King minister to Russia. No such office existed. He said in the nominating message that it was to open relations with Russia. No action was taken, and the Russian mission was not established until 1809, 1 think, when Mr. John Quincy Adams was sent.

On the 29th day of May, 1813, Mr. Madison nominated a, minister to Sweden to open diplomatic relations with that country. No such office had been created by Congress.

John Adams sent in the names of Ellsworth and Patrick Henry to be commissioners to France in conjunction with William Vans Murray. No such offices existed.

On the 11th of January, 1803, Jefferson nominated Livingston to negotiate with France, and Charles Pinckney to negotiate with Spain in conjunction with Monroe. No such offices existed.

Of course, Mr. President, with the extension of our diplomatic service cases of nominating to offices for which there is no appropriation have practically disappeared, but the cases which I have cited—of Washington, John Adams, and Madison—show that the men most familiar with the Constitution in its early days conceived that they had an entire right to nominate a minister to a country where there was no provision for a mission made by Congress and that the Senate in all instances confirmed those nominations just as if an appropriation had been made, thereby recognizing the right of the President. It is a method by which recognition could be extended. It is a method which, in practice, has not been used at all lately for that purpose, because very naturally the reception of the minister or ambassador of the state seeking recognition has been the obvious way to meet it.

Mr. President, I have tried to lay down the general international law; I have tried to show the general practice of the Government of the United States and the precedents which we have had in regard to it. Having shown, as I believe, that all the authorities hold that recognition is an Executive function which can not be invaded or diminished by the legislative body; that whatever dangers it may carry, the Constitution has placed it in Executive hands, I now come to the exercise of that right in the present case of Panama. The right of the President to recognize being demonstrated by law and precedent, I wish to inquire whether that undoubted right has been properly exercised in this particular case.

1546. In 1825 the House, after long debate, made an unconditional appropriation for the expenses of the ministers to the Panama Congress.

Discussion as to the right of the House to withhold an appropriation to pay the expenses of diplomatic agents appointed by the Executive.

In 1825 the House, after long discussion, declined to make a declaration of policy or give express approval of a diplomatic service instituted by the President.

Discussion of the prerogatives of the House in relation to treaties, commercial and otherwise.

On December 6, 1825,[1] in his annual message to Congress President John Quincy Adams referred to the independence of the South American Republics, and said:

Among the measures which have been suggested to them by the new relations with one another, resulting from the recent changes in their condition, is that of assembling at the Isthmus of Panama a congress, at which each of them shall be represented, to deliberate upon objects important to the welfare of all. The Republics of Colombia, of Mexico, and of Central America have already deputed plenipotentiaries to such a meeting, and they have invited the United States to be also represented there by

[1] First session Nineteenth Congress, Journal, p. 13.

their ministers. The invitation has been accepted, and ministers on the part of the United States will be commissioned to attend at those deliberations and to take part in them so far as may be compatible from that neutrality from which it is neither our intention nor the desire of other American States that we should depart.

The House having adopted a resolution inquiring of the President in regard to the character and objects of the proposed mission, on March 17, 1826,[1] the President transmitted to the House a lengthy explanation, at the conclusion of which he said:

The concurrence of the House to the measure, by the appropriations necessary for carrying it into effect, is alike subject to its free determination and indispensable to the fulfillment of the intention. * * * With this unrestricted exposition of the motives by which I have been governed in this transaction, as well as of the objects to be discussed and of the ends, if possible, to be attained by our representation at the proposed congress, I submit the propriety of an appropriation to the candid consideration and enlightened patriotism of the Legislature.

By a message transmitted the same day the President also submitted the propriety of making an appropriation for carrying into effect the appointment of the mission.

The former message was committed to the Committee on Foreign Affairs and the latter to the Committee on Ways and Means.

On March 25[2] both committees reported. The Committee on Ways and Means reported a bill making an appropriation for the mission. The Committee on Foreign Affairs reported the following resolution:

Resolved, That, in the opinion of this House, it is expedient to appropriate the funds necessary to enable the President of the United States to send ministers to the congress of Panama.

Both reports were committed to Committees of the Whole House on the state of the Union.

The consideration of the resolution reported from the Committee on Foreign Affairs began on April 3,[3] when Mr. Louis McLane, of Delaware, offered an amendment expressing the sense of the House as to what the ministers ought and ought not to do. In the progress of the debate, which lasted until April 20, Mr. McLane, at the suggestion of various Members, modified his amendment until it reached this final form,[4] which it was proposed to add to the resolution reported by the committee:

The House, however, in expressing this opinion do not intend to sanction any departure from the settled policy of this Government; that in extending our commercial relations with foreign nations we should have with them as little political connection as possible, and that we should preserve peace, commerce, and friendship with all nations and form entangling alliances with none. It is therefore the opinion of this House that the Government of the United States ought not to be represented at the congress of Panama except in a diplomatic character, nor ought they to form any alliance, offensive or defensive, or negotiate respecting such an alliance with all or any of the Spanish-American Republics, nor ought they to become parties with them, or either of them, to any joint declaration for the purpose of preventing the interference of any of the European powers with their independence or form of government or to any compact for the purpose of preventing colonization upon the continent of America, but that the people of the United States should be left free to act in any crisis in such a manner as their feelings of friendship toward these Republics and as their own honor and policy may at the time dictate.

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[1] Journal, pp. 359, 360.

[2] Journal, p. 378; Debates, pp. 1764, 1765.

[3] Journal, p. 411; Debates, p 2009.

[4] For the various modifications see Debates, pp. 2009, 2011, 2059, 2304, 2369, 2410, 2453, 2457; also Journal, pp. 451, 452.

The debate, which was protracted until April 21,[1] centered to a large extent around the question of the House's constitutional powers, and related, first, to the propriety of the amendment and, second, to the right of the House to refuse the appropriation.

There was a diversity of opinion as to whether or not the President, by the language of his message, had invited the House to decide as to the propriety of the mission.

Those who argued in favor of the amendment contended that it did not amount to an instruction to diplomatic agents, but was a proper expression of opinion by the House. The House had always exercised the right of expressing its opinion on great questions, either foreign or domestic, and such expressions were never thought to be improper interferences with the Executive.[2] It was recalled that in the early days of the Government, when the President made an annual speech to Congress instead of sending a message, opinions on all questions of moment were expressed in the addresses which the House adopted in reply to the President. Since the abandonment of that practice Congress had spoken generally by the acts recorded on the statute book; but on extraordinary occasions, in accordance with the usages of the British Commons as exemplified recently by the resolution beseeching the King to negotiate for the suppression of the slave trade, the House had considered and often adopted resolutions expressive of opinions.[3] Thus, there were the two resolutions of Mr. Clay relating to the opening of diplomatic relations with the South American republics; Mr. Trimble's resolution relating to the same general subject; the resolution recommending negotiations for the suppression of the slave trade, which brought the President and Senate into collision, causing the President to come to the House for instructions which the Committee on Foreign Affairs did not favor; Mr. Webster's resolution at the last session relating to diplomatic relations with Greece, and the request that the President open negotiations for the cession of Abaco. It was also urged that the power of the House to appropriate for the expenses of the mission carried with it the right to impose conditions.

In opposition to the amendment, it was observed that, while the House had an undoubted right to express its general opinion in regard to questions of foreign policy, in this case it was proposed to decide what should be discussed by particular ministers already appointed. If such instructions might be furnished by the House in this case, they might be furnished in all, thus usurping the prerogative of the Executive.[4] Such action would infringe on the treaty-making power, and was not in harmony with the precedent of 1796. Moreover, independent of the constitutional objection, the House was too numerous a body to interpose in foreign negotiations, which required secrecy and despatch.[5] The assertion that the House might qualify its appropriation with conditions overlooked the fundamental fact that the House had no gifts of its own to give, but was rather the steward over a

[1] Debates, pp. 2009–2098, 2135–2509.

[2] Arguments of Messrs. Jaines Buchamam, of Pennsylvania, John Forsyth, of Georgia, and others, Debates, pp. 2012, 2059, 2170, 2171, 2305.

[3] Arguments of Messrs. John Forsyth, of Georgia, Joseph Hemphill, of Pennsylvania, and others, Debates, pp. 2226, 2306.

[4] Argument of Mr. Daniel 'Webster, of Massachusetts, Debates, pp. 2254–2258.

[5] Argument of Mr. Silas Wood, of New York, Debates, pp. 2049–2051.

trust fund.[1] Furthermore, the House should not give instructions which it could not enforce. If it should be admitted that the President was bound to obey the House, he must also be bound to obey the Senate. And suppose the Senate and House should give incompatible instructions? The House had not been wont to express itself on matters of diplomacy in other than general terms, and it would be noted that the resolutions of Mr. Clay in regard to the South American Republics were much more guarded than that now before the House.[2]

As to the right of the House to refuse the appropriation there were also two opinions. It was maintained on the one side that the House, in matters relating to diplomatic intercourse and treaties, was not held simply to carry out the will of the President and the Senate by consenting to the appropriation of the necessary money. A refusal to appropriate would be justified by the Constitution and the precedents, and might afford a salutary check on the action of the President and the Senate. A treaty requiring the aid of Congress to carry it into effect did not become the supreme law of the land until it had the sanction of Congress. And it was the right and duty of the House, in such a case, to deliberate, and withhold the legislation, if necessary. If the House was merely to register the edicts of other branches of the Government the President and Senate might send ministers to every petty principality and negotiate and ratify treaties of the utmost importance, without the House being able to express its will. The power of the President and the Senate to make laws by means of treaties would be indefinite, and might even involve the country in war. It was true that the Constitution was mandatory as to the duty of Congress to pay the compensation of the President and the courts, but it was not equally mandatory as to the payment of the compensation of ministers.[3] It was pointed out that the precedent of 1796 related to a treaty already made. There was a difference between appropriating to carry out a promise made by a minister and appropriating to send a minister to make a promise. In the present case the question was as to the Diplomatic Corps, and the authorization of a new and important policy. The agents to be sent to Panama were not ministers as known to the law of nations and contemplated by the Constitution. Surely the House might be consulted in a case like this, and might express its opinion by withholding the appropriation.[4] The treaty making and legislative powers were inseparably blended. Besides the examples already given of declarations by the House as to matters belonging to the treaty making power, there was the law of March 3, 1815, proposing to foreign nations a repeal of discriminating impost and tonnage duties. This was a declaration of legislative will on a subject within the treaty-making power.[5] Again, in 1798, Congress, by law, abrogated the treaties of 1778 with France.

Those, who argued that the appropriation should be made called attention to the fact that public ministers were created, not by statute, but by the law of nations,

[1] Mr. Webster.

[2] Arguments of Mr. Alexander Thomson, of Pennsylvania, and others, Debates, pp. 2278, 2338–2340, 2378.

[3] Argument of Mr. James K. Polk, of Tennessee, Debates, pp. 2474–2486.

[4] Arguments of Messrs. George McDuffie, of South Carolina, and John Forsyth, of Georgia, Debates, pp. 2491–2494, 2506.

[5] Argument of Mr. Samuel D. Ingham, of Pennsylvania, Debates, pp. 2349–2354.

and were recognized by the Constitution as existing. They were appointed by the President and the Senate. Acts of Congress limited their salaries, but did no more. By voting the salaries the House simply empowered another branch of the Government to discharge its own duties. In so voting the House had no responsibility for the conduct of the negotiations. To refuse the appropriation would be to prevent the action of the Government according to constitutional plan. Of course, the House could break up a mission by withholding salaries, as it could break up a court but the House should not, and could not, share Executive duty.[1] The House was morally bound to vote the salaries of ministers duly created by the President and the Senate. The obligation was as strong as it was to carry into effect a treaty. The power to create the minister was contained in the same clause that provided for treaties. The House might not prejudge the determination of the President and Senate in regard to those officers. Their salaries might not be withheld any more than the House might withhold the salaries of the President and Supreme Court. If the salaries were withheld the ministers would be legally appointed and their acts would be valid. Of course the House had the physical power to take such action, and there might be an extreme case where they would be impelled by duty to do it.[2] Thus, if the Army should entertain projects injurious to the country, Congress might, to defeat its objects, withhold its pay. But such extreme suppositions could hardly be admitted in argument. In the case of treaties containing stipulations requiring the exercise of powers vested in the House, such as the regulation of commerce, the House might act as it saw fit. But treaties not touching subjects committed to the discretion of the House should be treated, so far as appropriations to carry them into effect was concerned, as mandatory on the House.[3] It was even contended, further, that the House had no authority whatever in regard to treaties, which might be negotiated and ratified without the knowledge of the House, and that the House, in appropriating to carry out the stipulations, was not justified in weighing the propriety of the expenditure by the principles governing ordinary appropriations. What the House could do and what it should do were of course different matters. It might, by refusing all appropriations, bring the Government to a standstill. But to admit that the power to appropriate carried with it the right to direct diplomatic affairs would be to establish a principle that would concentrate in the House the whole powers of the Government.[4]

On April 20[5] the question was taken on agreeing to the amendment proposed by Mr. McLane, and it was agreed to, yeas 99, nays 94.

On April 21,[6] on the question of agreeing to the resolution as amended, there were yeas 54, nays 143.

The same day the House began the consideration of the bill making appropriation for the mission to Panama, and on Mr. George MeDuffie's motion to strike out the enacting clause, so as to defeat the bill, there were 61 yeas and 133 nays. On

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[1] Argument of Mr. Webster, Debates, pp. 2254–2258.

[2] Argument of Mr. Buchanan, Debates, pp. 2170, 2171.

[3] Argument of Mr. Edward Livingston, of Louisiana, Debates, pp. 2195–2198.

[4] Arguments of Messrs. Richard A. Buckner, of Kentucky, and Thompson, Debates, pp. 2087–2090, 2338—2340.

[5] Journal, p. 452; Debates, p. 2457.

[6] Journal, p 457; Debates, p. 2490.

April 22 the bill passed the House, yeas 134, nays 60.[1] This bill (H. R. 180) became a law.[2]

1547. On December 16, 1852[3] Mr. James Hamilton. of South Carolina, offered this resolution:

Resolved, That the President of the United States be requested to transmit to this House copies of all such documents or parts of correspondence (not incompatible with the public interest to be communicated) relating to an invitation which has been extended to the Government of this country "by the Republics of Columbia, of Mexico, and of Central America to join in the deliberations of a Congress to be held at the Isthmus of Panama" and which induced him to signify "that ministers on the part of the United States will be commissioned to join in those deliberations."

On January 31, 1826,[4] when this resolution was considered, Air. Churchill C. Cambreleng, of New York, suggested that on so important a question the House should be put in possession of all the facts, and therefore asked Mr. Hamilton to strike out the words "Not incompatible with the public interest to be communicated." Mr. Hamilton made the modification of the resolution, but Mr. Daniel Webster, of Massachusetts, immediately moved that they be inserted. He said, in support of his motion, that in all such calls it was customary in the first instance to limit the call, and he believed it unprecedented to call at once on the President for all the information in his hands on a given subject, without leaving it discretionary with him to withhold such part as the public good might require him to withhold. If the reply should not be satisfactory, the residue might be supplied later in a confidential communication.

Mr. Webster's motion was then agreed to without division, and debate on the resolution was resumed, involving both the general policy of the proposed mission and the propriety of calling for information on a subject in trusted by the Constitution to another department of the Government. On February 2, at the suggestion of Messrs. George McDuffie, of South Carolina, and William C. Rives, of Virginia, the House adopted an amendment adding to the resolution these words:

And, further, to communicate to this House all the information in possession of the Executive Department relative to the objects which the republics of the south propose to accomplish by the Congress of Panama and the powers proposed to be given to the commissioners or ministers of the United States to that Congress and the objects to which they are to be directed.[5]

Mr. Webster, who had commented upon the amendment as proposing an unusual interference with Executive power, recalled President Washington's refusal to furnish information pertaining to the treaty making power, and, objecting to a call without the discretionary clause, proposed to strike out all after the word "resolved" and insert the following:

That the President of the United States be requested to cause to be laid before this House so much of the correspondence between the Government of the United States and the new States of America, or their ministers, respecting the proposed congress, or meeting of diplomatic agents at Panama, and of such

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[1] Journal, pp. 459, 462; Debates, pp. 2507, 2514.

[2] On March 3, 1829, the President communicated to both House and Senate, as a matter of public interest, the instructions furnished to the ministers of the United States to the Panama Congress; Journal, second session Twentieth Congress, pp. 386, 387.

[3] First session Nineteenth Congress, Journal, p. 63; Debates, p. 817.

[4] Journal, p. 210; Debates, pp. 1208–1213.

[5] Journal, pp. 214–215; Debates, pp. 1241–1254.

information respecting the general character of that expected congress, as may be in his possession, as may, in his opinion, be communicated without prejudice to the public interest; and, also, to inform the House, as far as, in his opinion, the public interest may allow, in regard to what objects the agents of the United States are expected to take part in the deliberations of that congress.

Mr. Webster's motion was agreed to, whereupon Mr. Samuel D. Ingham, of Pennsylvania, moved to recommit the resolution as amended by the substitute with instructions to strike out the words "so far as, in his opinion, the public interest may allow."

This motion gave rise to a lengthy debate as to the relations of the House and the Executive.[1] Mr. Ingham said that the adoption of the motion to amend would be a distinct indication to the Executive that the House wanted all the information that it could get, the great interests of the nation demanding this. No disrespect to any other branch of the Government was intended. It had been a long practice of the House to insert a qualifying clause in calls upon the President for information, but in this case the whole should be asked for. To do less would be to carry too far the doctrine of confidence in public functionaries.

Mr. Thomas R. Mitchell, of South Carolina, while admitting that the House had no right to demand the information of the President, yet thought the House should request it, and that in case he should refuse it the House might decline to appropriate for the mission. Mr. John Forsyth, of Georgia, contended, on the other hand, that when the House requested information of the President the word "request" was used from courtesy and did not imply that the House had no right to demand information or that the President had a right to refuse it. Whenever, in the exercise of its constitutional authority, the House called upon the President for information, it had the right to demand it and the power to compel its production. President Washington had based his refusal of the call of the House, not on the ground of want of authority on the part of the House to demand, but because the demand was not made with a view to the exercise of any of the constitutional powers of the House. It would be strange if the House which could impeach those giving and receiving instructions, could not compel the production of them. The House might demand any information it might constitutionally want, and, in case of refusal, take the information by ordinary process of the Sergeant-at-Arms. In the usual calls for diplomatic information the qualifying clauses were inserted because the information was of such a nature that its publication might be injurious to the public interest, and also because the House might not be able to make any constitutional use of the information. But in this case the qualifying clause which it was proposed to strike out was in the second part of the resolution, which referred to our objects in going to Panama. Mr. George McDuffie, of South Carolina, elaborated this point still further. In calls for correspondence between this Government and foreign powers the qualification was invariably made that disclosure should be conditioned on the President's judgment. But here was a different and an unprecedented case. If the mission was to be sent it would be by the act of the Congress and not of the Executive. He denied the power of the President to send agents to a tilting tourney where they might involve the United States in war.

[1] Debates, pp. 1262–1302.

Against the proposed motion Mr. Henry R. Storrs, of New York, urged that the comity which should ever characterize the relations of the House and the Executive had settled long ago that respectful form which every call for information from that coequal department had always assumed. While not denying that a state of things might occur in which the House might be justified in demanding information, such a case did not exist at the present time, and there was no precedent for such a call.

Mr. Daniel Webster, of Massachusetts, urged that the words should remain because they were in accordance with the usual and, he believed, the invariable practice. It would imply a most extraordinary want of confidence in the Executive to strike out those words allowing him discretion. A qualification was as proper to one part of the resolution as to the other. If this were the case of an ordinary mission to Europe, would it be deemed constitutional for the House to ask the President to disclose without reserve all the objects of the mission? No one would pretend that it would. In the present case it seemed equally undesirable to call for unqualified publicity.

Mr. Peleg Sprague, of Maine, went still further, and held that the President was as independent in his sphere as the House in theirs, and that, in the conscientious performance of his duty, he might feel it necessary to withhold information called for by the House in unqualified terms.

Mr. Ingham's motion was decided in the negative, yeas 71, nays 98.[1]

The House then agreed to the resolution, as amended by Mr. Webster's substitute, yeas 125, nays 40.[2]

On March 17[3] the message of the President in response to the resolution was communicated to the House.

1548. While not questioning the right of the House to decline to appropriate for a diplomatic office, President Grant protested against its assumption that it might give directions as to that service.—On August 15, 1876,[4] President Grant sent the following message to the House:

> In announcing as I do that I have attached my signature of official approval to the "act making appropriations for the consular and diplomatic service of the Government for the year ending June 30, 1877, and for other purposes," it is my duty to call attention to a provision in the act directing that notice be sent to certain of the diplomatic and consular officers of the Government "to close their offices."
>
> In the literal sense of this direction it would be an invasion of the constitutional prerogatives and duty of the Executive.
>
> By the Constitution the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls," etc.
>
> It is within the power of Congress to grant or withhold appropriation of money for the payment of salaries and expenses of the foreign representatives of the Government.
>
> In the early days of the Government a sum in gross was appropriated, leaving it to the Executive to determine the grade of the offices and the countries to which they should be sent.

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[1] Journal, p. 217; Debates, p. 1301.

[2] Journal, p. 218; Debates, p. 1301.

[3] Journal, p. 349; Debates, p. 1683.

[4] First session Forty-fourth Congress, Journal, 99, 500, 1501; Record, pp. 5684–5685.

Latterly, for very many years, specific sums have been appropriated for designated missions or employments, and, as a rule, the omission by Congress to make an appropriation for any, specific port had heretofore been accepted as an indication of the wish on the part of Congress, which the Executive branch of the Government respected and complied with.

In calling attention to the passage which I have indicated, I assume that the intention of the provision is only to exercise the constitutional prerogative of Congress over the expenditures of the Government and to fix a time at which the compensation of certain diplomatic and consular officers shall cease, and not to invade the constitutional rights of the Executive, which I should be compelled to resist; and my present object is not to discuss or dispute the wisdom of failing to appropriate for several offices, but to guard against the construction that might possibly be placed on the language used as implying a right in the legislative branch to direct the closing or discontinuing of any of the diplomatic or consular offices of the Government.

The message was debated at some length, and in the course of the discussion reference was made to the precedent in the case of Mr. Harvey, whom President Johnson appointed minister to Portugal. The Congress declined for a time to appropriate for his salary, but later did so. The message was referred to the Committee on Appropriations, no action on the part of the House being contemplated.

1549. An authorization of diplomatic relations with a foreign nation originated in the House in 1882.—On July 15, 1882,[1] the Committee on Foreign Affairs reported the bill (H. R. 6743) authorizing the Secretary of State to take the necessary measures for the establishment of diplomatic relations with Persia, and making appropriations for that purpose.

This bill passed the House and Senate and became a law.

1550. Congratulations of the House on the adoption of a republican form of government by Brazil.—On February 13, 1890,[2] the House passed the joint resolution of the Senate (S. R. 54) providing:

Resolved, etc., That the United States of America congratulate the people of Brazil in their just and peaceful assumption of the powers, duties, and responsibilities of self-government, based upon the free consent of the governed, and in their recent adoption of a republican form of government.

This resolution was signed by the President.

On March 2, 1891,[3] Mr. Robert R. Hitt, of Illinois, chairman of the Committee on Foreign Affairs, laid before the House resolutions of the Brazilian Congress thanking the people of the United States for their message of congratulation sent by Congress upon the establishment of a republican form of government in Brazil.

These resolutions were transmitted to Mr. Hitt, as chairman of the Foreign Affairs Committee, by the Secretary of State.

They were read and ordered entered on the Journal.

1551. The House has expressed its interest in the establishment of constitutional government in other lands.—On March 10, 1792,[4] the House agreed to a resolution expressing the interest of the House in the adoption of a constitution by France, and requesting the President of the United States, in his reply to the notification from the French King, to express the sincere interest of the House.

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[1] First session Forty-seventh Congress, Journal, pp. 1803, 1847; House Report No. 1648.

[2] First session Fifty-first Congress, Journal, p. 219; Record, p. 1282.

[3] Second session Fifty-first Congress, Journal, p. 339; Record, p. 3685.

[4] First session First Congress, Annals, pp. 456, 457.

A special committee was appointed to wait on the President with this resolution.

On April 10, 1848,[1] the House passed the joint resolution from the Senate tendering by Congress the congratulations of the American to the French people.

This resolution was signed by the President on April 15.

1552. Congratulations of the House at the appearance of a new nation.—On May 20, 1902,[1] Mr. Robert R. Hitt, of Illinois, by unanimous consent presented the following resolution, which was agreed to by the House:

Resolved by the House of Representatives of the United States of America, That this House views with satisfaction, and expresses congratulation at, the appearance this day of the Cuban Republic among the nations of the world.

1553. The House has, by resolutions, extended its sympathy to foreign peoples desirous of greater liberty.—On March 27, 1867,[2] Mr. Nathaniel P. Banks, of Massachusetts, from the Committee on Foreign Affairs, reported the following resolution, which, after debate, was agreed to by the House:

Resolved, That the House extend its sympathy to the people of Ireland and of Canada in all their just efforts to maintain the independence of states, to elevate the people, and to extend and perpetuate the principles of liberty.

1554. On December 18, 1871,[2] the House, on motion of Mr. George F. Hoar, of Massachusetts, agreed to the following by a vote of yeas 182, nays 0:

Resolved, That while this House deems the conduct of foreign governments to be beyond its jurisdiction, it deeply sympathizes with all efforts to establish self-government and republican institutions, and with the families and friends of all persons who have lost their lives either in the field or on the scaffold or elsewhere in the cause of civil liberty.

1555. On December 20, 1876,[1] the Speaker stated that he was informed that there was in the city a gentleman who bore to the people of this country from the Irish nation congratulations to our people on this centennial year.

Thereupon Mr. William S. Holman, of Indiana, by unanimous consent, submitted the following preamble and resolution, which were agreed to:

Whereas it has been announced to this House by the Speaker that Mr. John O'Connor Power, M. P., has been deputed to present to the people of the United States congratulations of the Irish nation on the centenary of American independence: Therefore,

Be it resolved, That the subject of his mission be referred for consideration to the Committee on Foreign Affairs, with instructions to report what action should, in their opinion, be taken in the premises.

On March 3 Mr. Bernard G. Caulfield, of Illinois, submitted a preamble and resolution reciting the deeds of citizens of Irish descent in the establishment of this Republic, and accepting on behalf of the people of the United States the congratulations of the people of Ireland. This resolution, in the form of a simple resolution of the House, was offered by unanimous consent and agreed to.

1556. Resolutions originating in the House and making an exchange of compliments with certain republics were disapproved by President

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[1] First session Thirtieth Congress, Journal, pp. 669, 694.

[2] First session Fifty-seventh Congress, Journal, p. 726; Record, p. 5697.

[3] First session Fortieth Congress, Journal, p. 125; Globe, p. 392.

[4] Second session Forty-second Congress, Journal, p. 91; Globe, p. 200.

[5] Second session Forty-fourth Congress, Journal, pp. 114, 115, 675, 676; Record, pp. 321, 2237.

Grant as infringing on Executive prerogative.—On January 30, 1877,[1] the Speaker laid before the House a message received from the President[2] of the United States, returning with his objections the joint resolutions of the House (H. Res. 171) in reference to the congratulations from the Republic of Pretoria, South Africa, and (H. Res. 172) relating to congratulations from the Argentine Republic. In the veto message the President says:

Sympathizing as I do in the spirit of courtesy and friendly recognition which has prompted the passage of these resolutions,[3] I can not escape the conviction that their adoption has inadvertently involved the exercise of a power which infringes upon the constitutional rights of the Executive.

The usage of governments generally confines their correspondence and interchange of opinion and of sentiments of congratulation as well as of discussion to one certain established agency. To allow correspondence or interchange between states to be conducted by or with more than one such agency would necessarily lead to confusion, and possibly to contradictory presentation of views and to international complications.

The Constitution of the United States, following the established usage of nations, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers, and to receive all official communications from them. It gives him the power, by and with the advice and consent of the Senate, to make treaties and to appoint ambassadors and other public ministers; it intrusts to him solely "to receive ambassadors and other public ministers," thus vesting in him the origination of negotiations and the reception and conduct of all correspondence with foreign states, making him, in the language of one of the most eminent writers on constitutional law, "the constitutional organ of communication with foreign states."

No copy of the addresses which it is proposed to acknowledge is furnished. I have no knowledge of their tone, language, or purport. From the tenor of the two joint resolutions it is to be inferred that these communications are probably purely congratulatory. Friendly and kindly intentioned as they may be, the presentation by a foreign state of any communication to a branch of the Government not contemplated by the Constitution for the reception of communications from foreign states might, if allowed to pass without notice, become a precedent for the address by foreigners or by foreign states of communications of a different nature and with wicked designs.

If Congress can direct the correspondence of the Secretary of State with foreign governments, a case very different from that now under consideration might arise, when that officer might be directed to present to the same foreign government entirely different and antagonistic views or statements.

By the act of Congress establishing what is now the Department of State, then known as the Department of Foreign Affairs, the Secretary is to "perform and execute such duties as shall from time to time be enjoined or intrusted to him by the President of the United States, agreeable to the Constitution, relative to correspondence, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to said Department, and, furthermore, that the said principal officer (the Secretary of State) shall conduct the business of the said Department in such manner as the President of the United States shall from time to time order or instruct."

This law, which remains substantially unchanged, confirms the view that the whole correspondence of the Government with and from foreign states is intrusted to the President; that the Secretary of State conducts such correspondence exclusively under the orders and instructions of the President, and that no communication or correspondence from foreigners or from a foreign state can properly be

[1] Second session Forty-fourth Congress, Journal, p. 328; Record, p. 1112.

[2] Ulysses S. Grant.

[3] The resolutions were introduced December 15 (Journal, p. 82; Record, pp. 227, 228), and it appears from the debate that the congratulations came from the congress of sister republics, and the resolutions were intended to return the congratulations of the American Congress.

addressed to any branch or Department of the Government except that to which such correspondence has been committed by the Constitution and the laws.

I therefore feel it my duty to return the joint resolutions without my approval to the House of Representatives, in which they originated.

In addition to the reasons, already stated for withholding my constitutional approval from these resolutions is the fact that no information is furnished as to the terms or purport of the communications to which acknowledgments are desired, no copy of the communications accompanies the resolutions, nor is the name even of the officer or of the body to whom an acknowledgment could be addressed given; it is not known whether these congratulatory addresses proceed from the head of the state or from legislative bodies; and as regards the resolution relating to the republic of Pretoria, I can not learn that any state or government of that name exists.

U. S. GRANT.

Washington, January 26, 1877.

The veto message was referred to the Committee on Foreign Affairs, and was not reported therefrom.

1557. The House has expressed its regret at attempts on the lives of foreign rulers.—On June 25, 1894,[1] a message from the President communicated to the House the intelligence of the death by assassination of President Carnot, of France. Thereupon Mr. James B. McCreary, of Kentucky, offered the following resolutions, which were agreed to by the House:

Resolved, That the House of Representatives of the United States of America, has heard with profound sorrow of the assassination of President Carnot, and tenders the people of France sincere sympathy in their national bereavement.

That the President of the United States be requested to communicate this expression of sorrow to the Government of the Republic of France and to Madame Carnot; and that, as a further mark of respect to the memory of the President of the French Republic, the House of Representatives do now adjourn.

On June 27 the Speaker laid before the House a cable dispatch from the Government of France to the Speaker acknowledging the action of the House. This dispatch appears in full in the Journal, although no order in regard to it was made.[2] On July 25 the Speaker laid before the House a communication from the Secretary of State transmitting more formal expressions of gratitude from the Government of France. These also appear in full in the Journal without special order.[3]

1558. On May 4, 1866,[4] the House, on motion of Mr. Thaddeus Stevens, of Pennsylvania, passed a joint resolution expressing deep regret at the attempt on the life of the "Emperor of Russia by an enemy of emancipation." This joint resolution was passed by the Senate and signed by the President.

1559. The Senate expressed its disapproval of the attempt to destroy the English Parliament houses.—On January 26, 1885,[5] the Senate, by resolution expressed its indignation and profound sorrow at the attempt to destroy the English Parliament Houses.

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[1] Second session Fifty-third Congress, Record, p. 6800.

[2] Journal, p. 452; Record, p. 6897.

[3] Journal, p. 508; Record, p. 7853.

[4] See joint resolution (H. Res. 133), first session Thirty-ninth Congress, Globe, pp. 2394, 2443; Journal, p. 1367.

[5] Second session Forty-eighth Congress, Record, p. 996.

1560. The Congress, by joint resolution, expressed its abhorrence of massacres reported in a foreign nation.—On June 22, 1906,[6] the House considered and passed Senate Joint Resolution No. 68, as follows:

Resolved, etc., That the people of the United States are horrified by the report of the massacre of Hebrews in Russia on account of their race and religion, and that those bereaved thereby have the hearty sympathy of the people of this country.

This joint resolution was approved by the President.[2]

1561. In 1846 President Polk, for reasons of public policy, declined to inform the House as to expenditures from the secret or contingent fund of the State Department.—On April 9, 1846,[8] the House agreed to the following:

Resolved, That the President of the United States be requested to cause to be furnished to this House an account of all payments made on President's certificates from the funds appropriated by law, through the agency of the State Department, for the contingent expenses of foreign intercourse since the 4th of March, 1841, until the retirement of Daniel Webster from the Department of State, with copies of all entries, receipts, letters, vouchers, memorandums, or other evidence of such payments, to whom paid, for what, and particularly all concerning the Northwestern boundary, dispute with Great Britain; also copies of whatever communications were made from the Secretary of State during the last session of the Twenty-seventh Congress, particularly February, 1843, to Mr. Cushing and Mr. Adams, members of the committee of this House on Foreign Affairs, of the wish of the President of the United States to institute a special mission to Great Britain; also copies of all letters on the books of the Department of State to any officer of the United States, or any person in New York, concerning Alexander McLeod: *Provided,* That no document or matter is requested to be furnished by the foregoing resolution which, in the opinion of the President, would improperly involve the citizen or subject of any foreign power.

On April 20, in a message to the House, President Polk declined to give the desired information in regard to the contingent fund, explaining the nature of that fund under the laws and the impropriety of making public the information asked. In the course of the message the President said:

It may be alleged that the power of impeachment belongs to the House of Representatives, and that with a view to the exercise of this power that House has the right to investigate the conduct of all public officers under the Government. This is cheerfully admitted. In such a case the safety of the Republic would be the supreme law, and the power of the House, in the pursuit of this object, would penetrate into the most secret recesses of the Executive Departments. It could command the attendance of any and every agent of the Government, and compel them to present all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge. But, even in a case of that kind, they would adopt all wise precautions to prevent the exposure of all such matters the publication of which might injuriously affect the public interests, except so far as this might be necessary to accomplish the great ends of public justice. If the House of Representatives, as the grand inquest of the nation, should, at any time, have reason to believe that there has been malversation in office, by an improper use or application of the public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and papers of the Executive Departments, public or private, would be subject to the inspection and control of a committee of that body, and every facility in the power of the Executive be afforded to enable them to prosecute the investigation.

The experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good, to make expenditures, the very object of which would be defeated by publicity. Some governments have very large amounts at

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[1] First session Fifty-ninth Congress, Record, p. 9004.

[2] 34 Stat. L., p. 835.

[3] First session Twenty-ninth Congress, Journal, pp. 653, 654, 693; Globe, pp. 643, 698.

their disposal and have made vastly greater expenditures than the small amounts which have from time to time been accounted for on President's certificates. In no nation is the application of such sums ever made public. In time of war, or impending danger, the situation of the country may make it necessary to employ individuals for the purpose of obtaining information or rendering other important services who could never be prevailed upon to act if they entertained the least apprehension that their names, or their agency, would in any contingency be divulged. So it may often become necessary to incur an expenditure for an object highly useful to the country; for example, the conclusion of a treaty with a barbarian power, whose customs require on such occasions the use of presents; but this object might be altogether defeated by the intrigues of other powers if our purposes were to be made known by the exhibition of the original papers and vouchers to the accounting officers of the Treasury. It would be easy to specify other cases which may occur in the history of a great nation in its intercourse with other nations wherein it might become absolutely necessary to incur expenditures for objects which could never be accomplished if it were suspected in advance that the items of expenditure, and the agencies employed, would be made public.

Actuated undoubtedly by considerations of this kind, Congress provided such a fund, coeval with the organization of the Government, and subsequently enacted the law of 1810 as the permanent law of the land. While this law exists in full force I feel bound by a high sense of public policy and duty to observe its provisions and the uniform practice of my predecessors under it.

With great respect for the House of Representatives, and an anxious desire to conform to their wishes, I am constrained to come to this conclusion.

Chapter L.

PREROGATIVES OF THE HOUSE AS RELATED TO THE EXECUTIVE.[1]

1562. The House, either alone or in concurrence with the Senate, has by resolution expressed opinions or determinations on important public questions.—On April 5, 1852[2] the House adopted the following resolutions:

Resolved, That we recognize the binding efficacy of the compromises of the Constitution, and believe it to be the intention of the people generally, as we hereby declare it to be ours individually, to abide such compromises, and to sustain the laws necessary to carry them out—the provision for the delivery of fugitive slaves and the act of the last Congress for that purpose included—and that we deprecate all further agitation of questions growing out of that provision, of the questions embraced in the acts of the last Congress known as the compromise, and of questions generally connected with the institution of slavery, as unnecessary, useless, and dangerous.

Resolved, That the series of acts passed during the first session of the Thirty-first Congress, known as the compromise, are regarded as a final adjustment and a permanent settlement of the question therein embraced, and should be maintained and executed as such.

1563. On December 17, 1860,[3] Mr. Owen Lovejoy, of Illinois, introduced the following, which was considered and agreed to by a vote of 135 yeas and no nays:

Whereas the Constitution of the United States is the supreme law of the land, and its ready and faithful observance the duty of all good and law-abiding citizens: Therefore

Resolved, That we deprecate the spirit of disobedience to that Constitution wherever manifested, and that we earnestly recommend the repeal of all statutes, including nullification laws so called, enacted by State legislatures, conflicting with and in violation of that sacred instrument, and the laws of Congress made in pursuance thereof; and it is the duty of the President of the United States to protect and defend the property of the United States.

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[1] See Chapter LVII, sections 1856–1910, of Volume III for precedents as to inquiries of the Executive. Chapter LXII, sections 1981–2000, of Volume III for relations of the House to the election and inauguration of the President. Chapters LVIII to LXI, sections 1911 to 1980, for functions of the House at the electoral count. See also the preceding chapter.

[2] First session Thirty-second Congress, Journal, pp. 552–559, Globe, pp. 976–983.

[3] Second session Thirty-sixth Congress, Journal, p. 86; Globe, p. 109.

1564. On January 7, 1861,[1] Mr. Garnett B. Adrian, of New Jersey, offered the following resolution, which was agreed to by a vote of yeas 125, nays 56:

Resolved, That we fully approve of the bold and patriotic act of Major Anderson in withdrawing from Fort Moultrie to Fort Sumter, and of the determination of the President to maintain that fearless officer in his present position; and that we will support the President in all constitutional measures to enforce the laws and preserve the Union.

1565. On December 6, 1862,[2] the House, on motion of Mr. Justin S. Morrill, of Vermont, adopted a resolution declaratory of the duty of soldiers, citizens, and officials to unite in putting down the rebellion against the Government.

1566. On March 3, 1863,[3] the House and Senate adopted a series of concurrent resolutions setting forth the attitude of Congress on the subject of intervention in the then existing war by foreign nations. These resolutions do not appear in full in the Journal of the House.

1567. On December 5, 1865,[4] Mr. Samuel J. Randall, of Pennsylvania, offered the following resolution, which was agreed to, yeas 162, nays, 1:

Resolved, That, as the sense of this House, the public debt created during the late rebellion was contracted upon the faith and honor of the nation; that it is sacred and inviolate, and must and ought to be paid, principal and interest; that any attempt to repudiate or in any manner to impair or scale the said debt shall be universally discountenanced and promptly rejected by Congress if proposed.

On January 28, 1878,[5] the House passed a concurrent resolution from the Senate declaring the coin bonds of the United States payable in silver dollars of 412½ grains.

1568. On December 15, 1875,[6] the House, by a vote of yeas 223, nays 18, agreed to the following resolution:

Resolved, That in the opinion of this House the precedent established by Washington and other Presidents of the United States in retiring from the Presidential office after their second term has become, by universal concurrence, a part of our republican system of government, and that any departure from this time-honored custom would be unwise, unpatriotic, and fraught with peril to our free institutions.

1569. While the House in some cases has bestowed praise or censure on the President or a member of his Cabinet, such action has at other times been held to be improper.—On May 26, 1809,[7] Mr. John Randolph, of Virginia, after referring to the abandonment of the old relations of Congress and the President wherein the President made an annual speech to the Congress, and the House responded with an address, proposed the following:

Resolved, That the promptitude and frankness with which the President of the United States has met the overtures of the Government of Great Britain toward a restoration of harmony and a free commercial intercourse between the two nations, receives the approbation of this House.[8]

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[1] Second session Thirty-sixth Congress, Journal, p. 152; Globe, p. 280.

[2] Third session Thirty-seventh Congress, Journal, p. 39; Globe, p. 14.

[3] Third session Thirty-seventh Congress, Journal, pp. 572, 583; Globe, p. 1541.

[4] First session Thirty-ninth Congress, Journal, p. 17; Globe, p. 10.

[5] Second session Forty-fifth Congress, Record, p. 627.

[6] First session Forty-fourth Congress, Journal, p. 66.

[7] First session Eleventh Congress, Journal, pp. 18, 34 (Gales & Seaton ed.); Annals, pp. 92, 134, 156, 164, 187, 219.

[8] This resolution of the House should be distinguished from a concurrent expression of both Houses, such as the resolution passed by House and Senate in 1809 condemning the British minister and pledging Congress to stand by the Executive in repelling insults to the nation. First session Eleventh Congress, Annals, pp. 481, 747, 1151.

A lengthy debate arose over this resolution, involving, besides the merits of the question, the question of precedent and propriety. Mr. Randolph cited two precedents in support of the propriety of the resolution. The first was a paragraph in the address to the President, adopted December 6, 1793, wherein the House expressed approbation of the President's proclamation of neutrality in the existing conflict in Europe.[1] The second precedent was that of January 7, 1803, wherein the House expressed, by a resolution, their determination to maintain rights of navigation on the Mississippi, and expressed themselves as relying with perfect confidence in the wisdom and vigilance of the Executive.[2]

It was objected that the Constitution did not include such expressions of opinion among the duties of the House; that their effect would be to constitute the House censors; that it was not wise to compliment officers whom it might be necessary to impeach, etc.

Finally, on June 2[3] the resolution was laid on the table, yeas 54, nays 41.

1570. On January 18, 1819,[4] the House, in Committee of the Whole, began consideration of a resolution reported from the Committee on Military Affairs, to whom had been referred so much of the President's message as related to the conduct of the war against the Seminole Indians by Gen. Andrew Jackson.

The resolution was as follows:

Resolved, That the House of Representatives of the United States disapproves the proceedings in the trial and execution of Alexander Arbuthnot and Robert C. Ambrister.

In the course of the long debate, which related chiefly to the moral and political aspects of the question, several speakers touched on the question as to the power of the House to adopt such a resolution. It was urged on the one hand that the adoption of the resolution would be to trench on the Executive authority, and on the other that the House in the St. Clair and Wilkinson cases had settled its right to investigate, and that the right to investigate involved the right to censure.

The resolution was disagreed to, 108 to 62.

1571. On April 30, 1862,[5] the House, by a vote of yeas 79, nays 45, agreed to the following resolution reported from the select committee appointed to investigate Government contracts:

Resolved, That Simon Cameron, late Secretary of War, by investing Alexander Cummings with the control of large sums of the public money and authority to purchase military supplies without restriction, without requiring from him any guarantee for the faithful performance of his duties, when the services of competent public officers were available, and by involving the Government in a vast number of contracts with persons not legitimately engaged in the business pertaining to the subject-matter of such contracts, especially in the purchase of arms for future delivery, has adopted a policy, highly injurious to the public service, and deserves the censure of the House.[6]

On December 16, 1862, the Senate, by a vote of yeas 38, nays 3, laid on the table a resolution censuring James Buchanan, recently President of the United States.[7]

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[1] Journal, first session Third Congress, p. 13 (Gales & Seaton ed.).

[2] Journal, second session Seventh Congress, pp. 273–276 (Gales & Seaton ed.); Annals, p. 339.

[3] First session Eleventh Congress, Journal, p. 35 (Gales and Seaton ed.); Annals, p. 219.

[4] Second session Fifteenth Congress, Journal, pp. 239, 241; Annals, pp. 583, 943, 1012, 1065,1079, 1088, 1135.

[5] Second session Thirty-seventh Congress, Journal, p. 631; Globe, pp. 1848, 1888.

[6] This resolution was rescinded during a succeeding Congress.

[7] Third session Thirty-seventh Congress, Globe, pp. 101, 102.

1572. On July 16, 1894,[1] Mr. James B. Creary, of Kentucky, moved to suspend the rules and agree to the following resolution:

Resolved, That the House of Representatives indorses the prompt and vigorous efforts of the President and his Administration to suppress lawlessness, restore order, and prevent improper interference with the enforcement of the laws of the United States, and with the transportation of the mails of the United States, and with interstate commerce, and pledges the President hearty support, and deems the success that has already attended his efforts as cause for public and general congratulation.

This resolution, after debate, was agreed to, two-thirds voting in favor thereof.

1573. The House has at times adopted resolutions requesting or advising the Executive as to matters within the sphere of his duties.—On April 9, 1818,[2] the House, on the report of a select committee appointed to investigate the circumstances of the imprisonment of an American citizen by Spain, agreed to this resolution:

Resolved, That this House is satisfied that the imprisonment of Richard W. Meade is an act of cruel and unjustifiable oppression; that it is the right and duty of the Government of the United States to afford to Mr. Meade its aid and protection; and that this House will support and maintain such measures as the President may hereafter adopt to obtain the release of the said R. W. Meade from confinement, should such measures be proper and necessary.

1574. On February 22, 1823,[3] the House agreed to this order:

Ordered, That * * * the petition of Jacob and Henry Schieffelin, of New York, * * * be referred to the President of the United States; and that he be requested to afford to the petitioners, in the prosecution of their claim on the British Government, such assistance as the nature of the case may require.

1575. On July 5, 1832,[4] the House considered a joint resolution from the Senate providing for a joint committee to wait on the President and request him to appoint a public fast day, in order that by humiliation and prayer the Asiatic cholera might be everted. This resolution was debated at length, especially as the President had informally expressed some sentiments unfavorable to Executive action in the matter. Precedents of similar requests in 1812 and 1814 were cited. Finally, after consideration and reference to a committee, the resolution was, on July 14, laid on the table.

1576. On July 27, 1866,[5] the House agreed to resolutions declaring it to be the duty of the Executive Departments to proceed to the trial of Jefferson Davis.

1577. On July 8, 1897,[6] the Senate considered a simple resolution directing the Secretary of State to collect through the diplomatic representatives abroad information as to postal telegraph systems, etc. On July 12[7] the resolution was agreed to; and thereafter the Secretary of State obeyed the directions.

1578. On April 29, 1872,[8] the House by resolution advised the Executive as to the course to be pursued in the case of John Emilio Houard, alleged to be a citizen of the United States, imprisoned in Cuba.

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[1] Second session Fifty-third Congress, Journal, p. 484; Record, p. 7544.

[2] First session Fifteenth Congress, Journal, p. 442; Annals, pp. 1699–1713.

[3] Second session Seventeenth Congress, Annals, pp. 1077–1087; Journal, p. 249.

[4] First session Twenty-second Congress, Journal, pp. 1020, 1182; Debates, pp. 3859, 3879, 3914.

[5] First session Thirty-ninth Congress, Journal, p. 1185.

[6] First session Fifty-fifth Congress, Record, p. 2452.

[7] Record, p. 2529.

[8] Second session Forty-second Congress, Journal, pp. 755, 756; Globe, p. 2818.

1579. Instance wherein the House by resolution expressed an opinion as to the course of action which an executive officer should follow.—On December 13, 1906,[1] the House agreed to this resolution:

Resolved, That it is the sense of the House of Representatives that hereafter, in printing reports, documents, or other publications authorized by law, ordered by Congress or either branch thereof, or emanating from the Executive Departments, their bureaus or branches, and independent offices of the Government, the Government Printing Office should observe and adhere to the standard of orthography prescribed in generally accepted dictionaries of the English language.

1580. An opinion of the Attorney-General that neither House may by resolution give a construction to an existing law which would be of binding effect on an executive officer.—On August 23, 1854,[2] Caleb Cushing, Attorney-General of the United States, submitted to the Secretary of the Interior, in relation to the claim of Isaac Bowman, an opinion. The opinion states that—

On the 20th of February, 1854, the Senate passed the following resolution, namely:

"*Resolved,* That the claim of Isaac Bowman, legal representative of Isaac Bowman, deceased, for half-pay due his father under the act of the general assembly of Virginia of May, 1779, be referred to the Secretary of the Interior for liquidation under the act of Congress of July 5, 1932, and that the Committee on Pensions be discharged from the further consideration of the case."

And on the 1st of July, 1854, the House adopted a resolution, reported by the Committee on Revolutionary Claims, in the following words, namely:

"*Resolved,* That the petition in the case of Isaac Bowman be referred to the Secretary of the Interior for liquidation under the act of July 5, 1832, and that this committee be discharged from its further consideration."

Whereupon the question of law submitted to me for consideration is, whether, on the supposition that the Secretary on a reexamination of the case maintains his original opinion and believes the claim not to be allowable under the provisions of the said act on the evidence presented, is he bound to consider these two resolutions, or either of them, as mandatory on him, and as compelling him to liquidate the claim against his judgment of the right of the case?

It is impossible for me to conceive of any other than a negative answer to this question.

When an act of Congress commands a head of Department to do a particular thing, and the thing to be done is ministerial in its nature—as to pay so much money to A. B.—then the head of Department is bound in law to do the thing, and may be compelled by mandamus of the circuit court. (Kendal *v.* United States, 12 Peters, 610.)

The same doctrine applies to a joint resolution, properly enacted, which differs from an act of Congress only in form.

But if the tenor of the law be not mandatory of a mere ministerial act to be done, then the head of Department acts according to his discretion, in subordination always to his constitutional and legal relation to the President of the United States. (Decatur *v.* Paulding, 14 Peters, 497.)

The reason of this must be apparent to the least reflection.

The act of a head of Department is, in effect, an act of the President. Now, the Constitution provides for coordinate powers acting in different and respective spheres of cooperation. The executive power is vested in the President whilst all legislative powers are vested in Congress. It is for Congress to pass laws, but it can not pass any law which, in effect, coerces the discretion of the President, except with his approbation, unless by concurrent vote of two-thirds of both Houses, upon his previous refusal to sign a bill. And the Constitution expressly provides that orders and resolutions, and other votes of the two Houses, in order to have the effect of law, shall, in like manner, be presented to the President for his approval, and if not approved by him shall become law only by subsequent concurrence in vote of two-thirds of the Senate and House of Representatives.

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[1] Second session Fifty-ninth Congress, Record, pp. 369, 370.

[2] Vol. 6, Opinions of the Attorneys-General, p. 680.

If, then, the President approves a law which imperatively commands a thing to be done, ministerially, by a head of Department, his approbation of the law, or its passage after a veto, gives constitutionality to what would otherwise be the usurpation of executive power on the part of Congress.

In a word, the authority of each head of Department is a parcel of the executive power of the President. To coerce the head of Department is to coerce the President. This can be accomplished in no other way than by a law, constitutional in its nature, enacted in accordance with the forms of the Constitution.

Of course, no separate resolution of either House can coerce a head of Department unless in some particular in which a law, duly enacted, has subjected him to the direct action of each; and in such case it is to be intended that, by approving the law, the President has consented to the exercise of such coerciveness on the part of either House.

For instance, the act of September 2, 1789, (1 Stat. L., p. 66), renders it the duty of the Secretary of the Treasury to "make report and give information to either branch of the legislature, in person or writing, as he may be required, respecting all matters referred to him by the Senate or House of Representatives, or (and) which shall appertain to his office." And in practice the same duty is imposed on other heads of Department. But, except where otherwise provided by law, every such communication of a head of Department to either House must be understood to be made with the assent express or implied, of the President. Suppose, for example, the House of Representatives should, by vote, assume to require the Secretary of State to communicate to it a copy of a draft of a treaty under negotiation, or his instructions to some diplomatic agent of the Government; still, it is clear, he could not do this except with permission of the President.

On the same principle, and with stronger reason, it is not in the power of a separate resolution of either House to command or to control the executive action of a head of Department—that is, of the President—in the construction and execution of a general law of the land.

It does not help the case, constitutionally speaking, if there should happen to be a resolution of the same substance, or even of the same identical words, passed by each House; for such separate resolutions have not the form nor the responsibilities of enactment, according to the rules of the two Houses, nor do they possess the conditions of a law according to the Constitution.

Therefore, even if the two resolutions in Bowman's case were mandatory in their terms, which they are not, yet they have not the constitutional requisites of any authority, either mandatory or directory, over the action of the Secretary.

Indeed, it seems little better than a mere truism to say that a separate resolution of either House of Congress is not a law.

Whenever a general act is passed, like that for the payment of half-pay to certain officers of the Virginia line, that is to say, a law embracing a defined class of cases, and assigning to a head of Department the executive duty of ascertaining the particular cases of the class, and applying the law to them, in such case the terms of the law constitute a rule for his government. It is incumbent on him, as on every other citizen, to obey the law. To obey it, in him, is to execute it according to its provisions, as conscientiously construed by him in his best judgment, or if he doubt, then as he may be advised by the Attorney-General. To do otherwise—that is, on the one hand to refuse to apply the law to cases to which it is justly applicable, or on the other to apply it to cases to which it is not justly applicable, is to disobey, not to obey—to violate, not to execute—the constitutional will of the legislative department of the Government.

It may happen that a claim shall rise which, according to the plain terms of the law, is not within its provisions, or which is not proved by the evidence which the law prescribes, and so is rejected by the Secretary. In such a case the claimant can apply to Congress, and that body may pass a private law for the relief of the party, dispensing with its own conditions of applicability, or its prescribed rules of evidence. But no such dispensing power resides in the Secretary.

Or the Secretary, in the exercise of his lawful discretion in construing such a general act of Congress, may adopt a construction of it which is deemed erroneous by the two Houses of Congress. In that case they will pass a declaratory act, which, being approved by the President or repassed after his refusal to approve it, constitutes a new law for the government of the Secretary.

But the Constitution has not given to either branch of the Legislature the power, by separate resolution of its own, to construe, judicially, a general law or to apply it executively to a given case. And its resolutions have obligatory force only so far as regards itself or things dependent on its own separate constitutional power.

Any other view of the subject would result in the absurd conclusion that a separate resolution of either House could repeal or modify an act of Congress. For, as the Supreme Court well say, in one of the cases before cited, a head of Department "must exercise his judgment in expounding the acts and resolutions of Congress under which he is from time to time required to act." That exposition of the law, conscientiously made by him, and with the aid of the law officer of the Government, is the law of the case. If the question be one of judicial resort, the exposition of the statute by the Supreme Court will constitute the law. But if it be a mere executive question, then the exposition of the particular Secretary, or of the Attorney-General, is just as much the law, and, as such, binding on the conscience of the head of Department as any other part of the statute, which may happen to be of unquestionable import, and so not to require exposition. In fine, it becomes the law—that is, the authorized construction of the legal intendment of the act of Congress. That ascertained legal intendment of a statute can not be authoritatively changed by a separate resolution of either or of both Houses, but only by a new act of Congress.

The conclusive test of the whole doctrine is to inquire whether the Supreme Court of the United States would adjudge that the report of a committee, or a resolution of either House, has the effect of repealing, modifying, or conclusively construing an act of Congress. It is perfectly clear that they would not. (Albridge *v.* Williams, 3 Howard, 9.)

It does not appear, in the case of Bowman, why the obvious and usual course of proposing a law for his relief was not followed, provided the two Houses of Congress would, on full consideration of his claim, in the established legislative forms, have sanctioned the view of it, which is implied by the passage of these resolutions in connection with the reports of the Committees on Revolutionary Clams and on Pensions in the case.

The Attorney-General then goes on to refer to an opinion of the Attorney-General of March 27, 1849, in the case of Churchill Gibbs, wherein the Attorney-General gives the opinion that a proper deference to the legislative branch of the Government demanded that the executive department should heed a resolution wherein the Congress had given a construction of the existing law. Mr. Cushing then proceeded with his argument in relation to this question, and says:

Most assuredly it can not be sound constitutional doctrine that a declaratory resolution of either House, construing a general law, is obligatory against the judgment of the Executive, and that it is the duty of the Executive to yield its judgment in all such cases to the mere opinion of the Senate or of the House of Representatives. Such an assumption is contrary, as I have shown, to the plain letter and clear spirit of the Constitution.

If it be said that, although a head of department be not absolutely bound in law to yield up his own judgment, yet that, in the language of the opinion under consideration, it is his duty so to do, out of deference to both or either of the Houses, or to prevent the public reproach of disagreement between the legislative and executive branches of the Government, or for any other possible consideration of mere expediency, I reply that the whole weight of the argument of expediency is the other way; for the adoption of such a rule would inevitably tend to the disorganization of the Government.

In the first place, the President is not bound to yield up his own judgment, even to the most unequivocally expressed opinion of the two Houses, in the form of a bill passed through all the solemnities of constitutional enactment. But if the hypothesis under consideration be maintainable, a separate resolution of either House will constrain the Executive, when a bill, solemnly passed to be enacted, would not. Of course, this idea would afford easy means of striking the veto power and the rights of minorities out of the Constitution, and conferring on a bare majority of the two Houses that legislative omnipotence which it was one of the great objects of the Constitution to guard against and avoid.

According to the letter of the Constitution, resolutions of the two Houses, even a joint resolution, when submitted to the President and disapproved by him, do not acquire the force of law until passed anew by a concurrent vote of two-thirds of each House. On the present hypothesis, the better way would be not to present the resolution to the President at all, and then to call on him to accept it as law, with closed eyes, and, however against law he may know it to be, yet to execute it out of deference to the assumed opinion of Congress.

In the second place, the hypothesis puts an end to all the forms of legislative scrutiny on the part of Congress. A declaratory law, especially if it involve the expenditure of the public treasure, has forms of legislation to go through to insure due consideration. All these time-honored means of securing right legislation will pass into desuetude if the simple acceptance of a resolution, reported by a committee, is to be received as a constitutional enactment, obligatory on all concerned, including the Executive.

In this way, instead of the revenues of the Government being subject only to the disposition of Congress in the form of a law constitutionally enacted, they will be transferred to the control of an accidental majority, expressing its will by a resolution, passed, it may be, out of time, and under circumstances in which a law duly and truly representing the will of Congress could not have passed. And thus, all those checks and guards against the inconsiderate appropriation of the public treasure, so carefully devised by the founders of the Government, will be struck out of the Constitution.

Where is the doctrine to stop? Will a declaratory resolution of one House constitute a law, or must both Houses concur? Will one resolution suffice? Or must there be several successive ones, cumulative one upon the other? And what is to be done if opposing resolutions be passed by the two Houses?

And by what intelligible ground of constitutional distinction is the Executive to obey, out of deference, and against his judgment, a separate resolution of either House on the subject of private claims, and not on any other business of the Government? All general laws are a rule comprehending particulars more or less numerous. The construction of a law is, in part, the consideration of what particulars are included within the rule; and the execution of the law is the application of that rule to the particulars of ascertained inclusion. If, by separate resolution of either House, a pension law or half-pay law may be construed with conclusive legal effect, so may any other law within the whole scope of the legislation of the United States.

Nay, instead of assuming it as a general rule of duty that the Executive is to obey, as of course, out of deference, and against his better judgment, a separate declaratory resolution of either House, we should assume the contrary as a rule; because such a resolution is, on its face, an attempt to coerce the conscience of the Executive by extra-constitutional means; and because, if the resolution were expressive of the true will of Congress, it may be presumed that it would have been passed into a law according to the Constitution. I can not readily conceive of any innovation so dangerous to good legislation, and so well calculated to defeat the will of Congress itself, as the setting up of a hasty vote or order of either House accepting the report of a committee, and adopted out of time perhaps, to have the force of law. Wherefore, it is most respectfully urged that, in the interest of the legislative department of the Government, not less than that of the executive, the doctrine supposed is wholly inadmissible, even regarded in the light of expediency.

But, after all, is not our first duty that of humble submission to the Constitution? Of what avail are arguments of expediency against the positive injunctions of the Constitution? How can the consideration of "deference" to any human power, or of possible liability to "reproach," justify, in a head of department, the deliberate infringement of the Constitution? There is but one safe guide for any of us, and that is the Constitution, and the laws under it duly enacted by Congress.

A mere vote of either or of both Houses of Congress, declaring its opinion of the proper construction of a general law, has, be it repeated, in itself, no constitutional force or obligation as law. It is opinion merely, and to be dealt with as such, receiving more or less of deference, like other mere opinions, according to the circumstances.

1581. In cases where its investigations have suggested the culpability of executive officers, the House has by resolution submitted advice or request to the Executive.—On March 27, 1867,[1] Mr. Calvin T. Hulburd, of New York, from the Committee on Public Expenditures, reported the following:

Whereas Congress having determined to adjourn, there is not sufficient time prior thereto for the Committee on Public Expenditures to conclude its investigation of the administration of the New York custom-house by Henry A. Smythe, in the manner indicated by the House, although the committee having given Mr. Smythe two hearings, he has expressed himself content therewith, unless the committee desires to prosecute the investigation further; and whereas in the opinion of the committee there is

[1] First session Fortieth Congress, Journal, p. 126; Globe, pp. 255, 282, 394.

abundant affirmative testimony in the possession of the House of Henry A. Smythe's unfitness to hold the office of collector; therefore

Resolved, That it is the sense of this House that Henry A. Smythe should be removed from the office of collector of the port of New York, and that a copy of this resolution and the testimony be transmitted to the President of the United States.

When this course of action was proposed on March 21, it caused some debate as to the power of the House to proceed in this way. It was urged that the House might impeach, but that the appointment and removal of subordinate officers was an Executive function.

The resolution and preamble were agreed to, yeas 68, nays 38.

1582. On March 24,1870,[2] Mr. John A. Logan, of Illinois, from the Committee on Military Affairs, reported the following:

Whereas it is in evidence before the Committee on Military Affairs of this House, as well as admitted by Commander John H. Upshur, of the Navy, that he paid the sum of $1,300 to one M.D. Landon, with a view of having said money used in procuring the appointment of his son to the Naval Academy at Annapolis: Therefore,

Be it resolved, That a copy of said evidence be transmitted to the Secretary of the Navy, and that he be directed to convene a court-martial for the purpose of putting said Commander Upshur on trial for conduct unbecoming an officer.

After debate, and on motion of Mr. Logan, the word "requested" was inserted in the place of "directed," as being more appropriate.

Mr. James A. Garfield, of Ohio, then raised the question that it was not becoming for the House to appear as prosecutor in one of the Executive Departments, and therefore moved to amend the resolution so that it should request the convening of a court of inquiry instead of a court-martial. This amendment was disagreed to, yeas 71, nays 109.

The preamble and resolution were then agreed to as amended.

1583. On March 24, 1870,[2] Mr. John A. Logan, of Illinois, from the Committee on Military Affairs, reported the following:

Whereas the testimony presented to the House of Representatives on the 16th instant, as taken by the Committee on Military Affairs in the case of R. R. Butler, clearly shows that Gen. A. Schoepf, one of the examiners in the Patent Office, was engaged in lending himself as a medium through which money should pass for corrupt purposes: Therefore,

Resolved, That the evidence in said case be placed in the hands of the Secretary of the Interior, and that he be requested at once to remove said Schoepf from the position of examiner of patents, as an improper person to have or hold so responsible a position under the Government.

Mr. Horace Maynard, of Tennessee, proposed an amendment to request the Secretary to institute an inquiry, instead of removing General Schoepf.

The amendment was disagreed to, and the resolution was then agreed to.

1584. On January 6, 1873,[3] the House agreed to a resolution requesting the President to cause the employment of two attorneys to prosecute suit against the Crédit Mobilier.

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[1] Second session Forty-first Congress, Journal, p. 521; Globe, p. 2191.

[2] Second session Forty-first Congress, Journal, p. 523; Globe, p. 2194.

[3] Third session Forty-second Congress, Journal, pp. 125–128; Globe, p. 359.

1585. In 1842 the House, after discussion, abandoned a proposition to pass on the authority of the President to appoint commissions of investigation without the sanction of law.—On May 4, 1842,[4] the House proceeded to the consideration of the message from the President of the United States of the 30th of April, ultimo, transmitting reports of the commissioners appointed to examine into the affairs of the New York custom-house. The question recurred on the motion of Mr. Henry A. Wise of Virginia, that the said message, with all the documents which accompany the same, be printed.

Mr. Joseph R. Underwood, of Kentucky, moved to amend the same by adding as follows:

but, in printing the message and accompanying documents, this House does not intend to approve or sanction the institution of this commission, it being the opinion of this House that the President has no rightful authority to appoint and commission officers to investigate abuses, or to procure information for the President to act upon, and to compensate such officers at public expense, without authority expressly given by law.

This amendment was debated on May 5 and May 9, and again on June 8, the constitutional aspects of the question being considered. On the latter date, by a division of the question, a vote was taken first on agreeing to this portion of the proposed amendment:

but, in printing the message and accompanying documents, the House does not intend to approve or sanction the institution of this commission.

This portion was agreed to, yeas 86, nays 83.

Thereupon Mr. John Quincy Adams, of Massachusetts, saying that it was time to get rid of the question, since the House had undertaken to decide on the constitutional powers of the Executive, moved that the whole subject be laid on the table.

This motion was agreed to, yeas 96, nays 76.

1586. The House has decided that a Vice-President succeeding to the Presidency should be called "the President" without qualification.—On May 31, 1841,[2] at the organization of the House, Mr. Henry A. Wise, of Virginia, offered the customary resolution authorizing the appointment of a committee to join a similar committee on the part of the Senate "to wait on the President of the United States, and inform him that quorums of the two Houses have assembled," etc.

Mr. John McKeon, of New York, moved to amend by inserting before the word "President" the words "Vice-President, now exercising the duties of."

After a discussion of the constitutional provisions relating to the death of a President, and the duties of the Vice-President, the proposed amendment was decided in the negative without division, and the resolution as originally presented was agreed to.[3]

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[1] Second session Twenty-seventh Congress, Journal, pp. 784, 796, 930–932; Globe, pp. 476–478, 481, 482, 600.

[2] First session Twenty-sixth Congress, Journal, p. 19; Globe, pp. 3, 4.

[3] Vice-President Tyler had succeeded President Harrison, who had died before the assembling of this Congress, which had been called together by his proclamation. This was the first time that a Vice-President had succeeded to the office.

1587. The proposition to have the heads of the Executive Departments occupy seats on the Floor and participate in proceedings.—On April 6, 1864, Mr. George H. Pendleton, of Ohio, from a select committee [1] submitted a report [2] on the bill (H. R. 214) to provide that the heads of the Executive Departments might occupy seats on the floor of the House of Representatives.[3] The committee entertained no doubt of the power of Congress to pass the bill. Members of the Cabinet would not become Members of the House any more than the contestant for a seat, who was sometimes admitted to argue in his own behalf, or the delegate from a Territory, who was admitted to debate, but not to vote, by virtue of a statute. The law of 1787, organizing the Treasury Department, provided that the Secretary of the Treasury—

shall make report and give information to either branch of the legislature, either in person or in writing (as he may be required), respecting all matters which may be referred to him by the Senate or House of Representatives, or which shall appertain to his office.

The report cites the fact that on July 22, 1789, the Secretary of Foreign Affairs, Mr. Jefferson, attended agreeably to order, and made the necessary explanations.[4] On August 22, 1789, the President of the United States came into the Senate chamber, attended by General Knox, Secretary of War, and laid before the Senate a statement of facts.[5] Other instances in the first Congress are cited by the committee.

The committee proposed certain amendments to the rules to allow for carrying out the provisions of the bill, which provided that Cabinet officers might have seats on the floor with right to participate in debate relating to their Departments, and that they should attend at certain stated times to give replies to questions.

The committee agreed that Congress would, by such an arrangement, be better informed as to measures of legislation, and that the influence of the Executive Departments upon legislation would be open and authorized instead of secret and unauthorized. The example of other nations and the authority of Justice Story's Commentaries were cited in support of this view.[6]

The bill was not acted on, but was debated at considerable length.[7]

1588. Presents to the President or other officers were formerly placed at the disposal of Congress.—On January 6, 1834,[8] President Jackson, by message to the House of Representatives, communicated an extract of a letter from R. J. Leib, consul of the United States at Tangier, by which it appeared that Mr. Leib had received a present of a lion and two horses from the Emperor of Morocco, which he held as belonging to the United States. In this connection also the Presi-

[1] Mr. Pendleton's associates, on this committee were Messrs. Thaddeus Stevens, of Pennsylvania; Justin S. Morrill, of Vermont; Robert Mallory, of Kentucky; John A. Kasson, of Iowa; James G. Blaine, of Maine, and John Ganson, of New York.

[2] First session Thirty-eighth Congress, House Report No. 43.

[3] For text of this bill, see p. 8 of Report.

[4] Annals, First Congress, vol. 1, p. 51.

[5] Annals, First Congress, vol. 1, p. 66.

[6] Second session Thirty-eighth Congress, Journal, pp. 149, 152, 177; Globe, pp. 419–424, 437–448.

[7] It appears from the record of debates (Annals, first session Fifth Congress, p. 458) that the Secretary of State was present at the secret session of the House when the message relating to Senator William Blount was considered, and that he gave an opinion to the House relating to the pending question.

[8] First session Twenty-third Congress, Journal, pp. 165, 373; Debates, p. 2317.

dent called attention to the fact that the number of articles presented to United States officials and deposited in the Department of State had become a source of inconvenience.

The message was referred to the Committee on Foreign Affairs, and on March 4 that committee made a report [1] and was discharged from further consideration of the subject.

The subject was revived at the next session, and on December 18, 1834,[2] the Committee on Foreign Affairs made a report accompanying a joint resolution (H. Res. No. 13), which became a law.

1589. On January 19, 1830,[3] President Andrew Jackson transmitted a message directed to both the House and Senate, which contained this paragraph:

> The accompanying gold medal, commemorative of the delivery of the Liberator President of the Republic of Colombia from the daggers of assassins, on the night of the 25th of September last, has been offered for my acceptance by that Government. The respect which I entertain, as well for the character of the Liberator President as for the people and Government over which he presides, renders this mark of their regard most gratifying to my feelings; but I am prevented from complying with their wishes by the provision of our Constitution forbidding the acceptance of presents from a foreign state by officers of the United States; and it is, therefore, placed at the disposal of Congress.

The message was referred to the Committee on Foreign Affairs, and on February 9 [4] they reported this resolution, which was agreed to by the House:

> *Resolved,* That the medal recently offered to the acceptance of the President of the United States by the President Liberator of Colombia be deposited by the clerk in the Department of State.[5]

1590. A formal protest by the President against certain proceedings of the House was declared a breach of privilege.—On August 30, 1842 [6] a motion was made by Mr. John M. Botts, of Virginia, that the rules in relation to the order of business be suspended, and that the written communication from the President of the United States, received this day, be now read. This motion passed in the affirmative, two-thirds voting therefor, and the communication from the President of the United States was then read.[7] Thereupon Mr. Botts moved

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[1] Report No. 302, first session Twenty-third Congress. The committee reviewed generally the subjects of presents to officials.

[2] Second session Twenty-third Congress, Journal, pp. 107, 387; Debates, pp. 762, 830.

[3] First session Twenty-first Congress, Journal, p. 187.

[4] Journal, p. 274.

[5] In their report the committee say that this action is taken in accordance with the precedents in similar cases. Report No. 170, first session Twenty-first Congress. See also House Report No. 107, second session Twenty-first Congress. In the late usage Congress is asked to consent that the officer to whom the gift is sent may accept it; and acts by joint resolution.

[6] Second session Twenty-seventh Congress, Journal, p. 1459; Globe, pp. 894, 973, 974.

[7] This message may be found on page 190, Vol. IV of Richardson's Messages and Papers. These resolutions, except No. 4 (which was not agreed to), were copied from the resolutions adopted by the Senate in 1834. That year that body had adopted certain resolutions condemning the course of President Jackson in the removal of the deposits from the bank of the United States to the State banks. Against this President Jackson sent a protest.

August 9 President Tyler had returned to the House with his objections House bill No. 472, "to provide revenue from imports," etc. This was referred to a special committee, of which Mr. John Quincy Adams was chairman. This committee made a report severely criticizing the message. It was against this report that the President sent his protest.

the following resolutions, which were all agreed to except the fourth, which was disagreed to:

1. *Resolved,* That while this House is, and ever will be, ready to receive from the President all such messages and communications as the Constitution and laws and the usual course of public business authorize him to transmit to it, yet it can not recognize any right in him to make a formal protest against votes and proceedings of this House, declaring such votes and proceedings to be illegal and unconstitutional, and requesting the House to enter such protest on its Journal.

2. *Resolved,* That the aforesaid protest is a breach of the privileges of this House, and that it be not entered on the Journal.

3. *Resolved,* That the President of the United States has no right to send a protest to this House any of its proceedings.

4. *Resolved,* That the Clerk of this House be directed to return the message and protest to its author.

1591. President Jackson. having sent to the Senate a protest against its censure of his acts, the Senate declared the protest a breach of privilege and refused it entry on the Journal.—On April 17, 1834,[3] President Jackson sent to the Senate his protest against the resolution which the Senate, on March 28, had agreed to, in these words:

Resolved, That the President, in the late executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both.

This protest was debated until May 7,[2] when these resolutions were agreed to, yeas 27, nays 16.

Resolved, That the protest communicated to the Senate on the 17th instant, by the President of the United States, asserts powers as belonging to the President, which are inconsistent with the just authority of the two Houses of Congress, and inconsistent with the Constitution of the United States.

Resolved, That while the Senate is, and ever will be, ready to receive from the President all such messages and communications as the Constitution and laws and the usual course of business authorize him to transmit to it, yet it can not recognize any right in him to make a formal protest against votes and proceedings of the Senate, declaring such votes and proceeding to be illegal and unconstitutional, and requesting the Senate to enter such protest on its journals.

Resolved, That the aforesaid protest is a breach of the privileges of the Senate, and that it be not entered on the Journal.

Resolved, That that President of the United States has no right to send a protest to the Senate against any of its proceedings.

1592. A protest by the minister of a foreign power against proposed action of the House was held to be an invasion of privilege.—On August 5, 1841,[3] Mr. John Quincy Adams, of Massachusetts, called the attention of the House to a communication from the minister of France to the Secretary of the Treasury, which accompanied the message of the President of the United States of the preceding day, and observed that he considered the fact of a foreign functionary addressing an official communication to any officer of this Government, except the head of the Department of State, a breach of official decorum; and the further fact of the remonstrance of such functionary against the passage of any measure pending

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[1] First session Twenty-third Congress, Debates, p. 1317.

[2] Debates, p. 1712.

[3] First session Twenty-seventh Congress, Journal, p. 320; Globe, p. 298;.

before this House as a breach of the privileges of this House. He therefore moved, as a matter of privilege, the following resolution:

Resolved, That the President of the United States be requested to inform this House by what authority the minister from France addressed a communication to the Secretary of the Treasury, remonstrating against the passage of a bill now pending before Congress.

Mr. Hopkins L. Turney, of Tennessee, objected to the reception of the resolution as a question of privilege, contending that the privileges of the House were not involved in the subject-matter of the correspondence referred to in the resolution.

The Speaker [1] decided against the objection taken by Mr. Turney, and that the rights, privileges, and dignity of the House were involved in the subject-matter touched upon in the resolution.

Mr. Turney having appealed, both the appeal and the resolution were laid on the table.

1593. Congress, by concurrent resolution, directs executive officers, to make investigations in river and harbor matters.—On February 1, 1906,[2] the following resolution was received from the Senate by message, and was on the same day referred to the Committee on Rivers and Harbors:

Resolved by the Senate (the House of Representatives concurring), That the Secretary of War be, and he is hereby, authorized and directed to inquire into the advisability of establishing a harbor of refuge by the construction of a breakwater on the island of Nantucket, Massachusetts, at or near the westerly side of Great Point, for the purpose of providing better protection for commerce and the lessening of the perils of navigation to coastwise traffic in the adjacent waters.

On February 2,[3] also, the following resolution was agreed to in the Senate and transmitted to the House:

Resolved by the Senate (the House of Representatives concurring), That the Secretary of War be, and he is hereby, authorized and directed to cause an examination and survey to be made with a view to providing a harbor suitable for the largest boats at a point opposite or near the following-described land: Sections Nos. 33 and 34, township 37, range 8 west, Lake County, Ind.

The act of March 3, 1905,[4] provides:

That after the regular or formal reports made as required by law on any examination, survey, project, or work under way or proposed, are submitted no supplemental or additional report or estimate shall be made unless ordered by a concurrent resolution of Congress.

1594. A law confers on either House of Congress the power to direct by simple resolution that the Secretary of Commerce and Labor make certain investigations.—The act of February 14, 1903.[5] "to establish the Department of Commerce and Labor," provides that the Secretary of Commerce and Labor shall "from time to time make such special investigations and reports as he may be required to do by the President, or by either House of Congress, or which he himself may deem necessary and urgent."

The same act gives the Commissioner of Corporations, an officer under the Secretary of Commerce and Labor, the power to compel testimony and the production of papers.

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[1] John White, of Kentucky, Speaker.

[2] First session Fifty-ninth Congress, Record, p. 1913.

[3] Record, p. 1977.

[4] 33 Stat. L., p. 1147.

[5] 32 Stat. L., p. 829.

Acting under the provisions of this act—

On March 7, 1904,[1] the House agreed to this resolution:[2]

Resolved, That the Secretary of Commerce and Labor be, and he is hereby, requested to investigate the causes of the low prices of beef cattle in the United States since July 1, 1903, and the alleged large margins between the prices of beef cattle and the selling prices of fresh beef, and whether the said conditions have resulted in whole or in part from any contract, combination in the form of trust or otherwise, or conspiracy in restraint of commerce, etc.

1595. The power of appointment to office belongs to the President, and Congress, by law, may not declare one an officer who is not such in fact.— By a message dated September 30, 1890,[3] President Benjamin Harrison returned to the House of Representatives, without his approval, the joint resolution (H. J. Res. No. 39) declaring the retirement of Capt. Charles B. Shivers, of the United States Army, legal and valid, and that he is entitled as such officer to his pay. The President says:

It is undoubtedly competent for Congress by an act or joint resolution to authorize the President, by and with the advice of the Senate, to appoint Captain Shivers to be a captain in the Army of the United States and to place him upon the retired list. It is also perfectly competent, by suitable legislation, for Congress to give to this officer the pay of this grade during the interval of time when he was improperly carried upon the Army lists. But the joint resolution, which I herewith return, does not attempt to deal with the case in that way. It undertakes to declare that the retirement of Captain Shivers was legal and valid, and that he always has been and is entitled to his pay as such officer. I do not think this is a competent method of giving the relief intended.

The message states the facts to be that Captain Shivers was summarily dismissed from the Army by order of the President on July 15, 1863. On August 11, 1863, an order was issued revoking this order of dismissal and restoring Captain Shivers to duty as an officer of the Army. On December 30, 1864, Captain Shivers, by proper order, was placed on the retired list of the Army. The Supreme Court (114 U. S., 619) had decided that the President had the authority to so separate an officer from the service; and that having been thus separated he could not be restored except by nomination to the Senate and confirmation thereby. The Attorney-General therefore gave an opinion that Captain Shivers was not an officer on the retired list of the Army.

This message was referred to the Committee on Military Affairs and was not acted on further.

1596. The House of Representatives having appointed a committee to inquire into the conduct of the President of the United States, and the President having protested, the House insisted on the right so to do.

The power of inquiry as related to the power of impeachment.

Instance wherein the appointment of the mover of an investigation as chairman of the committee caused debate.

On March 5, 1860,[4] on motion of Mr. John Covode, of Pennsylvania, and by a

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[1] Second session Fifty-eighth Congress, Record, p. 2958.

[2] Without the authority of act of Congress as given, a direction to an executive officer to make an investigation would be made, not by simple resolution of the House, but by joint resolution, which is a law. See instance, 34 Stat. L., p. 823.

[3] First session Fifty-first Congress, Journal, p. 116.

[4] First session Thirty-sixth Congress, Journal, pp. 450, 484; Globe, pp. 997, 998.

vote of 117 yeas to 45 nays, the rules were suspended and the following resolution was agreed to:

Resolved, That a committee of five Members be appointed by the Speaker for the purpose of investigating whether the President of the United States, or any other officer of the Government, has, by money, patronage, or other improper means, sought to influence the action of Congress, or any committee thereof, for or against the passage of any law appertaining to the rights of any State or Territory; and also to inquire into and investigate whether any officer or officers of the Government have, by combination or otherwise, prevented and defeated, or attempted to prevent or defeat, the execution of any law or laws now on the statute books; and whether the President has failed or refused to compel the execution of any law thereof, etc.

There was also a further resolution relating to the investigation of the use of money in elections and abuses in certain public offices.

The Speaker appointed as the committee Messrs. Covode, Abraham B. Olin (of New York), Warren Winslow (of North Carolina), Charles R. Train (of Massachusetts), and James C. Robinson (of Illinois).

On March 29, 1860,[1] a message was received from the President of the United State's in which he protested against the resolution, saying:

The House of Representatives possess no power under the Constitution over the first or accusatory portion of the resolution, except as an impeaching body; while over the last, in common with the Senate, their authority as a legislative body is fully and cheerfully admitted.

It is solely in reference to the first or impeaching power that I propose to make a few observations. Except in this single case, the Constitution has invested the House of Representatives with no power, no jurisdiction, no supremacy whatever over the President. In all other respects he is quite as independent of them as they are of him. As a coordinate branch of the Government, he is their equal. Indeed, he is the only direct representative on earth of the people of all and each of the sovereign States. To them, and to them alone, is he responsible while acting within the sphere of his constitutional duty, and not in any manner to the House of Representatives. * * *

The people have not confined the President to the exercise of executive duties. They have also conferred upon him a large measure of legislative discretion. No bill can become a law without his approval, as representing the people of the United States, unless it shall paw after his veto by a majority of two-thirds of both Houses. In his legislative capacity, he might, in common with the Senate and the House, institute an inquiry to ascertain any facts which ought to influence his judgment in approving or vetoing any bill.

This participation in the performance of legislative duties between the coordinate branches of the Government ought to inspire the conduct of all of them, in their relations toward each other, with mutual forbearance and respect. At least each has a right to demand justice from the other. The cause of complaint is, that the constitutional rights and immunities of the executive have been violated in the person of the President.

The President further protested that the resolution involved the preliminary proceedings of impeachment, and contended that, as in the case of Judge Peck[3] and in succeeding impeachments, the accusations should be set forth definitely and specifically, and should be considered by the Committee on the Judiciary, which had always been considered the appropriate committee, according to proper forms. But the House of Representatives, by making John Covode chairman of the select committee had made the accuser the judge. Also the House, by adopting the resolution, had indorsed vague charges against the Executive, without permitting

[1] First session Thirty-sixth Congress. Journal, p. 618; Globe, pp. 1434–1440; House Report No. 394, p. 33.

[2] See section 2364 of Vol. III of this work. James Buchanan was President,

[3] See section 2364 of Vol. III of this work.

inquiry to be made as to specific charges. Thus the President was denied the privileges which the Constitution granted to the humblest citizen. He also contended that the proceeding tended to aggrandize the legislative department at the expense of the executive.

After debate the message was referred to the Committee on the Judiciary. This committee reported [1] on April 9, 1860. This committee consisted of Messrs. John Hickman, of Pennsylvania; John A. Bingham, of Ohio; George S. Houston, of Alabama; Miles Taylor, of Louisiana; Thomas A. B. Nelson, of Tennessee; William Kellogg, of Illinois; John H. Reynolds, of New York; Christopher Robinson, of Rhode Island, and Albert G. Porter, of Indiana.

The report, to which Messrs. Houston and Taylor dissented, recommends the adoption of this resolution:

Resolved, That the House dissents from the doctrines of the special message of the President of the United States of March 28, 1860;

That the extent of power contemplated in the adoption of the resolutions of inquiry of March 5, 1860, is necessary to the proper discharge of the constitutional duties devolved upon Congress;

That judicial determinations, the opinions of former Presidents, and uniform usage sanction its exercise; and,

That to abandon it would leave the executive department of the Government without supervision or responsibility, and would be likely to lead to a concentration of power in the hands of the President, dangerous to the rights of a free people.

In support of these resolutions the report of the committee contends:

The President of the 'United States, under the Constitution, possesses neither privilege nor immunity beyond the humblest citizen, and is less favored in this respect than Senators and Representatives in Congress. Article 1, section 6, reads: "They (the Senators and Representatives) shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same." No such exemption is made in behalf of the Executive or any other officer of Government. The conduct of the President is always subject to the constitutional supervision and judgment of Congress; while he, on the contrary, has no such power over either branch of that body. He is left, under the law, without shield or protection of any kind, except such as is borne by all. He is as amenable for all his acts after inauguration as before. He can make no plea which is denied to any other citizen, and is subject to the same scrutiny, trial, and punishment, with the proceedings, hazards, and penalties of impeachment superadded. The President and the citizen stand upon equality of rights. The distinction between them arises from an inequality of duties. Wherever the conduct of the latter is open to inquiry and charge, that of the former is not the less so. The President affirms, with seeming seriousness, in comparing himself with the House of Representatives, that, "as a coordinate branch of the Government, he is their equal." This is denied in emphatic terms. He is "coordinate," but not coequal. He is "coordinate," for he "holds the same rank;" but he is not coequal, for his immunities and powers are less. The Members of the House may claim a, privilege, whether right or wrong, which he can not, and the executive or law executing power must always be inferior to the legislative or law-making power. The latter is omnipotent within the limits of the Constitution; the former is subject not only to the Constitution, but to the determinations of the latter also. To repeat the point: The President is not, in any respect, superior to the citizen, merely because he is bound to discharge more numerous duties; and he is not coequal with that branch of Government which helps to impose and define those duties. The fact that he holds a limited veto over the legislation of Congress can not affect the soundness of the views here briefly presented. His claim to "legislative capacity," in other words, to possess legislative power, will scarcely be conceded in view of Article I, section 1, of the Constitution, declaring that, "All legislative powers herein (therein) granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

[1] House Report No. 394, first session Thirty-sixth Congress.

The committee then go on to discuss the President's assumption that the resolution charged him with the commission of high crimes and misdemeanors. They deny that it was a charge. It was a mere inquiry, as the language of the resolution would show. But even if the charges were, proper for impeachment, the House might proceed in any way it might consider proper, either according to the precedent of the case of Judge Peck, or according to other forms.

The committee drew a distinction between this case and the protest of President Jackson against the Senate resolution of March 28, 1834, wherein the President was censured. The resolutions of the House in this case did not propose censure, but merely an inquiry.

The appointment of the Member moving the resolution as chairman of the committee was in accordance with "a practice in legislation coextensive with our national existence."

The propriety of inquiry into the acts of the Executive had been admitted by Presidents Jackson and Polk, and the

necessity for the full and unrestricted exercise of the power in question is so overruling as to prevent its surrender: (1) With a view to impeachment; (2) for the purpose of legislation; (3) to protect the privileges of Congress.

The committee replied to the statement that the legislative power would be aggrandized unduly, by pointing out that the fears of the fathers that the Executive would be unduly aggrandized, were more likely to be realized.

On June 8 the resolution of the committee was agreed to,[1] yeas 87, nays 40.[2]

[1] Journal, p. 1041; Globe, pp. 2774–2776.

[2] On June 25 a second message of protest was received from the President and was referred to a select committee, Journal, p. 1218.

Chapter LI.

POWER TO PUNISH FOR CONTEMPT.

1597. Discussion by Jefferson as to the inherent power of the House to punish for contempts without prior sanction of law.—Thomas Jefferson, in his Manual written for the use of the Senate and in 1837 adopted as a guide for the House in all cases not provided for by its rules and orders, has the following in his discussion of the subject of privilege:

So far there will probably be no difference of opinion as to the privileges of the two Houses of Congress; but in the following cases it is otherwise: In December, 1795, the House of Representatives committed two persons of the name of Randall and Whitney for attempting to corrupt the integrity of certain Members, which they considered as a contempt and breach of the privileges of the House; and the facts being proved, Whitney was detained in confinement a fortnight, and Randall three weeks, and was reprimanded by the Speaker. In March, 1796, the House of Representatives voted a challenge given to a Member of their House to be a breach of the privileges of the House;[1] but satisfactory apologies and acknowledgments being made, no further proceeding was had. The editor of the Aurora having, in his paper of February 19,1800, inserted some paragraphs defamatory of the Senate, and failed in his appearance, he was ordered to be committed. In debating the legality of this order it was insisted in support of it that every man, by the law of nature, and every body of men, possesses the right of self-defense; that all public functionaries are essentially invested with the powers of self-preservation; that they have an inherent right to do all acts necessary to keep themselves in a condition to discharge the trusts confided to them; that whenever authorities are given, the means of carrying them into execution are given by necessary implication; that thus we see the British Parliament exercise the right of punishing contempts; all the State legislatures exercise the same power, and every court does the same; that if we have it not, we sit at the mercy of every intruder who may enter our doors or gallery, and, by noise and tumult, render proceeding in business impracticable; that if our tranquillity is to be perpetually disturbed by newspaper defamation, it will not be possible to exercise our functions with the requisite coolness and deliberation; and that we must therefore have a power to punish these disturbers

[1] See sections 2677–2687 of Volume III of this work.

of our peace and proceedings. To this it was answered that the Parliament and courts of England have cognizance of contempts by the express provisions of their law; that the State legislatures have equal authority because their powers are plenary; they represent their constituents completely, and possess all their powers, except such as their constitutions have expressly denied them; that the courts of the several States have the same powers by the laws of their States, and those of the Federal Government by the same State laws adopted in each State, by a law of Congress; that none of these bodies, therefore, derive those powers from natural or necessary right, but from express law; that Congress have no such natural or necessary power, nor any powers but such as are given them by the Constitution; that that has given them directly exemption from personal arrest, exemption from question elsewhere for what is said in their House, and power over their own Members and proceedings; for these no further law is necessary, the Constitution being the law; that, moreover, by that article of the Constitution which authorizes them "to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in them," they may provide by law for an undisturbed exercise of their functions, e. g., for the punishment of contempts, of affrays or tumult in their presence, etc., but, till the law be made, it does not exist, and does not exist from their own neglect; that, in the meantime, however, they are not unprotected, the ordinary magistrates and courts of law being open and competent to punish all unjustifiable disturbances or defamations, and even their own sergeant, who may appoint deputies ad libitum to aid him (3 Grey, 59, 147, 255), is equal to small disturbances; that in requiring a previous law, the Constitution had regard to the inviolability of the citizen, as well as of the Member; as, should one House, in the regular form of a bill, aim at too broad privileges, it may be checked by the other, and both by the President; and also as, the law being promulgated, the citizen will know how to avoid offense. But if one branch may assume its own privileges without control, if it may do it on the spur of the occasion, conceal the law in its own breast, and, after the fact committed, make its sentence both the law and the judgment on that fact; if the offense is to be kept undefined and to be declared only ex re nata, and according to the passions of the moment, and there be no limitation either in the manner or measure of the punishment, the condition of the citizen will be perilous indeed. Which of these doctrines is to prevail time will decide. Where there is no fixed law, the judgment on any particular case is the law of that single case only, and dies with it. When a new and even a similar case arises, the judgment which is to make and at the same time apply the law is open to question and consideration, as are all new laws. Perhaps Congress in the meantime, in their care for the safety of the citizen, as well as that for their own protection, may declare by law what is necessary and proper to enable them to carry into execution the powers vested in them, and thereby hang, up a rule for the inspection of all, which may direct the conduct of the citizen, and at the same time test the judgments they shall themselves pronounce in their own case.

1598. It was found inexpedient to define the offense of contempt of the House by law and provide a punishment.—On February 13, 1837,[1] Mr. Andrew Beaumont, of Pennsylvania, moved the following resolution:

Resolved, That the Committee on the Judiciary be instructed to inquire into the expediency of bringing in a bill defining the offense of a contempt of this House, and to provide for the punishment thereof.

After debate a motion was made that the resolution lie on the table, and was decided in the negative. Then, after further debate, the resolution was disagreed to.

1599. The contempt cases of Randall and Whitney in 1795.

On the evidence of Members who in their places gave information of attempts to bribe them, the House issued an order for the arrest of the person charged with the offense.

Arrests are made by the Sergeant-at-Arms on authority of a warrant duly signed, attested, and sealed; and on performing the duty that officer makes return on the warrant.

[1] Second session Twenty-fourth Congress, Journal, p. 386; Debates, p. 1755.

On December 28, 1795,[1] information being given to the House by the following Members in their places, to wit, William Smith (South Carolina), William V. Murray (Maryland), and William B. Giles (Virginia), that a person of the name of Robert Randall had made or communicated to them, respectively, certain overtures to obtain their several support in this House to a memorial intended to be presented by the said Robert Randall, on behalf of himself and others, for the grant of a tract of land containing 18,000,000 or 20,000,000 acres, bordering on Lakes Erie, Michigan, and Huron, and lying within the limits of the United States; for which support the said Members, respectively, were promised to receive of the said Robert Randall and his associates a consideration or emoluments in lands or money; and this House, regarding the said information as sufficient evidence of a contempt to, and breach of the privileges of, this House, in an unwarrantable attempt to corrupt the integrity of its Members, it was—

Resolved, That Mr. Speaker do issue his warrant, directed to the Sergeant-at-Arms attending this House, commanding him to take into custody, wherever to be found, the body of the said Robert Randall, and the same in his custody to keep, subject to the further order and direction of the House.

A warrant, pursuant to this resolution, was accordingly prepared, signed by Mr. Speaker, under his seal, attested by the Clerk and delivered to the Sergeant-at-Arms, with order forthwith to execute the same and make due return thereof to the House.

Information being also given to the House, by Mr. Daniel Buck, one of the Members from Vermont, of an application to him by a person of the name of Charles Whitney, by which there was good reason to believe that the said Whitney was a partner and associate of the before-named Randall, etc., so action was taken against Whitney similar to that already taken against Randall, although at first there was hesitation because it was reported that Whitney was already in custody of a magistrate.

On December 29[2] the Sergeant-at Arms made a return on the warrants, that he had executed the same on the bodies of Robert Randall and Charles Whitney, who were taken into custody on the preceding day, and were held subject to the further direction of the House.

1600. The contempt cases of Randall and Whitney, continued.

In 1795 proceedings against persons in contempt were taken in accordance with recommendations by a select committee on privileges.

Form of arraignment of Randall and Whitney in 1795.

Instance wherein the House amended its charges against a person already arraigned for contempt.

Thereupon the House authorized the appointment of a Committee of Privileges to report "a mode of proceeding," and Messrs. Abraham Baldwin, of Georgia; William Smith, of South Carolina; William B. Giles, of Virginia; William V. Murray, of Maryland; Edward Livingston, of New York; Joshua Coit, of Connecticut, and Benjamin Goodhue, of Massachusetts, were appointed.

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[1] First session Fourth Congress, Journal, pp. 389; Annals, pp. 166–170; American State Papers (miscel.), Vol. I, p. 125.

[2] Journal, p. 391; Anna, p. 169.

This committee on the same day [1] reported the following resolution, which was agreed to:

Resolved, That the said Robert Randall and Charles Whitney be brought to the bar of the House and interrogated by the Speaker touching the information given against them, on written interrogatories, which with the answers thereto shall be entered on the minutes of the House. And that every question proposed by a Member be reduced to writing and a motion made that the same be put by the Speaker. That, after such interrogatories are answered, if the House deem it necessary to make any further inquiry on the subject, the same be conducted by a committee to be appointed for that purpose.

The said Robert Randall was accordingly brought to the bar of the House in custody of the Sergeant-at-Arms; and the charge against him being read, he was interrogated by Mr. Speaker—

whether he did admit or deny the truth of the said charge.

to which interrogatory he answered that he was not prepared to admit or deny the same, but requested that time might be allowed him to answer, and offer a vindication of his conduct, until the day after tomorrow.

Whereupon it was

Ordered, That the said Robert Randall do now withdraw in custody, until the House shall presently decide on his request.

The said Robert Randall accordingly withdrew in custody; and after debate the House decided that he be allowed until 12 o'clock tomorrow to make answer.

The House also resolved

That it be an addition to the charge against the said Robert Randall "that he informed a Member of this House that a number of the Members of this House, not less than thirty, had engaged or were engaged to support his memorial and application, or words to that effect."

The said Robert Randall was then returned to the bar in custody and notified by Mr. Speaker of the indulgence and further proceeding of the House respecting him; after which it was

Ordered, That he be detained in custody of the Sergeant-at-Arms and brought again to the bar at 12 o'clock tomorrow.

Charles Whitney was then brought to the bar in custody, the charges against him read, and thereupon he was interrogated by the Speaker.[2] The Speaker seems to have asked the questions according to his own judgment, none being suggested by Members. In response to one question the respondent denied that he had offered any improper inducements to Mr. Buck at his house in Vermont.

Thereupon Mr. Buck informed the House that the respondent had offered him land and money.

On motion it was then

Ordered, That the respondent withdraw in custody, that the proceedings respecting him be adjourned until tomorrow at 12 o'clock, and that he be kept in custody separate and apart from Robert Randall.

1601. The contempt cases of Randall and Whitney, continued.

The House permitted a person arraigned for contempt in 1795 to be represented before the House by counsel.

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[1] Journal, p. 392.

[2] Journal, pp. 392, 393; Annals, p. 177.

On December 30[1] a petition of Robert Randall was presented and read praying that he might be indulged with the assistance of counsel, and a reasonable time to prepare for his defense.

Considerable debate arose as to the propriety of permitting counsel, and also as to whether or not the examination should be by a select committee or before the House. It was urged that these proceedings were peculiar, not analogous to process in the courts, where the Constitution provided for counsel and trial by jury. This process was justified by the inherent power of the House to take measures for its own preservation; and there was no obligation to permit counsel, although it might be done as a matter of favor.

The House decided that Randall's petition should be granted. He was then brought to the bar in custody, and it being demanded of him by Mr. Speaker "what further time he required to prepare for his defense?" he answered "until Friday next."

The House then ordered that he have the time asked, and in the meantime be remanded to custody.

The Speaker then laid before the House a document which had been given up by Charles Whitney to the Sergeant-at-Arms, and which purported to be an agreement relating to the land scheme, from which the proceedings had arisen. The document was read and laid on the table.

Charles Whitney was then brought in under custody, and the further information against him, given by Mr. Buck on the preceding day, being read to him, he was interrogated by the Speaker "whether he did admit or deny the same?"

To which he answered that he did wholly deny the same.

Thereupon he was remanded to custody.

1602. The contempt cases of Randall and Whitney, continued.

A person being on trial for contempt, both the information given by Members and their testimony were required to be under oath.

In 1795 the House decided to hear the case of a person arrested for contempt at the bar rather than by a select committee.

In 1795 the House introduced a district judge to administer oaths to witnesses in a contempt case heard at the bar of the House.

Method of examining witnesses through the Speaker in a contempt case tried at the bar of the House in 1795.

In a contempt case tried at the bar of the House the prisoner and counsel withdrew during deliberations of the House.

Then, as to whether or not the examination should be by select committee or before the House debate arose, it being urged that the dignity of the House demanded an open inquiry rather than secret proceedings before a select committee. The matter was referred to the Committee on Privileges.

On December 31[2] the Committee on Privileges submitted their report. This report included several provisions that were the subject of debate. It was urged that the information to be given by Members in writing over their signatures should also be sworn to; but the argument was made that this was a proceeding by privilege, not by law, and that the word of the Member was sufficient. On the other hand, it

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[1] Journal, p. 393; Annals, p. 179.

[2] Annals, pp. 185–195.

was argued that no citizen should be punished without the solemnity of an oath, and that where the offense was not committed in the presence of the House it was proper for the information to be on oath. Another question arose as to the proposed introduction of the district judge to administer oaths. It was urged that this would be an encroachment on the privileges of the House; but the House declined to take this view. And finally a contention arose as to whether or not an oath should be required of Members who should testify as well as of the witnesses for the accused. The Committee on Privileges had reported in favor of requiring an oath of the latter only, and it was argued in support of this that the oath taken by a Member when he took his seat was sufficient. On the other hand, it was urged that the trial should proceed as in the courts. The House decided to amend the report in this respect.

On January 1[1] the report was adopted in form as follows:

That the proper mode of conducting the further inquiry and the trial in the case of Robert Randall and Charles Whitney will be to proceed, first, with a further hearing of Robert Randall at the bar of the House.

That the information that has been given against the said Robert Randall and Charles Whitney be reduced to writing and signed by the informants themselves, respectively, and entered at large on the Journal. That the said information be read to the prisoners, and that they be called upon by the Speaker to declare what they have to say in their defense.

That if the said prisoners shall offer any parole evidence in their exculpation the same shall be heard at the bar of the House, excepting the Members of the House, who may give their testimony on oath in their places; and no question shall be put to any Member on the part of the prisoner by way of cross-examination, except leave be first given by the House, and every such question shall be put by the Speaker; and that the judge of the district of Pennsylvania be requested to attend for the purpose of administering an oath or affirmation to all witnesses. That all questions on the part of the House to be asked of the said witnesses shall be put by the Speaker.

That in every debate the prisoners and their counsel shall be directed to withdraw; and that when they shall have concluded their defense and are withdrawn, the sense of the House shall be taken on the guilt or innocence of the prisoners, respectively.

January 4[2] the Members delivered at the Clerk's table their several informations showing attempts to corrupt them at the seat of Government. Then Robert Randall was arraigned, being attended by counsel, Messrs. Lewis and Tilghman; and the informations were read to him.

It was then demanded of him by Mr. Speaker: "What have you to say in your defense?" To which he answered that he was "not guilty."

In response to further demand by the Speaker, he said he had no witness whom he wished examined.

His counsel asked, however, that the informations delivered against him might be attested by oaths of the informant Members, and that he be permitted to examine them under oath.

The prisoner and counsel having retired, after debate the House adopted the following:

Resolved, That the prisoner be informed that if he has any questions to propose to the informants or other Members of the House he is at liberty to put them in the mode already prescribed; that the said informant Members be sworn to the declaration just read, and also to answer such questions as shall be asked of them touching the same.

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[1] Journal, p. 395 , Annals, p. 194.

[2] Journal, p. 397.

Oaths were then administered by the district judge.

Various Members of the House were questioned on behalf of the respondent in the manner prescribed in the resolution of the House.

1603. The contempt cases of Randall and Whitney, continued.

For contempt in attempting to bribe its Members the House committed Robert Randall in 1795.

The House, in 1795, declined to take action that would seem to imply a definition of its privileges.

Is an attempt to bribe a Member at a place other than the seat of government, and before he has taken his seat, a breach of privilege?

On January 5[1] counsel for the respondent made an argument and on the next day[2] the House proceeded to a final decision. The following resolution was proposed, but set aside:

Resolved, That the said Robert Randall has thereby committed a high contempt of this House and a breach of privilege.

It was then voted by yeas and nays, 78 to 17, as follows:

Resolved, That it appears to this House that Robert Randall has been guilty of a contempt to, and a breach of the privileges of, this House by attempting to corrupt the integrity of its Members in the manner laid to his charge.

Resolved, That the said Robert Randall be brought to the bar, reprimanded by the Speaker, and committed to the custody of the Sergeant-at-Arms until further order of this House.

January 7[3] the case of Whitney was taken up. His case was distinguished from that of Randall by the fact that he had attempted to corrupt a Member-elect before he had taken his seat and away from the seat of government. Various propositions were made to declare the case not one of privilege, because of one or both of these reasons; but objection was made to a definition of privilege, and finally, by a vote of yeas 52 to nays 30, a simple resolution discharging Whitney from custody was agreed to.

On January 12[4] Randall petitioned that he be released from imprisonment and on January 13 the House adopted a resolution that he be discharged from the custody of the Sergeant-at-Arms.

1604. William Duane, for a publication tending to defame the Senate, was found guilty of contempt and imprisoned by order of that body.

The Senate requested the Executive to prosecute William Duane for defamation of the Senate.

Form of proceedings at the trial of William Duane at the bar of the Senate.

A person on trial at the bar of the Senate was to be present at the arraignment and examination but to retire during the deliberations.

William Duane, on trial at the bar of the Senate for contempt, was allowed counsel under certain conditions.

Form of warrant signed by the President of the Senate for taking William Duane into custody.

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[1] Annals, p. 212.

[2] Journal, p. 405; Annals, pp. 218–220.

[3] Journal, p. 407; Annals, pp. 222–229.

[4] Journal, p. 414.

On Much 8, 1800,[1] after a debate that had began on February 26, and after the discussion and rejection of several propositions, the Senate agreed to the following by a vote of 19 yeas to 8 nays:

Resolved, That the Committee on Privileges be, and they are hereby, directed to consider and report what measures it will be proper for the Senate to adopt in relation to a publication in the newspaper printed in the city of Philadelphia on Wednesday morning, the 19th of February, 1800, called the General Advertiser, or Aurora, in which it is asserted that the bill prescribing the mode of deciding disputed elections of President and Vice-President of the United States had passed the Senate, when, in fact, it had not passed; in which it is also asserted that the Hon. Mr. Pinckney, a Senator from the State of South Carolina, and a member of the committee, who brought before the Senate the bill aforesaid, had never been consulted on the subject, whereas, in fact, he was present at each meeting of the committee; and generally to report what measures ought to be adopted in relation to sundry expressions contained in said paper respecting the Senate of the United States, and the members thereof, in their official capacity.

On March 18[3] the committee submitted the following report, which, as agreed to on March 19 and 20, contains a statement of the entire case:

Whereas on the 19th of February, now last past, the Senate of the United States being in session in the city of Philadelphia, the following publication was made in the newspaper, printed in the said city of Philadelphia, called the General Advertiser, or Aurora, viz:

"In our paper of the 27th ultimo we noticed the introduction of a measure into the Senate of the United States, by Mr. Ross, calculated to influence and affect the approaching Presidential election, and to frustrate, in a particular manner, the wishes and interests of the people of the Commonwealth of Pennsylvania.

"We this day lay before the public a copy of that bill as it has passed the Senate.

"Some curious facts are connected with this measure, and the people of the Union at large are intermediately, and the people of this State immediately, interested to consider the movements, the mode of operation, and the effects.

"We noticed a few days ago the caucuses (or secret consultations) held in the Senate Chamber. An attempt was made in an evening paper to give a counteraction (for these people are admirable at the system of intrigue) to the development of the Aurora, and to call those meetings jacobinical; we must cordially assent to the jacobinism of those meetings—they were in the perfect spirit of a jacobinical conclave.

"The plain facts we stated are, however, unquestionable; but we have additional information to give on the subject of those meetings. We stated that intrigues for the Presidential election were among the objects. We now state it as a fact that can not be disputed upon fair ground, that the bill we this day present was discussed in the caucus on Wednesday evening last.

"It is worthy of remark how this bill grew into existence.

"The opponents of independence and republican government who supported Mr. Ross in the contest against Mr. McKean are well known by the indecency, the slander, and the falsehood of the measures they pursued—and it is well known they are all devoted to the Federal party, which we dissected on Monday. Mr. Ross proposed this bill in the Federal Senate (how consistently with the decency of his friends will be seen), a committee of five was appointed to prepare a bill on the subject; on this committee Mr. Pinckney, of South Carolina, was appointed. On Thursday morning last (the caucus held the preceding evening) Mr. Ross informed Mr. Pinckney that the committee had drawn up a bill on the subject, when in fact Mr. Pinckney had never been consulted on the subject, though a member of the committee. The bill was introduced and passed as below.

"On this occasion it may not be impertinent to introduce an anecdote which will illustrate the nature of the caucuses, and show that our popular Government may, in the hands of a faction, be as completely abused, as the French constitution has been, by the self-created consuls:

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[1] First session Sixth Congress, Senate Journal, p. 45. (Gales & Seaton ed.)

[2] This debate is reported at length in vol. 6 of Annals, pp. 66–106.

[3] Senate Journal, pp. 51–54; Annals, pp. 111–115.

"In the summer session of 1798, when Federal thunder and violence were belched from the pestiferous lungs of more than one despotic minion, a caucus was held at the house of Mr. Bingham, in this city. It was composed of Members of the Senate, and there were present seventeen Members. The Senate consisting of thirty-two Members, this number was of course a majority, and the session was a full one.

"Prior to deliberation on the measures of war, navy, army, democratic proscription, etc., it was proposed and agreed to that all the Members present should solemnly pledge themselves to act firmly upon the measures to be agreed to by the majority of the persons present at the caucus.

"The measures were perfectly in the high tone of that extraordinary session. But upon a division of the caucus it was found that they were divided nine against eight. This majority, however, held the minority to their engagement, and the whole seventeen voted in the Senate upon all the measures discussed at the caucus.

"Thus it is seen that a secret self-appointed meeting of seventeen persons dictated laws to the United States; and, not only that, nine of that seventeen had the full command and power over the consciences and votes of the other eight, but that nine possessed, by the turpitude of the eight, actually all the power which the Constitution declares shall be vested in the majority only. In other words, a minority of nine Members of the Senate ruled the other twenty-three Members.

"It is easily conceivable, as in the recent changes in France, that the spirit of caucusing may be conducted in progression down to two or three persons; thus three leading characters may agree to act upon measures approved by any two of them, these three may add two others, and they would be a majority of five; and those adding four others would be a majority of nine; and this nine possess all the power of a majority of twenty-three.

"Yet such is the way we are treated—by those who call themselves Federalists.

"The following bill is an offspring of this spirit of faction secretly working, and it will be found to be in perfect accord with the outrageous proceedings of the same party in our State legislature who are bent on depriving this State of its share in an election that may involve the fate of the country and posterity."

Resolved, That the said publication contains assertions and pretended information respecting the Senate and the committee of the Senate, and their proceedings, which are false, defamatory, scandalous, and malicious, tending to defame the Senate of the United States, and to bring them into contempt and disrepute, and to excite against them the hatred of the good people of the United States; and that the said publication is a high breach of the privileges of this House.

Resolved, That William Duane, now residing in the city of Philadelphia, the editor of the said newspaper called the General Advertiser, or Aurora, be, and he is hereby, ordered to attend at the bar of this House, on Monday, the 24th of March, instant, at 12 o'clock, at which time he will have opportunity to make any proper defense for his conduct in publishing the aforesaid false, defamatory, scandalous, and malicious assertions and pretended information; and the Senate will then proceed to take further order on the subject; and a copy of this and the foregoing resolution, under the authentication of the Secretary of the Senate of the United States, and attested as a true copy by James Mather, Sergeant-at-Arms for the said Senate, and left by the said Sergeant-at-Arms with the said William Duane, or at the office of the Aurora, on or before the 22d day of March, instant, shall be deemed sufficient notice for the said Duane to attend in obedience to this resolution.

On March 22,[1] the Committee on Privileges reported the following form of proceeding:

When William Duane shall present himself at the bar of the House, in obedience to the order of the 20th instant, the President of the Senate is to address him as follows:

First. William Duane:

You stand charged by the Senate of the United States, as editor of the newspaper called the General Advertiser, or Aurora, of having published in the same, on the 19th of February now last past, false, scandalous, defamatory and malicious assertions and pretended information respecting the Senate and the committee of the Senate and their proceedings, tending to defame the Senate of the United States, and to bring them into contempt and disrepute, and to excite against them the hatred of the good people of the United States, and therein to have been guilty of a high breach of the privileges of this House.

[1] Senate Journal p. 55; Annals, p. 117.

Then the Secretary shall read the resolutions of the Senate, passed the 20th instant, and with the preamble; after which the President is to proceed as follows, viz:

First. Have you anything to say in excuse or extenuation for said publication?

Secondly. If he shall make no answer the Sergeant-at-Arms shall take him into custody, and retiring with him from the Senate Chamber until the Senate shall be ready for a decision, at which time the Sergeant-at-Arms shall again set him at the bar of the House and the President of the Senate is to pronounce to him the decision.

Thirdly. If he shall answer, he is to continue at the bar of the House until the testimony (if any be adduced) shall be closed and then he shall retire while the Senate are deliberating on the case; and when a decision is agreed upon, the said Duane, being notified of the time by the Sergeant-at-Arms verbally, or by a written notice left at his office, shall appear at the bar of the House, and the President of the Senate is to pronounce to him the decision.

On March 24,[1] Duane appeared at the bar of the Senate, and, the charges against him having been read, requested that he be allowed the assistance of counsel.

Thereupon he was ordered to withdraw, and after debate the following resolutions were agreed to:

Resolved, That William Duane, having appeared at the bar of the Senate and requested to be heard by counsel on the charge against him for a breach of privileges of the Senate, he be allowed the assistance of counsel while personally attending at the bar of the Senate, who may be heard in denial of any facts charged against said Duane, or in excuse and extenuation of his offense.

Resolved, That a copy of the resolution last agreed to be sent to William Duane, and at the same time he be ordered to attend at the bar of this House at 12 o'clock on Wednesday next.

On Wednesday, March 26[2]—

Ordered, That the Sergeant-at-Arms, at the bar of the House, do call William Duane, and the said William Duane did not appear.

Whereupon, on motion—

Resolved, That as William Duane has not appeared at the bar of this House, in obedience to the order of the 24th instant, and has addressed a letter to the President of the Senate, which has been read this morning, in which he refuses any further attendance, his letter be referred to the Committee of Privileges, to consider and report thereon.

On March 27[3] the Committee on Privileges reported the following resolution, which was agreed to, yeas 16, nays 11:

Resolved, That William Duane, editor of the General Advertiser, or Aurora having neglected and refused to appear at the bar of this House at 12 o'clock on the 26th day of March, instant, pursuant to the order of the 24th instant, of which order he had been duly notified; and having sent the following letter to the President of the Senate, which has been communicated to the Senate, viz:

"To the President of the Senate:

"SIR: I beg of you to lay before the Senate this acknowledgment of my having received an authenticated copy of their resolutions on Monday last, in my case. Copies of those resolutions I transmitted to Messrs. Dallas and Cooper, my intended counsel, soliciting their professional aid; a copy of my letter enclosed, marked A. Their answers I have also the pleasure to enclose, marked B and C. I find myself, in consequence of these answers, deprived of all professional assistance, under the restrictions which the Senate have thought fit to adopt. I therefore think myself bound by the most sacred duties to decline any further voluntary attendance upon that body, and leave them to pursue such measures in this case as in their wisdom they may deem meet.

"I am, sir, with perfect respect,

"WM. DUANE,"

is guilty of a contempt of said order and of this House, and that, for said contempt, he, the said William Duane, be taken into custody of the Sergeant-at-Arms attending this House, to be kept subject to the further orders of the Senate.

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[1] Senate Journal, p. 56; Annals, p. 118.

[2] Senate Journal p. 58; Annals, p. 121.

[3] Senate Journal, pp. 59–61; Annals, pp. 122–125.

The committee further reported the following resolution, which was agreed to, yeas 18, nays 11:

Resolved, That a warrant issue signed by the President of the Senate, in the following form, viz:

UNITED STATES,

The 27th day of March, 1800, ss:

Whereas the Senate of the United States, on the 18th day of March, 1800, then being in session in the city of Philadelphia, did resolve that a publication in the General Advertiser or Aurora, a newspaper printed in the said city of Philadelphia, on Wednesday, the 19th of February, then last past, contained assertions and pretended information respecting the Senate and committee of the Senate, and their proceedings which were false, defamatory, scandalous, and malicious, tending to defame the Senate of the United States, and to bring them into contempt and disrepute, and to excite against them the hatred of the good people of the United States; and that the said publication was a high breach of the privileges of the House.

And whereas the Senate did then further resolve and order that the said William Duane, resident in the said city, and editor of said newspaper, should appear at the bar of the House on Monday, the 24th day of March, instant, that he might then have opportunity to make any proper defense for his conduct in publishing the aforesaid false, defamatory, Scandalous, and malicious assertions and pretended information.

And whereas the said William Duane did appear on said day at the bar of the House, pursuant to said order, and requested counsel, and the Senate, by their resolution of the 24th day of March, instant,

"Resolved, That William Duane, having appeared at the bar of the Senate and requested to be heard by counsel on the charge against him for a breach of privileges of the Senate, he be allowed the assistance of counsel while personally attending at the bar of the Senate, who might be heard in denial of any facts charged against said Duane, or in excuse and extenuation of his offense, and that the said William Duane should attend at the bar of the Senate on Wednesday, then next, at 12 o'clock, of which the said Duane had due notice."

And whereas said William Duane, in contempt of the said last-mentioned order, did neglect and refuse to appear at the bar of the Senate at the time specified therein, and the Senate of the United States, on the 27th day of March, instant, did thereupon resolve that the said William Duane was guilty of a contempt of said order of the Senate, and that for said contempt he, the said William Duane, should be taken into custody of the Sergeant-at-Arms attending the Senate, to be kept for their further orders. All which appears by the journals of the Senate of the United States now in session in the said city of Philadelphia.

These are, therefore, to require you, James Mathers, Sergeant-at-Arms for the Senate of the United States, forthwith to take into your custody the body of the said William Duane, now resident in the said city of Philadelphia, and him safely to keep, subject to the further order of the Senate; and all marshals and deputy marshals and civil officers of the United States, and every other person, are hereby required to be aiding and assisting to you in the execution thereof, for which this shall be your sufficient warrant.

Given under my hand, this 27th day of March, 1800.

THOMAS JEFFERSON,
PRESIDENT OF THE SENATE OF THE UNITED STATES.

On May 14,[1] the last day of the session, the Senate, by a vote of yeas 13, nays 4, agreed to the following:

Resolved, That the President of the United States be requested to instruct the proper law officer to commence and carry on a prosecution against William Duane, editor of the newspaper called the Aurora, for certain false, defamatory, scandalous, and malicious publications in said newspaper, of the 19th of February last, tending to defame the Senate of the United States, and to bring them into contempt and disrepute, and to excite against them the hatred of the good people of the United States.

Proceedings instituted against Duane in accordance with this request resulted in a sentence of imprisonment for thirty days and the payment of cost of prosecution.[2]

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[1] Senate Journal, p. 98; Annals, p. 194.

[2] Smith's Digest of Decisions and Precedents, Senate Miscel. Doc. No. 278, second session Fifty-third Congress, p. 17.

1605. The arrest by a civil magistrate of an officer of the House for an act performed in the service of the House was deemed a high breach of privilege.

A spectator in the gallery having created disturbance, the Speaker ordered his arrest.

On December 22, 1800,[1] a spectator, one James Lane, in the gallery applauded by clapping his hands. The Speaker[2] at once directed the Sergeant-at-Arms to attend to the disturbance, and the Sergeant-at-Arms at once went into the gallery and took the person out, keeping him in confinement about two hours.

The spectator obtained a warrant for the arrest of the Sergeant-at-Arms, who was apprehended and conducted before a magistrate, by whom, after a time he was released, James Lane not appearing to prosecute.

On December 30,[3] the Speaker laid before the House a letter from the Sergeant-at-Arms on the subject, which was referred to a select committee on privileges.

On January 6, 1801,[4] the committee reported a resolution that it was not expedient for the House to take any further order on the letter from Joseph Wheaton, Sergeant-at-Arms.

This was agreed to, yeas 58, nays 30.

The report was then presented to the House, as follows:

That the representation made by the Sergeant-at-Arms, contains a correct statement of facts; and that he, in the opinion of the committee, is to be commended for the promptitude and fidelity with which he executed the order of the Speaker, to apprehend the person guilty of indecent and disorderly conduct in the gallery.

The committee have reason to believe, from the best information they can obtain, that the person who committed the disorder (and who has since absconded), was, at the time, intoxicated with liquor.

The magistrate, by whose warrant the Sergeant-at-Arms was arrested and held in custody, for discharging his duty in the premises, has explained his conduct, in a letter accompanying this report. The suggestion made to him, that any one Member of this House was consulted relative to the prosecution of the Sergeant-at-Arms, is, by the committee, presumed to be wholly false; as it would imply in such Member, not only a disregard of all sense of personal propriety, but also an inexcusable contempt for the honor and dignity of the House.

That, although the arrest and confinement of an officer of the House of Representatives, for any act by him performed in its service, and in obedience to its orders, must be deemed a high breach of its privileges; yet as the magistrate, in the present case, seems rather to have been deceived by false representations, than influenced by improper views, the committee can not consider his conduct as a subject of animadversion.

They are therefore of opinion, that it is not expedient for the House to take any further order on the letter of Joseph Wheaton.

The question being put on agreeing to this report, there were yeas 50, nays 38; so the report was agreed to.

The debate showed that the power of the Speaker to order the arrest of a person in the gallery, and of the Sergeant-at-Arms to make the arrest, was questioned. The Speaker said that he considered himself possessed of the power to arrest and confine a person for disorderly behavior during the present sitting, subject to the instructions of the House. He had not claimed the power to confine an individual beyond that time.

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[1] Second session Sixth Congress, Journal, p. 744 (Gales & Seaton ed.); Annals, p. 851.

[2] Theodore Sedgwick, of Massachusetts, Speaker.

[3] Journal, p. 748; Annals, p. 866.

[4] Journal, p. 752; Annals, p. 880.

1606. The contempt case of John Anderson before the House in 1818.

A citizen having attempted to bribe a Member, the House arrested, tried, and punished him.

Discussion of the power of the House to issue a general warrant.

Discussion of the power of the House to punish for a breach of its privileges.

The House appointed a committee of privileges to determine the procedure in the Anderson contempt case.

In the case of John Anderson, the accused and witnesses were examined at the bar of the House.

For attempting to bribe a Member John Anderson was censured by the Speaker at the bar of the House.

On January 7, 1818,[1] Mr. Lewis Williams, of North Carolina, arose and laid before the House a letter from Col. John Anderson, in which the latter requested him to accept $500 as "part pay for extra trouble" in furthering claims from the River Raisin. Mr. Williams also submitted a signed statement from himself.

On the letter and statement being read, on motion of Mr. John Forsyth, of Georgia—

Resolved, unanimously, That Mr. Speaker do issue his warrant directed to the Sergeant-at-Arms attending this House, commanding him to take into custody, wherever to be found, the body of John Anderson, and the same in his custody to keep, subject to the further order and direction of this House.

Mr. Forsyth explained that he had, in drawing up the resolution, followed the precedent of 1795.[2]

Before the adoption of the resolution there was some question as to the authority of the House to issue a general warrant, which was spoken of as opposed to the principles of civil liberty. The Speaker[3] observed that, in the practice of the House, happily, instances were extremely rare where such a warrant became necessary. No such case had occurred within his observation. But there could be no doubt, when an offense was committed against the privileges or dignity of the House, it was perfectly in its power to issue a warrant to apprehend the party offending. The Speaker also expressed the opinion that the facts on which the warrant was issued need not be substantiated by oath.

On January 8, Colonel Anderson having been arrested, an extended debate arose on Mr. Forsyth's motion for the appointment of a committee on privileges to report a mode of procedure. It was objected that neither the Constitution nor the law gave any authority to the House to punish, and that the great and oppressive powers assumed in this respect by the British Parliament were no precedent here. The House might protect itself from indecorum and insult, but might not punish individuals for acts done elsewhere. It was better to suffer a hundred insults than to trample on the rights of the individual. The precedent of 1795 was set by "a high-handed party majority, full of British notions and fond of British precedents."

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[1] First session Fifteenth Congress, Journal, pp. 117, 119, 129, 154; Annals, pp. 580, 614, 622, 626, 631, 639, 743, 790.

[2] See section 1599 of this work.

[3] Henry Clay, of Kentucky.

On the other hand, it was said that there must be in the House the power to resist the advances of bribery and corruption, since the Constitution, in giving being to the House, must have given it every attribute necessary to its security and its purity. The House of Commons acted as a House in its punishment for contempts; therefore the different functions of Parliament, as compared with Congress, did not prevent the precedents of the Commons from being valuable. The precedent of 1795 had not been set by party influence, since of the 78 who voted for the proceedings 39 were afterwards, when the parties were formed, known as Republicans.

The Committee on Privileges being authorized by the House, it was composed of Messrs. John Forsyth, of Georgia; Joseph Hopkinson, of Pennsylvania; Henry St. George Tucker, of Virginia; John Sergeant, of Pennsylvania; Richard M. Johnson, of Kentucky; Timothy Pitkin, of Connecticut, and John W. Taylor, of New York.

This committee reported the following resolution, which was adopted:

Resolved, That John Anderson be brought to the bar of the House and interrogated by the Speaker, on written interrogatories, touching the charge of writing and delivering a letter to a Member of the House offering him a bribe, which, with his answers thereto, shall be entered on the minutes of the House; and that every question proposed by a Member be reduced to writing and a motion made that the same be put by the Speaker, and the question and answer shall be entered on the minutes of the House. That after such interrogatories are answered, if the House deem it necessary to make further inquiry on the subject, the same be conducted by a committee appointed for that purpose.

Anderson then appeared at the bar of the House in the custody of the Sergeant-at-Arms; and the Speaker addressed him, informing him why he had been brought before the House, and that the House would take into consideration any request of his for counsel, leave to summon witnesses, etc.

And Anderson having stated his requests and retired, the House resolved to allow him counsel and ordered that the Clerk issue processes for his witnesses; also that a copy of the letter of accusation be furnished him. Then he was brought to the bar and the resolution communicated to him by the Speaker.

In the midst of the proceedings Mr. John C. Spencer, of New York, presented a resolution that, because of great doubt of the power of the House to punish Anderson for contempt, the case should be turned over to the Attorney-General of the United States, and that the Committee on the Judiciary should inquire into the expediency of providing a law for the punishment of contempt. A very long and exhaustive debate arose. The authority of the law of Parliament was denied, and it was contended that the House had only such privileges as were defined in Article I, section 6, and all cases not enumerated there were obviously excluded. There were no inherent powers, except those specifically enumerated. This argument was made by Mr. Philip P. Barbour, of Virginia, and Mr. Charles F. Mercer, of the same State, replied that in Virginia "from the form of the speaker's chair to the power of expelling a member the character and authority of the house of delegates is derived, without any express constitutional provision, from the House of Commons, the archetype of the popular branch of every State legislature, as it is of this House."

The resolution of Mr. Spencer was, at the end of the debate, postponed indefinitely, by a vote of 117 to 42.

Then, on January 15, it was voted that Anderson be brought to the bar of the House, where the Speaker propounded to him certain questions, which he

answered. Then witnesses were examined, the Speaker and Anderson questioning them. On January 16 the Speaker propounded further interrogatories, the remaining witnesses summoned by Anderson were examined, and then Anderson was heard in his own defense.

After this he was removed from the bar and the House came to final action in his case. Mr. Forsyth submitted the following resolution:

Resolved, That John Anderson has been guilty of a contempt and a violation of the privileges of the House, and that he be brought to the bar of the House on Wednesday next and be there reprimanded by the Speaker for the outrage he has committed, and then discharged from the custody of the Sergeant-at-Arms.

The resolution was amended making the time "this day" instead of Wednesday. There were several attempts to further amend, with a view of softening the resolution, in view of Colonel Anderson's services, but they failed; and the original resolution having passed as amended, John Anderson appeared at the bar of the House, was reprimanded, and then discharged from custody. In giving the reprimand the Speaker dwelt strongly upon the evil consequences of attempting to corrupt a legislative assembly.

1607. The case of John Anderson, continued.

Decision of the Supreme Court affirming the right of the House to punish John Anderson for contempt.

Anderson brought a suit against the Sergeant-at-Arms of the House[1] for assault and battery and false imprisonment, which was finally settled by a decision of the United States Supreme Court, rendered at the February term, 1821.

From the circuit court of the District of Columbia the case of Anderson *v.* Dunn went to the Supreme Court of the United States, and at the February term, 1821 a decision was rendered. (6 Wheaton, 204.) The summary of the decision was:

To an action of trespass against the Sergeant-at-Arms of the House of Representatives of the United States, for an assault and battery and false imprisonment, it is a legal justification and bar, to plead, that a Congress was held and sitting, during the period of the trespasses complained of, and that the House of Representatives had resolved that the plaintiff had been guilty of a breach of the privileges of the House, and of a high contempt of the dignity and authority of the same; and had ordered that the Speaker should issue his warrant to the Sergeant-at-Arms, commanding him to take the plaintiff into custody, wherever to be found, and to have him before the said House, to answer to the said charge; and that the Speaker did accordingly issue such a warrant, reciting the said resolution and order, and commanding the Sergeant-at-Arms to take the plaintiff into custody, etc., and deliver the said warrant to the defendant, by virtue of which warrant the defendant arrested the plaintiff and conveyed him to the bar of the House, where he was heard in his defense, touching the matter of the said charge, and the examination being adjourned from day to day, and the House having ordered the plaintiff to be detained in custody, he was accordingly detained by the defendant until he was finally adjudged to be guilty, and convicted of the charge aforesaid, and ordered to be forthwith brought to the bar, and reprimanded by the Speaker, and then discharged from custody; and after being thus reprimanded, was actually discharged from the arrest and custody aforesaid.

After the statement of the case, the opinion, delivered by Mr. Justice Johnson, proceeds:

Notwithstanding the range which has been taken by the plaintiff's counsel in the discussion of this cause, the merits of it really lie in a very limited compass. The pleadings have narrowed them down

[1] The House authorized an appropriation for the defense of the Sergeant-at-Arms. Second session Fifteenth Congress, Annals, p. 433.

to the simple inquiry, whether the House of Representatives can take cognizance of contempts committed against themselves under any circumstances? The duress complained of was sustained under a warrant issued to compel the party's appearance, not for the actual infliction of punishment for an offence committed. Yet it can not be denied that the power to institute a prosecution must be dependent upon the power to punish. If the House of Representatives possessed no authority to punish for contempt, the iniating process issued in the assertion of that authority must have been illegal; there was a want of jurisdiction to justify it.

It is certainly true that there is no power given by the Constitution to either House to punish for contempts, except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either House, or any one coordinate branch of the Government. Shall we, therefore, decide that no such power exists?

It is true that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it can not be doubted that the effort would have been made by the framers of the Constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

The idea is utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.

No one is so visionary as to dispute the assertion that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion applied to the exigencies of the state as they arise. It is the science of experiment.

But if there is one maxim which necessarily rides over all others, in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbor's rights.

That "the safety of the people is the supreme law" not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety can not be guarded. On this principal it is, that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

It is true that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow from this circumstance that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.

But it is contended that if this power in the House of Representatives is to be asserted on the plea of necessity, the ground is too broad and the result too indefinite; that the executive and every coordinate, and even subordinate, branch of the Government may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness.

This is unquestionably an evil to be guarded against, and if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced.

But what is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness or repel insult is a supposition too wild to be suggested. And, accordingly, to avoid the pressure of these considerations, it has been argued that the right of the respective Houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence; while the absolute legislative power given to Congress within this district enables them to provide by law against all other insults against which there is any necessity for providing.

It is to be observed that, so far as the issue of this cause is implicated, this argument yields all right of the plaintiff in error to a decision in his favor; for, non constat, from the pleadings, but that this warrant issued for an offense committed in the immediate presence of the House.

Nor is it immaterial to notice what difficulties the negation of this right in the House of Representatives draws after it when it is considered that the concession of the power, if exercised within their walls relinquishes the great grounds of the argument, to wit, the want of an express grant and the unrestricted and undefined nature of the power here set up. For why should the House be at liberty to exercise an ungranted, an unlimited, and undefined power within their walls any more than without them? If the analogy with individual right and power be resorted to it will reach no further than to exclusion, and it requires no exuberance of imagination to exhibit the ridiculous consequences which might result from such a restriction imposed upon the conduct of a deliberative assembly.

Nor would their situation be materially relieved by resorting to their legislative power within that district. That power may, indeed, be applied to many purposes, and was intended by the Constitution to extend to many purposes indispensable to the security and dignity of the General Government; but they are purposes of a more grave and general character than the offenses which may be denominated contempts, and which, from their very nature, admit of no precise definition. Judicial gravity will not admit of the illustrations which this remark would admit of. Its correctness is easily tested by pursuing, in imagination, a legislative attempt at defining the cases to which the epithet contempt might be reasonably applied.

But although the offense be held undefinable, it is justly contended that the punishment need not be indefinite. Nor is it so.

We are not now considering the extent to which the punishing power of Congress by a legislative act may be carried. On that subject the bounds of their power are to be found in the provisions of the Constitution.

The present question is, What is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?

Analogy and the nature of the case furnish the answer—"the least possible power adequate to the end proposed," which is the power of imprisonment. It may at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement, since commitment alone is the alternative where the individual proves contumacious. And even to the duration of imprisonment a period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows that imprisonment must terminate with that adjournment.

This view of the subject necessarily sets bounds to the exercise of a caprice which has sometimes disgraced deliberative assemblies, when under the influence of strong passions or wicked leaders, but the instances of which have long since remained on record only as historical facts, not as precedents

for imitation. In the present fixed and settled state of English institutions there is no more danger of their being revived, probably, than in our own.

But the American legislative bodies have never possessed or pretended to the omnipotence which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under the specious appearance of merited resentment.

If it be inquired what security is there that, with an officer avowing himself devoted to their will, the House of Representatives will confine its punishing power to the limits of imprisonment, and not push it to the infliction of corporal punishment, or even death, and exercise it in cases affecting the liberty of speech and of the press, the reply is to be found in the consideration that the Constitution was formed in and for an advanced state of society and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments. It is not therefore, reasoning upon things as they are, to suppose that any deliberative assembly constituted under it would ever assert any other rights and powers than those which had been established by long practice and conceded by public opinion. Melancholy, also, would be that state of distrust which rests not a hope upon a moral influence. The most absolute tyranny could not subsist where men could not be trusted with power because they might abuse it, much less a government which has no other basis than the sound morals, moderation, and good sense of those who compose it. Unreasonable jealousies not only blight the pleasures, but dissolve the very texture of society.

But it is argued that the inference, if any, arising under the Constitution is against the exercise of the powers here asserted by the House of Representatives; that the express grant of power to punish their Members, respectively, and to expel them, by the application of a familiar maxim, raises an implication against the power to punish any other than their own Members.

This argument proves too much; for its direct application would lead to the annihilation of almost every power of Congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible. Yet there is an express grant of power to punish in one class of cases and one only, and all the punishing power exercised by Congress in any cases, except those which relate to piracy and offenses against the laws of nations, is derived from implication. Nor did the idea ever occur to any one that the express grant in one class of cases repelled the assumption of the punishing power in any other.

The truth is that the exercise of the powers given over their own members was of such a delicate nature that a constitutional provision became necessary to assert or communicate it. Constituted, as that body is, of the delegates of confederated States, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interests of the State which sent him.

In reply to the suggestion that on this same foundation of necessity might be raised a superstructure of implied powers in the Executive and every other Department, and even ministerial officer of the Government, it would be sufficient to observe that neither analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body. Even corruption anywhere else would not contaminate the source of political life. In the retirement of the Cabinet it is not expected that the Executive can be approached by indignity or insult; nor can it ever be necessary to the Executive, or any other Department, to hold a public deliberative assembly. These are not arguments; they are visions which mar the enjoyment of actual blessings, with the attack or feint of the harpies of imagination.

As to the minor points made in this case, it is only necessary to observe that there is nothing on the face of this record from which it can appear on what evidence this warrant was issued. And we are not to presume that the House of Representatives would have issued it without duly establishing the fact charged on the individual. And, as to the distance to which the process might reach, it is very clear that there exists no reason for confining its operation to the limits of the District of Columbia; after passing those limits, we know no bounds that can be prescribed to its range but those of the United States. And why should it be restricted to other boundaries? Such are the limits of the legislating powers of that body; and the inhabitant of Louisiana or Maine may as probably charge them with bribery and corruption, or attempt, by letter, to induce the commission of either, as the inhabitant of any other section of the Union. If the inconvenience be urged, the reply is obvious; there is no difficulty in observing that respectful deportment which will render all apprehension chimerical.

1608. The case of Hallet Kilbourn, a contumacious witness in 1876.

Form of subpoena duces tecum issued in Kilbourn case.

In the Kilbourn case the subpoena was attested for the Clerk by deputy.

The witness Kilbourn was arraigned without previous adoption of a form.

The House denied to Kilbourn the services of counsel at his arraignment for contempt.

On March 14, 1876,[1] Mr. John M. Glover, of Missouri, from the Select Committee on the Real Estate Pool and Jay Cooke Indebtedness, which had been empowered "to send for persons and papers," made to the House a "partial report," stating that it had caused a subpaena duces tecum to be issued and duly served on one Hallet Kilbourn, a resident of this District. The subpoena was in the words and figures following:

HALLET KILBOURN:

We command and strictly enjoin you that, laying aside all manner of business and excuses whatsoever, you appear in your proper person before the select committee of the House of Representatives, appointed on the 28th day of January, A. D. 1876, of which Hon. John M. Glover is chairman, at their room in the Capitol—the room of the Committee on Mines and Mining—in the city of Washington, D. C., on Saturday, the 4th day of March, A. D. 1876, at the hour of 10 o'clock a.m., of said day, to testify what you know in regard to the matters to be inquired of by said committee; and that you also diligently and carefully search for, examine, and inquire after, and bring with you and, produce at the time and place aforesaid, the certain deeds and deeds of trust, declarations of trust, and "printed papers" referred to therein, relating to the following squares, parts of squares, lots, and parcels of ground, or real property, situate in the city of Washington, in the District of Columbia, to wit, all the property described in the paper writing hereto attached, marked "Exhibit A," and made a part of this subpoena, also relating to any other property purchased or sold by you as trustee for either the "real estate pool "in which the firm of Jay Cooke & Co., or Messrs. Stewart, Hillyer & Sunderland, or either of them, had an interest, together with all copies, drafts, and vouchers relating to said documents, and all other documents, letters, and paper-writings whatsoever, including bank books, bills of exchange, bank checks, stubs of checks, ledgers, blotters, day books, and other books of accounts or maps, that can or may afford any information or evidence relating to the said matters to be inquired of by said committee, belonging to you, or subject to your control, either individually, or as trustee, or as a member of the firm of Kilbourn. & Latta.

Herein fail not and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 28th day of February, A. D. 1876.

[SEAL.]

MICHAEL C. KERR, *Speaker.*

Attest:

GEO. M. ADAMS, *Clerk.*

By GREEN ADAMS, *Chief Clerk.*

The Exhibit A follows, and then the report of the committee proceeds to state that said Kilbourn appeared as a witness before the committee at 10 a. m., March 4, 1876, and to give extracts of testimony showing the interrogatories and replies of the witness. This testimony shows that the witness declined to produce books and papers and to answer certain questions, on the ground that the subject involved was a purely private matter and had no relation, in the remotest degree, to any public interest whatsoever.

[1] First session Forty-fourth Congress, Journal, pp. 578–588; Record pp. 170–1708.

The committee closed their partial report by stating that it was necessary, for the efficient prosecution of the inquiry ordered by the House, that said Hallet Kilbourn should be required to respond to the subpoena duces tecum, and answer the questions which he had refused to answer, and that there was no sufficient reason why the witness should not obey said subpoena duces tecum and answer the questions he had declined to answer, and that his refusal as aforesaid was in contempt of this House.

This resolution accompanied the report:

Resolved, That the Speaker issue his warrant, directed to the Sergeant-at-Arms attending this House or his deputy, commanding him to take into custody forthwith, wherever to be found, the body of Hallet Kilbourn, and him bring to the bar of the House to show cause why he should not be punished for contempt, and in the meantime to keep the said Kilbourn in his custody to wait the further order of this House.

This resolution was agreed to without debate or division.

On the same day[1] the Sergeant-at-Arms appeared at the bar of the House having in custody, as therein commanded, the body of Hallet Kilbourn.

Whereupon the said Kilbourn was arraigned and the following interrogatory propounded to him by the Speaker:

Mr. Kilbourn, you are presented at the bar of the House, upon the order of the House, under arrest on an alleged breach of the privileges of the House in refusing to answer certain questions propounded to you by a committee of the House, which questions that committee was authorized by the House to ask. It is my duty now, by authority of the House, to ask you whether you are now ready to answer those questions before the committee.

Mr. Kilbourn then stated that the proceedings were of great importance to him, and he would respectfully request that he might be represented by his counsel, Judge Black, of Pennsylvania, and David Dudley Field, of New York.

Mr. Horace F. Page, of California, moved that the request be granted. In the debate it was urged against this Motion[2] that it was not the practice of the House to permit such proceeding, the prisoner at the bar being usually permitted to have read his reasons for not responding to the demands. On the other hand, it was argued[3] that this was in spirit, although not technically, a criminal proceeding, and. the prisoner had a constitutional right to be represented as he requested.

On motion of Mr. Glover, the motion of Mr. Page was laid on the table, yeas 117, nays 74.

1609. The case of Hallet Kilbourn, continued.

When arraigned the witness Kilbourn submitted a written, unsworn answer, which does not appear in the Journal.

The journal contains no reference to the act of the Speaker in certifying the case of the witness Kilbourn to the district attorney.

Then, on motion of Mr. Nathaniel P. Banks, of Massachusetts, leave was granted said Kilbourn to make his statement[4] in writing, to be read at the Clerk's desk.

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[1] Journal, pp. 589–591; Record, p. 1712–1716.

[2] By Mr. William S. Holman, of Indiana.

[3] By Mr. George F. Hoar, of Massachusetts.

[4] This statement was not printed in the Journal, but is found in the Record. Journal., p. 591; Record, p. 1715.

In this statement he admitted that the House, as well as the Senate, had originally the power to try and punish for all contempts that might be committed against it; and, as to contempts generally, each House was still in the possession of the same jurisdiction which it had from the beginning; but, as regarded the particular offense which a witness committed by refusing to obey a subpoena or to answer a proper question, the Revised Statutes [1] had declared it to be an indictable misdemeanor and transferred the whole power of trial and punishment to the criminal courts of the District. Therefore the House could do nothing but certify the facts found by the committee. The witness further denied the right of the House to investigate private business arbitrarily; but if either the committee or the House would assert that the production of his private papers, or the revelation of his private business, would promote any public interest, or if any private individual would assert on oath that the papers asked for would lead to the detection of corruption, he would respond freely to all demands for information or papers.

The answer of the witness does not appear to have been under oath.

The Speaker then propounded to the witness the interrogatories which he had refused to answer:

Mr. Kilbourn, are you now prepared to answer, upon the demand of the proper committee of the House, "where each of these five members reside," meaning the members of the pool? Are you prepared to produce, in obedience to the subpoena duces tecum, the records which you have been required by the committee to produce?

The witness declining to answer the said interrogatories, Mr. Glover submitted the following resolution, which was agreed to:

Resolved, That Hallet Kilbourn, having been heard by the House pursuant to the order heretofore made requiring him to show cause why he should not answer the questions propounded to him by the committee and respond to the subpoena duces tecum by obeying the same, and having failed to show sufficient cause why he should not answer said questions and obey said subpoena duces tecum as aforesaid, be, and is therefore, considered in contempt of the House because of said failure.

Mr. Glover also submitted the following resolution, which was agreed to:

Resolved, That in purging himself of the contempt for which Hallet Kilbourn is now in custody, the said Kilbourn shall be required to state to the House whether he is now willing to appear before the committee of this House to whom he has hitherto declined to obey a certain subpoena duces tecum, and answer certain questions and obey said subpoena duces tecum, and make answers to said questions; and if he answers that he is ready to appear before said committee and obey said subpoena duces tecum and answer said questions, then said witness shall have the privilege to so appear and obey and answer forthwith or so soon as said committee can be convened; and that in the meantime the witness remain in custody; and in the event that said witness shall answer that he is not ready to so appear before said committee and obey said subpoena duces tecum and make answer to said questions as aforesaid, then that said witness be recommitted to the said custody for the continuance of such contempt; and that such custody shall continue until the said witness shall communicate to this House, through said committee, that he is ready to appear before said committee and make such answer and obey said subpoena duces tecum, and that in executing this order the Sergeant-at-Arms shall cause the said Kilbourn to be kept in his custody in the common jail of the District of Columbia.

On March 28, 1876,[2] the Speaker, by unanimous consent, laid before the House a letter from H. H. Wells, United States attorney for the District of Columbia,

[1] Revised Statutes, section 102.

[2] Journal, pp. 680–682; Record, pp. 2008–2020.

stating that the grand jury had found against Hallet Kilbourn an indictment in five counts:

(1) Failure to produce certain papers before the House committee; (2) refusing to answer certain questions before said committee; (3) refusing to answer certain questions before the House of Representatives; (4) failure to produce papers and refusal to answer questions before the committee; (5) refusal to answer the questions and produce the books and papers before the House of Representatives.

On the same day the Speaker also laid before the House a communication from John G. Thompson, Sergeant-at-Arms, reporting that the United States marshal for the District of Columbia had appeared with a warrant issued by the supreme court of said District for Hallet Kilbourn and had requested that he be admitted to the presence of Kilbourn in the jail, that the said Kilbourn might, under the terms of the warrant, be taken from the jail and before the court to be tried on the criminal charge. The Sergeant-at-Arms stated that he had declined to accede to the request, since the effect of such action would be to release Kilbourn from his custody by an officer of the House of Representatives. A copy of the warrant was appended to the letter, but does not appear in the Journal.

Mr. Glover thereupon submitted this resolution:

Resolved, That Hallet Kilbourn, a recusant witness, having by this House been adjudged guilty of a contempt of its authority by reason of his refusal to answer certain questions and refusing to produce, in answer to a subpoena duces tecum, certain documents, books, papers, etc., before a special investigating committee of this House, and said Kilbourn, because of said contempt and the judgment of this House, being now by its order and said judgment in the custody of the Sergeant-at-Arms in the common jail of the District of Columbia, there to remain in said custody until he shall communicate to this House, through said committee, that he is ready to appear before said committee and make answer to said questions and obey said subpoena duces tecum: Therefore, because of the facts and premises aforesaid, the said Sergeant-at-Arms is ordered to retain the custody aforesaid of said witness, and not to part with his custody or deliver him up to any other person, officer, court, or tribunal until the further order of this House.

The resolution was debated at length. Mr. Jephtha D. New, of Indiana, said, in reply to the contention of the witness that no person had filed allegations that the public interest demanded production of the papers or the answering of the questions, that the resolution authorizing the investigation of the real estate pool had recited that the Government was a creditor of Jay Cooke & Co., and therefore concerned in the investigation of the real estate pool, which was part of their assets.[1] The question of the right of the House to punish for contempt was considered at length, as well as the bearings of the law relating to witnesses.

Mr. Stephen A. Hurlbut, of Illinois, proposed, as a substitute to the resolution offered by Mr. Glover, a preamble reciting the fact of Kilbourn's committal by order of the House, and further reciting that in accordance with the provisions of law the Speaker had certified[2] to the district attorney the facts pertaining to the case, and a presentment had been found by the grand jury, and a resolution directing the release of Kilbourn and the delivery of him to the marshal of the District.

The House refused to agree to this substitute, yeas 33, nays 191, and the original resolution presented by Mr. Glover was then agreed to.

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[1] For terms of this resolution, see Journal, p. 578.

[2] The Journal does not contain a record of the Speaker's certification.

On April 3,[1] by a motion to suspend the rules, Mr. Glover attempted to have passed a resolution providing limitations on the diet furnished the prisoner; but the resolution failed to command the necessary two-thirds vote.

On April 12,[2] the Speaker laid before the House a letter from the Sergeant-at Arms reporting that a writ of habeas corpus had been served upon him commanding him to produce the body of Hallet Kilbourn before one of the justices of the Supreme Court of the District of Columbia at 10 a.m. April 12, 1876. The Sergeant-at-Arms requested instructions, and attached to his letter a copy of the writ. This copy is printed in the Journal.

Mr. New, by unanimous consent, presented a resolution, which was agreed to, referring the matter to the Judiciary Committee with instructions for early action.

On April 15,[3] Mr. Frank H. Hurd, of Ohio, from the Committee on the Judiciary, made a report recommending the adoption of the following preamble and resolution:

Whereas one Hallet Kilbourn was subpoenaed to testify in a certain investigation ordered by this House before a committee duly authorized to send for persons and papers; and whereas during his examination as a witness the said Hallet Kilbourn refused to answer certain questions propounded to him as such witness by said committee, and to produce certain books and papers which he was ordered by said committee to produce; and whereas for such refusal the House of Representatives has adjudged the said Hallet Kilbourn to be in contempt of its authority and has ordered him into custody until he shall purge himself of said contempt and answer the questions as propounded and produce the papers and books ordered to be produced; and whereas said committee is still engaged in the investigation which it was ordered to make by the House, and is unable to complete the same because of the contumacy of the witness; and whereas the said Hallet KiIbourn is now in execution by the legal process of this House as aforesaid; and whereas the Chief Justice of the Supreme Court of the District of Columbia has issued a writ of habeas corpus to the Sergeant-at-Arms of this House, directing him to produce before the said judge the body of the said Kilbourn. Therefore,

Be it resolved, That the Sergeant-at-Arms be directed to make a careful return of said writ, setting out the causes of the detention of said Kilbourn, and to retain the custody of his body, and not to produce it before the said judge or court without further order of this House.

This resolution was discussed at length[4] on the same and succeeding day. It was urged that the English precedents for a hundred and fifty years as well as the American precedents were in favor of a course of action different from that proposed by the majority. Parliament since 1704 had not refused to bring the body into court.

Mr. J. R. Tucker, of Virginia, moved to amend by directing the Sergeant-at-Arms to appear by counsel before the court and raise question as to the legality of the writ of habeas corpus, meanwhile retaining custody of the body of said Kilbourn.

This proposition was disagreed to, and after exhaustive debate, the following resolution, offered by Mr. William P. Lynde, of Wisconsin, was agreed to[5] as a substitute—yeas, 166; nays, 75—and the resolution of the Committee on the Judiciary as amended was then agreed to:

Resolved, That the Sergeant-at-Arms be, and he is hereby, directed to make careful return to the writ of habeas corpus in the case of Hallet Kilbourn that the prisoner is duly held by authority of the

[1] Journal, p. 736; Record, p. 2170. This action would seem to indicate that such a resolution was not considered privileged.

[2] Journal, pp. 789, 790; Record, p. 2417.

[3] Journal, pp. 807; 808, Record, p. 2482.

[4] Record, pp. 2483–2500, 2513–2532.

[5] Journal, pp. 813, 814; Record, p. 2532.

House of Representatives to answer in proceedings against him for contempt, and that the Sergeant-at-Arms take with him the body of mid Kilbourn, before said court when making such return as required by law.

1610. The case of Hallet Kilbourn, continued.

While confined in jail for contempt, the witness Kilbourn was released by habeas corpus proceedings, the court intimating that the punishment of law superseded the right of the House to punish.

In making return in the habeas corpus proceedings in the Kilbourn, the Sergeant-at-Arms produced the body of the prisoner.

On April 19[1] the Speaker laid before the House a communication from the Sergeant-at-Arms in which the latter reported to the House that he had made a careful return of the writ of habeas corpus, setting out in detail the facts relating to his detention, and that said Kilbourn was in his custody by virtue of an adjudication of the House finding him guilty of contempt of its authority. The Sergeant-at-Arms further stated that he produced the body of said Kilbourn and presented it to the judge who had issued the writ. Thereupon the judge ordered Kilbourn, into the custody of the Marshal of the District of Columbia, who immediately took possession of his body.

A question was made that a copy of the return should be appended to the letter of the Sergeant-at-Arms, and the Speaker[2] said that this should be done to perfect the record.[3]

On April 28[4] a letter from the Sergeant-at-Arms, transmitting the decision of the Chief Justice of the Supreme Court of the District of Columbia, in the matter of Hallet Kilbourn's petition for a writ of habeas corpus, was laid before the House.

On May 2[5] the House declined to accept an offer of Kilbourn to appear before the committee and testify and furnish such information as his books might contain.

The opinion of Chief Justice Carter "begins by stating that the real question involved is whether the House of Representatives possessed jurisdiction for punishment over the person of the relator. It might be regarded in the light of unvarying authority that punishment for contempt within the limitations of the jurisdiction of the House, whether the House was to be considered as a court or not, was conclusive of judgment, and might not be inquired into by writ of habeas corpus or otherwise. It was a right inherent in the jurisdiction of the tribunal, essential to its integrity and preservation, and inviolate from the interference of jurisdiction disconnected with the tribunal exercising it. The first inquiry would be whether the power of the House to inflict the punishment involved in its order had been transferred by

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[1] Journal, p. 821; Record, p. 2591.

[2] Michael C. Kerr, of Indiana, Speaker.

[3] This return was submitted April 20, 1876, and is printed in the Record but not in the Journal. Record, pp. 2646–2654.

[4] Record, p. 2818; Journal, p. 880.

[5] Journal, p. 905; Record, p. 2884.

[6] For full text of this opinion, see Digest of Decisions and Precedents (Smith's) Senate miscellaneous document, second session Fifty-third Congress, No. 278, pp. 549–552.

law to the adjudications of the courts.[1] By the law approved January 24, 1857,[2] it was provided that a recalcitrant witness should "in addition to the pains and penalties now existing" be liable to indictment for misdemeanor, and on conviction be punished by fine and imprisonment. The failure of the witness to testify being reported to the House, the statute made it the duty of the Speaker to certify the fact, under the seal of the House, to the district attorney. In the revision of the statutes (act of June 22, 1874) the last expression of legislation on this subject was embodied in sections 102 and 104 of the Revised Statutes.

The reasons for the statutory enactment seem to have been that the antecedent condition of the power was latent, undefined, and unpublished. Common justice to the citizen required that it should be defined and made known. Again, it was a truth well known to the constitutional student of the history of this Government that a large and intelligent portion of its statesmen have denied the implied power of either House of Congress to inflict any punishment.

The present statute had a further significance in that, for some reason, the words "in addition to the pains and penalties now existing," as found in the earlier act, have been dropped, leaving the punishment of the statute the sole penalty.

It might be objected that it was not in the power of Congress to supersede by law the authority residing in either branch to punish for contempt and inherited from the Constitution. But the act did not imply the abnegation of power on the part of the House or Senate to inflict punishment for contempt, but, on the contrary, recognized that power, and exercised it in denominating the offense a misdemeanor and punishing it as such.

There was nothing in the language or nature of the statute indicating that the penalty imposed by it was to operate as an addition to any penalty that might be inflicted by the House for the same offense. Such a purpose would seem to be in violation of the Constitution. The offense was a single act—the refusal to produce the papers and to give the residences and names of the members of the real estate pool. The relator could not be punished in the courts in the penalty of transgression, and also in the House to make him testify. With the judgment of the House in contempt, its power to punish terminated, and the punishment prescribed by law intervened.

1611. The case of Hallet Kilbourn, continued.

The attempt in 1876 to punish Hallet Kilbourn for declining to testify before a committee resulted in a decision of the Supreme Court denying that the House has an unlimited power to punish for contempt of its authority.

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[1] On February 18, 1871 (Third session Forty-sixth Congress, Record, p. 1754), when the House was providing for recompensing the attorney who had defended Members of the House against the suits of Hallet Kilbourn, John H. Reagan, of Texas, said: "On the question of contempt the House surrendered its jurisdiction of the matter to a petty court. The result was that the officers of the House and the Members of its committee were brought into court to answer for a trespass, instead of the House compe;ling the offending witness guilty of contempt to answer to the exclusive jurisdiction of this House. It was the folly and fault of this House in failing to vindicate its jurisdiction which has brought the Government, as well as the officers and Members of this House, into contempt."

[2] 11 Stat. L., p. 155.

The power of the House to punish for contempt is limited to the cases expressly defined by the Constitution.

In the Kilbourn case the court held that no witness could be punished for contumacy except in an inquiry which the House had power to make.

The House does not possess the general power to inquire into the private affairs of the citizen.

In the Kilbourn case the court decided that the resolution authorizing the investigation was in excess of the constitutional power of the House.

Kilbourn brought suit for false imprisonment against John G. Thompson,[1] Sergeant-at-Arms, and several Members of the House, and the case reached the Supreme Court of the United States, where an opinion was delivered by Mr. Justice Miller at the October term, 1880.[2] Beside the general issue, Thompson pleaded in justification that he acted as Sergeant-at-Arms of the House, in conformity with its rules and orders, and under command of the duly and properly attested warrant of the Speaker.[3] The opinion of the court denies that there is in neither branch of Congress an unlimited power to punish for contempt of their authority.

> The powers of Congress itself, when acting through the concurrence of both branches, are dependent solely on the Constitution. Such as are not conferred by that instrument, either expressly or by fair implication from what is granted, are "reserved to the States respectively, or to the people." Of course neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachments. No general power of inflicting punishment by the Congress of the United States is found in that instrument. It contains in the provision that "no person shall be deprived of life, liberty, or property without due process of law," the strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. An act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment would be conceded by all thinking men to be unauthorized by anything in the Constitution. That instrument, however, is not wholly silent as to the authority of the separate branches of Congress to inflict punishment. It authorizes each House to punish its own Members. By the second clause of the fifth section of the first article, "each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member, "I and by the clause immediately preceding, it "may be authorized to compel the attendance of absent Members, in such manner and under such penalties as each House may provide." These provisions are equally instructive in what they authorize and in what they do not authorize. There is no express power in that instrument conferred on either House of Congress to punish for contempts.

The court goes on to say that the advocates of this power have used two principal arguments—first, its exercise by the House of Commons; and, second, the necessity of such a power to enable the two Houses of Congress to perform the duties and exercise the powers which the Constitution has conferred on them.

The first argument is examined at length, and the conclusion is reached that the powers and privileges of the House of Commons on the subject of punishment

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[1] On March 3,1877, the House by resolution authorized the Sergeant-at-Arms to employ counsel in this case. (Second session Forty-fourth Congress, Journal, p. 678; Record, p. 2241.) Also on August 9, 1876, (fast session Forty-fourth Congress, Journal, p. 1413; Record, p. 5387).

[2] 103 U.S., pp. 170–205.

[3] This warrant is given in full. It quotes the resolution of the House, directs the execution of the order, and is given under the hand and seal of the Speaker, attested by the Clerk. See 103 U.S., p. 176.

for contempts rest on principles which have no application to other legislative bodies, and certainly have none to the House of Representatives of the United States.

As to the second argument, the court makes no decision, none being required by the circumstances of the case; but in passing the intimation is given that the English precedents do not give much aid to the doctrine that the power exists as one necessary to enable either House of Congress to exercise successfully the function of legislation.

The opinion then goes on:

As we have already said, the Constitution expressly empowers each House to punish its own Members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order.

So, also, the penalty which each House is authorized to inflict in order to compel the attendance of absent Members may be imprisonment, and this may be for a violation of some order or standing rule on that subject.

Each House is by the Constitution made the judge of the election and qualification of its Members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature.

The House of Representatives has the sole right to impeach officers of the Government and the Senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases.

Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizens.

The court goes on to describe the three departments of the Government—legislative, executive, and judicial—and to declare that in the preamble and resolution [1] under which the committee acted in the Kilbourn case the House of Representatives—

not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the Government, because it was in its nature clearly judicial.

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[1] The full text (see Journal, p. 578) is as follows:

"Whereas the Government of the United States is a creditor of the firm of Jay Cooke & Co., now in bankruptcy, by order and decree of the district court of the United States in and for the eastern district of Pennsylvania, resulting from the improvident deposits made by the Secretary of the Navy of the United States with the London branch of said house of Jay Cooke & Co. of the public moneys; and whereas a matter known as the 'real estate pool' was only partially inquired into by the late joint select committee to inquire into the affairs of the District of Columbia in which Jay Cooke & Co. had a large and valuable interest; and whereas Edwin M. Lewis, trustee of the estate and effects of said firm of Jay Cooke & Co., has recently made a settlement of the interest of the estate of Jay Cooke & Co., with the associates of said firm of Jay Cooke & Co., to the disadvantage and loss, as it is alleged, of the numerous creditors of said estate, including the Government of the United States; and whereas the courts axe now powerless, by reason of said settlement, to afford adequate redress to said creditors:

"*Resolved,* That a special committee of five Members of this House, to be selected by the Speaker, be appointed to inquire into the nature and history of said 'real estate pool' and the character of said settlement, with the amount of property involved in which Jay Cooke & Co. were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers, and report to this House.

The court points out that if the United States was a creditor of the defunct firm the only legal redress was a resort to the courts; and, in fact, the matter was then before the court. That the indebtedness resulted from the "improvidence" of a Cabinet officer did not change the nature of the suit, since no purpose of impeaching the Secretary was avowed. The House of Representatives could not know that the court was powerless to redress the creditors, since the matter was still pending, and even if the court were powerless the preamble and resolution suggests no remedy. If the real estate pool was charged with any crime or offense, the court alone could punish the members. The House had no authority to enter into this investigation into the private affairs of individuals who held no office under the Government.

> We are of opinion for these reasons [concludes the court] that the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of the Speaker, under which Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment is without any lawful authority.

The court then reviews the similar case of Anderson *v.* Dunn.

1612. The Senate ease of Elverton R. Chapman, a contumacious witness in 1894.

Instance wherein the Senate proceeded to an investigation of charges made in general terms against its membership by newspapers.

In 1894 the certification of alleged cases of contempt before a Senate committee was made without action of the Senate declaring the witness in contempt.

On May 17, 1894,[1] the Senate agreed to a resolution providing for the investigation of newspaper charges that there had been corruption in connection with the passage of the tariff bill, particularly in connection with the sugar schedule thereof. This resolution was in form as follows:

> Whereas, it has been stated in the Sun, a newspaper published in New York, that bribes have been offered to certain Senators to induce them to vote against the pending tariff bill; and
>
> Whereas, it has been stated in a signed article in the Press, a newspaper published in Philadelphia, that the sugar schedule has been made up, as it now stands in the proposed amendment, in consideration of large sums of money paid for campaign purposes to the Democratic party; therefore,
>
> *Resolved,* That a committee of five Senators be appointed to investigate these charges and to inquire further whether any contributions have been made by the so-called sugar trust, or any person connected therewith, to any political party for campaign purposes or to secure or defeat legislation, and with power to send for persons and papers and to administer oaths.
>
> *Resolved further,* That said committee be authorized to investigate and report upon any charge or charges which may be filed before it, alleging that the action of any Senator has been improperly influenced in the consideration of said bill, or that any attempt has been made to so influence legislation; and whether any Senator has been or is speculating in what is known as sugar stocks during the consideration of the tariff bill now before the Senate.

On May 29[2] the committee reported that Elisha J. Edwards and John S. Shriver had refused to answer pertinent interrogatories, and concluded:

> Wherefore the committee report and request that the President of the Senate certify as to each witness his aforesaid failure to testify and his aforesaid refusals to answer, and all the facts herein, under the seal of the Senate, to the United States district attorney for the District of Columbia, to the end that each of said witnesses may be proceeded against in the manner and form provided by law.

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[1] Second session Fifty-third Congress, Senate journal, p. 197; Record, pp. 4848–4851.

[2] Senate journal., pp. 214216; Record, pp. 5451–5459.

The Vice-President [1] decided that the report was not such as required the action of the Senate, and on appeal the decision was sustained.

Mr. Joseph N. Dolph, of Oregon, presented a resolution providing for the arrest and arraignment of Edwards as a contumacious witness, but the resolution was never brought to a vote.

On June 12 the committee reported that Elverton R. Chapman had refused to answer pertinent questions. No action was taken on this report by the Senate.[2] Mr. William V. Allen, of Nebraska, at this time offered in the Senate a resolution providing for the arrest and arraignment of Chapman, but no action was taken on it.

On June 21, 1894, the committee in a similar manner reported that Henry O. Havemeyer, John E. Searles, and John W. Macartney had refused to answer pertinent inquiries, and in the usual form used in the preceding cases, requested the President of the Senate to certify the cases.

In these cases, however, there were minority reports, a portion of the committee not agreeing that the questions at issue were pertinent or such as the committee had authority to ask. In these cases, also, the resolutions for the arrest and arraignment of the recalcitrants were offered but not acted on.

The above reports gave rise to considerable debate, Mr. David B. Hill, of New York, contending that the report should be acted on by the Senate before the President could be authorized to certify. In the preceding cases he had certified, but in this case the committee were not united. It was further contended by Mr. William E. Chandler, of New Hampshire, that it was questionable whether the statute executed itself, and used the seal of the Senate for that purpose without the action of the Senate. Mr. George F. Hoar, of Massachusetts, further objected that the Senate was laying down its constitutional rights in not itself compelling the witnesses to testify.[3] Mr. Hill also urged that the Senate, and not a divided committee, should determine whether there had been a refusal to answer material questions. The debate ceased without any action of the Senate and was not resumed.

The cases of all the witnesses mentioned above were certified by the President of the Senate, and indictments were found against them.

1613. The case of Elverton R. Chapman, continued.

In 1894 the power of punishing for contempt was fully discussed in the district court of appeals.

The indictment against Chapman was the subject of further legal proceedings, involving interesting questions of law. These questions, after being passed upon by the supreme court of the District of Columbia, were carried to the court of appeals of the District of Columbia, where a decision was rendered in an opinion by Mr. Chief Justice Alvey, which discusses at length the principles involved: [4]

This case comes into this court on an appeal specially allowed from the judgment of the court below, overruling a demurrer to the indictment against the appellant.

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[1] Adlai E. Stevenson, of Illinois.

[2] Senate journal, p. 238; Record, p. 6146.

[3] Senate Journal, pp. 254; Record, pp. 6639–6648.

[4] See Smith's Digest of Decisions and Precedents, second session Fifty-third Congress, Senate Miscellaneous Document No. 278, p. 822.

The appellant was indicted under section 102 of the Revised Statutes of the United States, providing for the prosecution and punishment of contumacious witnesses summoned to give testimony before either House of Congress or committees thereof. It is averred in the indictment that the appellant was summoned and appeared as a witness before a special committee of the Senate of the United States, in relation to a matter of inquiry before said committee, and that he refused to answer questions pertinent to the matter of inquiry referred to such committee.

The section of the Revised Statutes under which the indictment was found is as follows:

"SEC. 102. Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months."

In connection with the foregoing section 102 it is proper to read section 104 of the Revised Statutes, which is as follows:

"SEC. 104. Whenever a witness summoned as mentioned in section 102 fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

At the time the committee was raised and the subject-matter of inquiry was referred to it, the Senate had under consideration and debate the tariff act recently passed, known as the Wilson bill, with a very large number of proposed amendments thereto, reported from the Finance Committee of that body on the 20th of March, 1894; and among these amendments thus reported were certain proposed amendments providing for duties on sugar, different from the provisions in the bill as it had been passed by the House of Representatives and sent to the Senate. In the consideration of this matter, and in the rater, of duties that might be fixed to be paid on imported sugar, it was supposed that the American Sugar Refining Company was largely interested and that the market value of the stock of that corporation would be materially affected, the one way or the other, by the ultimate action and judgment of the Senate. In this state of affairs the matter became a topic of heated discussion with the public, and the press of the country teemed with imputations of bad faith and violated pledges, and some to the extent of charging attempted bribery and corruption, and that certain Senators were yielding to corrupt influences, and were acting and intended to act, in a manner derogatory to their high duties of Senators and legislators of the nation. With these charges and imputations daily repeated, the Senate was impelled by a proper sense of duty to itself and the country to institute the proper proceedings for maintaining its dignity, integrity, and purity as an important branch of the legislative department of the Government. For this purpose, and acting upon the immediate inciting cause of certain publications recited in the preamble, the following preamble and resolutions were passed, on the 17th of May, 1894, raising a special committee, and clothing it with power of full investigation.

[Here follow the preamble and resolution as given above.]

Investigation was commenced, and according to the averments of the indictment in the course of the investigation by the committee, the appellant was produced as a witness, being a member of a firm of stockbrokers in the city of New York, dealing in the stock of the American Sugar Refining Company, and was asked by the committee, or a member thereof for the committee, whether the firm of Moore & Schley, of which the witness was a member, had bought or sold what were known as sugar stocks, during the month of February, 1894, and after the first day of that month, for or in the interest, directly or indirectly, of any United States Senator; had the firm, during the month of March, 1894, bought or sold any stocks or securities known as sugar stocks, for or in the interest, directly or indirectly, of any United States Senator; had the said firm, during the month of April, 1894, bought or sold any stocks or securities known as sugar stocks, for or in the interest, directly or indirectly, of any United States Senator; had the said firm, during the month of May, 1894, bought or sold any stocks or securities known as sugar stocks, for or in the interest, directly or indirectly, of any United States Senator; was the said firm at that time carrying any sugar stock for the benefit of or in the interest, directly or indirectly, of any United States Senator. But the appellant, then and there, to wit, on the 9th day of June, 1894, each and all of said questions willfully refused to answer; and all of which said questions are averred to have been pertinent to the inquiry then and there being made by the committee under the resolution.

This, so far as we are informed, is the first case of an indictment found under section 102 of the Revised Statutes, or the act from which that section was formed. There have been many cases of contempt, on the part of witnesses, for refusing to answer questions on inquiries instituted by the Houses of Congress, since the passage of the original act of 1857, from which sections 102, 103, and 104 of the Revised Statutes are taken; but in no case prior to the present, so far as we are informed, have the proceedings reached the form of an indictment.

There is no serious objections urged to the form of the indictment. The great effort on the part of the appellant has been to show, and which has been urged with great ability, that the provisions of the statute, as embodied in section 102 of the Revised Statutes, are unconstitutional and void; and that the scope and nature of the inquiry authorized by the resolutions of the 17th of May, 1894, were not within the limits of the power of the Senate of the United States, and therefore void.

In support of the demurrer to the indictment several positions have been strongly and ingeniously urged in argument; but we shall consider and determine the case as fully embraced by three principal questions—

(1) "Is the section 102 of the Revised Statutes of the United States constitutional and valid?

(2) "Was the inquiry directed by the resolutions of the 17th of May, 1894, within the power of the Senate to execute by requiring witnesses to testify, and—

(3) "Were the questions propounded to the appellant, the witness, pertinent to the subject-matter of inquiry that the committee was charged to investigate?"

If either of those propositions be resolved in the negative, it would follow that the demurrer should have been sustained; but, on the other hand, if they are all resolved in the affirmative, it results that the demurrer was properly overruled.

(1) With respect to the first of these questions, we can entertain no doubt. The section of the Revised Statutes brought into question, with some unimportant omissions and changes of phraseology, embodies the first section of the act of Congress of the 24th of January, 1857, entitled "An act more effectually to enforce the attendance of witnesses on the summons of either House of Congress and to compel them to discover testimony." (11 Stat., 155.) The history of Congress is full of instances where difficulties had been experienced in compelling unwilling and contumacious witnesses to make disclosure of facts essential to Congressional action; and it was found that the ordinary and incidental powers that pertained to the Houses of Congress in their separate capacities were quite inadequate to meet the exigencies of many of the cases that occurred. It was for the remedy of this evil that the act of 1857 was passed.

That Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions can not admit of serious question. Congress is invested with all the legislative power of the Government, and each House also with certain other powers not legislative in their nature; and it is expressly provided that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the powers vested in it. (Const., art. 1, sec. 8, par. 18.) Under this grant of power, what more natural and appropriate, as a means of executing its powers and indeed necessary, than a statute providing for the discovery of evidence as the basis of action, and prescribing a punishment for those who condemn the authority of the body, and, by their contumacious conduct, obstruct the lawful exercise of its functions. We have no doubt of the power of Congress in this respect.

It has been, however, strongly urged in argument that the terms of the section 102 are sufficiently broad and comprehensive to include a class of witnesses protected and exempted by the provisions of Article V of the Constitution, and especially so urged when read, as it should be, in connection with the next succeeding section, 103 of the Revised Statutes, and therefore the section is void in toto. But it is not pretended that the appellant belongs to the class of witnesses contemplated by the article of the Constitution referred to; and if the contention of the appellant were conceded to be correct, as applied to a class of witnesses under different conditions, it would not follow necessarily that the statute should be stricken down in its entirety, because it may be susceptible of an unconstitutional application in certain cases that may possibly arise. This is not reasonable, nor is it in accordance with the rule of interpretation adopted by the Supreme Court of the United States as applied to a statute good on its face, but where, by reason of its general and comprehensive terms, it may be made, by construction, to apply to objects forbidden by the Constitution. In such case the statute win be allowed its full force and operation, as applicable to all cases, rightfully and constitutionally within its provisions, but such application

will be sustained as to those objects simply to which the statute is forbidden to extend. This is the rule as we understand it, upon which the Supreme Court acted in the State Freight Tax Cases, 15 Wall., 232; Supervisors *v.* Stanley, 105 U. S., 305, 313; Virginia Coupon Cases, 114 U. S., 269, and other cases that could be cited.

But we are not to be understood as conceding that any such rule of construction as that just stated is necessary to be invoked. It is not by any means necessary that section 103 should be read with or as part of section 102. The last-mentioned section stands alone and makes a complete provision by its own terms, and it is in no manner dependent upon section 103; and there is nothing in the terms of section 102 that renders it liable to constitutional condemnation, whatever may be thought of section 103. The statute must not be condemned as unconstitutional if by any reasonable construction of its terms it can be maintained as constitutional and valid. This is an undoubted rule of construction.

It has also been seriously contended in argument that the act of 1857, now embodied in the Revised Statutes, was an attempt on the part of Congress to delegate its power and jurisdiction, or the power and jurisdiction of the several Houses thereof, incident and belonging to it as a legislative body, to punish for contempts, to the courts, and therefore the statute is void. But to this we can not accede. The statute has never been understood, either by Congress itself or by the courts, as having any such purpose as that of an attempt to delegate the power of the Houses of Congress to commit for contempt of their authority. This is fully shown by the case of Irwin, who was, for refusing to testify, committed by order of the House of Representatives, in 1875, and who, unsuccessfully, attempted to be relieved on habeas corpus. And so the case of Kilbourn, which occurred in 1876, where the witness was committed to prison by the order of the House of Representatives for refusing obedience to a subpoena duces tecum, and to testify in regard to a matter referred to a committee for investigation, and for which imprisonment an action was brought. In that case, which underwent great consideration by the Supreme Court, it was never suggested or intimated that Congress held, or had attempted, to divest itself of, and relegated to the courts, the power to punish for contempts, in cases to which the power of each House properly extends, by the passage of the act of 1857. That Congress could not divest itself, or either House thereof, of that essential incidental power inherent in it may well be conceded. It is a constitutional incident of the body; but it can only be exercised in such cases as to which the power of the Houses in their separate capacities extends.

But the existence of such inherent power in the House of Congress did not preclude the passage of the act of 1857, in the exercise of the ordinary legislative power of the two Houses of Congress, prescribing additional pains and penalties to those already existing by virtue of the inherent powers of the Houses of Congress, as legislative bodies, nor did Congress express its meaning in any doubtful terms. By the very terms of the original act of 1857 it was declared that the recusant witness should, in addition to the pains and penalties then existing, be liable to indictment as and for a misdemeanor in any court of the United States having jurisdiction thereof, etc. In the Revised Statutes the terms "in addition to the pains and penalties then existing" have been omitted, but this omission can certainly not operate to make the statute import a sense that it never was intended to have nor consistently with the Constitution could have. It is only by showing that the statute, as it stands in the statute book, is void, that the objection to it is available as a defense to the indictment; and the effort to show it void has utterly failed.

(2) We come now to the question whether the matter of inquiry directed by the resolutions of the 17th of May, 1894, was within the power of the Senate to execute by requiring witnesses to testify. And in considering this question we must confess there is great difficulty in clearly and distinctly marking the boundaries within which either House of Congress may act with coercive power to compel the disclosure of facts deemed important to it and the rights of the citizen to exemption from inquiry into his private affairs. The question was most elaborately considered in the case of Kilbourn *v.* Thompson (103 U. S., 168), but that case was presented in somewhat different aspect from the present.

It must, however, be considered as established by that case that while within certain limits and for certain purposes either House of Congress may, where the examination of witnesses and the production of papers are necessary to the performance of its legal and constitutional functions, fine and imprison a contumacious witness, yet the Constitution invests neither House with any general power to punish for contempt. In that case it was also held that the question whether either House of Congress, acting in the case of a witness refusing to testify, had proceeded within the limits and scope of its constitutional authority, is a judicial question and one not to be concluded by the judgment of

the body itself. In other words, that the House taking action in such case is a body of limited and restricted powers and whenever powers are exercised in excess or beyond the limits of those constitutionally possessed by the House its action can afford protection to no one acting under its unauthorized order or command. In the Kilbourn case the resolution of the House of Representatives under which Kilbourn was summoned and examined as a witness, directed the committee to examine into the history and character of what was called "the real-estate pool of the District of Columbia;" and the preamble recited, as the grounds of the investigation, that Jay Cooke & Co., who were debtors of the United States, and whose affairs were then in litigation in a bankrupt court, had an interest in the pool or were creditors of it. The subject-matter of the investigation, therefore, was of judicial cognizance and not legislative, and this was shown on the face of the resolution; and it was held that there existed no power in Congress, or in either House thereof, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, to investigate the affairs of that partnership, and consequently there was no authority in the House to compel a witness to testify on the subject. It followed that the order of the House declaring Kilbourn guilty of a contempt of its authority and ordering his imprisonment was void, and afforded no protection to the Sergeant-at-Arms in an action against him for false imprisonment. It was emphatically declared by the court "that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possess the general power of making inquiry into the private affairs of the citizen."

In the case now before us the subject-matter referred to the committee for investigation was altogether different in its nature and involved questions and consequences wholly unlike the subject-matter referred to the committee in Kilbourn's case. It was a matter immediately and most seriously affecting the Senate itself and the great legislative trust confided to its members by the people or the States of the Union. The dignity of the body and the integrity and purity of some of its members were openly and seriously questioned, and that, too, in a manner well calculated to destroy public confidence in and bring odium and reproach upon that important branch of our national legislature. The charges or imputations referred to in the resolutions, the truth of which was made the subject of inquiry, not only affected pending legislation with distrust, but were of a nature, if found to be true, to subject members of the body to reprimand or expulsion, and other guilty parties to punishment, at the hands of the Senate. But nothing could be done until inquiry was made and the facts brought to light. A preliminary investigation was therefore necessary. And for the purposes of the inquiry no more formal proceedings were required than those adopted by the Senate. No technical formality was required and no specific charges could, in justice and fairness, be formulated against any Member of the Senate or any other person until the facts could be ascertained upon which to proceed, and it certainly can not be true that the Senate is powerless in such case to elicit the facts. What the ultimate action of the Senate should or may be upon the facts when ascertained is not the question for the court to determine, but simply whether the inquiry instituted forms a subject-matter properly and constitutionally within the cognizance and jurisdiction of the Senate. That the subject-matter was within its jurisdiction we entertain no doubt. And having power and jurisdiction of the subject-matter of inquiry, the Senate by its committee had full and ample power to compel the attendance of the appellant as a witness and to require him to answer any question pertinent to the matter of inquiry embraced by the resolutions. There is no pretense that the answers to the questions propounded would or could criminate the witness in any way, and it was his clear duty as a citizen to obey the law and to answer the questions without respect to the persons to be affected. His refusal was at his peril and he must abide the consequences prescribed by the statute.

It has been strongly insisted in argument that because the specific ulterior purpose of the investigation was not avowed or declared on the face of the resolutions, and thus made to appear affirmatively and in terms, that the Senate by instituting the investigation intended the exercise of some of its acknowledged powers, such as the expulsion or censure of its Members, the punishment of parties for attempting to corrupt Members, or for conduct otherwise calculated to bring the body into scandal and contempt with the people, therefore there was no power to require disclosure of facts, though pertinent to the inquiry, authorized to be made. But to the correctness of this contention we can not consent. The subject-matter of inquiry being within the jurisdiction of the Senate, the court can not assume that the body intended the investigation as a mere idle, prying, inquisitive proceeding, without ultimate aim or object. We must assume that the object and design of the inquiry was intended for legitimate purposes and not for the accomplishment of that which would be unlawful.

The resolutions of reference to the committee do not, in terms, require the committee to report their proceedings to the Senate. But that was necessarily a part of their duty, for it is an established principle "that when their acts and proceedings are agreed to they become the acts and proceedings of the House; it is consequently the duty of committees both to proceed under the authority given them and to report their proceedings to the House." (Cush. Parl. Law, sec. 1930.)

(3) The last question to be considered is whether the questions propounded to the appellant were pertinent to the subject-matter of inquiry before the committee. This question would seem to need but little to be said in regard to it. Each and all of the questions had reference to and sought to elicit the information whether the stockbrokers' firm, to which the appellant belonged, had bought or sold during the months of February, March, April, and May, 1894, sugar stocks for or in the interest, directly or indirectly, of any United States Senator, or were carrying such stocks for said Senators. If these questions had been answered in the negative, this fact thus proved would have gone far toward relieving Senators of the charge or imputation of using and abusing their position as Senators for the purpose of making selfish gain in the stock market. While, on the other hand, if the answers had been in the affirmative, the fact thus disclosed would have subjected the Senator or Senators involved not only to the animadversion of the public, but to censure, if not expulsion, from the body to which he or they belonged by his or their fellow Senators. This was plainly within the scope of the inquiry, and was that to which the resolution referred when it directed the committee to inquire "whether any Senator has been or is speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate." Whether the questions propounded by the committee or by the Senate were pertinent is a judicial question and is an essential element in the offense charged; but we are clearly of opinion that the questions set out in the indictment and which the appellant refused to answer were all pertinent to the inquiry given in charge to the committee.

Upon the whole, this court is of the opinion that the indictment is good and sufficient, and that the demurrer thereto was properly overruled by the court below; and that the demurrer in the similar case of the United States against John W. Macartney, also on appeal to this court, and submitted with and to be determined on the arguments in the case against Chapman, the present appellant, was also properly overruled by the court below; and that the judgments entered on the demurrers in both cases must be affirmed; and it is so ordered.

Judgments affirmed.

The case was carried to the Supreme Court of the United States, and at the October term of 1896 that tribunal decided—

that this tribunal has no jurisdiction to review, on writ of error, a judgment of the court of appeals of the District of Columbia in a criminal case under section 8 of the act of February 9, 1893.[1]

1614. The case of Elverton R. Chapman, continued.

In 1894 Elverton R. Chapman was committed by the courts for contempt of the United States Senate in declining, as a witness, to answer a pertinent question.

In the Chapman case the Supreme Court held that the power to punish for contempt remains with each House in cases to which its power properly extends.

Each House possesses the inherent power of self protection.

An inquiry as to the integrity of Senators was held to be within the power of the Senate, and questions relating thereto were not unreasonable intrusions into the affairs of the citizen.

It is not essential that a resolution authorizing an investigation of the conduct of Senators shall specify censure or expulsion in order that the Senate may constitutionally compel testimony.

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[1] 164 U. S., p. 436.

Chapman, being committed, applied to the Supreme Court of the United States for a writ of habeas corpus. On April 19, 1897,[1] the court rendered its decision, and held in the first place that sections 102 and 104 of the Revised Statutes, when reasonably construed, were not open to the objection that they conflicted with the Constitution of the United States, and that Congress possesses the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legislative functions.

The decision further found that—

while Congress can not divest itself or either of its Houses of the inherent power to punish for contempt it may provide that contumacy in a witness called to testify in a matter properly under consideration by either House and deliberately refusing to answer questions pertinent thereto shall be a misdemeanor the United States.

The opinion, delivered by Mr. Chief Justice Fuller, has the following discussion of certain phases of the case:

Under the Constitution the Senate of the United States has the power to try impeachments; to judge of the elections, returns, and qualifications of its own Members; to determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member; and it necessarily possesses the inherent power of self-protection.

According to the preamble and resolutions, the integrity and purity of Members of the Senate had been questioned in a manner calculated to destroy public confidence in the body and in such respects as might subject Members to censure or expulsion. The Senate, by the action taken, signified its judgment that it was called upon to vindicate itself from aspersion and to deal with such of its members as might have been guilty of misbehavior and brought reproach upon it, obviously had jurisdiction of the subject-matter of the inquiry it directed and power to compel the attendance of witnesses, and to require them to answer any question pertinent thereto. And the pursuit of such inquiry by the questions propounded in this instance was not, in our judgment, in violation of the security against unreasonable searches and seizures protected by the fourth amendment.

In Kilbourn *v.* Thompson (103 U. S., 168), among other important rulings, it was held that there existed no general power in Congress, or in either House, to make inquiry into the private affairs of a citizen; that neither House could, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, investigate the affairs of that partnership as a mere matter of private concern; and that consequently there was no authority in either House to compel a witness to testify on the subject. The case at bar is wholly different. Specific charges publicly made against Senators had been brought to the attention of the Senate; and the Senate had determined that investigation was necessary. The subject-matter as affecting the Senate was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizen; they did not seek to ascertain any facts as to the conduct, methods, extent, or details of the business of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks and the particular stock named, was employed by any Senator to buy or sell for him any of that stock, whose market price might be affected by the Senate's action. We can not regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of either of the two Houses they can not be defeated on purely sentimental grounds.

The questions were undoubtedly pertinent to the subject-matter of the inquiry. The resolutions directed the committee to inquire "whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate." What the Senate might or might not do upon the facts when ascertained we can not say, nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative

[1]166 U. S., p. 661.

answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers.

Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a Member.

After a citation and comment on authorities, the opinion proceeds:

Counsel contends with great ability that the law under consideration is necessarily subject to being impaled on one or the other of two horns of a dilemma, either inflicting a fatal wound. The one alternative is that the law delegates to the District of Columbia criminal court the exclusive jurisdiction and power to punish as contempt the acts denounced, and thus deprive the Houses of Congress of their constitutional functions in the particular class of cases. The other alternative is that if the law should be interpreted as leaving in the Houses the power to punish such acts, and vesting in addition jurisdiction in the District criminal court to punish the same acts as misdemeanors, then the law is invalid because subjecting recalcitrant witnesses to be twice put in jeopardy for the same offense contrary to the fifth amendment.

The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, of course, constitutes a contempt of that body, and by the statute this is also made an offense against the United States.

The history of Congressional investigations demonstrates the difficulties under which the two Houses have labored, respectively, in compelling unwilling witnesses to disclose acts deemed essential to taking definitive action, and we quite agree with Chief Justice Alvey, delivering the opinion of the court of appeals, "that Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions;" and that it was to affect this that the act of 1857 was passed. It was an act necessary and proper for carrying into execution the powers vested in Congress and in each House thereof. We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt in cases to which the power of either House properly extended; but because Congress, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account.

Nevertheless, although the power to punish for contempt still remains in each House, we must decline to decide that this law is invalid because it provides that contumacy in a witness called to testify in a matter properly under consideration by either House and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States, who are interested that the authority of neither of their departments, nor of any branch thereof, shall be defied and set at naught. It is improbable that in any case cumulative penalties would be imposed, whether by way of punishment merely or of eliciting the answers desired, but it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offense, since the same act may be an offense against one jurisdiction and also an offense against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being diverso intuitu and capable of standing together.

1615. The President, by message, complained to the House that his secretary, immediately after delivering a message to the House, had been assaulted in the Capitol.

Discussion of the theory that the House has the inherent power to punish for contempts wherever committed.

On May 16, 1828,[1] Mr. George McDuffie, of South Carolina, from the select committee to whom was referred the message[2] of the President of the United States relative to an assault committed upon his private secretary, made a report accompanying and recommending the adoption of the following resolution:

Resolved, That the assault committed by Russel Jarvis on the person of John Adams, the private secretary of the President, in the Rotunda of the Capitol, immediately after the said John Adams had delivered a message from the President to the House of Representatives and while he was in the act of retiring from it, was a violation of privilege which merits the censure of this House.

Resolved, That it is not expedient to have any further proceedings in this case.

The committee decided that the act was in contempt of the authority and dignity of the House, involving not only a violation of its own peculiar privileges, but of the immunity which it was bound, upon every principle, to guarantee to the person selected by the President as the organ of his official communications to the House. The proceedings of Congress could not be more effectually arrested by preventing Members of either House from going to the Hall of their deliberations than they might be by preventing the President from making official communications essentially connected with the legislation of the country. The power of punishing for contempts was not peculiar to the common law of England, but belonged essentially to every judicial tribunal and legislative body. The power in question grows out of the great law of self-preservation and, from its nature, is not susceptible of precise definition and precise limitation.

The minority views, submitted by Mr. P. P. Barbour, of Virginia, agreed with the majority as to the facts of the case, but took the ground that it was not competent for the House to "punish Russel Jarvis for the assault upon the private secretary of the President as for a contempt to the House." The minority denied the doctrine of the inherent right of the House to punish for contempts, holding that the House had only such powers in this direction as were given by the Constitution. This instrument, which defined so carefully the privileges of the Members and the powers of the House to give itself organization and action, surely did not mean to leave the House "at liberty to range in the boundless field of wild and capricious precedent in search of power to punish its fellow-citizens." The Constitution had, moreover, declared that the trial of all crimes, except in cases of impeachment, should be by trial by jury, and that no man should be deprived of his life, liberty, or property without due process of law. The two Houses of Congress might remove any disorder or disturbance within their respective Chambers, so as to prevent any obstruction to the progress of their business, but they had not the power of imprisoning for contempt. But if they had this power, still it could not be extended to embrace any case beyond their own Chambers; for if it were, where would be the limits? The court, in the case of Anderson *v.* Dunn, give the answer. They say that they know no bounds to the process of this House for contempt but those of the United States. This principle could not be admitted to be correct. Tremendous would be that power which could drag before it any citizen from Maine to Florida and punish him for contempt, of which the sole criterion would be the discretion of the power punishing.

[1] First session Twentieth Congress, Congressional Debates, p. 2715.

[2] For this message see Journal, p. 587.

On May 23 Mr. Barbour moved to postpone the orders of the day in order to consider the question, his object being to test the sense of the House on the expediency of considering the question during the present session. The motion failed, 69 to 69. So the matter was not settled by the House.

1616. For assaulting a Member for words spoken in debate, Samuel Houston was censured by the House in 1832.

The complaint of a Member that he had been assaulted for words spoken in debate was made in the form of a letter to the Speaker accompanied by an affidavit.

After debate the House ordered a warrant to issue for arrest of a person who had violated its privileges by assaulting a Member.

Samuel Houston, arrested for a breach of privilege, was arraigned at the bar of the House, informed of the charge, and informed that he might summon witnesses and employ counsel.

On April 14, 1832,[1] the Speaker laid before the House a communication addressed to the House by Mr. William Stanberry, of Ohio, a Member, in which the latter said that on the previous night he was waylaid on the street near his boarding house, attacked, knocked down by a bludgeon, and severely bruised and wounded by Samuel Houston, late of Tennessee, for words spoken in his place in the House of Representatives.

The letter being read, Mr. Joseph Vance, of Ohio, moved the following resolution, which was adopted, 106 yeas to 65 nays.

Resolved, That the Speaker do issue his warrant, directed to the Sergeant-at-Arms attending this House, commanding him to take in custody, wherever to be found, the body of Samuel Houston; and the same in his custody to keep, subject to the further order and direction of this House.

An affidavit of Mr. Stanberry was presented, wherein he made oath to the truth of the facts stated in his letter.

Mr. Vance's resolution was the subject of extended debate. He had followed the precedents of 1795 and 1818,[2] as he considered the present assault as gross a breach of privilege as the offering of a bribe. Mr. James K. Polk, of Tennessee, took the ground that the law of the District of Columbia was the proper remedy for the Member, and indorsed the sentiment that precedents from the House of Commons were repugnant to the spirit and genius of republican institutions. Among those who favored the resolution, Mr. Edward Everett, of Massachusetts, took the ground that the freedom of debate, the dearest privilege of freedom, was involved. Why had Congress left Philadelphia? Was it not because an insult had been offered a Member in a public theater because, as it was believed, of the part he had taken in public business? The legislature of Pennsylvania had promised to protect Congress if it would stay, but they determined to go where they could protect themselves.[3] If the time should ever come when the House would not assume the injuries inflicted on its Members as done to itself, the Constitution would no longer be worth living under.

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[1] First session Twenty-second Congress, Journal, pp. 590, 593, 595, 600, 604, 610, 713, 725, 730, 736; Debates, pp. 2511, 2534, 2540, 2548, 2550, 2563, 2822, 2839.

[2] See secs. 1599 and 1606 of this chapter.

[3] This evidently refers to the case of Mr. Randolph. (See sec. 2680 of Volume III.)

The resolution, as presented by Mr. Vance, was adopted by a vote of 145 yeas to 25 nays.

Pursuant to the resolution, a warrant was prepared, signed by the Speaker under his seal, attested by the Clerk, and delivered to the Sergeant-at-Arms, with orders forthwith to execute the same and make due return thereof to the House.

1617. The case of Samuel Houston, continued.

For the trial of Samuel Houston for contempt a committee on privileges reported on a method of procedure.

In 1832 the Speaker was empowered to administer the oath to witnesses in the contempt case of Samuel Houston.

For the trial of Samuel Houston a committe was appointed to examine witnesses at the bar of the House.

The House declined to permit Samuel Houston, on trial at its bar for contempt, to challenge the right of a Member to sit in the trial.

On April 16, the Speaker having announced to the House that the Sergeant-at-Arms had the body of Samuel Houston in custody, on motion of Mr. John Davis, of Massachusetts,

Resolved, That Samuel Houston be brought to the bar of the House to answer the charge of having assaulted and beaten William Stanberry, a Member of this House from the State of Ohio, for words spoken by said Stanberry in his place as a Member of this House, in a debate upon a question depending before the House, and that he be forthwith furnished by the Clerk with a copy of the said charge as set forth in the letter of said William Stanberry.

Samuel Houston was then brought to the bar of the House by the Sergeant-at-Arms, and the Speaker addressed him, informing him of the charge against him and that he would be allowed to employ counsel and summon witnesses.

He was then remanded and retired from the bar in the custody of the Sergeant-at-Arms; when

On motion of Mr. Davis, of Massachusetts, it was [2]

Resolved, That a committee of privileges, consisting of seven Members, be appointed and instructed to report a mode of proceeding in the case of Samuel Houston, who is now in custody by virtue of an order of this House, and that said committee have leave to execute the duty assigned them immediately.

The committee was constituted of Messrs. John Davis, of Massachusetts; William Drayton, of South Carolina; John W. Taylor, of New York; Henry A. Muhlenberg, of Pennsylvania; James M. Wayne, of Georgia; Clement C. Clay, of Alabama, and William W. Ellsworth, of Connecticut.

On April 17 Mr. Davis, from the committee, reported the mode of proceeding.

This report was in the form of an order,[3] which was adopted by the House and provided the following procedure:

Said Samuel Houston shall be again placed at the bar of the House, and the letter of William Stanberry shall be read to him; after which the Speaker shall put to him the following interrogatory:

Do you admit or deny that you assaulted and beat the said Stanberry, as he has represented in the letter which has been read, a copy of which has been delivered to you by order of the House?

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[1] For statement of Speaker in full see Journal, p. 595; Debates, p. 2540.

[2] Journal., p. 596.

[3] Journal, p. 600; Debates, pp. 2550–2553.

If the said Samuel Houston admit that he did assault and beat the said Stanberry as in said letter is represented, then the Speaker shall put to him the following interrogatory:

Do you admit or deny that the same assault and beating were done for and on account of words spoken by said Stanberry in the House of Representatives in debate?

But if the said Samuel Houston deny the assault and beating, or that the same were done for the cause aforesaid, or refuse or evade answering the said interrogatories, then the said William Stanberry shall be examined as a witness touching the said charge; after which the said Samuel Houston shall be allowed to introduce any competent evidence in his defense, and then any further evidence the House may direct shall also be introduced.

If parol evidence is offered, the witnesses shall be sworn by the Speaker and be examined at the bar, unless they are Members of the House, in which case they may be examined in their places. A committee shall be appointed to examine witnesses. The questions put shall be reduced to writing (by a person to be appointed for that purpose) before the same are proposed to the witness, and the answer shall also be reduced to writing. Every question put by a Member not of the committee shall be reduced to writing by such Member and be propounded to the witness by the Speaker, if not objected to; but if any question shall be objected to or any testimony offered shall be objected to by any Member, the Member so objecting and the accused or his counsel shall be heard thereon, after which the question shall be decided without further debate.

When the evidence is all before the House the said Samuel Houston shall be heard on the whole matter by himself or his counsel, as he may elect.

After the said Samuel Houston shall have been so heard he shall be directed to withdraw, and the House shall proceed to consider the subject and to take such order thereon as may seem just and proper.

Said Samuel Houston shall be furnished with a copy of this order.

Messrs. Davis, of Massachusetts; Richard Coulter, of Pennsylvania; Jabez W. Huntington, of Connecticut; John M. Patton, of Virginia, and Samuel Beardsley, of New York, were appointed the committee to examine witnesses

Then, on motion of Mr. Davis, it was

Resolved, That this House will proceed to the trial of Samuel Houston to-morrow, at 12 o'clock meridian.

On April 18[1] the House, on motion of Mr. Cave Johnson, of Tennessee,

Resolved, That Samuel Houston be permitted to have counsel to aid him in the defense of the proceedings instituted against him in the House of Representatives, and that a seat be assigned to said counsel within the bar of the House.

A resolution forbidding publication of the testimony by newspapers while the trial was going on was offered, but being antagonized strongly was withdrawn.[2]

The Sergeant-at-Arms was then directed by the Speaker to place Samuel Houston at the bar of the House; whereupon Samuel Houston was placed at the bar, accompanied by Francis S. Key, as his counsel, when the Speaker addressed him as follows:

Samuel Houston, you stand charged before the House of Representatives of the United States with having assaulted William Stanberry, one of its Members from Ohio, for words spoken by him in the House of Representatives, in debate.

By order of the House you have been brought this day to its bar to answer this charge.

Before I propound to you any interrogatory touching this matter you will say whether you are now ready to proceed to trial in the mode prescribed by the order of the House, of which you have been informed, or whether you have any request to make of the House before you are put upon your trial. If you have, it will now be received and considered by the House.

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[1] Journal, p. 604; Debates, p. 2556.

[2] Debates, pp. 2556–2562.

Samuel Houston then answered in the words following:

The accused, put to the bar of this House to answer for an alleged offense, begs leave respectfully to protest against the authority of this House to institute the present proceeding, and under this protest is prepared to submit to whatever course the House may order concerning the investigation they may think proper to make.

Before, however, the House proceeds further in the inquiry, he asks permission to make, by his counsel, a motion which from its nature must be preliminary to any trial on which he may be put.

Which answer being read by the Clerk, a motion was made by Mr. James M. Wayne, of Georgia, that Samuel Houston be permitted to make the motion indicated in his answer, which had been read and delivered in by him.

This motion being agreed to, Samuel Houston made the motion in the words following:

The accused asks leave to object to an honorable Member of this House, sitting and voting in the House upon the questions that may arise on the present proceeding against him, on the ground that such Member has formed and expressed opinions in relation to the accused and in relation to the accusation unfavorable to the accused, and committing himself upon the subject of the accusation.

A motion was then made by Mr. George McDuffie, of South Carolina, that the said Samuel Houston be removed from the bar of the House.

Mr. Clement C. Clay, of Alabama, urged [1] that the prisoner and his counsel should not be compelled to retire until they had been allowed to offer argument in support of their motion; but Mr. McDuffie replied that if there was any question that the House owed it to its own dignity to decide without argument it was this.

The House thereupon agreed to the motion that the prisoner and his counsel be removed, and Samuel Houston was conducted from the bar.

The request was then debated, and was objected to on the ground that it was a challenge of one of the judges; that it amounted to a call upon the House to expel one of its Members temporarily, a proceeding impracticable; and that, if the right of challenge was admitted, it might be carried to great lengths.[2]

A motion was then made by Mr. William S. Archer, of Virginia, that the said Samuel Houston be again brought to the bar of the House and that he have leave to withdraw his said motion.

The motion being agreed to, Samuel Houston, accompanied by his counsel, was then again brought to the bar of the House and withdrew his said motion.

1618. The case of Samuel Houston, continued.

The House declined to release Samuel Houston on bail pending his trial by the House for contempt.

In the examination of witnesses in the contempt case of Samuel Houston, the House declined to permit a witness to state opinions.

In the trial of Samuel Houston for contempt, the House permitted an affidavit to be read.

Thereupon the Speaker put the following interrogatory to the said Samuel Houston:

Are you ready to proceed to your trial?
Answer.—I am ready to go to trial.

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[1] Debates, p. 2564.

[2] Debates pp. 2564–2566.

The Speaker thereupon had the letter of William Stanberry read, and then propounded the first interrogatory prescribed by the rules.

Mr. Houston's reply was given from a written paper read by his counsel. The reply admitted the assault and beating because of words reported to have been uttered in debate by Mr. Stanberry; but denied any intention to commit any contempt or breach of privilege, or that such had really been committed.

The House then postponed further hearing of the case until the succeeding day.

Then, by unanimous consent, Mr. Henry W. Connor, of North Carolina, offered this resolution:[1]

Resolved, That Samuel Houston be released from the custody of the Sergeant-at-Arms, on giving security for his appearance at the bar of this House from day to day, and from time to time, until the termination of his trial. The amount of the security and terms of the bond to be prescribed by the Speaker of the House.

Mr. John Dickson, of New York, questioned whether precedent could be found for such proceeding, either in the House of Commons or of the House of Representatives; and Mr. Richard H. Wilde, of Georgia, raised questions as to what would happen in case the bond should be forfeited, there being no rules or statutes to authorize an officer of the House to prosecute. Mr. William S. Archer, of Virginia, said that it was not usual for the British Parliament to take bail in similar cases.

The debate continuing on April 19, and a proposition to discharge Mr. Houston being suggested as an amendment, Mr. Dickson defended the procedure, citing precedents of Parliament since 1550. In the sixteenth century the course in such cases had been to apply to the King to cause the offender to be prosecuted; but since then the course pursued in every case had been to arrest the offender in the first instance—thus the cases of the Earl of Shaftesbury in 1677, Sir Alexander Murray in 1671, and Sir Francis Burdett in 1810. In the last case actions had been brought against the Sergeant-at-Arms and the Speaker; but the court had sustained the power of the House. In this country an instance had occurred in New York State where the legislature had arrested and imprisoned until the end of the session an individual who had challenged De Witt Clinton. In the House of Representatives also were cited the cases of Randall, Whitney, and Anderson.

Mr. Connor's motion was withdrawn.

Samuel Houston, accompanied by his counsel, was then placed at the bar of the House; and, having responded that he was ready to proceed, the proceedings began.[2]

Mr. William Stanberry, the Member who complained to the House, was sworn in his place, and gave his testimony, which appears in full in the Journal, as does all the testimony. During his testimony witness was questioned both by the accused and by the committee. The witness testified in relation to his speech which had given offense to Mr. Houston.

On April 19,[3] during the testimony of Mr. Stanberry, a question was asked on behalf of the accused that elicited an answer suggesting, in connection with charges

[1] Journal, pp. 607, 610; Debates, pp. 2567, 2570.

[2] Journal, p. 610; Debates, p. 2571.

[3] Journal, p. 615; Debates, p. 2572.

against Mr. Houston, fraud on the part of the late Secretary of War. This response at once caused objection and debate, but resulted in no definite action. On April 20, however, while the witness was stating reasons which led him to believe that Mr. Houston had been engaged in an attempted fraud through a Government contract, he was stopped by a Member, and after debate the House agreed to this motion:[1]

That the witness be precluded from stating his belief of any fraud committed by Governor Houston or in which he participated, but may be permitted to state any evidence which he then had or now has tending to prove it.

On April 20 also an effort was made, in order to save the time of the House, to confine the examination of witnesses and discussion of questions arising out of testimony to the committee, but objection was made and the proposition was withdrawn.

On April 20[2] also Mr. Stanberry, in the course of his testimony, presented a paper purporting to be the affidavit of one Luther Blake, charging Samuel Houston with fraud. Counsel for Mr. Houston claimed that the paper should not be considered evidence until it should be shown how taken, and objection was made to reading it.

The question being put, the House decided that the paper should be read; but on the succeeding day an affidavit in explanation of certain defects of this paper was not received.

1619. The case of Samuel Houston, continued.

Discussion as to the right of the House to punish for a contempt not committed in its actual presence.

Argument that the parliamentary law as to contempt does not apply to the House.

The House ordered spread on its Journal the paper in which Samuel Houston protested against the right of the House to punish him for contempt.

Rule for examining Members as witnesses in a trial at the bar of the House for contempt.

The trial continued, and on April 26 Mr. Key began his argument[3] for the defense. He was prevented by illness from concluding until May 3. On May 7 Mr. Houston spoke[4] at the bar in his own defense.

Thereupon Mr. John M. Harper, of New Hampshire, offered the following resolution:[5]

Resolved, That Samuel Houston, now in the custody of the Sergeant-at-Arms, be forthwith discharged.

Mr. Jabez W. Huntington, of Connecticut, moved to amend this by striking out all after the word "Resolved," and inserting: "That Samuel Houston has been guilty of contempt and a violation of the privileges of this House."

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[1] Journal, p. 620.

[2] Journal, p. 621; Debates, p. 2581.

[3] Debates, p. 2597. The argument of counsel does not appear in the Journal.

[4] Journal, p. 713; Debates, p. 2810.

[5] Journal, p. 713; Debates, p. 2822.

On the next day an extended debate took place on these propositions, Mr. Polk supporting the original resolution in an exhaustive speech.

Mr. Polk, in favoring the original resolution, stated [1] that upon full examination of the question he was confirmed in the opinion that the House was invested with no authority, under the Constitution or laws of the land, to punish as for a contempt or violation of its privileges any offense committed not in the presence of the House during its session or in such manner as to disturb its proceedings. The precedents of Parliament were not applicable, for Congress was limited by a written Constitution, and the parliamentary law of privilege was not the law of privilege of either House of Congress. The Constitution had conferred no such power, and even if it had it could not be exercised until the offense was defined and the punishment prescribed. Mr. Polk argued in support of his position with exhaustive citations from authorities.

The debate continued until May 11, [2] being closed by Mr. Dickson, of New York, who argued that the inherent right of the House to punish for breach of its privileges was sustained by precedents of Parliament, legislatures of the States, of the Continental Congress, and of the House itself. The Constitution itself in this case was evidently authority for the procedure, for it could not be that it meant to protect them from arrest in going to and returning from the House and yet leave them subject to individual lawless violence because of words spoken in debate.

He was answered by Mr. Ellsworth, of Connecticut, and thereafter the debate continued at length and with an exhaustive citation of authorities and precedents.

Finally, on May 11, the Huntington amendment was agreed to, 106 yeas to 88 nays, and then the following was adopted:

Resolved, That Samuel Houston be brought to the bar of the House on Monday next, at 12 o'clock, and be there reprimanded by the Speaker for the contempt and violation of the privileges of the House of which he has been guilty, and that he be then discharged from the custody of the Sergeant-at-Arms.

This was agreed to, 96 yeas to 84 nays, and on May 14 Mr. Houston was censured by the Speaker for invading the rights and privileges of the House.[3]

As Mr. Houston was brought to the bar he was allowed to present a paper protesting against the punishment inflicted on him. This paper was, by vote of the House, spread on the Journal.[4]

1620. It being doubtful whether or not an assault on a Member had been for words spoken in debate, no action was taken.

A person who had assaulted a Member was permitted to be present at the investigation by a select committee and cross-examine witnesses.

On February 28, 1835,[5] the Speaker laid before the House a letter from Hon. John Ewing, of Indiana, in which the latter apologized for his absence from the House and explained that while on his way to his boarding house after the adjournment on the evening of the 26th instant he was waylaid and assaulted in a most

[1] Debates, p. 2822.

[2] Debates, p. 3002.

[3] Journal, p. 736; Debates, p. 3021.

[4] Journal, p. 735; Debates, p. 3020.

[5] Second session Twenty-third Congress, Journal, pp. 485, 489, 518; Globe, p. 314.

outrageous and dastardly manner by John F. Lane, a lieutenant in the United States Army and son of the Hon. A. Lane, of Indiana, for no other known cause than for words spoken in debate some weeks since, in reply to his father, on the floor of the House of Representatives. Mr. Ewing stated that he had but a casual acquaintance with the person who committed this outrage, and no intercourse whatever with him to lead to the assault. A blow from an iron cane with a leaden head accompanied the first notice of the attack, and was repeated by several others. Mr. Ewing regretted his disability at such an important and pressing period of the session.

After this letter had been read Mr. Edward A. Hannegan, of Ohio, moved the following resolution:

Resolved, That a committee of seven Members be appointed to investigate the circumstances of the assault on the Hon. John Ewing, and to report the facts to this House.

After unsuccessful motions to lay the resolution on the table and to postpone it until March 3, it passed, 127 yeas to 63 nays.

Mr. Hannegan was made chairman of the committee, which on March 3 brought in their report.[1] They took testimony in the presence of Lieutenant Lane, to whom the privilege of cross-examination of witnesses was given. After the testimony on the part of the committee had been closed Lieutenant Lane gave the committee to understand that he did not feel bound to introduce any evidence going to show what his private motives were for the assault upon Mr. Ewing. After reciting the circumstances the committee say that they have been unable to discover any cause other than that assigned by Mr. Ewing. The committee had no grounds for supposing this to be the cause of the assault other than the supposition of Mr. Ewing and the absence of all apparent cause besides. Lieutenant Lane had disclaimed any such intention or motive. Therefore the committee, as the time allowed was brief, declined suggesting any action by the House.

1621. A proposition relating to an assault on a Senator by a Member was held in order as a question of privilege.

The House failed to agree to a resolution to expel a Member for assaulting a Senator.

The House censured a Member for being concerned in an assault on a Senator.

The House declined to censure two Members in one resolution, taking such action as enabled a vote to be taken as to each.

On May 23, 1856,[2] Mr. Lewis D. Campbell, of Ohio, submitted a preamble and resolution, which he subsequently modified to read as follows, viz:

Whereas it is represented that on the 22d day of May, 1856, the Hon. Preston S. Brooks and the Hon. Lawrence M. Keitt, Members of this House from the State of South Carolina, and other Members, either as principals or accessories, perpetrated a violent assault on the person of the Hon. Charles Sumner, a Senator of the United States from the State of Massachusetts, while remaining in his seat in the Senate Chamber in performance of duties pertaining to his official station: Therefore,

Resolved, That a select committee of five Members be appointed by the Speaker to investigate the subject and report the facts, with such resolutions in reference thereto as in their judgment may be proper and necessary for the vindication of the character of this House; and that said committee have power to send for persons and papers and to employ a clerk; also to sit during the sessions of the House.

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[1] Reports of committees, second session Twenty-third Congress, No. 135, House of Representative.

[2] First session Thirty-fourth Congress, Journal, pp. 1023, 1029, 1076, 1077, 1185–7, 1193–7, 1193–4, 1197–1201, 1205–1221; Globe, pp. 1290, 1348–1352, 1578.

Mr. Thomas L. Clingman, of North Carolina, made the point of order that no question of privilege was involved in the proposition, and that it could not supersede the regular order of business.

The Speaker[1] decided that a question of privilege was involved in the proposition, saying:

The Chair is of opinion that the resolution involves a question of privilege. * * * If a personal difficulty occurred between two Members of this House, either during its session or immediately upon its adjournment, growing out of the proceedings in the House, the Chair is of the opinion that its investigation would be legitimately a question of privilege. His opinion is in accordance with many precedents involving the same circumstances.

The resolution refers to an assault by a Member of this House upon a member of the Senate while in his seat in the Senate Chamber. It does not, it is true, affect the privileges of the House or its Members with that directness which would exist if the assault had occurred between Members of the House in its presence. It is, however, only one step removed, and that removal is not such as to change the nature of the question. The members of the Senate are entitled under the Constitution to the privileges as Members of the House of Representatives; and whenever it shall appear, either by a message from the Senate or by an admitted statement on the part of any Member of this House, that the privileges of the Senate have been violated in the manner charged by the gentleman from Ohio, the Chair believes it to be a duty to submit it to the House as a subject of privilege. * * * The language of the resolution is, "whilst remaining in his seat in the Senate Chamber;" and the presumption is, from that language, "in the performance of the official duties pertaining to his station."

As a matter of right, the Senate has no cognizance of any violation of privilege upon the part of a Member of the House. This House is the protector exclusively of the privileges of its own Members; and the Chair would not recognize the right of the Senate to interfere with the privilege of any Member of the House, either here or elsewhere, upon the ground of an offense against the privileges of the Senate. It belongs to the House, if a Member has in any manner violated its own privileges or those of the Senate, to inquire into the facts, and come to such determination as its own dignity and regard for the privileges of the Senate may require. The Senate is not a tribunal competent to investigate and determine the privileges of Members of the House. The Chair is of opinion, therefore, that upon the facts stated in the resolution presented by the gentleman from Ohio, such a question of privilege is presented as will supersede ordinary subjects of legislation. The Chair is at liberty, undoubtedly, to refer the matter to the House for its decision. In the case lately decided by the House the Chair was not cognizant of the facts. No privilege of the Senate, or of any other person, was asserted, and the Chair declined to decide whether it was a question of privilege or not, and submitted it to the House for decision. But in this instance it is stated that a Member of the House has violated the privileges of the Senate by an assault upon one of its Members while in his seat in the performance of his duty; and the Chair believes he can not consistently decide that it is not a question of privilege.

As a precedent upon this point, the Chair refers to the action of the House of Representatives in the case of an assault committed upon the private secretary of the President of the United States,[2] not by a Member of Congress, but by a citizen. The information was transmitted to the House by the President in a special message. The House took cognizance of the subject as a question of privilege, and ordered a committee of investigation. The Chair decides this to involve a question of privilege.

Mr. Clingman having appealed from this decision, the appeal was laid on the table by a vote of 85 to 71.

The Speaker then announced the appointment of the following committee: Messrs. Lewis D. Campbell, of Ohio; Howell Cobb, of Georgia; Alfred B. Greenwood, of Arkansas; Francis E. Spinner, of New York, and Alexander C. M. Pennington, of New Jersey.

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[1] Nathaniel P. Banks, of Massachusetts, Speaker.

[2] See section 1615 of this chapter.

On June 2, 1856,[1] the committee reported. They came to the conclusion that the assault was a breach of the privilege of the Senate, but that the Senate could not therefor arrest and try and punish a Member of the House. Therefore only the House could punish. The act was an aggravated assault upon the freedom of speech guaranteed by the Constitution. The committee did not discuss the powers of the House to punish its disorderly Members, nor argue the general question of privilege. The passage of the resolution by the House was regarded as declaratory on the part of the House of its power to call its Members to account for such acts as violated the privileges of the Senate.

The views of the minority, submitted by Howell Cobb and Alfred B. Greenwood, concluded with a resolution declaring that the House had no jurisdiction of the case, and therefore deemed it improper to express any opinion on the subject. After reciting the facts the report argues elaborately the question of privilege, taking with strictness the ground that the privileges of the House are only such as are expressly given by the fifth and sixth sections of the first article of the Constitution or set forth in some law passed in pursuance thereof or some rule adopted under the authority of the same, and denying that either the Senate or House possessed the inherent right to declare what its privileges were. To admit this inherent right would be to establish the despotism of the privileges of Parliament. To illustrate the nature of these privileges, the precedents from the minority report of P. P. Barbour in 1828 were given.[2]

The framers of our Constitution had too much regard for the liberty of the citizen to give such power to either House of Congress. As to the assault upon the freedom of speech, the report questioned whether the Constitution contemplated such an assault as this, which was made in violation of the criminal law, and suggested that the constitutional intent was rather to protect Members from legal liability under the law for words spoken. While each House should guard its own privileges, it was not charged with guarding the privileges of the other body. The Constitution expressly gave each House the power to punish its Members for disorderly behavior, but the minority Members took the view that this referred only to the actual sessions of the House.

In the debate on the question those who sustained the report of the majority drew the distinction between two branches of the crime—the offense against the individual, which the courts could punish, and the offense against the people, whose majesty had been violated, and which could be punished by no tribunal but the House or Senate. The narrow construction of the provision as to disorderly behavior was also combated, as tending inevitably to reduce that provision of the Constitution to a mockery. The inherent right of the House to punish for contempts such as this, even though the offender had also violated the civil law, was urged from the precedents of Gunn and Frelinghuysen in 1796,[3] Robert Randall in 1795,[4] and the opinion of the Supreme Court in the case Anderson *v.* Dunn.[5] Mr. John

[1] Journal, p. 1076; Globe, pp. 1348–1367. The report and journal of the committee are published in full in the Globe.

[2] See section 1615 of this chapter.

[3] See section 2677 of Vol III. of this work.

[4] See section 1599 of this chapter.

[5] See section 1606 of this chapter.

A. Bingham, of Ohio, contended that for a Member of the House to violate the freedom of debate in the Senate was disorderly conduct, for which the House might expel him, Justice Story had said "that this power in the House to punish and expel its Members for aggravated misconduct was indispensable, not as a common, but as an ultimate, redress for the grievance."

Mr. Bingham summed up his statement by the claim that the House had the power to punish and expel its Members for breach of its privileges, for contempt of its authority, and for such high crimes and misdemeanors as are inconsistent with their public trusts and duties as Members, whether committed in the presence of the House and during its actual session or not. The opinions of jurists and the decision of the highest court most clearly established this. Beyond question, the act committed by the Member from South Carolina was a contempt of the House, a violation of his duty as a Member thereof, and a high crime against the people and their right of representation.

The question was put on the adoption of the preamble and resolutions recommended by the committee on July 9:

Whereas the Senate of the United States have transmitted to this House a message complaining that Preston S. Brooks, a Representative from the State of South Carolina, committed upon the person of Charles Sumner, a Senator from the State of Massachusetts, while seated at his desk in the Senate Chamber, after the adjournment of that body on the 22d of May last, a violent assault, which disabled him from attending to his duties in the Senate, and declaring that the said assault was a breach of the privileges of that body; and

Whereas, from respect to the privileges of the House, the Senate have further declared that, inasmuch as the said Preston S. Brooks is a Member of this House, they can not arrest, and, a fortiori can not try or punish him for a breach of their privileges; that they can not proceed further in the case than to make their complaint to this House, and that the power to arrest, try, and punish devolves solely on this body; and

Whereas upon full investigation it appears to this House that the said Preston S. Brooks has been guilty of the assault complained of by the Senate, with most aggravated circumstances of violence; that the same was a breach of the privileges not only of the Senate, but of the Senator assailed, and of this House as a coordinate branch of the legislative department of the Government, in direct violation of the Constitution of the United States, which declares that Senators and Representatives "for any speech or debate in either House shall not be questioned in any other place;" and

Whereas this House is of opinion that it has the power and ought to punish the said Preston S. Brooks for the said assault, not only as a breach of the privileges of the Senator assailed and of the Senate and House, as declared by the Constitution, but as an act of disorderly behavior; and

Whereas it further appears from such investigation that Henry A. Edmundson, a Representative from the State of Virginia, and Lawrence M. Keitt, a Representative from the State of South Carolina, some time previous to the said assault, were informed that it was the purpose of the said Preston S. Brooks to commit violence upon the person of the said Charles Sumner for words used by him in debate as a Senator in the Senate, and took no measures to discourage or prevent the same, but, on the contrary, anticipating the commission of such violence, were present on one or more occasions to witness the as friends of the assailant: Therefore

Resolved, That Preston S. Brooks be, and he is forthwith, expelled from this House as a Representative from the State of South Carolina.

Resolved, That this House hereby declare its disapprobation of the said act of Henry A. Edmundson and Lawrence M. Keitt in regard to the said assault.

Mr. Howell Cobb's proposition, to substitute a resolution that the House had no jurisdiction over the case, having been disagreed to, on July 14 [1] the House voted on

[1] Journal, p. 1201; Globe, p. 1628.

the first resolution for the explusion of Mr. Brooks, and there were 121 yeas and 95 nays—not the required two-thirds, so the resolution was not agreed to.

On July 15[1] the resolution relating to Mr. Edmundson and Mr. Keitt was decided in the negative—yeas 70 nays 125—it being urged that the cases of the two men should be voted on separately. This vote was then reconsidered, and then the resolution was amended by substituting a resolution of two branches, one relating to Mr. Keitt and the other to Mr. Edmundson. The resolution relating to Mr. Keitt was agreed to—yeas 106, nays 96. The second resolution, expressing disapprobation of Mr. Edmundson, was disagreed to—yeas 60, nays 136.

The preamble was then amended in relation to Mr. Edmundson, and then agreed to.

Both Mr. Brooks and Mr. Keitt resigned from the House immediately.

1622. A Member of the House having assaulted a Senator for words spoken in debate, the Senate examined the breach of privilege and transmitted the report to the House for action.

The Senate did not attempt to exercise any authority over a Member of the House who had committed a breach of the Senate's privilege.

The Senate having communicated the report of a breach of the Senate's privilege by a Member of the House. The House Journal records the fact but not the report.

On May 23, 1856,[2] in the Senate, Mr. Henry Wilson, of Massachusetts, announced the assault which had been made the day before on his colleague, Mr. Charles Sumner, of Massachusetts, by Mr. Preston S. Brooks, of South Carolina, a Member of the House of Representatives. Mr. Wilson then offered this resolution:

Resolved, That a committee of five Members be elected by the Senate to inquire into the circumstances attending the assault committed on the person of the Hon. Charles Sumner, a Member of the Senate, in the Senate Chamber yesterday, and that the said committee be instructed to report a statement of the facts, together with their opinion thereon, to the Senate.

This resolution was agreed to, and the following were chosen of the committee: Lewis Cass, of Michigan, Philip Allen, of Rhode Island, Henry Dodge, of Wisconsin, Henry S. Geyer, of Missouri, and James A. Pearce, of Maryland.

This committee, which subsequently was given authority to send for persons and papers, reported on May 28. On the same clay the resolution accompanying the report was agreed to. The report begins:

That from the testimony taken by them it appears that the Hon. Preston S. Brooks, a Member of the House of Representatives from the State of South Carolina, did, on the 22d day of the present month, after the adjournment of the Senate and while Mr. Sumner was seated at his desk in the Senate Chamber, assault him with considerable violence, striking him numerous blows on and about the head with a walking stick, which cut his head and disabled him for the time being from attending to his duties in the Senate. The cause of this assault was certain language used by Mr. Sumner in debates on the Monday and Tuesday preceding, which Mr. Brooks considered libelous of the State of South Carolina and slanderous of his near kinsman, Mr. Butler, a Senator from that State, who at the time was absent from the Senate and the city.

The committee forbear to comment upon the various circumstances which preceded and attended this affair, whether of aggravation or extenuation, for reasons which will be sufficiently obvious in the latter part of the report.

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[1] Journal. pp. 1206–1216; Globe, pp. 1638–1643.

[2] First session Thirty-fourth Congress, Journal of the House, p. 1070; Globe, pp. 1279, 1317.

They have examined the precedents, which are to be found only in the proceedings of the House of Representatives, the Senate never having been called on to pronounce its judgment in a similar case. In the House of Representatives, though different opinions have at various times been expressed by gentlemen of great eminence and ability, among whom may be mentioned the late President of the United States, Mr. Polk, the late Judge Barbour, of the Supreme Court, and Mr. Beardsley, of New York, yet the judgment of the House has always pronounced an assault for words spoken in debate to be a violation of the privileges of the House.

The report then goes on to refer to the cases of Baldwin and Gunn in 1796, Russel Jarvis and John Adams in 1828, of Samuel Houston in 1832,[1] and, after indorsing the views given by Mr. McDuffie in the Jarvis case, continues:

But, while it is the opinion of the committee that this assault was a breach of the privileges of the Senate, they also think that it is not within the jurisdiction of the Senate, and can only be punished by the House of Representatives, of which Mr. Brooks is a Member. This opinion is in strict conformity with the recognized parliamentary law. Hatsell, in his precedents, says as follows:

"The leading principle which appears to pervade all the proceedings of the two Houses of Parliament is that there shall subsist a perfect equality with respect to each other, and that they shall be in every respect totally independent one of the other. From hence it is that neither House can claim, much less exercise, authority over a Member of the other; but, if there is any ground of complaint against an act of the House itself, against any individual Member, or against any of the officers of either House, this complaint ought to be made to that House of Parliament where the offense is charged to be committed; and the nature and mode of redress or punishment, if punishment is necessary, must be determined upon and inflicted by them. Indeed, any other proceeding would soon introduce disorder and confusion, as it appears actually to have done in those instances where both Houses, claiming a power independent of each other, have exercised that power upon the same subject, but with different views and contrary purpose. (3 Hatsell, 67.)

"We see from the several precedents above cited, that neither House of Parliament can take upon themselves any breach of privilege offered to them by any Member of the other House; but that in such cases the usual mode of proceeding is to examine into the fact, and then to lay a statement of that evidence before the House of which the person complained of is a Member." (Ibid., 71.)

Mr. Jefferson, in the Manual of Parliamentary Practice prepared by him, lays down the following rule:

"Neither House can exercise any authority over a Member or officer of the other, but should complain to the House of which he is a Member, and leave the punishment to them."

A brief examination of the constitutional privileges of Senators and Representatives will show the soundness of this rule of parliamentary law.

The Constitution provides, article 1, section 6, that "They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, in going to and returning from the same." But the Senate is not a court of criminal judicature, empowered to try the excepted offenses, and can not take cognizance of a breach of the peace, as such. It can not take any notice of the assault except as a breach of its privileges, and in this aspect it is not one of the cases in which the privilege from arrest is excepted.

The Senate, therefore, for a breach of its privileges can not arrest a Member of the House of Representatives, and a fortiori can not try and punish him. That authority devolves solely on the House of which he is a Member.

It is the opinion of the committee, therefore, that the Senate can not proceed further in the present case than to make complaint to the House of Representatives of the assault committed by one of its Members, the Hon. Preston S. Brooks, upon the Hon. Charles Sumner, a Senator from the State of Massachusetts.

The committee submit herewith certain affidavits taken by them in the case, and the following resolution:

Resolved, That the above report be accepted, and that a copy thereof and the affidavits accompanying the same be transmitted to the House of Representatives."

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[1] See secs. 156, 161, 162, of this work.

The Secretary of the Senate, in delivering this report to the House on May 29, stated, according to the House Journal:

I am directed by the Senate to communicate to this House a resolution and report relating to a breach of the privileges of the Senate by a Member of this House.

The House Journal contains only this statement, the report not being given in full. The message was referred to the select committee to whom the House committed the subject of the assault, the House already, on May 23, having taken cognizance of the breach of privilege.[1]

1623. A letter from a Member of the House disclaiming any intention of invading the privileges of the Senate in assaulting a Senator, was, after some discussion, read to the Senate.—On June 2, 1856,[2] the President pro tempore of the Senate, Jesse D. Bright, laid before the Senate a communication from Representative Preston S. Brooks, of South Carolina, disclaiming any intention of causing a breach of the privileges of the Senate in assaulting Senator Charles Sumner, upon which assault the Senate had taken action as a breach of privilege. The letter, after some discussion, was read and ordered to be printed.

1624. An assault upon a Member within the walls of the Capitol, when the House was not in session, was deemed a breach of privilege, although it arose from a cause not connected with the Member's representative capacity.—On November 30, 1809,[3] the Speaker laid before the House the following letter:

To the Speaker of the House of Representatives:

SIR: An occurrence having recently taken place between a Member of the House of Representatives and myself, produced by circumstances not at all connected with his official duties or opinions, which from the time and place may be considered disrespectful to the House of Representatives, I take the liberty of tendering through you my most respectful declarations that I am the last who would willfully manifest a deficiency of that reverence which is due to the Representatives of my country, or that sacred regard which is also due to their privileges.

To yourself, sir, personally, I tender the assurances of my very great respect.

I. A. COLES.

NOVEMBER 29, 1809.

On December 8 a select committee was appointed to report on the facts and their opinion in the matter. Mr. John Taylor, of South Carolina, was made chairman.

On December 29 the committee reported that they had taken the deposition of the Hon. James Turner, a Senator of the United States, and of Mr. Samuel Sprigg, which depositions they reported to the House. The report continues:

From these depositions it was established to the satisfactory belief of your committee that Mr. I.A. Coles, without any immediate previous altercation or provocation, did assault and strike a Member of this House within the walls of the north wing of the Capitol, and this act was done on Monday, the 27th ultimo, about 1 o'clock p.m., and after this House had adjourned over to the following day.

That from the assertion of Mr. Coles, and from the actual admission of the Member assaulted, your committee were satisfied that the provocation or supposed provocation which occasioned the attack did

[1] See sec. 1620 of this chapter.

[2] First session Thirty-fourth Congress, Globe, p. 1347.

[3] Second session Eleventh Congress, Journal, pp. 111, 123, 147, 148 (Gales & Seaton ed.); Annals, pp. 685, 705, 987.

not arise from anything said or from any act done by the Member of this House in the fulfillment of his duties as a Representative in the Congress of the United States.

Your committee are of opinion that this latter circumstance may be received in extenuation, but can not be admitted in justification of the act done by Mr. Coles, and from all the circumstances of the case they are of opinion that mid assault and violence offered to the Member was a breach of the privileges of this House.

In view, however, of the acknowledgments and apologies made to the Speaker, and also in a letter to the committee, the committee recommended the adoption of this resolution:

Resolved, That any further proceeding in the above case is unnecessary.

On December 30 by a vote of 76 yeas to 25 nays the House voted to have the report printed and that it be committed to the Committee of the Whole for next Thursday. It does not seem to have been acted on thereafter.

1625. For attempted intimidation and assault upon a Member, A.P. Field was arrested and censured at the bar of the House for breach of privilege.—On February 7, 1865,[1] Mr. F. C. Beaman, from the select committee[2] to investigate the assault upon the Hon. William D. Kelley by A.P. Field, a citizen of Louisiana, made a report recommending the adoption of the following resolutions:

Resolved, That the Speaker do issue his warrant, directed to the Sergeant-at-Arms attending this House, commanding him to take into custody, wherever to be found, the body of A.P. Field, convicted of a breach of the privilege of the House in the attempt, by language of intimidation and bullying, to deter William D. Kelley, a Representative in this House from the Fourth district of the State of Pennsylvania, from the free and fearless exercise of his rights and duties as a Member of Congress, and voting and deciding upon a pending subject of legislation, and in following up the the said attempt at intimidation and bullying by an assault upon the person of said Representative Kelley, and forthwith bring him to the bar of the House, and thereupon said A.P. Field be reprimanded by the Speaker.

Resolved, That so much of the resolution of this House of the 5th day of December last granting the privilege of the hall to the claimants for seats from the State of Louisiana as applies to the said A.P. Field be rescinded.

The testimony before the committee showed that Field had assaulted Mr. Kelley with a knife at a hotel in Washington. Field admitted the assault, but excused himself on the ground that he was at the time laboring under much excitement.

On February 21[3] the first resolution was agreed to, yeas 82, nays 49. The second resolution was laid on the table, yeas 71, nays 64.

On February 22[4] the Sergeant-at-Arms appeared at the bar of the House, having in custody A.P. Field, and the Speaker administered to him a reprimand for his "flagrant breach of privilege."

1626. The case of Patrick Woods, in contempt of the House in 1870.

A Member having, in a letter to the Speaker complained that he had been assaulted on his way to attend the House, the matter was held to be a question of privilege.

A person who had assaulted a Member on his way to the House, but at a place distant therefrom, was arrested on warrant of the Speaker and arraigned at the bar.

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[1] Second session Thirty-eighth Congress, House Report No. 10.

[2] This committee was authorized by resolution presented January 23, 1865, second session Thirtyeighth Congress, Journal, p. 135.

Second session Thirty-eighth Congress, Journal, pp. 298, 299.

[4] Journal, pp. 301, 302.

Members are not permitted to communicate with a prisoner arraigned at the bar of the House.

On June 10, 1870,[1] the Speaker, as a question of privilege, laid before the House a communication from Mr. Charles H. Porter, of Virginia, detailing the circumstances of an assault made upon him in the city of Richmond, Va., on the 30th ultimo, by Patrick Woods, alias Pat. Dooley.

The same having been read, Mr. Hamilton Ward, of New York, submitted the following resolution:

Resolved, That the Speaker do issue his warrant, directed to the Sergeant-at-Arms attending this House, commanding him to take in custody, wherever to be found, the body of Patrick Woods, alias Pat. Dooley, and the same in his custody to keep, subject to the farther order and direction of this House.

Mr. Ward drew this resolution in accordance with the precedent of 1832.[2]

Mr. Charles A. Eldridge, of Wisconsin, raised the point of order that the paper presented did not show that the assault was made on the gentleman from Virginia in his capacity as a Member of Congress, or that it was designed to interfere with him as a Member of Congress, and that this, therefore, was not a question of privilege.

The Speaker[3] decided that any assault on a Member, which that Member, in his capacity as such, brings to the attention of the House, must be ruled as a question of privilege. The gentleman from Virginia, Mr. Porter, was absent by leave of the House, and he stated that at the time of the assault he was on his return to the House of Representatives for the purpose of attending to his public duties. The Chair could not imagine that there could be a, difference of opinion as to its being a question of privilege.

The resolution was agreed to, 126 yeas to 40 nays; and on June 11, 1870,[4] the Sergeant-at-Arms appeared at the bar having Woods in charge.

When the prisoner was arraigned at the bar, Mr. Logan H. Roots, of Arkansas, made the point of order that no Member had the right to converse with the prisoner at the bar while in custody. Jurors were not permitted to hold communication with the prisoner at the bar.

The Chair sustained the point of order.

1627. The case of Patrick Woods, continued.

In 1870 the investigation of a breach of privilege was committed to a standing committee.

A prisoner of the House was taken by its order and in custody of the Sergeant-at-Arms to testify in the court of a State.

Reference to English precedents as to power to punish for contempt.

Mr. William B. Allison, of Iowa, presented this resolution, which was agreed to:

Resolved, That the matter of privilege, being an assault upon Hon. Charles H. Porter, be referred to the Judiciary Committee of this House for examination, and report what action this House should take in the premises; that the committee have power to send for persons and papers, and that in the meantime the person at the bar be retained in the custody of the Sergeant-at-Arms.

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[1] Second session Forty-first Congress, Journal, pp. 1199, 1200; Record, pp. 4317, 4325, 4352, 5253.

[2] See Section 1616 of this chapter.

[3] James G. Blaine, of Maine, Speaker.

[4] Journal, p. 965; Globe, p. 4352.

On June 16,[1] on recommendation of the Committee on Judiciary, the House agreed to the following resolution:

Resolved, That the Sergeant-at-Arms of this House, or his assistant, John W. Le Barnes, be ordered to take Patrick Woods, now in the custody of the Sergeant-at-Arms, and being so held by order of this House for a breach of the privileges thereof, to Richmond, Va., there to testify in the court of hustings as a witness in the case of the Commonwealth of Virginia against John Gurhiser, on Monday next, the 20th instant; and that the Sergeant-it-Arms, or his assistant, John W. Le Barnes, shall continue to keep said Woods in his custody, and shall, immediately after he shall have so testified, return with said Woods to this House.

On June 25 Mr. John A. Bingham, of Ohio, from the Committee on the Judiciary, submitted the report of the committee:[2]

It appears, from an uninterrupted series of cases, both in this country and in England, from which we derived our parliamentary law, that all assaults made upon the reputation, character, and persons of Members have ever been held as breaches of the privileges of the legislative body of which the Member was a part, and as high crimes and misdemeanors. The uniformity of the decisions and action in these cases relieves your committee of the necessity of any review of the specific cases. In the Commons, on the 12th of April, 1733, it was resolved and declared, nem. con., "That the assaulting, insulting, or menacing any member of this House, or upon account of his behavior in Parliament, is a high infringement of the privileges of this House, a most outrageous and dangerous violation of the rights of Parliament, and a high crime and misdemeanor." This precedent has been constantly followed by the House and Senate during continuance of the Government, the earliest case being that of Duane for a libel on the Senate in 1800. Were we left unadvised by precedent the case would stand too clear for dispute upon principle. If, while in attendance or going from or returning to the House, a Member may be assaulted so that his life is endangered, insomuch that he can not attend the sessions of the House, such assault would clearly seem to be a breach of the privilege of the House, which has a right to the attendance of all its Members. So much is certain, that if one Member may be so assaulted all may be, or such a part as would interfere with a quorum of the House, and that such assaults as the one under consideration might be made for the purpose of interfering by disabling Members from attendance, and assaulting and maiming Members might become an inconvenient but sure method of changing a majority in the House in high party times, especially where that majority was not large. It can not seriously be imagined that the Constitution has left both Houses of Congress so impotent for self-protection in that regard as would be true in that case.

As to the power of punishment the committee based its recommendation on the decision in the case of Anderson *v.* Dunn, wherein it was laid down, "And even as to the duration of imprisonment a period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows that imprisonment must terminate with the adjournment." In England in the Case of Stockdale *v.* Hansard, in 1839, Lord Denham, chief justice, used the following language: "However flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties of it, yet his offense being committed the day before the prorogation, if the House ordered his imprisonment but for a week, every court in Westminster Hall and all the judges of all the courts would be bound to discharge him by habeas corpus."

[1] Journal, p. 1016; Globe, p. 4511.

[2] House Report No. 105, second session Forty-first Congress.

The committee therefore came to the conclusion "that the power of the House to punish for contempt of its privileges by imprisonment extends only to the terms of the Members of the then existing House. Thus, the limit of imprisonment of the offender at bar by the present House will be the 4th of March next. * * * It has been thought by some that the term of imprisonment must be limited only by the session, but your committee are satisfied that such is not the limitation either by precedent or reason. It has been early decided in England that the common law which required the release of the prisoner at the end of the session never applied to an adjournment even when it was in the nature of a prorogation." [1]

The minority views, signed by Messrs. C. A. Eldridge and M. C. Kerr, dissents from the statement of facts made by the majority, and holds that the assault had no connection with any official act of Mr. Porter, and was not made with any intention to detain him from his seat in the House, and in fact did not so detain him. The conelusion was then (1) that Congress derives no power whatever from the En&h parliamentary law; (2) that the Members of Congress are exempt only as defined in the Constitution; (3) that they have the same protection as all other citizens for their rights of person and property, no more and no less; (4) that Congress has the power to protect its free deliberation so far as it does not create any privileges in its Members or others; (5) that to give to Members of Congress a double protection to their persons or property from that enjoyed by other citizens will be to make them a privileged class, (6) and that, therefore, this House has no right to inflict punishment on Patrick Woods for assault on Mr. Porter, thus giving Porter double remedies against Woods, while Woods would only have a single one against Porter. On the question of punishment, the minority held that the prisoner could not be committed for a longer time than the adjournment of the session, and that he could not be kept until the expiration of the Congress.

1628. The case of Patrick Woods, continued.

For assaulting a Member returning to the House from an absence on leave, Patrick Woods was committed for a term extending beyond the adjournment of the session, but not beyond the term of the existing House.

Form of Speaker's warrant for commitment of a person in contempt, and of Sergeant-at-Arms's return thereon.

On July 7 [2] the House agreed, by a vote of 119 yeas to 57 nays, to the preamble and resolution recommended by the committee:

Whereas Patrick Woods, on the 13th day of May last past, at Richmond, did make a violent, unprovoked, and felonious assault upon Hon. Charles H. Porter, then being a Member of the House of Representatives, on his way returning thereto from a leave of absence, and did cut, bruise, and disable said Porter, being then a Member of the House, from attending to his duties therein, Woods well knowing that Mr. Porter was then Member of Congress, and on his way to Washington, and making such assault because of that knowledge; and whereas said Woods being brought to the bar of the House, and being fully heard in his defense by counsel and witnesses, before the Committee on the Judiciary, all the facts before recited fully appeared: Therefore,

[1] Woods was committed on July 8, 1870, and the second session ended July 15, 1870; but Congress did not terminate until March 3, 1871, there being a third session.

[2] Journal, pp. 1163–1168; Globe, pp. 5253, 5297.

Resolved, That Patrick Woods, now held at the bar of the House to answer for a breach of the privileges of the House for his offense, be, and hereby is, ordered to be punished by imprisonment in the jail of the District of Columbia, as other criminals are, for three months; and that a warrant in due form, under the hand of the Speaker, be issued to the Sergeant-at-Arms, directing the execution of this order.

On July 9, 1870,[1] the Speaker, by unanimous consent, laid before the House the return of the Sergeant-at-Arms in the case of Patrick Woods; which was read, ordered to be placed upon the Journal, and is as follows:

HOUSE OF REPRESENTATIVES OF THE UNITED STATES,
JULY 7, 1870.

TO NEHEMIAH G. ORDWAY, Esq., *Sergeant-at-Arms.*

SIR: The following resolution was this day adopted by the House of Representatives, to wit:

"Resolved, That Patrick Woods, now held at the bar of the House to answer for a breach of the privileges of the House, for his offense be, and he is hereby, ordered to be punished by imprisonment in the jail of the District of Columbia, as other criminals are, for three months; and that a warrant be made out in form, under the hand of the Speaker, and issued to the Sergeant-at-Arms, directing the execution of this order."

Now, therefore, this is to require you, Nehemiah G. Ordway, Sergeant-at-Arms of the House of Representatives of the United States, to execute the foregoing order of the House of Representatives.

Given under my hand and the seal of the House of Representatives the day and year above written.

[L.S.]

J.G. BLAINE.
Speaker of the House of Representatives.

Attest:

EDWARD MCPHERSON, *Clerk.*

OFFICE OF THE SERGEANT-AT-ARMS,
UNITED STATES HOUSE OF REPRESENTITIVES,
July 8, 1870.

I have executed the within warrant of the House of Representatives upon Patrick Woods, by delivering him to the warden of the jail in the District of Columbia, together with an attested copy of said warrant, and with the following further order addressed to him by me, to wit:

TO THE WARDEN OF THE JAIL OF THE DISTRICT OF COLUMBIA:

Sir: Pursuant to the order of the United States House of Representatives, a true copy of which is hereto annexed, you are hereby required to receive Patrick Woods into the jail aforesaid, and him there detain for the full term of three months named in said order of the United States House of Representatives; and you will not surrender said Woods to any authority except that issuing from said House of Representatives until the expiration of his sentence without further orders.

N. G. ORDWAY,
SERGEANT-AT-ARM U. S. HOUSE OF REPRESENTATIVES.
JULY 8, 1870.

I have this day received into the jail of the District of Columbia the above-mamed Patrick Woods.

JOHN S. CROKER,
Warden United States Jail.
Per D. B. MACK.

1629. An assault upon the clerk of a committee within the walls of the Capitol was held to be a breach of privilege.

A discussion as to the power of the House to imprison for a period after the adjournment of the session.

An instance wherein the House turned over to the jurisdiction of the courts an offender guilty of contempt.

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[1] Journal, p. 1199; Globe, p. 5422.

On July 17, 1866,[1] Mr. John B. Alley, of Massachusetts, as a question of privilege, submitted the following resolution:

Resolved, That whereas a violent personal assault, within the walls of this Capitol, has been committed upon the person of U. H. Painter, the clerk of the Committee on Post-Office and Post-Roads, by Benjamin B. Beveridge and Edward Towers, who are now in the custody of the police officers of the Capitol, the Sergeant-at-Arms is hereby directed to take into his custody the said assailants and to detain them until the further order of the House upon the subject, and that a committee of five Members be appointed to investigate and report upon the said assault, with power to send for persons and papers.

The Speaker[2] said:

As the Chair understands, the point is raised that this is not a question of privilege. The Chair rules that it is a question of privilege, which may properly receive the action of the House. This House has even gone so far as to bring citizens before the bar for disorder in the galleries. If this could be done then unquestionably when an officer of the House has been beaten or assailed within the walls of the Capitol the House has power to take action in the matter.

The committee were appointed, Mr. Alley being chairman. On July 18 he reported that the committee did not find evidence to show that Mr. Towers was implicated in the assault, and recommended his discharge from arrest, which was concurred in by the House.

On July 23, 1866, the committee reported as to the facts, and also in favor of turning the prisoner over to the civil authorities, because the House was about to adjourn and might not imprison him beyond the day whereon the session should end. A minority of the committee dissented from this view, holding that the House had power to imprison until the 4th of March next, when the existence of the House would expire. Mr. Alley replied by referring to the opinions of able lawyers in the House and to the commentators in support of the view that the House did not have power to imprison during a recess between two sessions of the same Congress.

Without bringing into the question the issue the House agreed to the following resolution without division:

Resolved, That the Sergeant-at-Arms be directed to deliver to the custody of the civil authorities Benjamin F. Beveridge and to prosecute said Beveridge before the criminal courts of this District for his assault upon the person of Uriah H. Painter, an officer of this House, within the walls of the Capitol, and that the evidence taken in the case by the special committee of the House be delivered to the United States district attorney for the District of Columbia.

1630. One reporter having assaulted another in the presence of the House, punishment for breach of privilege was inflicted.

In 1836 the House committed the examination of a breach of privilege to a select committee.

A breach of privilege which occurred during the reading of the Journal was at once disposed of, after which the reading of the Journal was concluded.

On June 11, 1836,[3] while the Clerk was reading the Journal of the last day's session of the House, an assault was committed within the Hall, and in the presence

[1] First session Thirty-ninth Congress, Journal, pp. 1031, 1042, 1088; Globe, pp. 3885, 3908, 4054, 4055.

[2] Schuyler Colfax, of Indiana, Speaker.

[3] First session Twenty-fourth Congress, Journal, pp. 983, 985, 1021; Globe, pp. 436, 437, 450.

of the House, by a person admitted to a place on the floor as a reporter or stenographer, to take down the debates, upon the person of another reporter or stenographer, also admitted to a place on the floor for the same purpose; whereupon Mr. Lewis Williams, of North Carolina, submitted the following motion, which was agreed to:

That both the persons be taken into custody, to await the order of the House in the premises.

During the consideration of the resolution Mr. John Bell, of Tennessee, offered a substitute proposing to turn the offenders over to the civil authorities, to be dealt with according to law, but expressly specifying that in adopting this proposition the House would not be influenced by any opinion of a deficiency of authority in the House to punish for disorderly conduct in their presence. Mx. Aaron Vanderpool, of New York, supported this substitute on the ground that, while the House could vindicate its privileges if it chose, it was not wise to do so with so much public business to dispose of. Mr. Bell withdrew his proposition after some further debate.

The resolution having been agreed to, thereupon the Sergeant-at-Arms executed the order by taking both the persons into his custody.

The reading of the Journal was then resumed and completed, and after a motion to amend the Journal had been disposed of Mr. Judson moved the following resolution, which was agreed to after debate:

Resolved, That a select committee be forthwith appointed, whose duty it shall be forthwith to inquire into an assault committed within the Hall of the House of Representatives this morning, while this House was in session, and for and on account of which two persons are now in custody of the Sergeant-at-Arms; and said committee are to make their report to this House; and that said committee be authorized to administer oaths and to cause the attendance of witnesses.

Messrs. Andrew T. Judson, of Connecticut; John Bell, of Tennessee; Lewis Willams, of North Carolina; Abijah Mann, jr., of New York, and James M. Mason, of Virginia, were the committee.

On June 16 the select committee reported the following resolutions:

Resolved, That Henry G. Wheeler has been guilty of a contempt and breach of the privileges of this House by committing the said assault in the Hall of the House of Representatives while the House was in session.

Resolved, That the said Henry G. Wheeler be excluded from any place on the floor or elsewhere in the Hall as a stenographer to take down the debates of this House.

Resolved, That the said Henry G. Wheeler be securely imprisoned by the Sergeant-at-Arms of this House for the remainder of the session, and that the Speaker of this House do issue his warrant to carry into effect this resolution.

On motion made and carried, Henry G. Wheeler was placed at the bar of the House. The first resolution was then agreed to. The second resolution was amended so as to exclude the prisoner from the floor only during the present session, and as amended the resolution was agreed to. Of the third resolution, on motion of Mr. Hawes, all after the word "*Resolved*" was stricken out and the following was inserted:

That Henry G. Wheeler be discharged from the custody of the officer of this House.

The report [1] of the committee accompanying the resolutions shows that Wheeler acknowledged his offense readily, and thus relieved the committee of the perplexities which often accompany cases of disorder, contempt, and breach of privilege. Therefore the committee recommended that the punishment be not vindictive. Wheeler had assaulted Robert Codd with a cane in the presence of the House, and so admitted.

In the House when the resolutions were presented Mr. Judson said that the committee, in view of the precedent of 1798,[2] felt bound to report the resolution for imprisonment, but they would readily accept the amendment proposed.

1631. A resolution as to an alleged false and scandalous report of the proceedings of the House by one of its reporters presented as a matter of privilege.—On February 9, 1847,[3] Mr. Stephen A. Douglas offered the following resolution as a question of privilege: [4]

Resolved, That "James A. Houston, reporter for the Union," having published a card in that paper of last evening, assuming the responsibility in toto of the false and scandalous report of the proceedings of this House on Saturday last, be, and he is hereby, expelled from this House.

After debate, the House decided the question on agreeing to the resolution in the negative by a vote of 11 yeas to 133 nays.

1632. In 1855 the House expelled from the floor William B. Chace, a reporter, who refused to testify before a committee.

In 1855 the House declined to punish a contumacious witness.

On February 5, 1855, [5] Mr. John Letcher, of Virginia, called up, as a question of privilege, the report submitted by him on the 15th ultimo, from the Select Committee on Colt's Patent and Other Bills, on the subject of the refusal of Mr. William B. Chace to appear and testify further before the said committee. [6]

This committee was appointed to investigate alleged improper means used to influence legislation for the extension of the Colt patent. Witnesses summoned before them having refused to testify, the committee reported the fact to the House and asked action to compel the witnesses to testify. The House declined to take action at the time. On February 5 the chairman of the committee again asked for action. This led to a debate on the powers of the House in relation to contumacious witnesses . [7] It appeared that in testimony which he had given before the committee Chace had admitted that he was to receive compensation for services in behalf of the Colt patent. This was in direct violation of the nineteenth [8] rule, which provided that no person should be admitted as a reporter or stenographer who should be employed "as an agent to prosecute any claim pending before Congress." Therefore T&. Letcher considered the right of the House to expel the reporter undoubted.

[1] House Report No. 762, first session Twenty-fourth Congress.

[2] See section 1642 of this volume.

[3] Second session Twenty-ninth Congress, Journal, p. 320; Globe, p. 359.

[4] The Cong. Globe (p. 359) indicates that the privileged character of the resolution was accepted as a matter of course, no question being raised. The nature of the alleged insulting report is given on p. 350 of the Globe.

[5] Second session Thirty-third Congress, Journal, p. 315.

[6] House Report No. 132, second session Thirty-third Congress.

[7] Cong. Globe, second session Thirty-third Congress, p. 572.

[8] This was of the old system of rules. Rule XXVI now relates to reporters.

Chace also questioned the right of the House to compel his attendance before the committee, and to require him to disclose facts within his knowledge affecting the conduct of Members in connection with pending legislation. Mr. Letcher took the ground that the House certainly had the right to imprison, quoting in support the precedents in the cases of Randall and Anderson. [1]

Mr. Thomas Henry Bayly, of Virginia, took the opposite view—that the House had no power to inflict punishment, since it had no criminal jurisdiction. The House had no authority which was not delegated, or which was not necessary and proper to carry into effect the powers which were delegated to it. If the House should try and convict, how would they punish? Were they to imprison, where was the jail? The decisions read on the other side merely established that the House has a right to preserve order, and to an uninterrupted deliberation with respect to public questions. That was all. If any disturber should commit a criminal offense, like entering the Hall and shooting down a Member, the House could only turn him over to the civil courts.

Mr. Joseph R. Chandler, of Pennsylvania, cited a case where the legislature of Pennsylvania, in 1835, had arrested and confined contumacious witnesses, himself among the number. It appeared from the debate that the jailer refused to receive them, however. The case of Nugent, confined by the Senate, was also cited.

Mr. Letcher having proposed the following resolutions:

Resolved, That the Speaker of this House be directed to revoke the privilege under which W. B. Chace holds a reporter's desk on the floor; and that said W. B. Chace be excluded from the Hall.

Resolved, That the Speaker do issue his warrant, directed to the Sergeant-at-Arms attending this House, commanding him to take into custody, wherever to be found, the body of W. B. Chace, and the same in his custody to keep, subject to the further order and direction of this House.

The House agreed to the former of these resolutions, but laid the latter upon the table.

1633. The supposed author of an anonymous newspaper charge against a Member not named was arrested and interrogated at the bar of the House.

The House being about to examine a person at its bar, a form of procedure as to questions was agreed to.

Form of oath administered by the Speaker to a person about to be examined at the bar of the House.

A person under examination at the bar was allowed to state his reasons why he should not answer a question, and also to have entered on the Journal a statement.

A person under examination at the bar of the House withdrew while the House passed on a request made by him.

On February 12, 1838,[2] Mr. Henry A. Wise, of Virginia, by consent, moved a resolution which, after amendment, was agreed to by the House in the following form, yeas 142, nays 46:

Whereas the following publication appears in the New York Courier and Inquirer:

"Corruption in Congress.—We published yesterday a letter from 'The Spy in Washington,' directly charging a Member of Congress with corruption, and offering to prove the charge before a committee of

[1] See sections 1599 and 1606 of this volume.

[2] Second session Twenty-fifth Congress, Journal pp. 379, 384–387; Globe, pp. 173, 178.

either House, when called upon for that purpose. We republish the charge to-day, and call upon Congress promptly to institute the investigation thus challenged, both as an act of justice to itself and the country. 'The Spy in Washington,' it may be said, is not an ostensible or responsible person; but we desire at once to obviate this difficulty by stating, as we now do, that he is known to us, and that whenever called upon by a committee of Congress we pledge ourselves that he shall be forthcoming, and that he is one whose standing warrants an immediate proceeding on the part of Congress.

"Extract from yesterday's Courier and Inquirer.—The more brief my statement the better it will be understood. It is in my power, if brought to the bar of either House, or before a committee, and process allowed me to compel the attendance of witnesses, to prove, by the oath of a respectable and unimpeachable citizen as well as by written documentary evidence, that there is at least one Member of Congress who has offered to barter his services and his influence with a department or departments for compensation. 'Why, sir,' said the applicant for a contract, 'if my proposition has merit, it will be received; if it has not, I do not expect it will be accepted.' And what do you think was the answer of the honorable Member? I will give it to you in his own emphatic language. 'Merit,' said he, 'why, things do not go here by merit, but by pulling the right strings. Make it my interest, and I will pull the strings for you.'"

"THE SPY IN WASHINGTON."

Therefore

Resolved, That Matthew L. Davis be forthwith subpoenaed to the bar of the House to testify and give evidence what he may know respecting the name of the Member implicated, if a Member of this House, and the authors of his information.

This resolution and preamble were adopted only after considerable debate as to the propriety of giving attention to an anonymous charge in a newspaper publication.

In obedience to the order of the House the Speaker issued a subpoena, directed to the Sergeant-at-Arms; to whom it was delivered for service.

After debate and reference to the parliamentary law, the House, on motion of Mr. Benjamin C. Howard, of Maryland, agreed to the following procedure:

Resolved, That the Speaker direct the publication in the Courier and Inquirer to be read to the witness, and then propound to him the following interrogatories:

First. Are you the author of the above letter? And, whether he declines or not to answer the above question, then the Speaker shall put the following:

Second. Do you know who is alluded to, or intended to be charged in the preceding letter? Answer yea or nay as the fact may be without giving the name.

Third. Is the person thus alluded to a Member of the House of Representatives? If the answer be in the affirmative, then,

Fourth. What is the name of that Member? And, in case the witness shall reply that a Member of the House of Representatives was not alluded to, he shall be forthwith discharged; and all proceedings under this inquiry shall cease.

The Speaker announced to the House that the Sergeant-at-Arms had made return that the subpoena for Matthew L. Davis had been served and that the witness was in attendance.

Matthew L. Davis then appeared, and was sworn [1] by the Speaker.

In pursuance of the order of the House, the publication in the Courier and Inquirer was read to the witness; and thereupon the Speaker propounded the first interrogatory agreed upon by the House, viz:

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[1] This oath was as follows: "You do solemnly swear that the evidence you will give to the House of Representatives, touching the matter now under examination, shall be the truth, the whole truth, and nothing but the truth; so help you God." Journal, p. 388.

1. Are you the author of the above letter? Whereupon the witness requested to.be permitted to assign reason why this interrogatory should not be answered.

The Speaker stated the question to the House, and thereupon propounded the question: "Shall the witness have leave to assign reasons why the interrogatory should not be answered?"

Debate arising, the witness, by direction of the House, withdrew from the bar, and, after the House had deliberated some time upon his request, the previous question was moved by Mr. Howard; and, being demanded by a majority of the Members present, it passed in the affirmative, and the main question was put:

"Shall the witness have leave to assign reasons why the interrogatory should not be answered?"

It passed in the affirmative, yeas 103, nays 90.

The witness was then again called to the bar, and the decision of the House, on his request, was announced to him by the Speaker. He thereupon gave his reasons why the interrogatory should not be answered, and declined to answer the same, and sent up to the Clerk a paper, in writing, which he requested should be entered on the Journal; and no objection being made thereto, it is entered accordingly, and is as follows:

I deny the right of this House to ask, and therefore decline to answer the question, whether I am, or am not, the author of the Spy in Washington; or the extract from the letter referred to in the interrogatory; but at the same time respectfully state that I know the Member of Congress to whom the Spy alludes, and am prepared to name him at the bar of this House or elsewhere.

The second interrogatory, viz: "is the person thus alluded to a Member of the House of Representatives?" was propounded to and answered by the witness.

Whereupon, in pursuance of the order of the House that "in case the witness shall reply that a member of the House of Representatives was not alluded to, he shall be forthwith discharged, and all proceedings under this inquiry shall thereupon cease," the witness was forthwith discharged by the Speaker, and withdrew from the bar; and all further proceedings under this inquiry ceased.

1634. Expulsion of a reporter from the floor for improper conduct. On February 19, 1857,[1] the select committee appointed to investigate charges that Members of the House had entered into corrupt combinations, made a general report, in which they stated that James W. Simonton, the regular Washington correspondent of the New York Times, had given contradictory testimony during the progress of the investigation, and had admitted that, while occupying a seat on the floor as a reporter, he had personally aided in the passage of the Wisconsin land bill under promise of receiving a certain compensation if the bill should pass, and also that he had accepted a small compensation for assisting a friend to pass a bill through the Senate. The committee, therefore, reported this resolution:

Resolved, That James W. Simonton be expelled from the floor of this House as a reporter.

On February 28 the House amended the resolution by adding the name of F. F. C. Triplett, and as amended the resolution was agreed to.

[1] Third session Thirty-fourth Congress, House Report No. 243, pp. 32, 38; Journal p. 567; Globe, p. 952.

1635. The House arrested and arraigned at the bar a newspaper reporter for alleged statements reflecting on the integrity of a Member.

A person arraigned at the bar of the House must be dealt with in strict accordance with the terms of the resolution ordering his arrest and arraignment.

A person arraigned for contempt submitted a statement in writing which did not appear in full in the Journal.

A person being under examination at the bar, the questions propounded to him were first approved by the House.

A person being under examination at the bar, the questions and answers were recorded in the Journal.

On June 10, 1870,[1] Mr. Thomas Fitch, of Nevada, rising to a question of privilege, laid before the House certain articles in a newspaper reflecting on his integrity as a Representative, tending to show that he might have accepted bribes from those favoring the recognition of the Cuban Republic. Mr. Fitch then offered the following:

Resolved, That W. Scott Smith, the reporter of the New York Evening Post, be brought to the bar of this House to show cause, if he can, why he should not be expelled from the reporters' gallery for libellous statements reflecting upon the integrity of Members of this House.

The chairman of the committee, which investigated the matter, who had been quoted in the article as authority for the doubt cast on Mr. Fitch's integrity, having stated to the House that the evidence exonerated Mr. Fitch, the resolution was agreed to, yeas 126, nays 40.

On the same day W. Scott Smith was brought to the bar of the House by the Sergeant-at-Arms, and by direction of the Speaker the resolution of the House and the newspaper extracts which Mr. Fitch had presented to the House were read.

The Speaker[2] then announced to the respondent that he was at liberty to answer in accordance with the terms of the resolution.

The respondent then submitted a statement in writing, which was read to the House, but was not entered in the Journal.

It being proposed to interrogate the prisoner, and Members proposing interrogatories, the Speaker held that if a Member wished to submit a question he should propose it in writing and the question would be submitted to the House to be approved by unanimous consent without debate. The prisoner at the bar could make his answer in writing if he should choose.

A question proposed by Mr. Fitch having been approved by the House and propounded to the respondent, he returned an answer in part, and in part declined, on the ground that he could not divulge the source of his information. This question and the answer appear in the Journal. The answer was in writing.

The answer having been read, Mr. Samuel S. Cox, of New York, offered the following:

Resolved, That all proceedings in the case of Mr. W. Scott Smith pending be suspended, and the party be, and he is hereby, discharged.

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[1] Second session Forty-first Congress, Journal pp. 957, 961, 963, 1068; Globe pp. 4314, 4318, 4692.

[2] James G. Blaine, of Maine, Speaker,

Mr. Fitch, on the ground that the answer was evasive, moved that the witness be compelled to answer, by holding him in contempt of the House until he should answer.

The Speaker held in regard to this motion:

The Chair has very grave doubts about the propriety of entertaining any such motion. The resolution of the House directed that William Scott Smith, the reporter of the New York Evening Post, be brought to the bar of this House to show cause, if he can, why he should not be expelled from the reporters' gallery of the House for libelous statements reflecting on Members of the House. It has always been the practice of the House, in the prosecution of similar inquiries and investigations, carefully to limit action according to the terms of the resolution under which any respondent may be brought to the bar of the House. The Chair, therefore, does not at all agree that it is in the nature of a privileged question, after this respondent has been brought to the bar of the House, to compel him to answer inquiries not within the purview of the order which brought him here.

The question recurring on the resolution offered by Mr. Cox, the following substitute was proposed by Mr. Aaron A. Sargent, of California:

That W. Scott Smith, having failed to purge himself of the charge of having slandered a Member of this House, and having declined to give the sources of the information upon which he alleges he based his statement, be expelled from the reporters' gallery.

After debate, the House, on motion of Mr. John Farnsworth, of Illinois, voted to refer the subject to a select committee of five.

The Speaker then informed the respondent that he was no longer in the custody of the House.

Mr. Luke P. Poland, of Vermont, chairman of the select committee, reported, on June 22, a recommendation that the resolution referred to them be laid on the table. The report of the committee was ordered printed.

1636. For publications affecting the reputations of Members reporters have been expelled from the House.—On March 4, 1846,[1] Mr. William Sawyer, of Ohio, sent to the Clerk's table a copy of a public newspaper printed in New York, called "The New York Tribune," containing a letter purporting to have been written by a correspondent of that paper in Washington, personally abusive of Mr. Sawyer, and requested that the letter might be read by the Clerk.

The letter having been read and Mr. Sawyer having concluded his remarks, Mr. Jacob Brinkerhoff, of Ohio, offered the following resolution:

Resolved, That the reporters and letter writers for the New York Tribune be expelled from this House.

Under the operation of the previous question the resolution was agreed to, yeas 122, nays 48.

1637. On February 9, 1847,[2] Mr. Stephen A. Douglas, of Illinois, offered the following as a question of privilege:

Resolved, That "James A. Houston, reporter for the Union," having published a card in that paper of last evening, assuming the responsibility in toto of the false and scandalous report of the proceedings of this House on Saturday last, be, and he is hereby, expelled from this House.

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[1] First session Twenty-ninth Congress, Journal, p. 483; Globe, pp. 457, 458.

[2] Second session Twenty-ninth Congress, Journal, p. 320.

After debate, which related principally to whether or not the report was intentionally inaccurate, the resolution was rejected, yeas 11, nays 133.[1]

1638. For improper conduct in connection with legislation reporters have been expelled from the House.—On May 17, 1860,[2] Mr. Warren Winslow, of North Carolina, from the Select Committee on the Subject of Executive Influence in the House, reported the testimony of F. W. Walker, and a portion of the testimony of C. Wendell, relating to the acceptance of money by Walker from Wendell. Walker was a newspaper correspondent and had accepted money from Wendell for furthering, in the press, the interests of Wendell before Congress. The report was accompanied by the following resolution:

Resolved, That F. W. Walker be expelled from the reporters' gallery of the House.

This resolution was agreed to.

1639. On March 3, 1875,[3] the House agreed to the following resolution, reported from the Committee on Ways and Means:

Resolved, That any reporter or correspondent having a seat in the gallery by permission of the Speaker who has received any fee, bribe, or reward in connection with any legislation pending in either House of Congress should be deprived of such privilege; and such conduct as disclosed before the Committee on Ways and Means is severely censured by the House.

1640. The Senate committed John Nugent for contempt in publishing a treaty pending in executive session.

In the Nugent case, in 1848, the Court held that the Senate and House were the sole judges of their own contempts.

The Senate has power, when acting in a case within its jurisdiction, to punish all contempts of its authority.

No court "may inquire directly into the correctness or propriety" of a commitment by either House, or discharge the prisoner on habeas corpus.

A warrant of commitment "need not set forth the particular facts which constitute the alleged contempt."

Form of warrant for commitment of John Nugent.

Each House has a right to hold secret sessions whenever in its judgment the proceedings should require secrecy.

In 1848 the Senate committed John Nugent, his contempt growing out of the publication of a treaty pending before the Senate in executive session. The proceedings in this case were conducted in executive session.

Nugent petitioned for discharge on writ of habeas corpus; and on May 11, 1848, Judge Cranch, of the circuit court of the District of Columbia, handed down a decision (Nugent *v.* Beale, Cranch's Reports, D. C.). The summary sets forth:

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[1] In the Twenty-ninth Congress (1846–47) the Senate expelled from its floor and gallery the representatives of two papers which had published articles libelous on the Senate. (Smith's Digest, Senate Mis. Doc. No. 278, second session Fifty-third Congress, pp. 45–77.)

On January 27, 1848, the Senate passed a resolution readmitting to a seat in the reporters' gallery Jesse E. Dow, who was excluded by an order of the Senate of March 16, 1846. (First session Thirtieth Congress, Globe, p. 262.)

[2] First session Thirty-sixth Congress, Journal, pp. 851, 852; Globe, pp. 2157, 2158.

[3] Second session Forty-third Congress, Journal, p. 636.

1. Every court, including the Senate and House of Representatives, is the sole judge of its own contempts; and in case of commitment for contempt, in such case, no other court can have a right to inquire directly into the correctness or propriety of the commitment, or to discharge the prisoner on habeas corpus.

2. The warrant of commitment need not set forth the particular facts which constitute the alleged contempt.

3. The Senate of the United States has power to punish for contempts of its authority in cases of which it has jurisdiction, and an inquiry whether any person, and who, had violated the rule of the Senate which requires that all treaties laid before them should be kept secret until the Senate should take off the injunction of secrecy, is a matter within the jurisdiction of the Senate.

4. The Senate of the United States has a right to hold secret sessions whenever in its judgment the proceeding shall require secrecy, and may pronounce judgment in secret session for a contempt which took place in secret session.

The warrant of arrest, as to which a question was raised, appears as follows in the decision:

UNITED STATES OF AMERICA.—

To the Sergeant-at-Arms of the Senate of the United States, Robert Beale:

Whereas John Nugent, having been summoned, and having appeared at the bar of the Senate, and having been sworn as a witness, he answered the following interrogatories:

1. Have you any connection with or agency for the proprietor of the newspaper published in the city of New York, and called the New York Herald? If yea, state what is that connection or agency.

2. Do you know that an instrument purporting to be a copy of the treaty between the United States of America and the Mexican Republic, with the amendments made by the Senate thereto, and the proceedings of the Senate thereon, was published in that newspaper? Declare.

3. Do you know by whom the copy of the instrument, with the amendments thereto and proceedings thereon in the last preceding interrogatory specified, was furnished to the editor or publishers, or any agent of the editor or publishers of the said newspaper called the New York Herald? If yea, declare and specify such person or persons.

4. Did you copy the parts purporting to be amendments of the treaty yourself for the purpose of sending them to the editor of the New York Herald, or for any other purpose? If you answer in the negative, then say if you know by whom they were copied.

5. Where, at what place or house, and at what time, were the said amendments of the treaty copied? And having refused to answer the following interrogatories:

6. Where, in what place or what house, and at what time, did you first receive a printed copy of the confidential document containing the treaty, the President's message, and also the other confidential documents printed in the Herald?

7. In answer to the third interrogatory, you have stated that you furnished the papers therein referred to, to the editor of the New York Herald. State from whom you received the said treaty with Mexico, with the amendments and the said portion of the proceedings of the Senate.

8. In your answer to the fourth interrogatory, you state that the amendments there referred to were communicated to the Herald in your handwriting. Did you copy the same, and from whom did you procure the original from which you copied the same?

9. You say in answer to the last question that you decline to answer the same, because you can not answer it with accuracy. State why you can not answer it with accuracy. Is it because you do not recollect the facts inquired of?

10. What portion of the facts do you not recollect with accuracy; is it as to the person from whom you obtained the papers, or either of them referred to?

11. State from whom you received the treaty.

12. State from whom you received the documents.

13. State from whom you received the proceedings of the Senate heretofore inquired of.

14. Was the copy of the treaty you forwarded to the Herald a printed copy?

———has, by so refusing, committed a contempt against the Senate and has, by the Senate, been ordered into the custody of the Sergeant-at-arms, there to remain until the further order of the Senate.

These are, therefore, to authorize and require you, and you are hereby authorized and required to take into your custody the body of the said John-Nugent, and him safely keep until he answers the said interrogatories, or until the further order of the Senate of the United States in this behalf, and for so doing this shall be your sufficient warrant.

Given under my hand this thirty-first day of March, in the year of our Lord one thousand eight hundred and forty-eight.

G.M. DALLAS,
Vice-President of the United States and President of the Senate.

Attest:

ASBURY DICKENS,
Secretary of the Senate of the United States.

The opinion of Judge Cranch, which was supported by numerous citations and discussions of authorities, especially English, lays down the following principles:

The jurisdiction of the Senate in cases of contempt of its authority depends upon the same grounds and reasons upon which the acknowledged jurisdiction of other judicial tribunal rests, to wit, the necessity of such a jurisdiction to enable the Senate to exercise its high constitutional functions—a necessity at least equal to that which supports the like jurisdiction which has been exercised by all judicial tribunals and legislative assemblies in this country from its first settlement, and in England from time immemorial. That the Senate of the United States may punish contempts of its authority seemed to be admitted by the prisoner's counsel, provided it be in a case within their cognizance and jurisdiction; but whether admitted or not, such is the law as laid down by the Supreme Court of the United States in Anderson *v.* Dunn, 6 Wheat., 224, and in Kearney's Case, 7 Wheat., 41.

* * * * * * *

These case [cited] and authorities, we think, show conclusively that the Senate of the United States has power to punish for contempts of its authority in cases of which it has jurisdiction; that every court, including the Senate and House of Representatives, is the sole judge of its own contempts, and that in case of the commitment for contempt in such a case no other court can have a right to inquire directly into the correctness or propriety of the commitment, or to discharge the prisoner on habeas corpus, and that the warrant of commitment need not set forth the particular facts which constitute the alleged contempt.

There were many cases cited in the argument to show that when the question of privilege or contempt came incidentally before the court, the court could and must decide it; but those cases have no bearing upon this, which is a case of habeas corpus, where it is admitted on all hands that the question of contempt is brought directly before the court.

But if, upon this point, it should be thought that the majority of the judges of this court have (as it is suggested) stated the principle too broadly in respect to the conclusive effect of a judgment of contempt and if it should be deemed necessary that it should appear in the return of the hapeas corpus that at the time of the supposed contempt the Senate were acting in a matter of which they had jurisdiction—we all think it does sufficiently appear in the return that the Senate were, at that time, engaged in a matter within their jurisdiction, to wit, an inquiry whether any person, and who, had violated the rule of the Senate which requires that all treaties laid before them should be kept secret until the Senate should take off the injunction of secrecy. This appears by the interrogatories propounded to the witness (the prisoner), as stated in the return, and by the recital, in part, of the answers of the witness to a part of those interrogatories.

But it has been contended also in argument that the power of the Senate to punish for contempts is confined to their authority over their own members.

It is true that by the Constitution, Article I, Section 5, "each House may determine the rules of its proceeding, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." But it says nothing of contempts. These were left to the operation of the common-law principle that every court has a right to protect itself from insult and contempt, without which right of self protection they could not discharge their high and important duties. It is not at all probable that the framers of the Constitution, by giving an express power to the Senate to punish its members for disorderly behavior, and even to expel a member, intended to deprive the Senate of that protection from insult, which they knew very well belonged to and was enjoyed by both Houses of Parliament and the legis-

latures of the former colonies and now States of this Union. The provision of the Constitution may have been intended to remove a doubt, whether a member of the Senate, appointed by and responsible to a State legislature, could be guilty of a contempt to a body of which he himself was a member; or it may have been intended to apply only to such disorderly behavior as did not amount to a contempt of the House; or to remove a doubt whether the Senate had power to expel a member. But whatever may have been the intention we think the provision does not justify an inference that their power to punish for contempts can be executed only upon members of the Senate.

* * * * * * *

It was also contended in argument that although the Senate might hold secret sessions, they could not, in secret session, punish a man for contempt. The court, however, can not perceive any reason why the Senate should not have the same power of punishing contempts in secret as in open session. In the early years of this Government the sessions of the Senate were always secret.

The Constitution of the United States, Article I, section 5, requires that "each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy." The journal can not be kept secret unless the proceedings themselves be kept secret. Hence, each House has a right to hold secret sessions whenever in its judgment the proceedings shall require secrecy. The necessity of the power to hold secret sessions, especially of the Senate, is so obvious that no argument in its favor is required by the court.

The Senate, besides being a branch of the Legislature, is the executive council of the President, and stands in intimate communion with him in regard to all our foreign diplomatic relations. Nothing, therefore, can be more proper than that all executive sessions of the Senate, and all confidential communications relating to treaties should be with closed doors and under seal of secrecy. Hence the standing rule of the Senate (No. 38) requires that all confidential communications made by the President of the United States to the Senate shall be, by the members thereof, kept secret; and all treaties which may be laid before the Senate shall also be kept secret until the Senate shall, by their resolution, take off the injunction of secrecy. And by the standing rule of the Senate (No. 39), "All information or remarks touching or concerning the character and qualifications of any person nominated by the President to office shall be kept secret." By the fortieth rule of the Senate, "'When acting on confidential or executive business, the Senate shall be cleared of all persons. except the Secretary, the principal or executive clerk, the Sergeant-at-Arms, and Doorkeeper and Assistant Doorkeeper." By the forty-first rule of the Senate, "The legislative proceedings, the executive proceedings, and the confidential legislative proceedings of the Senate shall be kept in separate and distinct books."

These rules were established under the power given to the Senate by the Constitution of the United States, Article I, section 5, "To determine the rules of its proceedings, "and are, therefore, until repealed, as obligatory as if they had been inserted in the Constitution itself; so that it is not only the privilege, but the duty of the Senate to hold its executive sessions in secret. No odium, therefore, can attach to the Senate from the circumstance that the judgment for contempt was pronounced in secret session, upon a transaction which took place in secret session. It could not have been done otherwise. The offense must be punished in secret session or go unpunished; leaving the Senate exposed to all sorts of insults in the discharge of their solemn constitutional duties.

After an anxious and careful consideration of the whole case, the court is unanimously of opinion that the Senate of the United States has power, when acting in a case within its jurisdiction, to punish all contempts of its authority, and that the prisoner, having been committed by the Senate for such a contempt, and being still held and detained for that cause by their officer, this court has, upon the habeas corpus, no jurisdiction to inquire further into the cause of commitment and must remand the prisoner.[1]

Prisoner remanded.

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[1] In 1871 (First session Forty-second Congress), the Senate arrested Z.L. White and H.J. Ramsdel for the publication of the treaty of Washington, and prolonged proceedings arose from their contumacy.

Chapter LII.

PUNISHMENT OF MEMBERS FOR CONTEMPT.

1641. The parliamentary law as to treatment of Members between whom warm words or an assault have passed.—Chapter XVII of Jefferson's Manual provides:

Whenever warm words or an assault have passed between Members, the House, for the protection of their Members, requires them to declare in their places not to prosecute any quarrel (3 Grey, 128, 293; 5 Grey, 280); or orders them to attend the Speaker, who is to accommodate their differences and report to the House (3 Grey, 419); and they are put under restraint if they refuse or until they do. (9 Grey, 234,312.)

1642. The attack of Matthew Lyon on Roger Griswold, in 1798.

An early instance wherein a Member in secret session informed the House of a breach of privilege occurring on the floor between two other Members.

While the House was investigating a difficulty between two Members it declared that it would be considered a high breach of privilege if either should enter into a personal contest pending decision.

Instance wherein testimony as to a difficulty between two Members was heard in Committee of the Whole.

On January 30, 1798,[1] while the House was concluding balloting for managers on the impeachment of William Blount, a Member in his place, Mr. Samuel Sewall, of Massachusetts, informed the House that he had a communication to make, which he conceived ought to be kept secret. When the House had been cleared Mr. Sewall stated that he had been informed, in a manner which, in his opinion left no doubt of the truth of the fact, that, in the presence of the House, while sitting, Mr. Matthew Lyon, a Member from Vermont, did this day commit a violent attack and gross indecency upon the person of Mr. Roger Griswold, of Connecticut, another Member of this House.

The House having decided that it was not necessary to keep the matter secret the doors were opened and the House considered this resolution:

Resolved, That Matthew Lyon, a Member of this House, for a violent attack and gross indecency committed upon the person of Roger Griswold, another Member, in the presence of this House, while sitting, be, for this disorderly behavior, expelled therefrom.

[1] First session Fifth Congress, Jonathan Dayton, of New Jersey, Speaker; Journal, pp. 154, 185; Annals.] , pp. 961, 964, 972, 979, 1034.

It was voted—49 yeas to 44 nays—that this resolution be referred to a Committee of Privileges, with instructions to inquire into the matter and report.[1]

Messrs. Thomas Pinckney, of South Carolina; Abraham B. Venable, of Virginia; John W. Kittera, of Pennsylvania; Isaac Parker, of Massachusetts; Robert Williams, of North Carolina; James Cochran, of New York, and George Dent, of Maryland, constituted this committee.

The House also came to the following resolution:

Resolved, That this House will consider it a high breach of privilege if either of the Members shall enter into any personal contest until a decision of the House shall be had thereon.

An attempt to amend by requiring Mr. Lyon to be considered in custody of the Sergeant-at-Arms was defeated—62 nays to 29 yeas.

On February 1 a letter of regret, apologizing for his conduct, was received from Mr. Lyon and referred to the Committee on Privileges.

On February 5 the report of the Committee on Privileges was committed to a Committee of the Whole House. It was also voted that the Committee of the Whole House be authorized to hear the testimony of witnesses on the subject-matter of the report. The propriety of considering the case in Committee of the Whole House was considered. It was objected that the committee might come to a conclusion which two-thirds of the House might not acquiesce in, as was the case in fact. On the other hand, it was urged that the Speaker might more conveniently give his testimony in committee than in the House.

1643. The case of Matthew Lyon, continued.

Members, testifying in the case of Matthew Lyon who was threatened with expulsion, were sworn and cross-questioned by Mr. Lyon.

The House declined to expel either Matthew Lyon or Roger Griswold for an affray on the floor of the House.

After their affray on the floor, Messrs. Lyon and Griswold were required to pledge themselves before the Speaker to keep the peace during the session.

Early instance wherein testimony in a case of breach of privilege was heard before a select committee.

On February 12 the Committee of the Whole House arose and, on rising, the chairman, by direction, reported the testimony of several Members of the House and one Member of the Senate and also their agreement to the resolution of expulsion.

The testimony related to the affray, and from it it appears that Mr. Griswold in the course of the altercation taunted Mr. Lyon with an alleged occurrence in his army record, whereupon the latter spat in his opponent's face. Each Member was put under oath, the judge of the district court administering the oath, before giving his testimony, and after he had given it was cross-questioned by Mr. Lyon. The testimony and cross-examination of each Member was reported to the House and printed in the Journal. The Speaker and one Senator were among the witnesses. The affair took place during the counting of ballots, when it was the habit of the Speaker to leave the chair and for Members to gather informally in groups, although the House

[1] On April 17, 1850 (first session Thirty-first Congress, Globe, pp. 763,769) the Senate referred to a select committee the subject of an affray between Senators Benton and Foote on the floor of the Senate.

was considered as in session. The Speaker, in his testimony, said he frequently left the chair for exercise during the counting of ballots and the reading of lengthy communications. Mr. Lyon based his defense on the fact that the House was apparently not in session.

When the House came to vote, a proposition that Mr. Lyon be censured by the Speaker was defeated by a vote of 52 to 44. Then the resolution of expulsion was voted on, there being 52 yeas and 44 nays. So the resolution failed, two-thirds not voting therefor.

On February 15, after prayers, while the Speaker was in the chair and before the Journal was read, Mr. Griswold assaulted Mr. Lyon with a stout cane, the latter being seated, writing. Mr. Lyon got the tongs from the fireplace, and there was an affray, which was with difficulty stopped. The House was so excited that it adjourned presently, no notice being taken of the affair. The next day a resolution was introduced to expel both Members. Then an order was passed that both Messrs. Lyon and Griswold be required to pledge themselves to keep the peace during the session. This they did before the Speaker. The motion to expel was referred to the Committee on Privileges.

In this case the Committee on Privileges were directed to take the evidence, which they did, reporting it to the House February 20. They also reported that .the resolution expelling the two Members should be disagreed to.[1] The report of the Committee on Privileges was agreed to—73 yeas to 21 nays. A motion that the Members be censured failed.

1644. The question of privilege arising from the duel between Jonathan Cilley and William J. Graves.

A Member who had in a hostile manner sent to another Member a demand for explanation of words spoken in debate, was held by a committee of the House to have violated privilege.

A committee being directed to investigate the death of a Member in a duel, they reported resolutions for punishment of other Members concerned, although not directed by the House to proceed against them.

The House in 1836 neglected to punish by expulsion or censure the surviving principal and his seconds in a duel arising over words spoken in debate.

Members who had been concerned in a duel which resulted in the death of a Member were permitted to attend and cross-examine witnesses during the investigation.

In 1838 the principle that a question of privilege might be introduced at any time was not fully developed (footnote).

On February 28, 1838,[2] Mr. John Fairfield, of Maine, moved the following resolution:[3]

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[1] On February 22, 1799, an attempt was made to expel Mr. Lyon, but it failed.

[2] Second session Twenty-fifth Congress, James K. Polk, of Tennessee, Speaker; Journal, pp. 501, 502, 811, 858, 860, 861; Globe, pp. 200, 201, 320, 329, 494.

[3] Mr. Fairfield brought this resolution in under a suspension of the rules. He first tried unanimous consent, and there was objection. The idea of presenting the matter as a question of privilege does not seem to have been broached (Journal, p. 501: Globe, p. 200). So, also, on April 21, the rules were suspended to enable the report to be made to the House (Journal, p. 811).

Resolved, That a committee consisting of seven Members be appointed to investigate the causes which led to the death of the Hon. Jonathan Cilley, late a Member of this House, and the circumstances connected therewith; and further, to inquire whether there has been, in the case alluded to, a breach of the privileges of this House.

This resolution was adopted by a vote of 152 to 49. The following committee were appointed: Messrs. Isaac Toucey, of Connecticut; William W. Potter, of Pennsylvania; Franklin H. Elmore, of South Carolina; Andrew De W. Bruyn, James Rariden, of Indiana; George Grennell, jr., of Massachusetts, and Seaton Grantland, of Georgia.

The committee reported [1] April 21, 1838. The majority of the committee in their report recite that the late Jonathan Cilley fell by the hands of William J. Graves, a Member from Kentucky, in a duel fought with rifles, near the boundary line between the District of Columbia and the State of Maryland, on Saturday, the 24th of February. The New York Courier and Inquirer had published an article, vouched for by the editor, James Watson Webb, charging corruption upon a Member of Congress. Mr. Cilley, in moving for a committee of inquiry, had made statements on the floor of the House reflecting upon the character of Webb. For this the editor had sent to Mr. Cilley a note by the hand of Mr. Graves. This Mr. Cilley had refused to receive, and then, after further correspondence, a challenge was sent by Mr. Graves to Mr. Cilley.

In the examination before the committee Mr. Graves and the seconds, Messrs. Wise and Jones, as well as others concerned, were permitted to attend and examine and cross-examine witnesses. The report of the committee (as distinguished from minority views) states that the inquiry was directed to one object only, the maintenance of the privileges of the House. Then follows a long and minute analysis of the evidence, followed by the conclusion that the words spoken by Mr. Cilley in debate, his refusal to receive a demand for the explanation of those words, and his refusal to assign for this other reason than that he chose to be drawn into no difficulty upon the subject were the causes which led to the death of Mr. Cilley. Therefore the committee were of the opinion that there had been a breach of the privileges of the House in thus demanding in a hostile manner an explanation of words spoken in debate. This was the highest offense that could be committed against either of the Houses of Congress. The committee therefore reported resolutions expelling Mr. Graves from the House and censuring Messrs. Henry A. Wise, of Virginia, and George W. Jones, of Tennessee, who had acted as the seconds in the duel. As it had been decided on a former occasion that it was a breach of privilege to send a challenge to a Member in attendance or to be the bearer of such a challenge, it seemed also to be equally a breach of privilege to act as a second.

Mr. Grennell and Mr. Rariden did not concur in the report, but filed their views. They took the ground that there were two objects of the investigation—an inquiry into the circumstances with a view of arousing public sentiment on the subject of dueling, and an inquiry as to whether the privileges of the House had been violated. The majority would have fulfilled the first object had they simply gathered the testimony and presented it without comment. In going beyond this to comment and argue and make deductions they had exceeded their duties. The two Members con-

[1] House Report No. 825, second session Twenty-fifth Congress.

curred with the majority in finding that a breach of the privileges had been committed both by principals and seconds, and that the offense of the surviving principal was of a high and aggravated character. But the two Members believed that the committee could not proceed to advise the House as to the sentence to be inflicted. Such a step would be like a grand jury recommending the kind of punishment in the indictment. Dueling had been frequent among Members of Congress. In 1809 a rule was proposed to the House declaring the sending of a challenge to duel by one Member to another a breach of the privileges of the House, but the rule was not adopted. The gravamen of this affair rested in the sending of the challenge and not in the fatal result, which did not change the offense against the privileges of the House. The two Members therefore recommended a law and a rule of the House against dueling, but no punishment of the offenders.

Mr. Elmore also filed his views. He took the ground that the collecting of the testimony as to the facts was the whole duty of the committee, without commenting upon those facts, except as the question of privilege was involved. The privileges of Members of Congress were not personal or private rights, but public trusts, assigned to the station and office, for great public purposes and utility. They were the privileges of a multitude of persons in whose room and place the Member is specially chosen. The privilege of a Member not being his own, but belonging to his constituents, the House, and the country, it is his duty to maintain and assert it, and if he waive or surrender it he commits himself a breach of the privileges of the House. The right of self-protection was an inherent privilege in every legislative body. Without any other authority the Revolutionary Congress punished one individual for sending a challenge to a Member of its body and compelled another to apologize for impeaching the honor of a Member in a memorial. The privilege under the Constitution which forbade a Member to be questioned in any other place for any speech or debate in either House was perhaps higher in nature than any other. It was for this privilege that the Commons of England made their memorable resistance to the tyranny of James I. In the case of the duel under consideration there could be no doubt that this privilege had been invaded. As to the punishment, the Supreme Court, in the case of Anderson *v.* Dunn, had affirmed the right of the House to imprison. To deprive the House of the right to punish for breach of privilege would be to deliver it over to disorder. But Mr. Elmore did not concur in recommendations for punishment, since that recommended for Mr. Graves seemed too severe. Dueling by Members of the House had been frequent and generally unnoticed and unpunished by the House. Mr. Graves had been negligent of the privileges of the House, but did not intentionally offer an indignity to it. Therefore he did not merit the heaviest punishment.

When the report and the minority views were brought in the request was made that they be printed and the consideration postponed until May 7. This precipitated a debate of considerable length. Mr. John Robertson, of Virginia, quoted Jefferson's Manual [1] in support of his contention that when the course of an investigation showed that any Member was implicated it was the duty of the committee to report that fact specially to the House, whereupon the Member is heard at the

[1] See sec. 1264 of this volume.

bar of the House, or a committee is specifically empowered to inquire concerning him. Mr. Elmore replied that the committee were peremptorily ordered by the House to make the investigation which they had made, and if the objection was valid it should have been made when the resolution was before the House. Mr. John Bell, of Tennessee, raised the question whether it was proper for the committee to proceed against a Member without being directed to do so by name. It was replied that when the resolution was adopted it was notorious that Members were implicated. In his opinion, Jefferson's Manual referred to a case where, in an investigation, a Member was incidentally charged. Mr. John Quincy Adams, of Massachusetts, criticised the report and said he intended to move to strike out the resolutions and argumentative part and let the facts be considered by the House. In his opinion the committee had transcended their powers. He was for a strict construction of Jefferson's Manual, and cited the case of Hon. John Smith in the Senate.[1]

After a parliamentary struggle of considerable intensity, on May 10 the whole subject was laid on the table and the reports and testimony were ordered printed. The motion to lay it on the table passed, 103 to 78.

July 4 an attempt to take up the report failed.

1645. A resolution for the investigation of an alleged assault of one Member on another at a place outside the Capitol was admitted as of privilege.

A violation of the personal security of a Member on his way to the House to attend a session was considered by a committee of the House a breach of privilege.

On August 18, 1856,[2] Mr. George A. Simmons, of New York, presented as a question of privilege, the following resolution:

Resolved, That a committee of five be appointed to investigate the alleged assault on the Hon. Amos P. Granger, a Representative from the State of New York, by the Hon. Fayette McMullin, a Representative from the State of Virginia, on the morning of the 18th instant, and that they report their action to this House on the second Monday in December next.

Mr. Howell Cobb, of Georgia, made the point of order that the resolution did not involve a question of privilege.

The Speaker[3] overruled the point of order.

The committee was composed of Messrs. Simmons; William Smith, of Virginia; John U. Pettit, of Indiana; John R. Edie, of Pennsylvania, and Thomas J. D. Fuller, of Maine.

On August 26, 1856,[4] the committee made their report.[5] This report showed that the two Members were in an omnibus on their way to the Capitol when they became involved in a controversy over the prospective failure of the army appropriation bill. There seems to have been no doubt that words led to an assault in which Mr. Granger suffered some injury. The majority of the committee, Messrs.

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[1] First session Tenth Congress, July 8, 1797.

[2] First session Thirty-fourth Congress, Journal, pp. 1527, 1589; Globe, p. 2238.

[3] Nathaniel P. Banks, of Massachusetts, Speaker.

[4] Second session Thirty-fourth Congress, Journal, p. 1589; Globe, p. 33.

[5] Report No. 1, second session Thirty-fourth Congress, bound in vol. 3 of reports or first session Thirty-fourth Congress.

Simmons, Pettit, and Edie, who made the report, came to the conclusion that the assault was a breach of the privileges of a Member of the House and of the House itself. The rights of the Members to personal security in coming from their boarding houses to the sessions at the Capitol were as clear and perfect as when debating on the floor, and this, too, without regard to the question whether a Member is assaulted or beaten in his special character as a Member of Congress or otherwise. In view of the mitigating circumstances of the case, however, the report recommended that no action be taken. Both report and resolution were laid on the table in the House.

1646. From Members between whom warm words or an assault have passed on the floor, the House has exacted apologies.—On January 16, 1838,[1] Mr. William C. Dawson, of Georgia, arose and said that he had waited to hear from some older Member a proposition in regard to what had occurred at this session between two Members of the House. But none being presented, he had drafted, in accordance with parliamentary usage, a resolution to prevent the recurrence of such scenes. He then submitted the following:

The Hon. Samuel J. Gholson, a Member of this House from the State of Mississippi, and the Hon. Henry A. Wise, a Member from the State of Virginia, having spoken language subject to the censure of this House, because in violation of its rules:

Be it therefore resolved, That those gentlemen do now make submission to this body.

Messrs. Gholson and Wise then made statements, each apologizing to the House, but withdrawing none of the statements made concerning one another.

The resolution was laid on the table on motion of Mr. Charles F. Mercer, of Virginia, who thereupon submitted the following:

Resolved, That Messrs. Gholson and Wise, Members of this House, between whom warm words have passed in debate, be required by the Speaker to declare in their places that they will not prosecute further the quarrel which has arisen this day between them.

This resolution was debated, and on the succeeding day was laid on the table, yeas 127, nays 63.

1647. On March 10, 1848,[2] during a vote by tellers, a personal conflict occurred between two Members, Hugh A. Haralson, of Georgia, and George W. Jones, of Tennessee. Great confusion and disorder was produced in the Hall.

Order being restored, the question was put on the pending motion.[3]

The result having been announced, Mr. Jones and Mr. Haralson severally apologized to the House for the breach of order committed by them and submitted themselves to its pleasure.

Mr. Jacob Thompson, of Mississippi, offered this resolution:

Resolved, That a select committee of five Members be appointed, who shall inquire into and report to the House the facts in relation to the personal rencontre on the floor of the House during its sitting, today between the Members from Georgia and Tennessee, the honorable Messrs. Haralson and Jones; and, also, what proceedings in their judgment are necessary for the vindication of this dignity of the House.

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[1] Second session Twenty-fifth Congress, Journal, pp. 290, 293; Globe, p. 107.

[2] First session Thirtieth Congress, Journal, pp. 536–539; Globe, pp. 453–456.

[3] Mr. Alexander D. Sims, of South Carolina, raised the question that the intervention of other business would preclude the House from taking up the breach of privilege; but Mr. Speaker Winthrop decided that such would not be the case. (Globe, p. 453.)

Mr. Alexander H. Stephens, of Georgia, moved that the resolution be laid on the table, which motion was decided in the negative.

After debate, Messrs. Jones and Haralson severally apologized to each other, giving assurances that the quarrel should not be further prosecuted and a reconciliation took place between them in the presence of the House.

Having voted down an amendment empowering the committee to inquire what action might be taken to prevent similar occurrences, the House, by a vote of 77 yeas to 69 nays, agreed to an amendment proposed by Mr. Stephens, whereby the resolution was modified to read as follows, and the modified resolution was then agreed to:

The gentleman from Georgia, Mr. Haralson, and the gentleman from Tennessee, Mr. Jones, having apologized to the House for the breach of order committed by them during the sitting of the House today:

Resolved, That said apology be accepted by the House, and that no further proceedings be taken in relation thereto.

1648. In 1838, in case of great disorder in Committee of the Whole, the Speaker took the Chair "without order to bring the House into order."

Warm words and an assault having passed between two Members; in the Committee of the Whole, the House required them to "apologize for violating its privileges and offending its dignity."

On June 1, 1838,[1] the House, in pursuance of the order of the day before, resolved itself into the Committee of the Whole House on the state of the Union (Mr. Benjamin C. Howard, of Maryland, in the chair) and proceeded to the consideration of the bill making appropriations for preventing and suppressing Indian hostilities for the year 1838, etc., and after some time spent therein, warm words and an assault passed between two Members—Messrs. John Bell, of Tennessee, and Hopkins L. Turney, of Tennessee—and great heat and confusion arising, and the committee being in great disorder, the Speaker took the chair.

Whereupon, order being restored, the Speaker[2] told the House "he had taken the chair without an order, to bring the House into order," and cited as authority for this course the parliamentary law as laid down in Jefferson's Manual, which, by a rule of the House, is made the law of the House.

And immediately thereafter Mr. Henry A. Wise, of Virginia, moved that the House do again resolve itself into the Committee of the Whole on the state of the Union, for the purpose of resuming consideration of the pending bill, when a motion was made by Mr. Charles F. Mercer, of Virginia, that the House do come to the following resolution:

Resolved, That warm words and a, mutual assault having passed between two Members of this House, viz, John Bell and Hopkins L. Turney, of the State of Tennessee, they be called upon by the Speaker to declare in their places that they will not prosecute any quarrel.

This resolution being read, it was, on motion of Mr. William W. Potter, of Pennsylvania, laid on the table. Mr. Isaac S. Pennybacker, of Virginia, then submiited the following:

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[1] Second session Twenty-fifth Congress, Journal, p. 1013; Globe, p. 422.

[2] James K. Polk, of Tennessee, Speaker.

The Hon. Hopkins L. Turney and the Hon. John Bell having violated the privileges of this House by assaulting each other in the House whilst sitting, it is, therefore,

Resolved, That the said Hopkins L. Turney and John Bell do apologize to the House for violating its privileges and offending its dignity.[1]

A motion by Mr. Archibald Yell, of Arkansas, that this resolution do lie on the table was defeated, 155 to 21.

And thereupon, before the question was put on the resolution. Mr. Bell and Mr. Turney voluntarily and severally made submission to the House, and apologized for the breach of its order and decorum, and contempt of its authority by them committed. Thereupon, on motion of Mr. William Taylor, of New York, the resolution of Mr. Pennybacker was laid on the table. The House then went into Committee of the Whole House on the state of the Union.

1649. In 1840 great disorder occurred in Committee of the Whole, whereupon the Speaker without order took the chair and restored order.

Two Members, having assaulted one another in Committee of the Whole, the House declined to permit the Committee to resume its sitting until a committee to investigate the facts of the disorder had been appointed.

A committee appointed merely to ascertain facts, considers itself without authority to submit a recommendation to the House.

On April 21, 1840,[2] while the House was in Committee of the Whole House on the state of the Union, warm words and an assault passed between two Members—Mr. Rice Garland, of Louisiana, and Mr. Jesse A. Bynum, of North Carolina—and great heat and confusion arising, and the committee being in disorder, the Speaker[3] took the chair and brought the House to order.

Mr. John W. H. Underwood, of Georgia, thereupon moved the following resolution:

Resolved, That a committee of five be appointed to investigate the facts relative to the disorder and personal violence which has just taken place between two of its Members, viz, Rice Garland and Jesse A. Bynum, and that said committee have power to send for persons and papers, and that said committee report with all practicable dispatch the facts of the case.

The resolution was adopted, and Messrs. Underwood, William O. Butler, of Kentucky, George N. Briggs, of Massachusetts, Nathan Clifford, of Maine, and Mark A. Cooper, of Georgia, were appointed the committee. It was ordered that the committee have leave to sit during the sessions of the House, and that it be directed to begin its investigations forthwith.

The debate on the resolution shows that the Speaker took the chair at the request of several Members, and after order had been restored stated that the committee had not regularly risen, and called upon the chairman, Mr. Zadoc Casey, of Illinois, to resume the chair. But Members interposed and took the ground that some steps should be taken in the matter. Then Mr. Underwood presented his resolution, and in the debate which followed, the necessity of a reform in the

[1] Such cases of disorder have been rare in the recent history of the House. For the last case see Cong. Record, second session Fifty-fifth Congress, p. 4043.

[2] First session Twenty-sixth Congress, Journal, pp. 814, 898; Globe, pp. 343, 394–396, 398.

[3] Robert M. T. Hunter, of Virginia, Speaker.

manners of the House was strongly urged. The committee reported April 25, and on April 27 the report [1] came up in the House.

The committee examined several witnesses and found that the controversy arose over the presentation of a paper relating to the receipts and expenditures of the Treasury, and that from dissenting views and words the two Members proceeded to a violent personal encounter. The members of the committee concluded their report with the statement that under the terms of the resolution they considered that their duty was simply to ascertain the facts, and that they were without authority to make any recommendation or submit any proposition to the House. They accompanied their report with the testimony. On May 14 [2] the report was considered in the House. A diversity of opinion arose as to whether the House should consider the case and punish the two Members by censure or expulsion for breach of privilege, or confine its attention to regulations for the future punishment of such offenses. After debate the subject was recommitted to the select committee with instructions to report what further proceedings might be necessary on the part of the House, and also what the form of those proceedings should take. It does not appear that this committee ever reported again.

1650. For an assault during debate in Committee of the Whole, the House after expulsion had been suggested, exacted apologies from a Member.

Two Members having created disorder in Committee of the Whole by an encounter, the Speaker took the chair and restored order, and the House immediately referred the subject to a select committee.

On September 9, 1841,[3] in Committee of the Whole House on the state of the Union, a rencounter took place between two Members of the House, viz, Henry A. Wise, of Virginia, and Edward Stanly, of North Carolina, and great heat and confusion arising, and the Committee being in disorder, the Speaker [4] took the chair and brought the House to order.

Both gentlemen made explanations, Mr. Wise apologizing to the House.

Thereupon Mr. Charles J. Ingersoll, of Pennsylvania, moved the following resolution:

Resolved, That a special committee be appointed to inquire into the circumstances of the rencounter on the floor of the House between Mr. Wise and Mr. Stanly, Members of this House, and to report thereon to the House.

This resolution being agreed to, the following were appointed the committee: Messrs. Ingersoll; Jeremiah Morrow, of Ohio; Horace Everett, of Vermont; Robert L. Caruthers, of Tennessee; Leverett Saltonstall, of Massachusetts; Isaac E. Holmes, of South Carolina, and Charles G. Ferris, of New York.

On September 11 the committee made the following report:

That they notified those gentlemen of their meeting in committee, where Mr. Wise and Mr. Stanly might attend if they thought proper, and that their respective written statements would be received by the committee.

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[1] First session Twenty-sixth Congress, House Report No. 488.

[2] Journal, pp. 892–900.

[3] First session Twenty-seventh Congress, Journal, pp. 488, 513, 514; Globe, pp. 445, 451.

[4] John White, of Kentucky, Speaker.

With commendable promptitude and candor both those gentlemen presented written statements not materially differing in their several accounts.

The committee, therefore, deemed it superfluous to take further testimony, and without delay, as the session is drawing to a close, present the following outline of this transaction:

During debate in Committee of the Whole, on the 9th day of the month, Mr. Stanly having said what Mr. Wise considered improper, or unkind, he left his seat, after Mr. Stanly resumed his, and went to it. Some exciting private conversation took place between them, of an angry but not insulting character, till Mr. Wise warned Mr. Stanly not to speak of him again as he said he had done; that he told him that he, Mr. Wise, but for their past relations, would scale Mr. Stanly on the floor for the first before-mentioned attack in debate. Mr. Stanly replied that he would not take Mr. Wise's warning. Mr. Wise proposed to Mr. Stanly, as Mr. Wise states for explanation, that they should go out of the House together. Mr. Stanly refused to go, saying, as he alleges, "No, sir; you have heard what I have said; you can take your own course; I have nothing more to say." Mr. Wise then applied contemptuous language to Mr. Stanly, which he cast back on Mr. Wise. The controversy thus became angry, and terms of indignity being exchanged, Mr. Wise says that he applied to Mr. Stanly terms of extreme insult, which Mr. Stanly repelled by calling Mr. Wise a liar; whereupon Mr. Wise says he struck Mr. Stanly, who says Mr. Wise struck at him. Blows were aimed, if not given, by both, at each other, in a conflict, which was put an end to by adjacent Members forcibly separating the combatants.

The proceedings of the House were entirely suspended by the tumult and confusion which ensued. Persons from without rushed in to the scene of action; the Speaker, without form, resumed the chair, and for some time tried in vain to restore order.

The committee consider it useless to dwell in mere terms of condemnation on an outrage so detrimental to the dignity of the House of Representatives and derogatory to the character of the country. Every Member must feel, as every citizen has declared, that it is high time to put an end to such destructive occurrences.

They therefore submit the following resolutions:

Resolved, That this report be inserted in full on the Journal of the House as a reprimand.

Resolved, That it be henceforth among the rules of this House that for any insulting word applied by Member to another in Committee of the Whole it shall be the duty of the chairman of the committee to report the same to the Speaker on his resuming the chair, whereupon the Speaker shall inflict a fine of not less than one hundred dollars on the offending Member, to be deducted from his compensation; and that for any insulting word applied by any Member to another, in the House, the Speaker shall fine him as before mentioned, as on report of such offense in the Committee of the Whole. All such proceedings subject to an appeal to the House.

Resolved further, That it be henceforth among the rules of the House that for any blow or assault inflicted by a Member of this House on another in Committee of the Whole the same shall be reported by the chairman of said committee to the Speaker; and for any blow or assault inflicted by a Member of this House on another, in the House, it shall be the duty of the Speaker in all such cases aforesaid forthwith to submit to the House a motion for the expulsion of such offending Member, which motion the House shall immediately, in priority to all other business, proceed, on the Speaker's said motion, to determine.

Debate arose on this report, in the course of which several propositions were submitted, one of them being a resolution for the expulsion of Mr. Wise.

Finally the House, by a vote of 104 yeas to 36 nays, voted to recommit the report with the following instructions, proposed by Mr. Alexander H. H. Stewart, of Virginia:

That as the Hon. Henry A. Wise, who was the assailant of the Hon. Edward Stanly on the floor of the House of Representatives on the 9th instant, has made the proper acknowledgments to the House, and as the controversy between the parties has been amicably and honorably adjusted,

Resolved, therefore, That all further proceedings on the part of this House be discontinued.

The Journal does not record that the committee reported as instructed.

1651. Two Members having assaulted one another in Committee of the Whole, the House appointed a committee of inquiry, although the two Members had severally explained to the House and reconciled their quarrel.

A person who had wounded one of the police of the Capitol was by the House committed to the custody of its Sergeant-at-Arms while a committee was instructed to investigate.

In 1844 the Speaker took the chair to quell disorder which had arisen in Committee of the Whole, whereupon the Chairman stated to the House the facts as to the disorder.

On April 23, 1844,[1] on motion of Mr. James J. McKay, of North Carolina, the rules were suspended, and the House resolved itself into the Committee of the Whole House on the state of the Union (Mr. George W. Hopkins, of Virginia, in the chair), and proceeded to the consideration of the bill (No. 213) to modify and amend the act entitled "An act to provide revenue from imports, and to change and to modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; and after some time spent therein warm words passed, which were followed by an assault between two Members, Messrs. George Rathbun, of the State of New York, and John White, of the State of Kentucky; and, great heat and confusion arising, and the committee being in great disorder, the Speaker[2] took the chair. Thereupon, order being restored, Mr. Hopkins, Chairman of the Committee of the Whole, rose and stated to the House the facts as they occurred in the committee, when Mr. Romulus Mitchell Saunders, of North Carolina, moved a resolution, which, with amendments proposed by Messrs. Cave Johnson, of Tennessee, and Jacob Thompson, of Mississippi, was agreed to as follows:

Resolved, That a select committee of five be appointed to inquire into the circumstances of the rencontre on the floor of the House between Mr. Rathbun and Mr. White, Members of this House, and to report thereon to the House; and that the committee be instructed to inquire into the expediency of reporting a bill or resolution providing for the exemplary punishment of any offenses within the walls of this Capitol or within the public grounds attached thereto. And that the same committee also examine into the assault made this morning upon one of the police of the Capitol by William S. Moore, and report all the facts in the case, and what, if any, connection existed between that assault and the encounter which took place between two of the Members of this House.

Mr. Saunders, Mr. John Quincy Adams, of Massachusetts, Mr. George C. Dromgoole, of Virginia, Mr. John J. Harding, of Illinois, and Mr. Reuben Chapman, of Alabama, were appointed on the committee.

Previously to the adoption of the resolution Mr. White and Mr. Rathbun severally explained to the House, and a reconciliation of the quarrel took place between them in the presence of the House.

After the appointment of the committee, Mr. Dromgoole moved the following resolution:

Resolved, That the Sergeant-at-Arms of this House retain in custody William S. Moore until the further order of the House.

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[1] First session Twenty-eighth Congress, Journal, p. 846; Globe, pp. 552, 577, 578, 604.

[2] John W. Jones, of Virginia, Speaker.

This was agreed to after the House had disagreed to an amendment proposed by Mr. William W. Payne, of Alabama, and providing that the Sergeant-at-Arms should be directed "to deliver to the civil authorities of this District, William S. Moore, charged with having fired a pistol, with the supposed intent to kill a Member of this body, and thereby, badly wounding a police officer."

In considering what course should be pursued, the Members in debate recalled the precedents in the cases of Messrs. Wise and Stanly and Messrs. Bell and Turney.

On May 13 the select committee reported that on the first branch of the subject, the rencontre between the two gentlemen, the committee had examined 34 witnesses, whose statements were sworn to. This testimony the committee reported to the House, but proposed no resolution, as they had no authority. Therefore the committee left the case with the House for its disposal. In the second branch of the case, the assault by William S. Moore, they had examined 16 witnesses, and reported all the material facts of the case. The committee expressed in distinct terms the power of this House to exclude offenders against decorum from its presence, and to punish for contempt committed within its presence, or the violation of any of its acknowledged privileges. But as it had been decided by the United States Supreme Court, in cases which the report set forth, that the House had no power to punish for contempt beyond imprisonment, which could only last during the continuance of the session of the House, the committee had thought proper to report a resolution, although they were only called upon to report the facts of the case. They had deemed it advisable to report a resolution to enable the House to act directly on the question, both as regarded the individual and themselves. And while the committee deemed it competent in this House to punish individuals for a violation of its privileges, and while such a punishment would be no bar to any future prosecution, the committee was of opinion that no such punishment should be inflicted by this House, but that the individual (Moore) should be turned over to the judicial authorities of the country. An officer would be ready to take-Moore into custody as soon as he should be discharged from the custody of the Sergeant-at-Arms.

After considerable debate and a postponement, on May 16, when a proposition to censure Messrs. White and Rathbun was pending, the whole subject was laid on the table, yeas 82, nays 73.

The report [1] of the committee held, as to the case of Moore:

> In the case of Anderson *v.* Dunn, arising out of an arrest of the plaintiff by the defendant, as an officer of this House, and acting under the Speaker's warrant, the Supreme Court have declared the highest power either House has to punish for contempt is that of imprisonment, and that this confinement can not extend beyond the existence of the session. So that, it follows, imprisonment must terminate with adjournment. The offense charged against the party would be that of an assault with intent to kill. If the party should be convicted of this crime, it would call for a higher degree of punishment than this House has the power to impose.

1652. An assault occurring between two Members in Committee of the Whole, the committee rose and the Speaker restored order before receiving the report.

Members who had committed an assault in Committee of the Whole

[1] Report No. 470, fast session Twenty-eighth Congress.

apologized to the House, although the Chairman of the committee had made no report of the occurrence.

An apology of Members for an assault committed in Committee of the Whole was not placed in the Journal.

On March 12; 1852,[1] while the Committee of the Whole House on the state of the Union was considering the resolution (S. 17) to authorize the continuance of the work on the two wings of the Capitol, an altercation arose between Messrs. Albert G. Brown, of Mississippi, and John A. Wilcox, of Mississippi, blows were exchanged, and a violent personal conflict ensued.

A motion that the committee rise was made and carried, and the Chairman reported that the committee had had the state of the Union generally under consideration, and particularly the bill (S. 17) to authorize, etc. No mention of the disorder was made in the report.

This report was not made, however, until order was restored by the Speaker, the Speaker[2] declining to receive the report until then.

A resolution was then offered to close debate on the bill before the committee; and pending consideration of this resolution, by unanimous consent Messrs. Brown and Wilcox, respectively, arose and made apology to the House for the disorder.

No further action was taken, and the Journal contains no reference to the affair.

1653. A Member having defied and insulted the Chairman of the Committee of the Whole, the Chairmam left the chair and, on the chair being taken by the Speaker, reported the facts to the House.

For defying and insulting the Chairman of the Committee of the Whole, the House declared Sherrod Williams in contempt and liable to censure.

An instance wherein, after a Member had explained, the House reconsidered its vote of censure.

In 1836 it seems to have been customary for the Chairman of the Committee of the Whole to count the committee to ascertain as to the presence of a quorum.

On July 2, 1836,[3] the House having gone into Committee of the Whole House on the state of the Union, after some time spent therein, the committee rose, and Mr. Joel B. Sutherland, of Pennsylvania, reported that while in Committee of the Whole House Mr. Sherrod Williams, of Kentucky, a member of the committee, addressed the Chairman (Mr. Sutherland) while he (the Chairman) was counting the Members for the purpose of ascertaining whether a quorum was present, and was called to order by the Chairman and requested to take his seat. This he positively and repeatedly refused to do, and called the Chairman to order and demanded of him to take his seat; and Mr. Williams persisting in his refusal to submit to the authority of the Chair, the Chairman had left the chair, and now reported the facts which had induced the committee to rise to the Speaker, and through him to the House.

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[1] First session Thirty-second Congress, Globe, p. 736.

[2] Linn Boyd, of Kentucky, Speaker.

[3] First session Twentyfourth Congress, Journal, pp. 1209, 1225; Globe, p. 484.

The House proceeding to consider the report, a resolution was offered by Mr. John M. Patton, of Virginia, for the appointment of a committee to consider what should be done "in vindication of the authority of the House, condemned by the violation of order." The House, however, with scarcely any dissent adopted a resolution offered by Mr. James A. Pearce, of Maryland, as follows:

Resolved, That the Member from Kentucky (Mr. Williams) having refused to take his seat when ordered so to do by the Chairman of the Committee of the Whole House, having ordered the Chairman to take his seat, and having defied the power of the Chair and the House, has committed a contempt of this House and is justly liable to its censure.

The record of the debate shows that Mr. Williams acknowledged that he had intended to express his disrespect for the Chairman personally, the latter having ignored his demands for a division of a question. Later, after a vote by tellers had disclosed the absence of a quorum, the Chairman, instead of vacating the chair and reporting the fact to the House, had proceeded to count the committee. For this Mr. Williams had called him to order.

The Speaker [1] said that the course of the Chairman in counting the House when a quorum had not voted was strictly parliamentary.

Mr. Elisha, Whittlesey, of Ohio, said the difficulty arose because the gentleman from Kentucky did not know the rules. It had been the invariable rule (practice is evidently meant) for the Speaker and Chairman of the Committee of the Whole, whenever the question was raised whether a quorum was present or not, to proceed himself to count the Members or to ascertain in any other way he thought best to accomplish that object.

As Mr. Williams refused to make any other apology than to say that he intended to insult the Chairman without intending to insult the House, and as Mr. Sutherland refused absolutely to go back into the chair under such circumstances, the House was forced to act. The Speaker stated that the case was altogether of a novel character, and Mr. R. M. Johnson, of Kentucky, thought it was perhaps the first instance of the kind since the organization of the Government.

On July 4, explanation having been made to the House by Mr. Williams, the House reconsidered the resolution declaring Mr. Williams justly liable to censure, and then decided it in the negative.[2]

1654. Three Members of the House were ordered to the bar of the House to answer for a contempt of privilege in being present at and assisting in an assault between two other Members.—On July 17, 1866,[3] the House agreed to the following resolution, one of three reported by a select committee of investigation:

Resolved, That Charles D. Pennypacker, of Kentucky, L. B. Grigsby, of Kentucky, and John S. McGrew, of Ohio, by their presence and participation in a premeditated assault between Hon. Mr. Rousseau, of Kentucky, and Ron. Mr. Grinnell, of Iowa, on account of words spoken in debate, in which the persons, if not the lives, of Members of the House were imperiled, were guilty of a violation of its privileges, and they are hereby ordered to be brought to the bar of this House to answer for their contempt of its privilege.

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[1] James K. Polk, of Tennessee, Speaker.

[2] Debates, pp. 4623, 4624; Journal, p. 1225.

[3] First session Thirty-ninth Congress, Journal, pp. 1036, 1111; Globe, p. 3891.

On July 24 it was ordered, on motion of Mr. Nathaniel P. Banks, of Massachusetts, that the execution of this order be dispensed with.

1655. The case of Lovell H. Rousseau, in contempt of the House, in 1866.

An assault by one Member on another for words spoken in debate was made the subject of an investigation by a select committee.

Discussion of the offense of questioning a Member "in any other place" for words spoken in debate.

The words of a Member having been excepted to but not taken down when delivered, and having afterwards been investigated by a committee, it was held in order to propose censure of the Member.

On June 15, 1866,[1] Mr. Rufus P. Spalding, of Ohio, as a question of privilege, offered the following resolution, which was agreed to by the House without debate, the previous question being ordered:

Whereas it is alleged in the public press that Hon. Lovell R. Rousseau, a Member of this House from the State of Kentucky, did, on the evening of Thursday, the 14th instant, commit an assault upon the person of Hon. Josiah B. Grinnell, a Member of this House from the State of Iowa, because of words spoken in debate in this House by the latter; and whereas said assault if committed, was a breach of the privileges of this House and of the Member assaulted: Therefore,

Resolved, That a select committee of five be appointed by the Speaker to investigate the subject, and to report the facts, with such resolution thereto as in their judgment may be proper and necessary for the vindication of the privileges of the House and the protection of its Members; and that said committee have power to send for persons and papers and to examine witnesses on oath.

The committee[2] I reported on July 2, and on July 14 the report was taken up for consideration in the House.[3] The committee found in their report that previous to the 14th of June Mr. Grinnell, on the floor of the House, in debate, had imputed cowardice to Mr. Rousseau in the latter's career as a soldier; that after the adjournment of the House on the 14th of June Mr. Rousseau assaulted Mr. Grinnell in the portico of the east front of the Capitol. The assault was made with a light cane. Three Members, each of whom was armed, as the committee found afterwards, were present as friends of Mr. Rousseau and they afterwards admitted that they should have taken part in the event of interference. The committee found no justification for the charge against the character of Mr. Rousseau for cowardice and condemned it as an infraction of the rules and usages of the House. Indeed, the minority considered the provocation so great that they dissented from the proposition of expulsion submitted by the majority. The majority of the committee found that, in spite of the provocation, there was no excuse for a resort to violence in contempt of the provision of the Constitution that "for any speech or debate in either House they (Members) shall not be questioned in any other place." Parliamentary assemblies were founded on the theory of the inviolability of the person of the Representative. An act of violence against a Member was an act of insurrection against the people whom he represented. It could not be justified by

[1] First session Thirty-ninth Congress, Journal, pp. 842, 843; Globe, p. 3194.

[2] Journal, pp. 944, 1018; Globe, pp. 3544, 3818.

[3] The report of the committee was signed by Messrs. Spalding, N. P. Banks, of Massachusetts, and M. Russell Thayer, of Pennsylvania. Messrs. Henry J. Raymond, of New York, and John Hogan, of Missouri, submitted minority views.

any delinquency or wrong on the part of the Representative which they have not authorized and for which they ought not to be held responsible or deprived of the rights of representation. "These prerogatives of the Representative," says the report, "are so much a matter of public concern that they can not be taken away by any act of the assembly of which he is a member, except by an order of expulsion or its equivalent, or annulled by the legislature; and, so far as they secure to him the right of attendance, it is not in the power of the Representative to waive or surrender them."

The committee recommended the following resolutions:

Resolved, That Hon. Lovell H. Rousseau, a Representative from Kentucky, by committing an assault upon the person of Hon. J. B. Grinnell, a Representative from the State of Iowa, for words spoken in debate, has justly forfeited his privileges as a Member of this House, and is hereby expelled.

Resolved, That the personal reflections made by Mr. Grinnell, a Representative from the State of Iowa, in presence of the House, upon the character of Mr. Rousseau, a Representative from the State of Kentucky, were in violation of the rules regulating debate and the privileges of its Members founded thereon, and merit the disapproval of the House.

Resolved, That Charles D. Pennypacker, of Kentucky, L. B. Grigsby, of Kentucky, and John S. McGrew, of Ohio, by their presence and participation in a premeditated assault between Hon. Mr. Rousseau, of Kentucky, and Hon. Mr. Grinnell, of Iowa, on account of words spoken in debate, in which the persons, if not the lives, of Members of this House were imperiled, were guilty of a violation of its privileges, and they are hereby ordered to be brought to the bar of this House to answer for their contempt of its privileges.

Mr. James F. Wilson, of Iowa, raised the question of order that, under the rules of the House, Mr. Grinnell might not be held to answer for words that were not at the time taken down, and also that the committee had exceeded its authority.

After debate, the Speaker [1] said:

The point raised by the gentleman involves in the first place the rules of debate and the manner of calling to order, and secondly the authority of the committee under instruction of the House.

The sixty-first rule, first read by the gentleman, was adopted, except that part in italics, by the first Congress under the Constitution, April 27, 1789. The sixty-second rule, upon which he mainly relies, is in the precise words in which it was originally introduced by John Q. Adams. The history of the sixty-second rule may perhaps show the reason for its introduction.

In 1832, Andrew Stevenson being Speaker, Mr. Stanberry, of Ohio, in the course of debate, denounced the Speaker for his political course in severe language. The chair was then occupied temporarily by James K. Polk, who was afterwards Speaker. No notice was taken by the Speaker pro tempore or by any Member of that denunciation until after the speech of Mr. Stanberry had been concluded, when exceptions were taken to it. The next day a motion was made to censure the Member for denouncing the Speaker, which was regarded as contempt of the House. After a long debate that motion prevailed by a large majority. But in the course of the debate there was a question raised as to what were the exact words used by the Member in debate. There was then no Congressional Globe; nothing but Gales & Seaton's Register of the debates, which was not a verbatim report. To settle the question, however, Mr. Stanberry repeated and reaffirmed the language. The next day John Quincy Adams offered this rule, which was immediately laid on the table. Five years afterwards it was taken up and adopted, and has since formed a part of our parliamentary law.

There are two ways to call to order. First, for irrelevant debate. That simply draws the Member back to the subject. Second, for disorderly language, transgression of the rules of the House, or indecorum of any kind. The sixty-second rule applies precisely to that. The Chair will read it. Before that, however, he Chair will read the sixty-first rule:

"If any Member, in speaking or otherwise, transgress the rules of the House, the Speaker shall, or any Member may, call to order; in which case the Member so called to order shall immediately sit down, unless permitted to explain."

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[1] Schuyler Colfax, of Indiana, Speaker. Globe, p. 3820.

Under this, the oldest rule, the primary responsibility of ca1ling to order seemed to be devolved upon the Speaker, but under the sixty-second rule, and this has been the usage since its adoption, the primary responsibility of calling to order devolves upon the Members of the House, as will be seen.

"If a Member be called to order for words spoken in debate, the person calling him to order shall repeat the words excepted to, and they shall be taken down in writing at the Clerk's table, and no Member shall be held to answer, or be subject to the censure of the House, for words spoken in debate, if any other Member has spoken, or other business has intervened, after the words spoken, and before exception to them shall have been taken."

The inference is plain that some Member calls to order, and the Speaker then rules upon the point. In "personal" explanations, which every Speaker dislikes, out of which grow so much of the trouble, discord, and strife there is in Congress, the Speaker is the only Member who is not asked to give his consent to it. It is the unanimous consent of the other Members of the House that is required. It is generally understood that the Member who asks this consent intends to make some "personal" remarks in review of remarks made in Congress, in the press, or elsewhere in which he claims to have been misrepresented. And the uniform usage of Speakers has been, with scarcely a single exception, searching far back in our parliamentary history, that when the House grants unanimous consent for a Member to make "a personal explanation," the Speaker, who does not give his consent, whose consent is not asked, waits until some Member rises to a question of order, when he promptly decides it. There have been very few exceptions, which, indeed, only prove the general rule. One was by the present occupant of the Chair, upon the occasion involved in this report, who, after the gentleman from Iowa [Mr. Grinnell] had been twice called to order by Members on the floor, and the points had been sustained, stated that if this line of remark was continued, he should himself check him, and did so.

This sixty-second rule is divided in the middle by a semicolon, and the Chair asks the attention of the gentleman from Iowa [Mr. Wilson] to the language of that rule, as it settles the whole question:

"62. If a Member be called to order for words spoken in debate, the person calling him to order shall repeat the words excepted to"—

That is, the "calling to order" is "excepting" to words spoken in debate—"and they shall be taken down in writing at the Clerk's table; and no Member shall be held to answer, or be subject to the censure of the House, for words spoken in debate, if any other Member has spoken, or other business has intervened, after the words spoken, and before exception to them shall have been taken."

The first part of this rule declares that "calling to order" is "excepting to words spoken in debate." The second part of the rule declares that a Member shall not be held subject to censure for words spoken in debate if other business has intervened after the words have been spoken and before "exception" to them has been taken. Exception to the words of the gentleman from Iowa [Mr. Grinnell] was taken by the gentleman from Illinois [Mr. Harding], the gentleman from Massachusetts [Mr. Banks], the gentleman from Kentucky [Mr. Rousseau], and also by the Speaker of the House, as the records of the Congressional Globe will show. The distinction is obvious between the two parts of the rule. In the first part it speaks of a Member excepting to language of another and having the words taken down. In the last part of the rule it says he shall not be censured thereafter unless exception to his words were taken; but it omits to add as an essential condition that the words must also have been taken down. The substantial point, indeed the only point, required in the latter part of the rule is, that exception to the objectionable words must have been taken.

These rules, the sixty-first and sixty-second, are not always carried out to their full extent; it is not always required that the words excepted to shall be taken down in writing at the Clerk's desk, as we have the Congressional Globe, in which are printed all the words spoken as taken down by the reporters in full. Sometimes, indeed quite often, the Chair rules upon the question of order as soon as it is raised, without the words excepted to being required by anyone to be taken down in writing and read. Sometimes, as today, in the debate upon the bridge bill, a Member calls another to order, and requires the words to be taken down in writing, when the Speaker rules upon the question of order. Sometimes the rule is carried a step further, and the demand is made that the Member called to order shall take his seat until leave is granted by the House for him to proceed in order. Sometimes, but rarely, the House goes beyond this and carries out the rule to its fullest extent and rigor by censuring the offending Member upon the spot.

The gentleman from Iowa [Mr. Wilson] read a precedent of Mr. Speaker Grow, from the Thirty-seventh Congress. But he did not read the language of the Manual, which was quoted by the Speaker

at that time. The language of Mr. Vallandigham was uttered in Committee of the Whole, when the Speaker was not in the chair and could not be. The Manual lays down a specific rule regulating debate in Committee of the Whole, and this is the rule:

"Disorderly words spoken in a committee must be written down as in the House, but the committee can only report them to the House for animadversion."

The only way the House could have taken notice of the words excepted to in that case was by having them written down in Committee of the Whole, to be reported to the House. The Committee of the Whole is a different body entirely from the House; it is presided over by a different person and is governed by different rules, as members are all aware. It has no power to censure a member for disorderly words, but must report them specifically to the House for its action.

The Chair is of the opinion, therefore, that under the sixty-second rule, which is composed of two parts, separated by a semicolon, it is distinctly shown by the first part that "calling to order" is excepting to words spoken in debate, and that can be pursued further, if any member sees fit to do so; that any member can demand that the words excepted to shall be taken down in writing, or a member may demand that the person called to order shall take his seat until the Speaker decides the point. But even if the decision is adverse the Speaker can not compel him to stop his speech, while any single member on the floor can, by demanding that he shall not proceed further unless by consent of a majority of the House. As this may seem strange to members, the Chair will read from the sixty-first rule:

"If the decision be in favor of the member called to order, he shall be at liberty to proceed; if otherwise, he shall not be permitted to proceed, in case any member object, without leave of the House."

It is for any member to object to another against whom a point of order has been successfully made, going on without the leave of the House. And the rule seems to be predicated on the presumption that if, out of all the members who heard the objectionable words and the Speaker's ruling against them, no one objects to his proceeding further, they are willing that he shall continue his speech. No such action was had in the House on the 11th of June, when this debate occurred. The Speaker promptly ruled upon every point of order which was raised. He ruled against the gentleman from Iowa [Mr. Grinnell] upon every point. Any gentleman upon either side had the right to insist that the gentleman should resume his seat and should not proceed until the House had given him permission to proceed in order. But no one raised that point, and thereby the right to raise it was waived. But that does not interfere with the operation of the last part of this rule, which states (inverting the language) that a member can be censured if exceptions to the words spoken by him were taken at the time.

But this case is also settled by the resolution adopted by the House. The gentleman from Ohio [Mr. Spalding] rose to a question of privilege, and submitted the resolution which has been read by the gentleman from Iowa. The Chair construes the preamble of that resolution somewhat differently from the gentleman from Iowa. That gentleman emphasized the latter part of the preamble, while the Chair thinks that the portion narrating the affair is the substantial part. The Chair will read the preamble and resolution, so that the House may judge whether his construction of them is correct. It may be remarked, in passing, that no gentleman moved to amend them, and they were unanimously agreed to by the House as instructions to this committee:

"Whereas it is alleged in the public press that Hon. Lovell H. Rousseau, a member of this House from the State of Kentucky, did, on the evening of Thursday, the 14th instant, commit an assault upon the person of Hon. J. B. Grinnell, a member of this House from the State of Iowa, because of words spoken in debate in this House by the latter; and whereas said assault, if committed, was a breach of the privileges of this House and of the member assaulted: Therefore,

"Resolved, That a select committee of five be appointed by the Speaker to investigate the subject and to report the facts, with such resolutions in reference thereto as in their judgment may be proper and necessary for the vindication of the privileges of the House and the protection of its members, and that said committee have power to send for persons and papers and to examine witnesses on oath."

The resolution referring to the preamble, which states that the member from Kentucky did "commit an assault upon the person of Hon. J.B. Grinnell, a member of this House from the State of Iowa, because of words spoken in debate in this House by the latter," and holding such assault to be a breach of the privileges of this House and of the member assaulted, instructs this committee to "investigate the subject and to report the facts, with such resolutions in reference thereto as in their judgment may be proper and necessary for the vindication of the privileges of the House and the protection of its members."

The Chair thinks that this gave the committee full jurisdiction in the case, by the unanimous order of the House, no one proposing to limit their resolutions, but conferring on them full power to report whatever, on the facts ascertained by them, they deemed proper and necessary for the double object of vindicating the privileges of the House and the protection of its members.

Now, in the case cited by the gentleman from Iowa, in which Mr. Vallandigham used language reflecting upon Senator "Wade, if the latter had been in the Hall at the time and when so offensively denounced, had immediately committed a personal assault upon the former, and if a committee had been appointed with instructions to investigate the matter as a violation of the privileges of a member of the House, is it not evident that the House would have expected the committee to report with reference to the whole controversy, even if an immediate collision had prevented the words from being excepted to, taken down and read at the Clerk's table, and ruled on by the Speaker; that the committee should at least have embraced in their report anything closely connected with the transaction—bearing the relation, it might be said, of cause to effect? Certainly this would have been expected by the House. In accordance with this principle was the action of the select committee upon the case which arose in the Thirty-fourth Congress, when a member from South Carolina, aided by another standing near by, assaulted a Senator from Massachusetts in his seat for words spoken in debate. In that case the committee reported upon the entire subject, including everything out of which the assault grew.

The Chair, therefore, is of opinion that under the instructions unanimously given in this case to the committee by this House the committee had authority to report upon the whole controversy, in accordance with the specific language of the preamble of the resolution providing for the appointment of the committee to investigate in assault caused by words spoken in debate. The Chair, therefore, overrules the point of order.

1656. The case of Lovell H. Rousseau, continued.

The House, after declining to expel, censured a Member for contempt in assaulting another Member for words spoken in debate.

A committee having general authority to examine and recommend in relation to an assault between two Members, was held to have authority also to recommend censure of other Members implicated.

The House having ordered a Member to be censured, he was allowed, by unanimous consent, to make explanation before the execution of the order.

A Member, for whom the House had voted censure, announced that he had sent his resignation to the Governor of his State; but the House nevertheless voted to inflict the punishment.

Censure inducted on a Member by the Speaker, by order of the House, appears in full in the Journal.

Where a two-thirds vote is required, a Member voting on the prevailing side may move to reconsider, even though he be one of an actual minority.

A majority is required to reconsider a vote taken under conditions requiring two-thirds for affirmative action.

Mr. Charles A. Eldridge, of Wisconsin, made the further point of order that the committee had no jurisdiction over the three Members mentioned in the third resolution, and that at most it could only report the facts in the case.

The Speaker said: [1]

The Chair overrules the point of order, for the reasons already stated by him in his decision just made. The committee were authorized and instructed—

"To investigate the subject and to report the facts, with such resolutions in reference thereto as

[1] Globe, p. 3821.

in their judgment may be proper and necessary for the vindication of the privileges of the House and. the protection of its Members."

It was a large authority, and if they had evidence that these gentlemen were connected in any way as accessories to the assault they had the right to report. Citizens have often been brought to the bar of the House for breach of its privileges. In the Fourth Congress the House of Representatives committed Randall and Whitney, two citizens, for attempting to corrupt the integrity of certain Members of Congress, which the House decided to be a contempt and breach of its privilege. In the same Congress it was decided that a challenge given by a citizen to a Member of Congress was a breach of privilege; and it was also decided to be a breach of privilege for the official printer (elected under the old law) to publish paragraphs defamatory of Congress in the official organ. The Chair thinks the committee had the right to report the third resolution as well as the second, and therefore overrules the point of order.

On July 16 and 17,[1] the report was debated in the House. Mr. Robert S. Hale, of New York, offered a proposition declaring that the House reported both personal reflections in debate and acts of violence toward Members, and declaring further the power and authority of the House to protect the privileges of its Members, but expressing the opinion that under the circumstances it was inexpedient to take further action. This proposition was decided in the negative.

Mr. Thaddeus Stevens, of Pennsylvania, submitted in the form of an amendment a proposition to adopt in place of all the resolutions reported by the committee the following:

Resolved, That Hon. Lovell H. Rousseau be summoned to the bar of the House, and he there publicly reprimanded by the Speaker for the violation of the rights and privileges of the House, of which he was guilty in the personal assault committed by him upon Hon. J.B. Grinnell for words spoken in debate.

This proposition was decided in the negative, yeas 35, nays 94.

The question was then taken on the proposition of the minority, submitted by Mr. Raymond, to substitute the following for the first resolution reported by the committee:

Resolved, That Hon. Lovell H. Rousseau be, and he is hereby, reprimanded for the violation of the rights and privileges of the House, of which he was guilty in the personal assault committed by him upon Ron. J. B. Grinnell, for words spoken in debate.

This proposition was decided in the negative, yeas 59, nays 69.

Then the question was taken on the first resolution of the committee, expelling Mr. Rousseau. And there appeared 73 yeas and 51 nays. So the resolution of expulsion was not agreed to. Mr. Nathaniel P. Banks, of Massachusetts, who had voted in the negative, which was the prevailing side, entered a motion to reconsider. The Speaker ruled that a Member voting on the prevailing side might move to reconsider, and that a majority vote would be required to reconsider.

The House next laid on the table the second resolution of the committee, that of censuring Mr. Grinnell.

The third resolution, censuring the three Members who had witnessed the affair, was agreed to.

Then the motion of Mr. Banks to reconsider was called up, and being agreed to, the question recurred on the resolution of expulsion.

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[1] Journal, pp. 1018, 1028, 1031, 1033, 1037; Globe, pp. 3846, 3874, 3891.

Mr. Banks thereupon moved to amend it by striking out all after the word *Resolved* and inserting:

That Hon. Lovell H. Rousseau, a Member of this House from the State of Kentucky, be summoned to the bar of this House, and be there publicly reprimanded by the Speaker for the violation of its rights and privileges, of which he was guilty in the personal assault committed by him upon the person of Hon. J. B. Grinnell, a Member of this House from the State of Iowa, for words spoken in debate.

This amendment was agreed to, and then the resolution, as amended, was agreed to, yeas 89, nays 30.

On July 21,[1] the chairman of the select committee demanded that the order of the House be executed. Thereupon Mr. Rousseau, who had not spoken during the proceedings, asked the privilege of making a personal explanation, and by unanimous consent this request was granted. In the course of the explanation Mr. Rousseau announced that he had sent his resignation to the Governor of Kentucky.

A question at once arose as to the propriety of carrying out the order of the House under these circumstances. After debate as to the right of the Member to resign, and after the point had been made that the House had the same right to censure a citizen who had invaded its privileges that it had to censure a Member, the House declined to postpone the execution of the order, by a vote of 43 yeas to 62 nays.

Then Mr. Rousseau presented himself at the bar of the House, and the Speaker inflicted on him the censure of the House. This censure appears in full in the Journal.

On July 24, by unanimous consent, it was—

Ordered, That the execution of the order of the House in the case of those implicated in the assault upon Ron. Mr. Grinnell be dispensed with.[2]

1657. Two Members having created disorder in Committee of the Whole, the Speaker took the Chair and restored order, whereupon the Committee rose, and the House adjourned before taking action on the disorder.

Although a breach of privilege occur in Committee of the Whole, it yet relates to the dignity of the House and is so treated

The rule requiring words spoken out of order to be taken down at once does not apply to an occurrence of disorder constituting a breach of privilege.

For an assault during debate in Committee of the Whole the House, after expulsion had been suggested, exacted apologies from two Members.

On December 21, 1880,[3] in Committee of the Whole House on the state of the Union, a scene of great disorder occurred between Messrs. James B. Weaver, of Iowa, and William A. J. Sparks, of Illinois. The Speaker took the Chair and restored order, and immediately thereafter the Committee arose and the House adjourned.

Immediately upon the assembling of the House on December 22,[4] Mr. Selwyn Z.

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[1] Journal, pp. 1074–1076; Globe, pp. 4009–4017.

[2] Journal, P. 1111.

[3] Third session Forty-sixth Congress, Journal, p. 114; Record, p. 311.

[4] Journal, p. 115; Record, pp. 328–335.

Bowman, of Massachusetts, rising to a parliamentary inquiry, asked if the reading of the Journal would be such intervening business as was referred to in the words of the rule:

He (the Member) shall not be held to answer, nor be subject to the censure of the House therefor, if further debate or other business has intervened.

The Speaker [1] said:

The Chair is of the opinion that the reading of the Journal does not take from the House any privilege that it now possesses.

The Journal having been read and approved, Mr. Robert M. McLane, of Maryland, claiming the floor for a question of privilege, referred to the scene of disorder the day before.

Mr. Joseph G. Cannon, of Illinois, made the point of order that the occurrence was in Committee of the Whole, and that the House had no knowledge of it.

The Speaker said:

The Chair would state that whatever might have been his decision touching that part of the rules to which the gentleman from Massachusetts has directed the attention of the Chair—clauses 4 and 5 of Rule XIV—the Chair finds warrant for the recognition of the gentleman from Maryland in the terms of Rule IX, which declares:

"Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings."

This matter, in the opinion of the Chair, relates, beyond controversy, to the dignity of the House. The Chair therefore rules the question one of privilege.

Mr. McLane then, after remarks, submitted the following:

Resolved, That the gentlemen from Iowa and Illinois be required to now apologize to this House for their conduct yesterday in this House.

In the course of the debate two other propositions were submitted, the first by Mr. Bowman, as follows:

Resolved, That, for gross breach of the privileges, rules, and decorum of this House, James B. Weaver, of Iowa, and William A. J. Sparks, of Illinois, be, and they hereby are, expelled from the House of Representatives of the Forty-sixth Congress of the United States.

The second proposition, submitted by Mr. Thomas M. Browne, of Indiana, proposed the investigation of the occurrence by a special committee.[2]

In the course of the debate the point was raised that the House might not take cognizance of the affair, because the words were not taken down at the time, and it was in reply urged that when the rule was framed the House did not have sworn reporters, and therefore it was necessary that spoken words be taken down at the time. The Speaker adhered to his ruling that the subject came as a question of privilege, and not under the rule providing for taking down of words. As to whether or not the words of the Congressional Record might be made a basis of action by the House, the same as words taken down under the rule, the Speaker declined to rule.

The House had by vote agreed to the proposition of Mr. Browne as an amend-

[1] Samuel J. Randall, of Pennsylvania, Speaker.

[2] Messrs. Sparks and Weaver had applied opprobrious epithets to one another, and Mr. Weaver had menaced Mr. Sparks with physical violence.

ment, when Messrs. Weaver and Sparks, by unanimous consent, made personal explanations, apologizing to the House for their conduct.

Thereupon, by a vote of yeas 105, nays 44, the House laid the whole subject on the table.

1658. The House has frequently allowed personal difficulties arising in debate and even violent assaults to pass without notice, the Members concerned making apologies either personally or through other Members.

When Members apologize for disorderly proceedings which the House has allowed to pass without taking action, the apology has not usually been entered on the Journal.

On March 25, 1834,[1] Mr. Seaborn Jones, of Georgia, arose and explained that a difficulty which had arisen a few days before on the floor between Messrs. James Blair and Henry L. Pinckney, of South Carolina, had been settled by an adjustment "amicable, satisfactory, and honorable." As the occurrence had taken place in the House it was the desire of those gentlemen that the House should know that it had been adjusted.

1659. On December 19, 1849,[2] Mr. Thomas H. Bayly, of Virginia, presented to the House a written explanation of a difficulty that had occurred between Messrs. William Duer, of New York, and Richard K. Meade, of Virginia, in debate on a previous day. This explanation was signed by Mr. Bayly, on behalf of Mr. Meade, and by Mr. C. M. Conrad, of Louisiana, on behalf of Mr. Duer.

No reference to this appears in the Journal.

1660. On March 22, 1852,[3] Mr. Robert W. Johnson, of Arkansas, arose and stated that the unpleasant misunderstanding between Messrs. Cyrus L. Dunham, of Indiana, and Graham N. Fitch, of Indiana, which occurred on the 17th, had been referred to Mr. John C. Breckenridge, of Kentucky, and himself, and it was now in his power to state that all difference had been justly and honorably settled.

No mention of this occurrence appears in the Journal.

1661. On August 25, 1852,[4] Mr. Robert W. Johnson, of Arkansas, announced to the House the settlement of the "unpleasant difficulty" which had occurred on the floor of the House on the preceding day between Messrs. Addison White, of Kentucky, and William H. Polk, of Tennessee.

The Journal makes no mention of this explanation.

1662. On February 5 1858,[5] during dilatory proceedings pending the reference of the message of the President relating to the Lecompton constitution of Kansas, a violent personal conflict occurred between Messrs. Galusha A. Grow, of Pennsylvania, and Lawrence M. Keitt, of South Carolina; Members crowded about and several participated. No mention of this occurs in the journal and no subsequent action seems to have been taken by the House. But on February 8 Messrs. Keitt and Grow severally apologized to the House for their breach of its order and decorum. No notice of this appears on the Journal.

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[1] First session Twenty-third Congress, Debates, p. 3137.

[2] First session Thirty-first Congress, Globe, p. 44.

[3] First session Thirty-second Congress, Globe, p. 814.

[4] First session Thirty-second Congress, Globe, p. 2345.

[5] First session Thirty-fifth Congress, Journal, pp. 328, 329, 349; Globe, pp. 603, 623.

1663. In early and infrequent instances of misunderstanding and disorder in the Senate no action was taken beyond investigation.—On March 2, 1833,[1] in the Senate, Mr. Henry Clay, of Kentucky, arose and made remarks in explanation and reconciliation of a misunderstanding that had taken place in debate between Mr. Daniel Webster, of Massachusetts, and Mr. George Poindexter, Of Mississippi.

1664. In 1850[2] occurred an episode between Messrs. Thomas H. Benton, of Missouri, and Henry S. Foote, of Mississippi, in the Senate, in which the latter menaced the former with a pistol. The subject was referred to a select committee, who made a report giving the facts in the case, and condemning the practice of carrying arms in the Senate as well as regretting the flagrant breach of order. The report further stated that this was the first instance of disorder of this kind in the Senate. There was no recommendation for action and no action was taken by the Senate.

1665. For unparliamentary language and an assault two Senators were declared in contempt and later were censured.

Two Senators having been declared in contempt a question was raised as to the right to suspend their functions as Senators, including the right to vote, but was not decided.

The President pro tempore of the Senate declined to take the responsibility of directing the Secretary to omit from the call of the yeas and nays the names of two Senators who had been declared in contempt.

Two Senators, declared by the Senate to be in contempt, were allowed to speak only after permission had been given by the Senate.

On a resolution in the Senate censuring two Senators the names of both were called, but neither voted.

On February 22, 1902,[3] while the Senate was considering the bill (H.R. 5833) temporarily to provide revenue for the Philippine Islands, Mr. John L. McLaurin, of South Carolina, referring to a certain statement made in debate by Mr. Benjamin R. Tillman, of South Carolina, said:

"I now say that that statement is a willful, malicious, and deliberate lie."

At this point Mr. Tillman advanced to Mr. McLaurin, of South Carolina, and the two Senators met in a personal encounter, when they were separated by Mr. Layton, the acting assistant doorkeeper, assisted by several Senators sitting near.

The Senate at once went into executive session, and after some time spent therein the executive session was terminated and the injunction of secrecy was removed from the following, which had been agreed to:

Ordered, That the two Senators from the State of South Carolina be declared in contempt of the Senate on account of the altercation and personal encounter between them this day in open session, and that the matter be referred to the Committee on Privileges and Elections with instructions to report what action shall be taken by the Senate in regard thereto.

Thereupon Mr. J. C. S. Blackburn, of Kentucky, asked whether or not Mr. Tillman would be entitled to recognition to make a statement.

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[1] Second session Twenty-second Congress, Debates, p. 810.

[2] First session Thirty-first Congress, Globe, pp. 762, 769, 1153, 1479, 1480.

[3] First session Fifty-seventh Congress, Record, pp. 2087–2090.

After debate the President pro tempore [1] said:

While these two Senators are declared to be in contempt the Chair could not recognize either if he should rise and address the Chair; but on motion made by any Senator that they be heard the Chair would recognize the Senator making the motion, and would hold that the motion was in order. In the ordinary transgression of the rules or violation of order the Senator violating must take his chair, and he can not be recognized by the presiding officer again until the Senate has relieved him of that by motion. Of course, the Senators from South Carolina can be relieved from the condition in which they are now, so far as recognition by the Chair is concerned, by a motion and by a majority vote of the Senate.

Thereupon, on motion of Mr. Blackburn, the Senate voted to allow the two Senators to be heard in order that they might purge themselves of contempt.

And Messrs. Tillman and McLaurin thereupon addressed the Senate apologizing for the occurrence.

On February 24,[2] a vote being taken on the pending bill, Mr. George Turner, of Washington, called attention to the fact that the name of neither Senator from South Carolina had been called.

The President pro tempore declined to entertain the question of order until the roll call had been completed and the result announced.

The result of the vote having been announced, Mr. Turner, rising to a question of privilege, stated that the State of South Carolina had been deprived of its rights under the Constitution, which declared that the Senate should "be composed of two Senators from each State," that "each Senator shall have one vote," and that "no State, without its consent, shall be deprived of its equal suffrage in the Senate."

In the course of the debate, Mr. Nelson W. Aldrich, of Rhode Island, read the following from Cushing:

The power to expel also includes in it a power to discharge a Member, for good cause, without inflicting upon him the censure and disgrace implied in the term "expulsion;" and this has accordingly been done, in some instances, by the House of Commons.

Analogous to the right of expulsion is that of suspending a Member from the exercise of his functions as such, for a longer or shorter period; which is a sentence of a milder character than the former, though attended with somewhat different effects; for during the suspension the electors are deprived of the services of their representative, without power to supply his place; but the rights of the electors are no more infringed by this proceeding than by an exercise of the power to imprison.

And Mr. Joseph W. Bailey, of Texas, denying the applicability of the law of Parliament, read the following from the American and English Encyclopedia of Law:

The same inherent power of punishing for contempt belongs to Parliament in England. The House of Commons has it, not because it is a representative body with legislative functions, but because it is a part of the high court of Parliament, the highest court in the realm.

A legislative assembly of an English colony, not being a judicial body, has no inherent right to punish for contempt, and, except in those cases where Parliament has invested them with it, they can not exercise it.

In the United States the judicial power is vested by the various constitutions in the courts created by the constitutions and such others as may be created. Neither Congress nor the State legislatures succeeded to those inherent and unlimited powers of punishing for contempt possessed by the English Parliament.

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[1] William P. Frye, of Maine, President pro tempore.

[2] Record, pp. 2124–2130.

The Senate having passed to other business without disposing of the question, on February 27,1 the President pro tempore made this statement to the Senate:

The Chair desires to say that on Monday last he requested the clerks not to call the names of the two Senators from South Carolina, they being by a resolution of the Senate in contempt of the body. On Tuesday he requested the clerks to read the names in the event there was a roll call. He did this not because he doubted in the least the propriety of the action he took on Monday. He did it because he recognized that it was a grave question, and he preferred to be in a position where, if it again arose, it could be by him submitted to the decision of the Senate and thus relieve the Chair from the responsibility.

On February 28, Mr. Julius C. Burrows, of Michigan, from the Committee on Privileges and Elections, made a report which, after reciting the circumstances of the encounter, proceeded:

We thus present to the Senate the entire record bearing upon this unfortunate occurrence, and no examination or investigation by your committee could possibly throw any additional light upon the transaction, which occurred in open session and in the presence of the membership of this body. That the conduct of the two Senators was an infringement of the privileges of the Senate, a violation of its rules, and derogatory to its high character, tending to bring the body itself into public contempt, can not be questioned or denied. Indeed, the Senate by a unanimous vote has already placed on record its condemnation of the Senators by declaring both guilty of contempt.

The majority of the committee are of the opinion that the legal effect of adjudging these Senators in contempt of the Senate was to suspend their functions as Senators, and that such a punishment for disorderly behavior is clearly within the power of the Senate, but the conclusion they have reached makes it unnecessary to discuss this question.

The offenses committed by the two Senators were not, in the opinion of a majority of the committee, of equal gravity. The charge made by Mr. Tillman had been once before in the Senate specifically denied in parliamentary language by Mr. McLaurin. The offense charged against Mr. McLaurin was among the most reprehensible a Senator could commit. He could not ignore it or fail to refute it and hope to be longer respected as either a man or a Senator.

Mr. McLaurin did not commence the encounter, but only stood in his place at his desk, where he was speaking, and resisted the attack that was made upon him.

In other words, his offense was confined to the use of unparliamentary language, for which he had unusual provocation.

Nevertheless, his offense was a violation of the rules of the Senate of so serious a character that, in the opinion of the committee, it should be condemned.

In the case of Mr. Tillman the record shows that the altercation was commenced by the charge he made against Mr. McLaurin. Such a charge is inexcusable, except in connection with a resolution to investigate. Mr. Tillman not only made the charge without any avowal of a purpose to investigate, but also disclaiming knowledge of evidence to establish the offense; and this he did after the charge had been specifically and unqualifiedly denied by Mr. McLaurin.

Such a charge under any circumstances would be resented by any man worthy to be a Senator, but, made as it was in this instance, its offensiveness was greatly intensified, and the result must have been foreseen by Mr. Tillman if he took any thought, as he should, of the consequences of his statements. This feature of his offense, coupled with the fact that he also commenced the encounter by quitting his seat some distance away from Mr. McLaurin, and, rushing violently upon him, struck him in the face, makes the case one of such exceptional misbehavior that a majority of the committee are of the opinion that his offense was of much greater gravity than that of Mr. McLaurin.

The penalty of a censure by the Senate, in the nature of things, must vary in actual severity in proportion to the public sense of the gravity of the offense of which the offender has been adjudged guilty. Therefore, notwithstanding the fact that, in the opinion of a majority of the committee, there is a difference in the gravity of the offenses under consideration, your committee are of the opinion that public good and the dignity of the Senate will be alike best promoted and protected, so far as this par-

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[1] Record, p. 2195.

[2] Record, pp. 2203–2207.

ticular case is concerned, by imposing upon each Senator, by formal vote, the censure of the Senate for the offense by him committed; and therefore the committee recommends the adoption of the following resolution:

"Resolved, That it is the judgment of the Senate that the Senators from South Carolina, Benjamin R. Tillman and John L. McLaurin, for disorderly behavior and flagrant violation of the rules of the Senate during the open session of the Senate on the 22d day of February, instant, deserve the censure of the Senate, and they are hereby so censured for their breach of the privileges and dignity of this body, and from and after the adoption of this resolution the order adjudging them in contempt of the Senate shall be no longer in force and effect."

A minority of the committee, Messrs. Joseph W. Bailey, of Texas, E. W. Pettus, of Alabama, Jo. C. S. Blackburn, of Kentucky, Fred. T. Dubois, of Idaho, and Murphy J. Foster, of Louisiana, presented the following dissenting views:

We dissent from so much of the report of the committee as asserts the power of the Senate to suspend a Senator and thus deprive a State of its vote, and so much as describes the offenses of the Senators as of different gravity; but we approve the resolution reported.

A portion of the majority, Messrs. L. E. McComas, of Maryland, Albert J. Beveridge, of Indiana, and J. C. Pritchard, of North Carolina, submitted views in favor of suspension of the two Senators. After discussing the power to punish generally, they submitted:

Since punishment for disorderly behavior may be inflicted by a majority vote in the Senate, what sorts of punishment may be imposed upon a Senator?

In Kilbourn *v.* Thompson (103 U. S., 189) Justice Miller says: "We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order."

Later, in In re Chapman (166 U. S., 668), Chief Justice Fuller says of the Senate: "It necessarily possesses the inherent power of self-protection" (Ib., 671); "Congress could not divest itself or either of its Houses of the essential and inherent power to punish for contempt in cases to which the power of either House extended."

While the Supreme Court has said that it does not concede that the Houses of Congress possess the general power of punishing for contempt analogous to that exercised by courts of justice, it had admitted that there are cues in which the Houses of Congress have such power of punishing for contempt, and points out the source of this power.

In Kilbourn *v.* Thompson (103 U.S., 201) the court said: "We may, perhaps, find some aid * * * if we can find out its source, and fortunately in this there is no difficulty. For, while the framers of the Constitution did not adopt the law and custom of the English Parliament as a whole, they did incorporate such parts of it and with it such privileges of Parliament as they thought proper to be applied to the two Houses of Congress."

Among these privileges, says the court, is the right to make rules and to punish members for disorderly behavior. The Senate has not like power with Parliament in punishing citizens for contempt, but it has like power with Parliament in punishing Senators for contempt or for any disorderly behavior or for certain like offenses. Like Parliament, it may imprison or expel a member for offenses."The suspension of members from the service of the House is another form of punishment." (May's Parliamentary Practice, 53.) This author gives instances of suspension in the seventeenth century and shows the frequent suspension of members under a standing order of the House of Commons, passed February 23, 1880.

Says Cushing, section 280: "Members may also be suspended by way of punishment, from their functions as such, either in whole or in part or for a limited time. This is a sentence of a milder character than expulsion."

"During the suspension," says Cushing, section 627, "the electors are deprived of the services of their representative without power to supply his place, but the rights of the electors are no more infringed by this proceeding than by an exercise of the power to imprison."

The Senate may punish the Senators from South Carolina by fine, by reprimand, by imprisonment, by suspension by a majority vote, or by expulsion with the concurrence of two-thirds of its members.

The offense is well stated in the majority report. It is not grave enough to require expulsion. A reprimand would be too slight a punishment. The Senate by a yea-and-nay vote has unanimously resolved that the said Senators are in contempt. A reprimand is in effect only a more formal reiteration of that vote. It is not sufficiently severe upon consideration of the facts.

The resolution proposed by the committee was agreed to, yeas 54; nays 12.

The names of both Senators from South Carolina were called on this vote, but neither voted, Mr. McLaurin stating that for obvious reasons he would refrain from voting.