

CHAPTER II.

THE CLERK'S ROLL OF THE MEMBERS-ELECT.

1. The statutes governing the making of the roll. Sections 14, 15.
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14. The law of 1863 makes it the duty of the Clerk of the preceding House to make a roll of the Representatives-elect whose credentials show them regularly elected.—Section 31 of the Revised Statutes, reenacting legislations of March 3, 1863,³ and February 21, 1867, provides:

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 credentials⁴ show that they were regularly elected in accordance with the laws of their States, respectively, or the laws of the United States.

15. The duty of making up the roll of Members-elect, in event the Clerk can not act, devolves on the Sergeant-at-Arms, and next on the Door-keeper.—Section 32 of the Revised Statutes, reenacting the law of February 21, 1867 (14 Stat. L., p. 397) provides:

In the case of a vacancy in the office of Clerk of the House of Representatives, or of the absence of inability of the Clerk to discharge the duties imposed on him by law or custom relative to the preparation of the roll of Representatives or the organization of the House, those duties shall devolve on the Sergeant-at-Arms of the next preceding House of Representatives.

¹Clerk declines to enroll when bearer of credentials is not of required age. (Sec. 418 of this volume.)

²See sections 328, 366, and 376 of this volume for other cases of informal credentials, and sections 317, 388, 522, and 523 of this volume for cases wherein the Clerk declined to enroll because of election in excess of apportionment or doubts as to legal time of election.

³The act of 1863 (12 Stat. L., p. 804) was in substantially the present form. The act of 1867 (14 Stat. L., p. 397) made temporary provisions relating to the States lately in secession.

⁴In 1877 a bill was introduced to prescribe the form of credentials and directing the manner in which the roll should be made up. But it was not reported from the committee to which it was referred. (First session Forty-fifth Congress, Record, p. 253; Journal, p. 165.)

SEC. 33. In case of vacancies in the offices of both the Clerk and the Sergeant-at-Arms, or the absence or inability of both to act, the duties of the Clerk relative to the preparation of the roll of the House of Representatives or the organization of the House shall be performed by the Doorkeeper of the next preceding House of Representatives.

16. In the early years of the House the credentials were examined by the Committee on Elections; but this practice fell into disuse.—On April 18, 1789,¹ a report was submitted from the Committee on Elections that the committee had, according to order, examined the certificates and other credentials of the Members returned to serve in this House, and had agreed to a report thereupon; which was twice read and agreed to by the House.

The report stated:

It appears to your committee that the credentials of the following Members are sufficient to entitle them to take their seats in this House. [The names follow.]

On October 28, 1791,² at the opening of the Second Congress, the procedure was the same.

17. On February 19, 1838,³ Mr. John Quincy Adams of Massachusetts, proposed the following resolution:

Resolved, That at the commencement of the first session of every Congress of the United States, every person claiming a seat in the House of Representatives shall, before taking his seat, furnish the Clerk of the House the credentials authenticating his election as a Member of the House; and, in calling over the roll of Members appearing to take their seats, the Clerk of the preceding House shall not include in the call any person who appears without producing his credential.

Debate arising over this resolution, its consideration was deferred, and it was not acted on.

18. On January 28, 1839, Mr. John Quincy Adams, of Massachusetts, presented a resolution that every Member of the House ought, before taking his seat, to produce at the Clerk's table or deposit in the Clerk's office, the credentials by virtue of which he claims his seat. Mr. Adams, in presenting his resolution, explained that he had offered it in consequence of the disuse of a practice which formerly existed, and which he believed to be the practice of every other deliberative body. This practice had been adopted at the beginning of the Government, and had been continued until the last eight or ten years. Since then every gentleman had come and taken his seat without presenting any evidence of his right to do so. Mr. Adams's resolution was not acted on.⁴

About this period the journals show a discontinuance of the old practice of the Committee on Elections reporting on the Members who have presented proper credentials.

19. The House reserves to itself the right to correct the Clerk's roll of Members-elect by striking off or adding to.

On July 4, 1861,⁵ at the time of the organization of the House, and while the

¹First session First Congress, Journal, p. 16. (Gales & Seaton, ed.)

²First session Second Congress, Journal, pp. 443, 453, 455. (Gales & Seaton, ed.)

³Second session Twenty-fifth Congress, Journal, p. 482; Globe, p. 190.

⁴Third session Twenty-fifth Congress, Journal, p. 395; Globe, p. 143.

⁵First session Thirty-seventh Congress, Journal, p. 13, 14; Globe, pp. 7–9.

oath was being administered to Members-elect, Mr. Thaddeus Stevens, of Pennsylvania, offered the following:

Resolved, That the Clerk of the House be directed to insert the name of John M. Butler upon the roll of Members, as the Representative from the First Congressional district of Pennsylvania, and that William E. Lehman shall be entitled to contest the seat of the said John M. Butler by giving him the required notice at any time within three months.

Mr. Lehman had been placed on the roll by the Clerk and had voted for Speaker. The Clerk explained to the House that he had placed his name on the roll because the governor of Pennsylvania had included him with the other Members from Pennsylvania in the proclamation which the law of the State required him to make of the persons returned as elected. This proclamation had been presented by Mr. Lehman as his credentials, and the Clerk had considered it his duty to be governed by this proclamation, rather than by returns of election judges which showed the election of Mr. Butler.

Mr. Stevens contended that the proclamation of the governor was of no binding force, since the law of the State required the governor to proclaim the result of the returns, and transmit the returns to the House. The proclamation was not in accordance with the returns filed, and no returns showing the election of Mr. Lehman had been sent to the House, nor had the proclamation. Returns showing Mr. Butler elected were presented.

On the other hand, it was urged the returns had been fraudulently made up, and that the governor in his proclamation had taken cognizance of this.

After debate the resolution was laid on the table, yeas 91, nays 48, and the oath was administered to Mr. Lehman.

20. On July 4, 1861,¹ during the organization of the House, and after the oath had been administered to the Members, the name of Samuel G. Daily, as Delegate from the Territory of Nebraska, was called.

On motion the question of administering the oath to Mr. Daily was postponed until after the completion of the organization of the House.

On July 5 Mr. William A. Richardson, of Illinois, moved that the name of Mr. Daily be stricken from the roll, and that the name of J. Sterling Morton be inserted in lieu thereof, and that said Morton be sworn in as such delegate.

It appeared from the debate that on November 2, 1860, the governor of Nebraska issued a certificate to Mr. Morton, the votes having been canvassed according to law by the governor, chief justice, and district attorney. Later, on April 29, 1860, the governor issued another certificate to Mr. Daily, wherein it was declared that the first certificate was revoked, because of the discovery of fraud which had credited to Mr. Morton more votes in one county than he, in fact, received, and the results of which being eliminated showed Mr. Daily to have been elected. It was urged by Mr. Richardson that the governor issued the second certificate without action of the board of canvassers provided by law, and therefore had usurped the authority of the House of Representatives in passing on the election and returns. On the other hand, it was urged that Mr. Daily had received the highest number of votes and had the certificate of the governor.

¹ First session Thirty-seventh Congress, Journal, pp. 35, 36; Globe, pp. 13-16.

The House, by a vote of yeas 57, nays 75, disagreed to the motion of Mr. Richardson.

The House then voted that the oath be administered to Mr. Daily.

21. On December 7, 1863,¹ the Clerk of the preceding House called the assembled Members-elect to order, and called the roll of Members by States, as made out by him under the act of March 3, 1863, which provided that he should place on the roll the names of "all 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."

After the roll had been called, the Clerk announced that other gentlemen had filed credentials which, in his opinion, did not meet the requirements of the law of 1863. The Clerk then read the credentials of five Members from Maryland, and the same having been read, Mr. Henry L. Dawes, of Massachusetts, offered the following:

Resolved, That the names of John A. J. Creswell, Edwin H. Webster, Henry Winter Davis, Francis Thomas, and Benjamin G. Harris be placed on the roll of the House of Representatives from Maryland.

A motion that this resolution be laid on the table having been decided in the negative, yeas 74, nays 94, the resolution was then agreed to.

Similarly the credentials of certain Missouri Members whose names had not been put on the roll by the Clerk were read, and a resolution that their names be put on the roll was offered.

Mr. William S. Holman, of Indiana, made the point of order that it was not in order thus to instruct the Clerk, but the Clerk overruled the point.

Then credentials were read of the Members from Oregon, Kansas, and West Virginia, and resolutions were offered and agreed to directing that their names, respectively, be placed on the roll.

The credentials of certain Members-elect from Virginia not being satisfactory to the House, a resolution directing their names to be placed on the roll was laid on the table, yeas 100, nays 73.

22. A motion to proceed to the election of Speaker has been held to be of higher privilege than a motion to correct the Clerk's roll.

In one or two cases it has been held that the Clerk may not entertain a motion to correct the roll which he makes up under the law.

Instance wherein, during the organization, the Clerk of the preceding House declined to entertain an appeal from his decision.

On October 15, 1877,² after the Clerk had called the roll of Members, Mr. Fernando Wood, of New York, as soon as the Clerk had announced that a quorum was present, moved to proceed to the election of a Speaker *viva voce* and demanded the previous question thereon.

Mr. Eugene Hale, of Maine, as a question of privilege, submitted the following preamble and resolution:

Whereas James B. Belford presents the only certificate of election as a Representative in the Forty-fifth Congress given by the duly constituted authorities of the State of Colorado; and

Whereas the Clerk of the House of Representatives of the Forty-fourth Congress has set aside said

¹ First session Thirty-eighth Congress, Journal, pp. 6-8; Globe, pp. 4-6.

² First session Forty-fifth Congress, Journal, p. 10; Record, p. 53.

legal certificate presented by said James B. Belford, thereby without law assuming rights and authority which only belong to the House: Therefore,

Resolved, That the name of Thomas M. Patterson be stricken from the roll of this House as Representative in the Forty-fifth Congress from the State of Colorado, and that the name of James B. Belford be placed upon said roll as a Representative in said Congress.

Mr. Samuel S. Cox, of New York, made the point of order that the resolution was not in order, the Clerk having absolute control over the roll of the House.

The Clerk¹ sustained the point of order, and stated the question to be on seconding the demand for the previous question.

Mr. Hale appealed from the decision of the Clerk.

The Clerk declined to entertain the appeal, on the ground that it was not competent for the Representatives-elect to instruct the Clerk in the performance of a duty imposed upon him by law, and for the further reason that a higher question of privilege was pending on which the previous question had been demanded.²

Mr. Wood's motion was then agreed to.

23. On March 4, 1869,³ at the time of the organization of the House, after the roll of Members-elect had been called and the Clerk had announced that a quorum was present, Mr. George W. Woodward, of Pennsylvania offered this resolution:

Resolved, That the roll of Members of the Forty-first Congress be amended by the addition of the name of Henry D. Foster, as the Representative of the Twenty-first Congressional district of Pennsylvania, and that said Foster be called and admitted as the sitting Member prima facie entitled to represent said district.

Mr. Elihu B. Washburne, of Illinois, claiming the floor on a question of privilege, moved that the House do now proceed to the election of a Speaker.

The Clerk⁴ said that the gentleman from Illinois had risen to a question of privilege which had precedence of the resolution of the gentleman from Pennsylvania, and therefore the question before the House was on the motion to proceed to the election of a Speaker.

24. On December 2, 1873, at the time of the organization of the House after the roll of Members-elect had been called and the presence of a quorum had been announced, Mr. Samuel S. Cox, of New York, announced his wish to make the motion that the name of John E. Neff be placed on the roll as Representative-elect from the Ninth Congressional district of Indiana.

The Clerk said:

The Clerk thinks it would not be in order. He has always declined to receive such a motion at this stage * * *. The Clerk must decline to entertain the motion.

25. The Clerk's roll may be corrected during organization by reference to the credentials.—On December 5, 1881, at the time of the organization of the House, while the roll of Members-elect was being called, an error appeared in the Clerk's roll, whereby, instead of the name of Mr. William W. Grout, Member-

¹ George M. Adams, of Kentucky, Clerk.

² For similar cases, see Congressional Globe, first session Forty-first Congress, p. 3; Record, first session Forty-third Congress, p. 5. Motions to amend the roll were formerly quite common, first session Thirty-eighth Congress, Journal, p. 7.

³ First session Forty-first Congress, Globe, p. 3.

⁴ Edward McPherson, of Pennsylvania, Clerk.

elect of Vermont, the name of the governor of that State was called, an error having been made in making up the roll from the credentials, whereby the name of the signer of the credentials was substituted for that of the bearer. This error, being corrected by reference to the credential, Mr. Grout's name was called, and the organization of the House proceeded.¹

26. The Clerk takes notice of the deaths or resignations of Members-elect and informs the House thereof at the time of organization.—At the beginning of each Congress, at the time of the organization, the Clerk submits to the House a table of the changes in membership since the election—that is, he presents the names of those who were placed on his roll but have been stricken off because of death or resignation. This seems to show that the Clerk may take cognizance of death and resignation in making up his roll.²

27. On December 3, 1883,³ the time of the organization of the House, the Clerk,⁴ when he had called the roll as far as the Seventh district of Virginia, announced that John Paul, who had been elected to represent that district, had resigned his office, the resignation to take effect September 5, 1883. Therefore the name of Mr. Paul was not called.

28. On December 3, 1883,⁵ at the time of the organization of the House, after the Clerk⁴ had completed the calling of the roll by States as far as North Carolina, he announced that he had information that Mr. Walter R. Pool, who was elected at the November election in 1882 to represent the First district of North Carolina, died on August 25, 1883. No certificate of the election of a successor had been filed with the Clerk. Therefore the name of Mr. Pool was not called.

29. An instance wherein the Clerk omitted from the roll the name of a disqualified Member-elect.—On March 4, 1871,⁶ at the organization of the House, after the roll of Members-elect had been called, the Clerk said:

Mr. Sion H. Rogers, one of the Representatives from North Carolina, requested the Clerk this morning that when his name was reached on the call it should be omitted.

Mr. Rogers's name had been omitted, not being called with the other North Carolina Members-elect. No explanation was given at this time for this action.

Mr. Rogers's name remained off the roll until May 23, 1872,⁷ when he was sworn in. It then appeared that he had deferred qualification until the passage of the law removing political disabilities.

30. Where it is not specifically stated that the bearer is elected in accordance with the law of the State and the United States, the credentials may be honored by the House, if not by the Clerk.—On December 7, 1869,⁸ Mr. Halbert E. Paine, of Wisconsin, from the Committee of Elections, made

¹ First session Forty-seventh Congress, Record, p. 7.

² See instance at the first of any recent Congress, first session Fifty-second Congress, Journal, p. 6.

³ First session Forty-eighth Congress, Record, p. 4.

⁴ Edward McPherson, of Pennsylvania, Clerk.

⁵ First session Forty-eighth Congress, Record, pp. 3, 4.

⁶ First session Forty-second Congress, Record, p. 6.

⁷ Second session Forty-second Congress, Journal, p. 936; Globe, p. 3783.

⁸ Second session Forty-first Congress, Globe, p. 22.

an oral report on the credentials of the Members from the State of Alabama. He said that the credentials were not in form sufficient to justify the Clerk of the House in putting their names on the roll had they appeared at the beginning of the Congress, because the credentials did not say that they were elected in pursuance of either the laws of Alabama or of the United States. Yet the credentials were in form sufficient to satisfy the Committee, and he thought the House also. Accordingly he moved that the gentlemen be sworn. The motion was agreed to and the oath was administered.

31. In 1871 a certificate from Arkansas, which bore on its face evidence that it was not issued within the time required by law, and concerning the proper execution of which there was doubt, was rejected.—On March 4, 1871,¹ at the time of the organization of the House, after the calling of the roll of Members-elect, the Clerk² said:

The certificate from the Third district of Arkansas bears upon its face evidence that it was not issued within the time required by law, nor within two months thereafter; besides, there is serious doubt whether the officer who executed it had at that time the right to do so. The circumstances surrounding the issue of this certificate are so suspicious that the Clerk feels compelled to reject it.

32. In 1871 the Clerk accepted the credentials from Mississippi which, though irregular in form, met all the substantial requirements of the military reconstruction acts.—On March 4, 1871,³ at the time of the organization of the House, the Clerk after he had called the roll of Members-elect, said:

A question has been raised before the Clerk upon the credentials from Mississippi. While being peculiar in form, owing to the fact that the reorganization of the State was effected under the military reconstruction acts, they appear to him to meet all the substantial requirements of the law, and are therefore accepted by him.

33. In 1871 the Clerk enrolled the Tennessee delegation, although the credentials were at marked variance with the usual form and there appeared a question as to the time of holding the election.—On March 4, 1871⁴ at the time of the organization of the House, the Clerk² after he had called the roll of Members-elect, said:

Regarding the certificates from Tennessee, the Clerk desires to state that they differ essentially from the credentials issued to the Representatives from that State elected to the Forty-first Congress; that, strictly judged, they are both vague and evasive and that the changes made are so marked and special as to create a belief that they were purposely made to produce uncertainty. The Clerk has been in doubt as to his duty concerning them, but has finally concluded to give them this time the benefit of the doubt and accept them. The point which has been argued, that the election was not held on the day fixed by the laws of Tennessee, involves a construction of the constitution and of several of the laws of that State; and the Clerk has, under the circumstances, concluded not to rule upon it.

The Tennessee Members had been called on the roll.

¹First session Forty-second Congress, Globe, p. 6.

²Edward McPherson, of Pennsylvania, Clerk.

³First session Forty-second Congress, Globe, p. 5.

⁴First session Forty-second Congress, Globe, pp. 5, 6.

34. A credential from Indiana not meeting the requirements of the law in 1873, neither claimant to the seat was enrolled.—On December 2, 1873,¹ at the organization of the House, after the calling of the roll of Members-elect, the Clerk² said:

In Indiana the paper issued by the governor respecting the Ninth district can not be accepted as a credential within the meaning of the law, and neither of the claimants is enrolled.

35. Conflicting credentials, signed by different persons as governor, being presented from Louisiana in 1873, the Clerk declined to enroll the bearers of either credentials.—On December 1, 1873,¹ at the time of the organization of the House, after the roll of Members-elect had been called, the Clerk² said:

In Louisiana there are two unchallenged certificates from the Third and Fifth districts only. In the remaining three districts and the Representatives at large two conflicting sets of papers have been presented, each certifying the election of a different person and each purporting to have been issued by a proper State officer. There is no substantial difference in form. The one set of papers purports to have been executed on the 4th of December, 1872, and to have been signed by Governor Warmouth, though not transmitted by him to the Clerk's office. They were received, one of them early in March last, another later in that month, and two of them in the latter part of April, 1873. The other set of papers purports to have been executed on the 30th of December, 1872, and to have been signed by Acting Governor Pinchback, and transmitted by him to the Clerk's office by mail, and received early in January last. The Clerk accordingly enrolls the two unchallenged Members.

36. The credentials from West Virginia in 1873 showed a doubt as to the true day of election, so the Clerk enrolled only one Member-elect, who was indisputably elected on each day.—On December 1, 1873,¹ at the time of the organization of the House, after the roll of Members-elect had been called, the Clerk² said:

In West Virginia there is a peculiar complication. There were two elections in 1872 at which Representatives in the Forty-third Congress were voted for—one of them in August, at the time of the adoption of the new State constitution, and the other on the fourth Thursday of October. In the First and Second districts different persons were chosen at these elections; in the Third district the same person was chosen at both. The proclamation and certificates of the governor reciting these various facts have been filed in the Clerk's office. The certificates of election are issued in the alternative, setting forth the due election of these respective parties, provided the time at which they were chosen was the time prescribed by law for holding the election. The Clerk considers these certificates inadmissible for enrolling either of the claimants in the First and Second districts. Assuming that the one or the other of those days was the legal day of election, Mr. Hereford, who was chosen at both, would appear to be entitled to be enrolled, notwithstanding the technical defect in each of his certificates separately considered. He has accordingly been enrolled.

A fresh series of certificates, dated November 22, 1873, and issued under an act of the legislature of that State dated November 15, 1873, by a new canvassing board specially created for that purpose and intended to supersede the papers issued by the governor under the then existing law, and which certify in form the due election of the persons who received a majority of the votes at the October election of 1872, have been presented, but appear to the Clerk to be of doubtful validity, and have not been accepted by him as credentials within the meaning of the law.

¹ First session Forty-third Congress, Record, p. 5.

² Edward McPherson, of Pennsylvania, Clerk.

37. The Arkansas election case of Gunter v. Wilshire in the Fortythird Congress.

The Clerk declined to enroll a person bearing as credentials a mere abstract of returns, although certified by the governor under seal of the State.

The House very reluctantly gave prima facie effect to a certified abstract of returns not in the form of credentials as required by law and issued after the time prescribed by law.

An instance wherein the claimant seated on prima facie showing was unseated after examination of final right.

On December 1, 1873,¹ at the organization of the House, the Clerk announced that but two valid certificates had been presented from the State of Arkansas. The certificates of the Members-elect from the First and Third districts were in question, and their names were not on the roll. On December 2² the House—

Resolved, That the credentials and papers in the possession of the Clerk of the House in the cases of the contested elections from the First and Third districts of Arkansas be referred to the Committee on Elections, with instructions to report on the earliest day practicable who of the contesting parties are entitled to be sworn in as sitting Members of the House.

On February 9, 1874,³ Mr. C. R. Thomas, of North Carolina, from the Committee on Elections, submitted the report on the prima facie right. The report first describes the papers presented as evidence—

1. An "abstract and certificate of the secretary of state" showing 12,522 votes cast for W. W. Wilshire, 11,961 cast for Thos. M. Gunter, 407 for Thos. M. Gunther, and 1,127 scattering. This abstract is accompanied by a certificate of the secretary of state of Arkansas, dated January 13, 1873, that "the above abstract is a true copy of the original now in my office, and exhibits a true statement of the votes cast for Congressman, etc., * * * according to the returns in my office; and I also certify that the same was cast up and arranged by me in the presence of Acting Governor O. A. Hadley within the time and in the manner prescribed by statute." Also, on November 20, 1873, the secretary of state certified to the returns of an additional county received after the first certificate was made. The belated returns increased the plurality for Mr. Wilshire.

2. A proclamation, dated February 18, 1873, signed by Elisha Baxter, governor, and duly countersigned by the secretary of state, under seal, proclaiming the result.

3. A certificate of election issued by Governor Baxter, giving the same abstract of votes as given in the proclamation, with footnotes, and in form as follows:

¹First session Forty-third Congress, Record, p. 5.

²Journal, p. 18; Record, p. 19.

³Report House of Representatives, No. 92; Smith, p. 131; Rowell's Digest, p. 286.

Abstract of the returns of the election held in the Third Congressional district of the State of Arkansas on the 5th day of November, A. D. 1872, for Representative in Congress.

Counties composing the Third Congressional district.	Votes polled for W.W. Wilshire.	Votes polled for Thos. M. Gunter.	Votes polled for Wilshire.	Votes polled for Gunther.
Benton	255	1,189	.....	.....
Boone ¹	188	746	.....	.....
Carroll	272	330	.....	.....
Crawford	932	590	.....	.....
Clark	1,317	806	.....	.....
Franklin	529	259	.....	.....
Johnson	119	75	.....	.....
Little River	505	276	.....	.....
Madison	434	557	.....	.....
Marion	140	684	.....	.....
Montgomery ²	177	.....	.....	407
Newton ²	278	.....	.....	184
Pulaski ³	3,160	1,621	12	.....
Perry	168	81	.....	.....
Pope	521	310	.....	.....
Pike	226	125	.....	.....
Polk	120	342	.....	.....
Sebastian	1,017	578	.....	.....
Sevier	264	425	.....	.....
Washington ⁴	702	1,218	.....	.....
Yell	536	1,011	.....	.....
Saber ⁵	784	276	.....	.....
Total	12,644	11,499	12	591

¹Boone County has not been made a part of the Third Congressional district by any act of the legislature.

²The votes given to "Gunter" from Montgomery and Newton counties were probably intended for Thomas M. Gunter.

³The scattering vote in Pulaski County given to "Wilshire," "Guntree," "S. M. Gunter," "T. M. Guntree," "Thos. M. Guntree," "T. Ros Gunter," and "Thos. M. Crenter" is a literal copy of the clerk's returns.

⁴A certificate of the clerk is appended to the returns from Washington County, questioning the validity of the election in Richland Township. If this objection is allowed the vote will stand: For Wilshire, 686, and Gunter, 1,125.

⁵Saber County has not been made a part of the Third Congressional district by any act of the legislature.

Scattered votes polled for Guntree, S. M. Gunter, T. M. Guntree, Thos. M. Guntree, T. Ros Gunter, and Thomas M. Crenter in Pulaski County, 1,456.

There are no returns from the clerk of Scott County.

"STATE OF ARKANSAS, *Executive Office*:

"Whereas the acting governor failed to issue a certificate of election to the person who received the highest number of votes for Representative in Congress from the Third Congressional district of Arkansas at the election held in said district on the 5th day of November, A. D. 1872; and whereas on the 14th day of February, A. D. 1873, the secretary of state, in my presence, did cast up the votes polled for said Representative at said election from the returns on file in his office: Now, therefore, I, Elisha Baxter, governor of the State of Arkansas, do certify that the foregoing statement, with the explanatory notes, is a full, true, and correct exhibit of the votes polled for Representative from the Third Congressional district of Arkansas at the election held in said district on the 5th day of November, A. D. 1872, as appears from the returns of said election on file and certificates of clerks deposited in the office of secretary of state.

"In testimony whereof I have hereunto set my hand and caused the seal of the State to be affixed, at Little Rock, on this 18th day of February, A. D. 1873.

[L. S.]

"ELISHA BAXTER, *Governor*.

"By the governor:

"J. M. JOHNSON, *Secretary of State*."

The law of Arkansas provided:

“Sec. 50. It shall be the duty of the secretary of state, in the presence of the governor, within thirty days after the time herein allowed to make returns of elections to the clerks of the county courts, or sooner, if all the returns shall have been received, to cast up and arrange the votes from the several counties, or such of them as have made returns, for such persons voted for as Members of Congress; and the governor shall immediately thereafter issue his proclamation, *declaring the person having the highest number of votes to be duly elected* to represent the State in the House of Representatives of the Congress of the United States, and shall grant a certificate thereof, under the seal of the State, to the person so elected.”

The law of Congress provided:

“That before the first meeting of the next Congress, and of every subsequent Congress, the Clerk of the next preceding House of Representatives shall make a roll of the Representatives elect and place thereon the names of persons claiming seats as Representatives elect from States which were represented in the next preceding Congress, and of such persons only, and whose credentials show that they were regularly elected in accordance with the laws of their States, respectively, or the laws of the United States.”

The most usual kind of credential is a certificate of the governor of a State, and such kind is required by the law of Arkansas. No particular form of one has heretofore been considered necessary by the House; and while such certificate, when it showed that the person named therein was regularly elected, etc., has always been admitted and held to be competent and satisfactory evidence of prima facie right to a seat, the House has frequently decided that the want of it from any reason would not impair or prejudice such prima facie right of a Member elect, but only remit him to other evidence to establish it.

Do the credentials and papers referred to the committee by the House resolution, any one or all of them, show that either Mr. Wilshire or Mr. Gunter was regularly elected in accordance with the laws of Arkansas, or do they establish the prima facie right of either to a seat?

In the opinion of the committee they furnish satisfactory evidence to establish the prima facie right of W. W. Wilshire to his seat. In their opinion the certificate of Governor Baxter is in itself sufficient in form and substance and legal intendment to establish such right of Mr. Wilshire. It indicates, or shows, that W. W. Wilshire received 12,644 votes, being a majority of 1,145 votes for Mr. Wilshire by the “abstract of the returns of the election held in the Third Congressional district of the State of Arkansas on the 5th day of November, 1872, for Representative in Congress;” and assuming that, as matter of law, the votes of the counties of Boone and Sarber should not have been counted or “arranged and cast up,” because these counties had “not been made parts of the Third Congressional district by any act of the legislature,” then the said certificate shows that Mr. Wilshire received a majority of 1,195 votes. And the certificate of Governor Baxter is to the effect that W. W. Wilshire was “duly elected,” and is in accordance with the laws of Arkansas before cited and mentioned.

The failure, from whatever cause it arose, of the acting governor, O. A. Hadley, in whose presence the secretary of state did cast up and arrange the votes from the several counties, etc., to issue the proclamation and grant the certificate—a duty which the laws of the State devolved upon him, and the act of Congress of May 31, 1870, as well (and said act made it a criminal offense in that he neglected or refused to do so)—could not prejudice the right of the people of the Third Congressional district, or of the person who had been chosen by them as Representative to the Forty-third Congress in pursuance of their obligation under the national Constitution. Such a failure, in any instance, ought not to be allowed by the House to hinder, impede, or delay the right of representation of the people of a district, or the right of the person chosen by them to a seat pending a contest upon the merits, when “that amount of proof which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt,” is produced in a case before it.

The report goes on to say that section 50 of the Arkansas laws above quoted is directory and that Governor Baxter was required to issue the certificate upon the omission of his predecessor to do so.

The majority did not conceive that the omission of the words “duly elected” or “other words declaratory of the fact or result would be nonessential, if not surplusage.” The report continues:

A strict adherence to any prescribed or particular form of credential, or to legal rules of evidence on a prima facie case of election, would tend to prejudice the rights of the party claiming to have been elected, and of the people as well, and to prevent the organization of the House.

The case of *Giddings v. Clark* was referred to.

The majority of the committee, therefore, reported a resolution giving Mr. Wilshire the *prima facie* right to the seat, without prejudice to the right of Mr. Gunter to contest.

Mr. Lucius Q. C. Lamar, of Mississippi, submitted minority views, which say, after citing the law:

The question then arises, Does W. W. Wilshire present to the committee, and, through the committee, to this House, a certificate in due form from the governor of the State, declaring W. W. Wilshire "to be duly elected to represent the State in the House of Representatives of the Congress of the United States?"

There can be but one answer to this inquiry. He does not and can not present such a certificate.

There is a certificate filed by him, issued by the governor of the State of Arkansas, which does not declare or show him to be duly elected, but simply gives a statement of the votes cast, from which statement it can not be ascertained who was elected; and a certificate is on file, in every respect identical in substance and letter, which was issued at the same time to his competitor, Thomas M. Gunter.

It can not, therefore, be said that the governor has issued a certificate of election to Mr. Wilshire.

After commenting on the action of the Clerk in not putting any name on the roll, the minority say:

Now, if the construction which a majority of the committee have put upon this resolution of the House is the true one, and it necessarily confines the investigation of the committee to the instrument by which the *prima facie* right is established, it follows that they should not have extended their inquiries beyond the face of this certificate, nor thrown before this House any information derived from evidence and proofs of a secondary character. Upon their construction of the resolution the proper course, in the opinion of the undersigned, would have been to have reported a resolution to the House that no *prima facie* right to a seat on this floor existed in this case.

Let us now examine this certificate and see if, from the facts therein stated, the committee had before them data sufficient to determine who, in the absence of any proof to the contrary, was the person duly elected. We have seen that no person was therein declared to have been duly elected.

The certificate shows that 12,644 votes were cast for W. W. Wilshire; that 11,499 votes were cast for Thomas M. Gunter, *eo nomine*, and that 1,456 votes were returned in unspecified proportions for Thomas M. Gunter and Thomas M. Crenter, those for Thomas M. Gunter being returned under different designations, each, however, clearly indicating Thomas M. Gunter as the person voted for. Now, can it be said that there is here any evidence that W. W. Wilshire received a larger number of votes than Thomas M. Gunter? It is clear that if Thomas M. Crenter received only 30 or 40 of these 1,456 votes, Thomas M. Gunter is the person duly elected. It is also equally clear that if Thomas M. Crenter received a larger proportion of the 1,456 votes than Thomas M. Gunter, then W. W. Wilshire is elected. But it is impossible to determine from anything on the face of this certificate what was the actual vote cast for Thomas M. Crenter, and therefore equally impossible to determine which candidate received the most votes, W. W. Wilshire or Thomas M. Gunter. This is fatal to the certificate as the credentials of Mr. Wilshire. To ascertain who was elected, it becomes necessary to refer to other proofs, which opens an inquiry into the merits of the case, and involves an abandonment of the *prima facie* consideration. The only alternative, therefore, as it seemed to the undersigned, was to enter at once upon the question of the fact of the election, and if the committee deemed it had not power to do so under the resolution of the House, to ask of the House an enlargement of its powers.

While the undersigned believe that if the governor's certificate shows no *prima facie* title to the seat on account of the doubt as to the identity of Thomas M. Crenter, it is the duty of the committee to inquire at once into the merits of the case, and to consider all the proofs bearing upon the merits, including the depositions as well as the documentary proofs; they are at the same time clearly of the opinion that the documentary proofs, outside of the certificates, show a large majority in favor of Mr. Gunter.

The minority thereupon proceed to argue that the tabulation of the secretary of state was under suspicion, and to show its defective nature proposed to introduce the returns of Pulaski County, saying:

If it is said that this return from Pulaski County and these proofs just cited can not be considered in a prima facie case, we reply that we have referred to them, not for the purpose of showing any prima facie case for Mr. Gunter, but simply to show that, so far from remedying the defects of Mr. Wilshire's claim, based on the certificate either of the governor or the secretary, they show Mr. Gunter to have been elected.

We have shown that neither the governor's certificate nor the secretary's casting up, standing by itself, establishes any prima facie right to the contested seat in W. W. Wilshire. If it is said that the two supplement each other, each supplying the deficiency of the other, in answer we reply that discrepancies and direct contradictions in these documents are so glaring and numerous as to neutralize the effect and destroy the validity of both as instruments of evidence.

In accordance with this line of argument the minority proposed a resolution that the case be recommitted with instructions that the committee report on the merits of the case.

The report was debated at length on February 17.¹ In this debate it was pointed out that the acting governor had in another Arkansas district certified that "O. P. Snyder was duly elected a Member of Congress," but that in this case the governor did not certify that either of the gentlemen was elected. It was also urged by Mr. George W. McCrary, of Iowa, that the footnotes made it a moral certainty that all the scattering votes were intended for Mr. Gunter.

In reply it was denied that the table made it certain that the scattering votes were intended for Mr. Gunter. The governor had not expressly declared in his certificate who was elected, but by incorporating the table he made it a part of the certificate, and thus showed who was elected. The fact that the words "duly elected" did not appear in the certificate was not fatal. There was no form of certificate prescribed by the House, and the State of Arkansas had not fixed the form. The footings of the table showed who was prima facie entitled to the seat.

The question being taken on the motion to substitute the minority proposition for the majority, there appeared, yeas 116, nays 117.²

The question then recurring on the passage of the resolution recommended by the majority of the committee, there appeared, yeas 118, nays 96. So the resolution was passed.

A motion to reconsider was made and disposed of on the next day.

Thereupon Mr. Wilshire appeared and took the oath.

38. The Arkansas election case of Gunter v. Wilshire—Continued.

A notice of contest served within thirty days of the issuance of the governor's proclamation was held sufficient, although the proclamation was not issued within the time prescribed by law.

Original returns of the precincts being lost, the House by testimony proved that certain votes returned as "scattering" because of misnomer were actually cast for contestant.

¹ Record, pp. 1563–1578.

² Journal, pp. 458, 460; Record, pp. 1577, 1601, 1602.

An instance wherein the House seated a contestant belonging to the minority party.

On June 3¹ Mr. J. W. Robinson, of Ohio, presented the report on the question of final right to the seat.

At the outset a preliminary question arose, which was disposed of as follows:

The contestee claims that the contest should be dismissed because the notice of contest was not served on him within thirty days from the day fixed by law for canvassing the returns and determining the result of the election.

The returns were first canvassed by the secretary of state, in the presence of Governor Hadley, on the 14th of December, 1872, but no proclamation of the result was made, nor any certificate of election issued to anyone, both of which the statute of the State required the governor to do immediately. (See sec. 50.) Afterward Elisha Baxter, being inaugurated governor, having, on the 18th day of February, 1873, caused the votes to be again canvassed by the secretary of state in his presence, made proclamation of the result, and issued his certificate.

This proclamation and certificate constitute the only announcement of the determination of the result of the election in that district, and the committee are of the opinion that, in view of all the circumstances, the service of notice of contest on the 13th of March is sufficient, and overruled the motion to dismiss the contest.

As to the merits of the case, the committee were unanimous in their conclusions:

By some strange mishap the original returns of the precincts where these scattering votes were cast have been lost or destroyed.

The testimony submitted satisfies the committee that the contestee and the contestant were the only candidates for Congress in that district; that 1,433 of the "scattering" votes referred to in the governor's certificate as being given for "Guntee," "T. M. Guntee," "Thomas M. Guntee," and "T. Ross Gunter," were, in fact, given for Thomas M. Gunter, and should be counted for him; and that 1 vote, referred to as given for "S. M. Guntee," and the 32 given for "Thomas M. Crenter," about which no evidence was offered, are not proven to have been cast for Thomas M. Gunter. The testimony on this point is voluminous, but entirely satisfactory, and the 1,433 votes are added by the committee to the credit of contestant Thomas M. Gunter. So, also, the 407 votes in Montgomery County, and the 184 votes in Newton County, returned for "Gunther," were cast for Thomas M. Gunter; also, the 12 votes in Pulaski County, returned for "Wilshire," were cast for the contestee, and should be credited to them, respectively.

Correcting the canvass of the returns, as above indicated, the committee find the whole vote returned, and to be counted for contestant, Thomas M. Gunter, to be 13,513, and for the contestee 12,656, giving the contestant a majority of 857 votes.

In the foregoing schedule no votes are canvassed from Scott County, and but 194 from Johnson County. In both of these counties returns were made which, if counted, would increase the majority of the contestant 1,003.

In accordance with their conclusions, the committee reported resolutions declaring Mr. Wilshire not entitled to the seat, and declaring Mr. Gunter, the contestant, elected.

On June 16,² the House without debate or division agreed to the resolutions, and Mr. Gunter was sworn in.³

39. In 1875 a paper of unusual form was submitted to the House at the time of organization by the Clerk, who had declined to make an en-

¹ Report No. 631; Smith, p. 233.

² Journal, pp. 1192, 1193; Record, p. 5046.

³ It is worthy of notice that contestant belonged to the party in a minority in the House, and the unseated Member belonged to the majority party.

rollment on the strength thereof.—On December 6, 1875,¹ at the organization of the House, after the calling of the roll of Members-elect, the Clerk² said:

For the Thirty-third district of New York the vacancy on the roll caused by the death of the gentleman originally returned has not been filled. The action of the State board of canvassers upon the returns of the late election has been received at the Clerk's office, but, being of unusual form, is submitted for action of the House.

40. In 1875 the Clerk enrolled the names of those bearing credentials signed by the recognized de facto governor of Louisiana, although there were other conflicting credentials.—On December 6, 1875,¹ at the time of the organization of the House, after calling the roll of Members-elect, the Clerk² said:

Respecting Louisiana, the Clerk begs to say that he has received two sets of certificates as to the first five districts—one signed by William Pitt Kellogg, as governor of Louisiana; the other signed by John McEnery, as governor of Louisiana. The Kellogg certificates were all received by the Clerk prior to the adjournment of the Forty-third Congress. One of the McEnery certificates was also received during that session; the others at different dates during the last summer and fall. The two sets of certificates agree in declaring the same persons elected in the First, Second, Third, and Fourth districts. In the Fifth the Kellogg certificate declares Mr. Frank Morey elected; the McEnery certificate declares Mr. William B. Spencer elected. As to the Sixth district, no McEnery certificate has been presented. The Kellogg certificate declares Mr. Charles E. Nash elected. The Clerk has enrolled all the gentlemen bearing the Kellogg certificates as coming from the de facto governor recognized by the last House.

41. Of three sets of credentials presented from Louisiana in 1877 the Clerk honored those which conformed to the requirements of State law.—On October 15, 1877,³ at the organization of the House, after the roll of Members-elect had been called, the Clerk⁴ said:

In reference to the State of Louisiana, the Clerk, if there be no objection, will take occasion here to remark that there were received from the State of Louisiana three different sets of credentials, one set signed by John McEnery, as governor of Louisiana, bearing date December 20, 1876, and declaring certain persons elected from the First, Fourth, and Sixth districts, but silent as to the persons elected from the other districts of said State. Inasmuch, however, as said McEnery was never de facto governor of Louisiana, and never, in point of fact, exercised or performed the functions of that office, it is not deemed necessary to make here any statement concerning the regularity or irregularity of the credentials coming from that source.

Another set of credentials is signed by William Pitt Kellogg, as governor of Louisiana, with the seal of the State attached, all of which not only bear different dates, but also reached the hands of the Clerk at different times and through different channels, and simply declare the persons elected from each of the districts of said State, respectively, except the Second district, as to which no certificate seems to have been issued by said Kellogg in favor of anyone. The law of Louisiana prescribing the character of the credentials by which the elections of its Representatives in Congress shall be authenticated and known provides as follows:

“That as soon as possible after the expiration of the time of making the returns of the election of Representative in Congress, a certificate of the returns of the election for such Representatives shall be entered upon record by the secretary of state, signed by the governor, and a copy thereof, subscribed by said officers, shall be delivered to the persons so elected and another copy transmitted to the House of Representatives of the United States, directed to the Clerk thereof.”

¹ First session Forty-fourth Congress, Record, p. 167.

² Edward McPherson, of Pennsylvania, Clerk.

³ First session Forty-fifth Congress, Record, pp. 51, 52.

⁴ George M. Adams, of Kentucky, Clerk.

These credentials signed by Governor Kellogg are in no sense a compliance with the requirement of the laws of Louisiana. They do not even purport to be entered on the record by the secretary of state and there signed by the governor, but are, on the contrary, a simple declaration by him that certain persons are elected, without even stating the sources of his information, and do more constitute credentials within the meaning of the laws of Louisiana than a simple statement from the treasurer or other State official would be. They are not such papers as the law of Louisiana has prescribed as the credentials by which the election of its Representatives in Congress shall be authenticated and known, and could not therefore be recognized by the Clerk as such, whose duty it is, under the law, to place on the roll the names of those, and only those, whose credentials show that they are elected in accordance with the laws of their respective States or the laws of the United States.

The other set of credentials is signed by Francis P. Nichols, as governor of Louisiana, and Oscar Arroyo, as assistant secretary of state, with the seal of the State attached. All of them bear date February 27, 1877, and all of them reached the hands of the Clerk at the same time, and through the channels prescribed by law. They declare the persons elected in each of the districts of Louisiana, respectively, and conflict with the certificate signed by Governor Kellogg in reference to two districts only. These credentials comply, it is thought, with the laws of Louisiana in every respect, and the Clerk has accordingly placed on the roll the names of the persons contained in these credentials.

42. In 1877 the Clerk disregarded credentials issued by the governor of Colorado in due form, holding that they showed the election to have been held on a day unauthorized by law.—On October 15, 1877,¹ at the time of the organization of the House, during the call of the roll of Members-elect the Clerk² said:

The Clerk will make a Statement with reference to the reasons by which he was controlled in not placing on the roll the names of anyone from the State of Colorado. There has been received by the Clerk a credential, signed by Governor J. L. Routt as governor of that State, with the seal of the State attached, declaring the election of James B. Belford on the 3d day of October, 1876. The law of Congress, in term, declares that the Clerk shall place upon the roll the names of those Representatives, and of those only, whose credentials show that they are elected in accordance with the laws of their States, respectively, or the laws of the United States. The Clerk does not think that there is any law inexistence, either in the State of Colorado, or any law of the United States, which authorizes the election of a Representative of the Forty-fifth Congress on the 3d day of October, 1876. That being the case, and the certificate which Mr. Belford brings showing on its very face that he was elected at a time unauthorized by either the laws of the United States or of his State, the Clerk could see no way in which he could possibly place the name of Mr. Belford on the roll.

The Clerk read the certificate, as follows:

“Certificate of election.

“STATE OF COLORADO, *State Department*, ss:

“I, John L. Routt, governor of the State of Colorado, hereby certify that at an election held on the 3d day of October, A. D. 1876, James B. Belford received 13,249 votes, being a majority of all the votes cast for Representative in the Forty-fifth Congress of the United States.

“He is therefore hereby declared duly elected Representative in said Congress.

“In testimony whereof I have hereunto set my hand and caused the great seal of the State to be affixed at the city of Denver this 6th day of November, A. D. 1876.

[SEAL.]

“JOHN L. ROUTT, *Governor*.

“By the governor:

“WILLIAM M. CLARK, *Secretary Colorado*.”

¹ First session Forty-fifth Congress, Record, p. 52.

² George M. Adams of Kentucky, Clerk.

There was also received by the Clerk a protest, signed by John M. Patterson, claiming to be Representative-elect from the State of Colorado, and accompanying that protest a certified copy of an abstract of the votes cast in each county on the Tuesday after the first Monday in November for Representative to the Forty-fifth Congress from the State of Colorado. This certified copy of the abstract of the votes cast at said election shows, however, that those votes were never canvassed by any board of canvassers and that no certificate was ever issued to anyone declaring the result of said election.

While the Clerk is of the opinion that the laws of the United States and of the State of Colorado required an election to be held in November, at which time Mr. Patterson claims to have been elected, still, inasmuch as Mr. Patterson does not present credentials regular in form, such as the Clerk feels would justify him in placing his name upon the roll, he will submit the credentials of Mr. Belford and Mr. Patterson, such as they are, to the consideration of the House after it shall have organized.

43. Of two conflicting credentials from Florida in 1877 the Clerk honored the one issued in accordance with a decision of the supreme court of the State.

A second credential being issued by a governor because of a decision of the State court, but not showing the result called for by the rule of that court, the Clerk honored the first credential.—On October 15, 1877,¹ at the time of the organization of the House while the roll of Members-elect was being called, the Clerk² said:

From the State of Florida certificates were received, signed by Marcellus L. Stearns as governor of Florida, with the seal of the State attached, certifying that William J. Purman was elected in the First and that Horatio Bisbee was elected in the Second district of said State. These certificates bear date, respectively, December 9 and December 14, 1876, and seem to be regular in form.

But in reference to the First district two certificates were subsequently received, signed by George F. Drew, governor of Florida, with the seal of the State attached and bearing date, respectively, January 12 and February 26, 1877. These certificates recite the fact that the canvass of the vote upon which the certificate in favor of Mr. Purman was based had been declared by the supreme court of the State of Florida illegal and that another canvass had been made, in obedience to the order of the supreme court of Florida, which canvass resulted in the election of Robert H. M. Davidson as Representative from said district.

Under such circumstances the Clerk felt bound to place on the roll from the First district of Florida the name of Robert H. M. Davidson, whose credentials show that he was elected in accordance with the laws of the State of Florida as interpreted by the supreme court of that State.

In reference to the Second district of Florida, a certificate was also subsequently received, signed by George F. Drew, governor of Florida, with the seal of the State attached, which certificate does not, however, like the subsequent certificate signed by George F. Drew in reference to the First district, show that the second canvass, made in pursuance of the order of the supreme court, resulted in the election of any other person than Mr. Bisbee, to whom Governor Stearns had previously issued a certificate; but, on the contrary, it simply declares that by counting the votes in a certain precinct in Clay County, which the board of State canvassers rejected, and which the supreme court in their opinion say could not be legally counted, then in that event J. J. Finley would be elected. Under such circumstances the Clerk could not see how the subsequent certificate declaring the election of Mr. Finley by doing what the supreme court declared could not be legally done could in any way invalidate the certificate which had previously been issued by Governor Stearns to Mr. Bisbee; and hence, whatever may be the merits of this case in a contest before the House, it seems clear to the Clerk that the prima facie right, with which alone the Clerk can deal, is with Mr. Bisbee, whose name was therefore placed on the roll.

44. The Mississippi election case of Chalmers v. Manning in the Forty-eighth Congress.

¹First session Forty-fifth Congress, Record, p. 52.

²George M. Adams, of Kentucky, Clerk.

No credentials being received, the Clerk declined to enroll either claimant, although one of them filed documents tending to show his election.

The House declined to order that the oath be taken by a person who had credentials perfect in form, but who had not presented them to the Clerk and did not desire to assert prima facie right.

In ordering an investigation as to prima facie right, the House referred, with the credentials, documents showing the state of the returns.

On December 3, 1883,¹ at the time of the organization of the House, the Clerk² after he had called the names of the Members-elect, made a statement respecting the Second district of Mississippi. He stated that James R. Chalmers, who claimed to have been elected there, had filed with him four exhibits in support of his claim to be enrolled as a Member-elect. These exhibits, which the Clerk gave at length, tended to show that the secretary of the state of Mississippi, in making on the 18th of November, 1882, the canvass of the vote of the district, had credited to J. R. Chambless enough votes to make, with those credited to J. R. Chalmers, enough to elect the latter over his leading competitor, Mr. Van H. Manning. After the canvass had been made papers had been filed with the secretary of state showing that the votes credited to J. R. Chambless were really cast for Mr. Chalmers, the error in the name being the error of a clerk of the commissioners in one county. The affidavit of this clerk was one of the papers filed by Mr. Chalmers as part of his exhibits.

The Clerk further stated that he had received no certificate from the governor based on the canvass of the secretary of state. Therefore, as the exhibits were not, in his opinion, sufficient ground for the enrollment of Mr. Chalmers, he had enrolled no one.

Later, after the organization of the House, Mr. George L. Converse, of Ohio, stated that Mr. Manning had not desired to present his credentials until there had been action by the House. But believing that the vacancy should be filled Mr. Converse would present them, and offered the following resolution:

Whereas Van H. Manning holds the certificate of the governor of the State of Mississippi in due form, giving him the prima facie right to a seat on this floor as a Representative of the Second district of Mississippi in the Forty-eighth Congress: Therefore,

Resolved, That the said Van H. Manning immediately qualify as a Member of this House as a Representative of said district without prejudice to the final right to the seat.

Mr. John A. Kasson, of Iowa, questioned whether the House had the right to order a man to be sworn in who did not claim a seat, but Mr. Converse denied that Mr. Manning did not claim a seat.

The previous question was then ordered on the resolution, by a vote of 163, nays 128.

Pending a motion to recommit with instructions, the House adjourned.

On the next day the request was made on behalf of Mr. Manning that the question of his prima facie right to a seat be referred. Therefore the proceedings of the previous day were rescinded, and the House agreed to this resolution:

¹First session Forty-eighth Congress, Journal, pp. 14, 17; Record, pp. 3, 6, 25.

²Edward McPherson, of Pennsylvania, Clerk.

Resolved, That the certificate and all other papers in the contested election case of Chalmers v. Manning, from the Second Congressional district of the State of Mississippi, be referred to the Committee on Elections, when appointed, with instructions to report immediately whether upon the prima facie case as presented by said papers said Manning or Chalmers is entitled to be sworn in as a Member, pending the contest on the merits, and not to affect the final right to said seat.

45. The Mississippi election case of Chalmers v. Manning continued.

In determining prima facie right the House went behind a certificate in due form, the bearer of which waived his prima facie right, and consulted the returns.

The House declined to give prima facie title to a contestant on the strength of the returns, although the bearer of the credentials waived his prima facie right.

An instance wherein the House seated neither of two claimants on prima facie showing, deferring the administration of the oath until the ascertainment of final right.

A contention that the admissions of a claimant might not waive a prima facie title in which the people of the district were interested.

An affidavit intended to explain a clerical error in returns was given little weight by the Elections Committee because of its ex parte character.

On February 8, 1884,¹ Mr. Henry G. Turner, of Georgia, presented the report of the majority of the Committee on Elections in the question arising as to the prima facie right to the seat preliminary to decision as to the final right in the Mississippi case of Chalmers v. Manning. The report of the majority thus states the preliminary facts:

In the Second Congressional district of Mississippi, composed of the counties of Benton, De Soto, Lafayette, Marshall, Panola, Tallahatchie, Tippah, Tate, and Union, an election for Representative in the Forty-eighth Congress was held on the 7th day of November, 1882, at which election Van H. Manning and James R. Chalmers were opposing candidates. When the Forty-eighth Congress assembled, on the 3d day of December last, before the organization of the House, the Clerk informed the House that—

“The Clerk has not enrolled the name of anyone as a Representative for the Second district of Mississippi, for the reason that no paper which can be considered a certificate of election in the sense of the law has been presented to him.”

After the organization of the House, on the same day, Mr. Converse, of Ohio, submitted the following resolution:

“Whereas, Van H. Manning holds the certificate of the governor of the State of Mississippi in due form, giving him the prima facie right to a seat on this floor as a Representative of the Second district of Mississippi in the Forty-eighth Congress: Therefore,

Resolved, That the said Van H. Manning immediately qualify as a Member of this House as a Representative of said district without prejudice to the final right to the seat.”

Pending the consideration of this resolution the House adjourned, and on the next day Mr. Converse stated that at the request of Mr. Manning he submitted the following resolution, which was adopted:

Resolved, That the certificate and all other papers in the contested election case of J. R. Chalmers v. Van H. Manning, from the Second Congressional district of the State of Mississippi, be referred to the Committee on Elections when appointed, with instructions to report immediately whether upon the prima facie case as presented by said papers said Manning or Chalmers is entitled to be sworn in as a Member pending the contest on the merits, and not to affect the final right to said seat.”

At the outset a question arose as to the effect of this action of the House. The majority say:

¹ First session Forty-eighth Congress, House Report No. 283; Mobley, p. 7.

This action of the House was either a refusal of the seat to Mr. Manning by the House, on the usual evidence of the governor's certificate, or it was a renunciation by him of his right to demand such seat upon the governor's certificate alone; perhaps it was both.

The minority views, submitted by Mr. John C. Cook, of Iowa, took issue with this construction of the resolution:

We conclude, therefore, in the light of all the surrounding facts, and upon a fair reading of the resolution, that the House, in adopting it, did not deny Mr. Manning's seat upon regular credentials, but required us to ascertain and report whether he or Mr. Chalmers held such credentials. Any other conclusion would place this House in the singular attitude of denying to Mr. Manning, without reason, a well-defined and established legal light. If the chairman is right in his construction of the resolution, certainly it would be better if the House would repeal it than that it should permit its error to ripen into wrong. We submit, however, that neither by his own action nor by the action of this House has Mr. Manning been placed beyond the pale of law, reason, and precedent, but that he is clearly entitled to a seat on this floor pending a contest on the merits, the same as any other Member duly returned.

The majority assume that by the terms of the resolution they are expected to examine and give weight to other papers besides the certificate of the governor. Their report says:

Among the papers referred to us we find a commission issued by the governor of Mississippi to Mr. Manning based on the certificate of the secretary of state, who by law is charged with the duty of canvassing the returns of elections and certifying the result to the governor. This commission bears the great seal of the State, and is otherwise unexceptionable in form; and could we have confined our inquiry as to the prima facie right to the disputed seat to this paper alone we would unhesitatingly have affirmed Mr. Manning's right to occupy the seat pending the contest. Except in extraordinary cases and in rare instances we find that the commission or certificate concludes all inquiry as to which of the claimants of a seat shall occupy it until the contest on the merits is determined. And every consideration of prudence and safety admonishes us to adhere to this practice.

The minority views hold—

In determining their report upon the question, our associates are pleased to speak of the facts in this case which relate to the merits. In doing so they say, "Mr. Manning's admission and his failure to file his certificate with the Clerk and take his seat in the usual way make this case without a parallel in the annals of Congress," and, ergo, justify them in going behind the certificate.

The committee could not have known anything about the alleged admissions until they had violated the law which forbade us from going behind the credentials, and can not justify their violation by subsequent developments. If the law is that you can look behind every certificate to see what the facts are, and then may or may not consider such facts in determining the prima facie right, as the committee may or may not consider them without parallel, the law that the certificate is conclusive of the prima facie right, so explicitly and uniformly laid down in the books, is but a delusion and a snare.

But we are advised that Mr. Manning's delay in filing his certificate is not unparalleled, and that heretofore such delay has not even excited comment. He offered his certificate the day on which Congress met, and certainly his failure to file it with the Clerk in vacation infringed no law and affected only his individual convenience.

But if we must be surprised by this delay, surely no one will seriously contend that it amounted to a waiver or a resignation of his right, or in any other way known to the law and practice of legislative assemblies defeated or impaired it.

This proposition, as to whether the House might at this stage go behind a certificate which was regular and not impeached by anything on its own face, was debated at length. The chairman of the committee, in his opening speech,¹ reviewed the older usage of the House in effecting, organization, showing, that in the early

¹Record, p. 1092.

days the Members-elect appeared on the first day and presented their credentials, which were read. Whenever a Member's credentials were assailed the question was determined at once from an inspection of the credentials alone. The phrase "prima facie case" was used to define the effect of the usual credentials prior to organization, and to distinguish that case from a trial on the merits. But when a case was taken out of the House and sent to a committee for determination without an investigation of the entire case on all the merits it was the usual practice to define the limits of the inquiry by the committee in the resolution of reference. In the case of *Hunt v. Sheldon* it was settled that the prima facie right might depend on something besides the certificate alone. The case of *Gunter v. Wilshire* was also cited. And in concluding the debate¹ the chairman reaffirmed the principle that in determining the prima facie right after the organization had been effected the House was not restricted to examination of the governor's certificate.

In opposition it was argued² that the question of prima facie right was really the question, "Who has the return?" In this case Mr. Manning had the return, and the committee might not consider in this connection the other question as to who was actually elected.

The minority report also says:

We maintain the constitutional right of the Second Congressional district of Mississippi to representation on this floor.

It is admitted that her citizens voted at the proper time and places, that her officers did all the law required them to do, from the beginning to the issuance of the proper certificate of election; indeed, that all was done there that was done in any district in the United States.

It is further admitted that Mr. Manning is here her duly accredited Representative. His credentials are from the proper authority, perfect in form, and verified under the great seal of the sovereign State of Mississippi; indeed, that his credentials are as valid as the credentials of any Member occupying a seat upon the floor of this House. Yet, while every other district is represented, as they have a right to be, without reference to whether there is or is not a contest over the seat, the majority of the committee maintain that the right of said district to representation must be denied, and Mr. Manning kept out of a seat upon this floor until they can decide this contest upon its merits.

We must protest against this conclusion, which is at war with reason, with all precedents, and with the fundamental right of representation.

We assert that Mr. Manning's credentials are absolutely conclusive of his right to be sworn in as a Member of this House, and represent the Second Congressional district of Mississippi on this floor until the House shall, in the exercise of its constitutional right, determine that he was not elected.

This principle is elementary, sanctioned by the wisdom of centuries, clearly announced by every text writer on the subject, supported by innumerable precedents, and unassailed at any time, by anybody, in any quarters, except in this case, at this time by the majority of this committee.

The majority report proceeds to an enumeration of the papers other than the credentials which were referred to the committee.

Pursuing the instructions of the House, we find from the papers referred to us that the secretary of state certified to the governor in due form that Van H. Manning received 8,749 votes, J. R. Chalmers 8,257, H. C. Carter 129, and J. R. *Chambless* 1,472. It appears from this certificate that 1,472 votes counted for J. R. *Chambless* were cast in Tate County, and that J. R. Chalmers received no votes in that county. On looking to the return of the election in Tate County, certified by the commissioners of election for that county, duly authenticated, and referred to us, we find that these commissioners certify that at the election in that county J. R. Chalmers received 1,472 votes, and add these words to the certificate: "All of which fully appears by the tally sheet on the opposite side of this page, which we certify

¹ Record, p. 1172.

² Especially by Mr. J. Randolph Tucker, of Virginia, Record, p, 1159.

to be a true and correct tally sheet of the votes cast in said Tate County." On the back of this certificate we find not a "tally sheet" but a tabular statement, which seems to count 1,472 votes for J. R. Chambless, and omits altogether the name of Chalmers. This tabular statement is without any caption; but if it is intended by the words "tally sheet," we think, that the secretary of state should have been guided by the face of the certificate, which was complete in itself, and counted these 1,472 votes for J. R. Chalmers. This course would have resulted in the election of Chalmers, according to the face of the returns, by a plurality over Manning of 980 votes. On the other hand, if this tabular statement on the back of the returns from Tate County is to be taken as a part of the return, this construction would render that return so absurd as to void it altogether, and in that view it should have been excluded altogether from the canvass by the secretary of state. This course would have resulted in the election of Chalmers by a plurality of 674 votes.

We also find among the papers referred to us another return of the election in Tate County, certified by the commissioners of election for that county, dated seven days after their first return, and giving 1,472 votes to J. R. Chalmers. But we think their functions had ceased with their first return; and this subsequent statement, being unofficial, can not be regarded as evidence.

We also find among the papers referred to us an affidavit made by one J. M. Williams, relating to the returns of the election in Tate County, to the effect that he was one of the clerks of the commissioners of election who canvassed the returns of the votes in said county, that he made out the "tally sheet," etc., that there was no vote returned for J. R. Chambless, and that if that name appeared in said tally sheet it was a clerical error, etc., but this affidavit being *ex parte*, and not having the character of official evidence, we have not in this inquiry given it much weight. The official returns of the votes cast at the various voting places in Tate County, or copies thereof properly authenticated, would have been better evidence than either the second return made by the commissioners of election for that county or this affidavit of Williams.

We also find among the papers referred to us certified copies of a verdict and judgment on a mandamus instituted by Mr. Chalmers in the circuit court in and for the first district of Hinds County, Miss., against Henry C. Myers, secretary of state, in which proceeding the issues involved in this contest over the *prima facie* right to the seat seem to have been determined by the court in favor of Mr. Chalmers on the 24th day of January, 1883, the commission having been awarded to Mr. Manning by the governor on the 18th day of November, 1882. It does not appear that the governor was advised of this proceeding, although it does appear from a recital in said verdict and judgment that the secretary of state certified the canvass of the vote after service of a prohibitory order upon him from the court. But it seems that the supreme court of Mississippi afterwards, on the 11th day of June, 1883, reversed the judgment of the circuit court, as appears from a certified copy of the judgment of the supreme court, among the papers referred. The ground of the reversal of the judgment of the lower court is not shown in the record. Mr. Manning was no party to this proceeding in either court.

On examining the issues between the parties to this contest, as stated in the notice of contest, and the answer thereto, we find that Mr. Chalmers denies Mr. Manning's *prima facie* right to the seat as well as his ultimate title; and Mr. Manning in his answer, after denying various charges in the notice of contest, and stating the circumstances under which the prohibitory order before mentioned in this report was obtained, and averring that it was properly disregarded by the secretary of state, makes this statement:

"I deny that any frauds were attempted or practiced by my friends, or that they were guilty of fraudulent or illegal practices, or that you received a majority of 1,332 votes as a Member of the Forty-eighth Congress from said Congressional district, though I admit that the inspectors and clerks of the several election precincts did certify to the county commissioners of election in their respective counties that you received a majority of the votes cast; and I further admit that the 1,472 votes which the commissioners of Tate County returned as cast for J. R. Chambless were in fact cast for you, and that the name Chambless was inserted in the return by clerical error instead of your name. And in this connection, I state that because of said error to your prejudice, I will not take a seat in said Congressor ask the clerk to enroll my name as a Member thereof until I have vindicated and the House shall have affirmed my right thereto."

Mr. Manning, in his answer, also charges against the contestant a resort to bribery, corrupt use of official patronage, and intimidation. All the papers referred to us, and hereinbefore specified, are exhibited in an appendix in this report.

This case is without precedent. The admissions of Mr. Manning his refusal to present his commission and take his seat in the usual way, and the instructions of the House, are without a parallel in the annals of Congress.

Guided by the instructions of the House, and having considered carefully the documentary evidence referred to us, we are unable to agree that Mr. Manning should be seated upon his prima facie title. Mr. Chalmers having no such credentials as the law contemplates, we do not think that he ought to be seated pending the contest.

The minority views declare that they can not agree—

that the admissions of Mr. Manning shall be held to affect the title to a seat in Congress, in which the citizens of the Second district of Mississippi are more deeply concerned than Mr. Manning.

The minority views go on to argue:

Now this question is not a new one; there is nothing startling nor unparalleled about it.

It is just as well settled that the returned Member has the right to hold the seat pending a contest on the merits with the person who would have been returned had not the clerical error of a returning officer intervened as that you can not go behind the certificate in determining who should hold the seat pending a contest on the merits. Indeed, the last stated rule, which all admit, grows out of and is founded upon the first.

If the person who ought to have been returned was entitled to the seat pending a contest with the Member who is returned no rule would ever have been made excluding the evidence by which the party who ought to have been returned could establish his right. Because the evidence, if admitted, does not establish any right, is the reason for excluding it. (See Cushing, sec. 144, 140, and authorities before cited.) The admission of a fact by Mr. Manning in his answer can not give any right which proof of the fact would not give.

Rights are dependent upon facts, and a defendant can neither give rights by admitting them nor abridge rights by denying them. If you should hold that the man who ought to have been returned is entitled to occupy the seat pending a contest on the merits, then it makes no difference whether the fact that the person ought to have been returned lies on the surface of the investigation in the shape of an admission or is buried under volumes of proof.

Such a precedent would double the labor in every contest. We would first have to examine the pleading and proof to ascertain who was elected on the face of the returns. After seating such person we would have to institute a second investigation to ascertain who was elected in very truth. Now, as it is apparent that the person who has the majority on the face of the returns has no more right to a seat than the person who is returned, since the right to the seat is vested all the time in the person really elected, legislative bodies have wisely determined, in the interest of economy, of their time and the public treasury, to have no intermediate investigation which does not reach the merits of the contest. As the man elected ought to be returned, and as fraud at the ballot box should be as promptly corrected as any errors committed by returning officers, you can not say who ought to have been returned until you have fully investigated the merits of the case.

The committee are not prepared to report that Mr. Manning ought not to have been returned, because they have not investigated his allegations that Mr. Chalmers was not only not elected but that the precinct officers would have returned a large aggregate majority for him but for the bribery and corruption of the voters by Mr. Chalmers. A little thought will make it apparent that you must hold either that a contest vacates a seat until a decision on the merits or that the returned Member shall hold the seat pending such contest, no matter what facts lie behind the certificate. Any effort to ingraft exceptions upon the settled rule leads inevitably to confusion, disorder, injustice, and a denial of the right to representation.

The great right here for your adjudication is the right of one hundred and fifty thousand citizens to representation on this floor while the individual contest between Messrs. Manning and Chalmers is being determined.

Consideration for that right and a deep sense of necessity of having fixed rules for the exercise of that right led to the adoption and has secured the maintenance up to this time of the rule that the returned Member shall hold the seat pending the contest on the merits.

The attempt of the majority of the committee to evade that rule leads to a denial of that constitutional right of representation which the rule was framed to protect.

And we call your attention now to a startling fact in this case.

The committee have reported unparalleled action on the part of this House and on the part of Mr. Manning, but they have not found anything to criticise upon the part of the people of the Second district of Mississippi, whose dearest right they assail and ask you to disallow.

In any and every aspect of this case this district is entitled to representation. Reason, analogy, precedent, and established rules unerringly point to Mr. Manning as the one person entitled to represent it.

Instead of being able to defend their conclusion behind the resolution of this House, some of the committee have confessedly gone outside of and beyond any authority you gave them. They say, "We are unable to agree that Mr. Manning should be seated upon his prima facie title." Your instructions were to find out whether he had a prima facie title. They have found that he has such prima facie title, and then proceed without warrant and without direction or solicitation from you to advise that he should not be allowed the right his prima facie title insures.

We respectfully submit that you never questioned his right to the seat if it appeared in our investigation that he had a prima facie title to it.

In view of the great interests and important principles involved, and of our clear convictions as to the right, we are impelled to submit this report and the following resolutions for your adoption:

Resolved, That the Hon. Van R. Manning holds perfect credentials, issued in due form and by lawful authority, as Member-elect to the Forty-eighth Congress from the Second Congressional district of the State of Mississippi.

Resolved, That being the duly returned Member he is entitled to be sworn in and occupy the seat on this floor pending a contest on the merits over it.

The majority recommended this resolution:

Resolved, That the Committee on Elections be discharged from the further consideration of the prima facie right to the seat in the contested election case of J. R. Chalmers *v.* Van H. Manning.

The report was very fully debated on February 13, 14, and 16, 1884,¹ and on the last day the question was taken on the proposition included in the first resolution of the minority. This was disagreed to, yeas 106, nays 139.

The second resolution of the minority was then disagreed to, yeas 91, nays 157.

The resolution proposed by the majority was then agreed to, ayes 113, noes 55.

46. The Mississippi election case of Chalmers *v.* Manning, continued.

The majority of the Elections Committee, in a sustained case, concluded that the House was not concerned about undue influence used in the nomination of a candidate.

A contestant, employed after the election as assistant to a United States district attorney, was held qualified to be seated, especially as his employment ceased before Congress met.

Instance wherein a contestant belonging to the party in the minority in the House was seated.

On June 20, 1884,² Mr. John C. Cook, of Iowa, presented the report of the majority of the committee on the question of final right to the seat. At the outset it admits that Mr. Chalmers received a majority of the votes.

A subordinate question was presented by charges and testimony relating to use of money and Federal patronage in the district, and the report says:

¹ Record, pp. 1091, 1126, 1156-1174; Journal, pp. 586-589, 591.

² Report H. of R. No. 1599; Mobly, p. 34.

Believing that it is the duty of the House, whenever it is shown that the election of a Member is the result of this influence, to declare the election void; and believing, further, that the testimony in a case is to be taken in connection with contemporaneous historical facts, your committee has given careful attention to the record and evidence in this case. We conclude that it can not fairly be said that the election of Mr. Chalmers was secured by such undue influence; that is to say, that without it he would not have been elected, especially in view of the large majority he received. It was perhaps more instrumental in making him the candidate of the Republican party and suppressing other aspirants for party support. But with this we think the House has no concern.

A large part of the evidence is calculated¹ to show that the contestant was deceitful in his politics, treacherous to his political friends, and unworthy of so high an office. This, however, must address itself to the voters of his district, and the House has no right to render an unjust decision because a man lawfully elected may be subject to this criticism more or less.

The minority views presented by Mr. Ambrose A. Ranney, of Massachusetts, in behalf of himself and five others of the committee, dissented from any conclusions that would imply credence in the charges.

The main issue in the case is thus stated and decided in the majority report:

It is next claimed that Mr. Chalmers, if legally elected, has since his election disqualified himself from holding this office by accepting another office from the United States and performing its duties within the term of office of a Member of the Forty-eighth Congress, under the following provision of the Constitution:

“And no person holding any office under the United States shall be a Member of either House during his continuance in office.”

Because on the 9th day of December, 1882, Mr. Chalmers was by the Attorney-General of the United States employed or appointed “special assistant to the district attorneys for the northern and southern districts of Mississippi,” and that by retaining this position he had vacated his office as Representative.

Your committee, however, passing the question of whether this is an office within the meaning of the Constitution, find that Mr. Chalmers was retained for a special purpose, and that prior to the time for the convening of Congress the matter for which he was appointed or employed had been disposed of. His account had been rendered to and closed by the Department. No resignation had been made—none was necessary. Practically his connection with the office of district attorney had ceased.

We recommend to the House for adoption the following resolution:

Resolved, That James R. Chalmers was duly elected as a Representative in the Forty-eighth Congress from the Second district of Mississippi, and is entitled to be sworn in as a Member of this House.

The minority views presented by Mr. Ranney practically concurred in this decision:

It has been contended that contestant was not eligible, or rather that he had lost his right to a seat, because employed December 9, 1882, by the Attorney-General, to act as counsel and aid the district attorneys in the prosecution of some criminal cases in Mississippi. His employment was a special one in the line of his profession, and it was in no sense an office which was incompatible with his holding the position of Representative to Congress. He was not awarded a certificate of election as the chosen Representative, but the same was awarded to and was held by another person, to wit, the contestee. He was only a contestant claiming the seat. He was employed and retained after the day of election for a special purpose, to assist the district attorneys for the northern and southern districts of Mississippi in the prosecution of certain criminal cases. The employment was authorized under the statutes of the United States. It was a special contract employment for special pay according to what he did, and not an appointment to fill any office created by law, with duties prescribed and a salary attached. There is no good reason for a claim that it was the holding of an office under the United States which was incompatible with his being a Member of this House under the provisions of the Constitution, even if he had been a Member of that body. But whether it was or not, inasmuch as he was not then accredited as a Member and another person was, and especially inasmuch as his employment had ceased, his services

¹ It was explained in debate that “intended” was the word which should have been used.

having been fully performed and ended before the Forty-eighth Congress met, he could not in any event properly be held to come within the provision of the Constitution referred to either in its letter or spirit. (Contested Elections in Congress, 1779–1837, p. 122; *Hammond v. Herrick*, in same, p. 287; Earle's case, p. 314; Mumford's case, p. 316; Schenck's case; McCrary, secs. 238, 244.)

But Mr. L. H. Davis, of Missouri, presented views wherein it was argued at length that an assistant district attorney was an officer within the meaning of the Constitution. Mr. Davis discussed the law and the precedents at length.

The report was debated on June 25,¹ the main issue being on the question as to whether or not the office of assistant district attorney was incompatible with that of Member of Congress. Several Members who thought that the offices might be incompatible, nevertheless considered that the contestant had the power of electing which office he would accept as soon as it should be determined that he was entitled to the seat in the House.

The question was first taken on the following resolution proposed by Mr. Davis in his minority views:

Resolved further, That said Chalmers having accepted the office of special assistant United States district attorney for the northern and southern districts of the State of Mississippi, since the said election, and holding said office up to and beyond the 1st day of February, 1884, is ineligible to a seat in this Congress, and a vacancy exists in the Second Congressional district of the State of Mississippi.

This resolution was disagreed to—ayes, 36; noes, 98.

Then the question was taken on a second resolution proposed by Mr. Davis:

Resolved, That the means and methods employed by the Federal Administration in securing the election of James R. Chalmers as a Member of the House of Representatives of the Forty-eighth Congress are, as appears by the majority report and the evidence on file, repugnant to and subversive of true representative government, and the said election is therefore declared void.

This resolution was disagreed to—yeas, 56; nays, 163.

Then the resolution of the majority declaring contestant elected was agreed to without division, and Mr. Chalmers appeared and took the oath.

It should be noted that Mr. Chalmers belonged to the minority party in the House, and Mr. Manning to the majority party.

47. No credentials being received from a district prior to the meeting of Congress, the Clerk placed no name on the roll for that district.

The Clerk, while presiding at the organization, declined to open a paper addressed to the Speaker, although it was supposed to inclose a missing credential.

On October 15, 1877,² at the organization of the House, while the roll of Members-elect was being called, the Clerk³ said:

From the State of Missouri there is one district, the third in number, from which no credential of any kind has been received in favor of any person, and consequently no name has been placed upon the roll from said district. There has been handed to me at this instant a paper from the State of Missouri, addressed to the Speaker of the House of Representatives. It is suggested that, as there is no Speaker, the Clerk should open it.

¹ Record, pp. 5591-5606; Journal, pp. 1548, 1550, 1553.

² First session Forty-fifth Congress, Record, p. 52.

³ George M. Adams, of Kentucky, Clerk.

Several Members having objected, the Clerk said:

The Clerk prefers, inasmuch as it might raise a question about which, at this late hour, he is not prepared to determine what he should or should not do in reference to the roll, to leave it for the House to determine when it shall have organized.

48. A Member-elect having been enrolled on the strength of credentials in due form, the Clerk declined to strike him from the roll on the strength of later papers.—On March 18, 1879,¹ at the time of the organization of the House, after the roll of Members-elect had been called, the Clerk² said in reference to one of the seats from the State of Florida:

He (the Clerk) received a certificate of election signed by the governor and authenticated by the seal of Florida, as prescribed by the following provision in the statutes of that State: "Whenever any person shall be elected to the office of elector of President or Vice-President, or Representative in Congress, the governor shall make out and sign and cause to be sealed with the seal of the State and transmit to such person a certificate of his election," duly accrediting Mr. Hull as a Representative-elect to the Forty-sixth Congress. He subsequently received a number of papers, among which was a certified copy of a canvass of the votes in the Second district of Florida, made by the board of State canvassers in pursuance of an order of the supreme court of that State, from which canvass it appears that Mr. Horatio Bisbee, Jr., was elected; but those papers were not accompanied by the certificate of the governor, authenticated by the seal of the State, as required by the statute just cited. The Clerk did not feel at liberty to regard anything as a credential within the meaning of the law governing him in making up the roll except a certificate made out and signed by the governor and sealed with the seal of the State, as prescribed by this provision of the statutes of Florida; and as Mr. Bisbee, who claims to have been elected, presented no such certificate, the Clerk could not regard him as possessing the prima facie evidence of an election which the laws of Florida requires that he should have, and consequently omitted his name from the roll.

49. On August 7, 1893,³ at the time of the organization of the House, the Clerk,⁴ after the State of Michigan had been called, made the following statement:

The Clerk begs leave to state, in reference to the certificate of election from the Fifth Congressional district of Michigan, that on December 22, 1892, there was filed in his office a certificate of election to the House of Representatives from that district in due and authorized form, showing the election of Hon. George F. Richardson as a Representative to the Fifty-third Congress of the United States, and the name of said George F. Richardson was, by the Clerk of the House, then duly placed upon the roll of Representatives-elect. Exactly similar certificates in every respect, certified to by the same State officers, were filed at other dates, as late as April 3, 1893, showing the election of Representatives to Congress from all the other districts of Michigan, and similar action was taken in each case.

On February 20, 1893, there was delivered to the Clerk an alleged certificate of election, signed by other persons (the State officers required by law to certify the election of Members of Congress having been changed in the interim), which said certificate, accompanied by sundry papers, claimed to show the election of Hon. Charles E. Belknap from the Fifth Congressional district of Michigan as a Representative to the Fifty-third Congress. The Clerk refused to strike off the roll the name of George F. Richardson as a Member-elect from this district, having already exercised the authority given to him by the law. The matter is therefore submitted to the House, which, when organized, is, under the Constitution and the law, judge of the elections, returns, and qualification of its own Members.

50. In 1879 the Clerk honored the regular credentials from the governor of Iowa, although papers presented in opposition thereto raised a

¹First session Forty-sixth Congress, Record, p. 4.

²George M. Adams, of Kentucky, Clerk.

³First session Fifty-third Congress, Record, p. 200.

⁴James Kerr, of Pennsylvania, Clerk.

doubt as to the lawful day of election.—On March 18, 1879,¹ at the time of the organization of the House, after the roll of Members-elect had been called by the Clerk,² he said:

There were presented to the Clerk certificates duly signed by the governor of the State of Iowa, under the seal of the State, accrediting the nine gentlemen whose names have been announced as Representatives duly elected on the 8th day of October, 1878. Sundry papers were also presented to the Clerk in reference to an election claimed to have been held on the Tuesday next after the first Monday in November, 1878. These papers, however, do not conform to the requirements of the laws of Iowa. They are not signed by the governor; they are not under the seal of the State; they are simply papers which came unauthenticated and in no sense constitute credentials within the meaning of the laws of Iowa. Whatever may be the fact, therefore, in reference to the time at which the election should have been held in the State of Iowa, even though it were definitely and clearly settled that the election should have been held in November instead of October, the Clerk could not in any event place on the rolls the names of those persons in whose behalf papers have been filed in reference to the November election for the reason that these papers do not comply with the laws of the State of Iowa and do not constitute credentials.

As to whether the election should have been held in October or in November there are grave doubts in the minds of those learned in the law. It is a question about which he confesses he has not been able to arrive at so clear and satisfactory conclusion as he himself could have desired. But in the discharge of the duty imposed upon him, unless he could arrive at a clear and satisfactory conclusion that those gentlemen were not elected on the proper day, he did not feel at liberty to withhold their names from the roll of Members-elect, but thought it proper to give the benefit of the doubt in favor of representation and to remand that question for the consideration of the House when it shall have organized.

51. In 1879 the Clerk declined to honor a regular credential for a Representative at large to which the State was not entitled by law.—On March 18, 1879,¹ at the organization of the House, after the roll of Members-elect had been called, the Clerk² said:

He (the Clerk) has received a certificate accrediting an additional Representative from the State of Kansas as elected from the State at large; but as he is not aware of any law authorizing that State to have more than three Representatives, he has not placed the name of the person who is claimed to have been elected for the State at large upon the roll.

52. In 1885 the Clerk honored the Nebraska credentials which, although they did not fully comply with the law, were identical in form with certificates sent from that State to former Congresses.—On December 7, 1885,³ at the time of the organization of the House, when the State of Nebraska was reached in the calling of the roll, the Clerk⁴ said:

The Clerk desires to state that he has some doubt as to whether the certificates from the State of Nebraska fully comply with the law, but as they are identical with the certificates filed with the Clerk of the House of Representatives of the Forty-seventh and Forty-eighth Congresses, and as there is no protest or contest, he has placed the names upon the roll.

53. The Kentucky election case of Letcher v. Moore in the Twenty-third Congress.

In 1833 the House declined to sustain the action of the Clerk in en-

¹ First session Forty-sixth Congress, Record, p. 4.

² George M. Adams, of Kentucky, Clerk.

³ First session Forty-ninth Congress, Record, p. 106

⁴ John B. Clark, of Maryland, Clerk.

rolling a person whose credentials on their face failed to comply with the requirements of the State law.

An instance wherein, at the organization of the House, before the enactment of the law as to the Clerk's roll, two claimants to a seat were present and participated in the proceedings.

In 1833 the House decided that a person bearing defective credentials should not be called on the roll call until after the election of Speaker and other officers.

In 1833 the House declined to seat either claimant until the final right should be determined.

Form of resolution used in 1833 to authorize the institution of a contest.

On December 2, 1833,¹ at the organization of the House, while the Clerk of the last House was calling the names of the Members-elect, and had called as far as the State of Kentucky, Mr. Chilton Allan, of that State, arose and objected to the calling of Thomas P. Moore, returned to serve as the Member for the Fifth Congressional district of said State, on the ground that the said Thomas P. Moore had not been duly elected and that the return of the said Thomas P. Moore was not in the form prescribed by the laws of the State of Kentucky.

Debate at once arose. Some question was made as to the competency of the body of unqualified Members to make a decision; a proposition was made that a chairman be chosen to preside, etc.

It appeared from the debate that the Clerk had put the name of Mr. Moore on his roll of Members-elect, and the Members called for the reading of the papers on which the Clerk had acted. He therefore produced Mr. Moore's certificate, which was signed by the sheriffs of three of the five counties composing the Congressional district, although the law required it to be signed by the sheriffs of all the counties. This certificate, on the face of it, stated that the votes of one county were not taken into account. Both Mr. Moore and his opponent, Mr. Robert P. Letcher, were present. Mr. Moore spoke on the question, and the report of debates indicates that Mr. Letcher was also heard to the extent of making a proposition that both withdraw until after the election of Speaker.

By general consent it was agreed that Mr. Moore should not be called until the House should have become organized by the election of Speaker and other officers.

On December 4 the subject was resumed and gave rise to an extended debate, during which the insufficiency of the credentials of Mr. Moore was urged. Finally, on December 5, the House agreed to these resolutions:

Resolved, That the Committee of Elections, when appointed, inquire, and report to this House, who is the Member elected from the Fifth Congressional district of the State of Kentucky and, until the committee shall report as herein required,

Resolved, That neither Thomas P. Moore nor Robert P. Letcher shall be qualified as the Member from said district.

Resolved further, That the Committee of Elections shall be required to receive as evidence all the affidavits and depositions which may have been heretofore, or which may hereafter be, taken by either of the parties, on due notice having been given to the adverse party, or his agent, and report the same to this House.

¹First session Twenty-third Congress, Journal, pp. 3, 26, 27; Debates, pp. 2130-2135, 2139-2160.

54. The Kentucky election case of Letcher v. Moore, continued.

The House considered the constitution and laws of the State in which the election was held as affording the rule by which irregularities should be tested.

Although the State constitution required that every vote be given viva voce, the Elections Committee in a report which failed, evidently for other reasons, to be sustained decided that the votes of certain mutes might be counted.

In an inconclusive case the House reversed the decision of its committee, that residence while attending a school was not such residence as entitled one to the suffrage.

In 1834 in an inconclusive case the Elections Committee gave the word "residence" the same meaning as "home" or "domicile."

In an inconclusive case in 1834 the Elections Committee held that right of suffrage was not lost by removal from the State unless there was an intention to remain away or proof of permanent location elsewhere.

The law requiring the presence of the sheriff at the voting, the committee rejected votes cast in his absence, but the House reversed this ruling.

In 1834 the Elections Committee adopted the rule that depositions must be signed by the witness, unless State law made the certificate of a magistrate sufficient.

On May 6, 1834,¹ the Committee on Elections reported in the case of Letcher v. Moore, from Kentucky, the first paragraph of the report explaining the situation:

The subject presented itself as one entirely new and unprecedented. Thomas P. Moore, esq., had a certificate from three only of the five sheriffs, and Robert P. Letcher, esq., a majority of the votes upon the poll books of the five counties composing that district. As Mr. Letcher had no certificate, and that of Mr. Moore was not signed by all the sheriffs, as required by the law of Kentucky, neither could produce a satisfactory testimonial of his election, and consequently neither was permitted to take his seat.

The partial certificate was the result of the action of the sheriff of one county, who withheld the poll book and thus prevented the issuing of a certificate to Mr. Letcher, who, with that county poll, would have been elected so far as the face of the returns went. The minority of the committee, united with the majority in condemning the conduct of the sheriff, and in the opinion that the certificate of three of the five sheriffs was insufficient to entitle Mr. Moore to a seat. But the minority did contend that certified copies of the poll books constituted sufficient evidence of the election to entitle the person in whose favor they showed a majority to take the seat, subject of course to future contest and final decision of the House.

This view did not prevail, however, the House not considering this aspect further, and neither party took the seat on prima facie right.

The committee gave to the contestants a certain time in which to take testimony, and then allowed the contestants an opportunity to examine the testimony and make briefs. Both contestants also presented arguments.

The committee found in their examination nearly 400 votes objected to, these objections arising principally as to the qualifications of voters, but some as

¹First session Twenty-third Congress, contested elections in Congress, from 1789 to 1834, p. 715.

to the conduct of officers of the election. The constitution and laws of Kentucky were the rule of the election, and the committee examined the objections with reference to that constitution and system of laws.

First, in relation to the qualification of voters. The constitution of Kentucky provided that "in all elections by the people" the "votes shall be personally and publicly given viva voce." Three deaf-mutes, able to read and write, voted, but objection was made that it was physically impossible for them to comply with the requirements of the constitution. The committee finally concluded that under a liberal construction of the constitution the votes might be received.

The State constitution also allowed every male over the age of 21 to vote in the county where he was actually residing, provided he had resided in the State two years. The committee gave to the term "residence" the same meaning as "home," or "domicile;" and three men who had been in another State five years were still considered entitled to vote. Also all men living in the county for the time being, unless the business bringing them there was merely temporary, were allowed to vote unless they had actual home or domicile in another part of the State. This principle determined the votes of laborers residing where they could get work. But the students of a theological seminary were rejected in accordance with the following principle laid down by the committee: "That the residence of young men from other States and counties, at schools, academies, or colleges, as scholars or students, is not such a residence as entitles them to the right of suffrage in the county where they are for the time being." The committee also laid down the following principle in reference to removal from the State: "An individual having the right of suffrage in Kentucky does not lose it by removal from the State merely, but there must be an evidence of his intention at the time he departs to leave the State permanently or proof of his permanent location elsewhere to forfeit his rights as a voter."

In their investigation the committee also laid down the following rules in regard to voters:

That no name be stricken from the polls as unknown, upon the testimony of one witness only that no such person is known in the county; and that where a man of like name is known, residing in another county, some proof, direct or circumstantial, other than finding such a name on the poll book, will be required of his having voted in the county or precinct where the vote is assailed.

That all depositions not subscribed by the witness be excluded, unless the certificate of a magistrate be sufficient according to the law of Kentucky.

That votes recorded upon the poll books as given to one candidate can not be changed and transferred to the other by oral testimony.

That all declarations or statements made by voters after the election, relative to their right of suffrage, be rejected.

That when a man is found on the poll book, proof that an individual of that name resides in the county, who is a minor, is not sufficient to strike the name off the poll book, and that some proof, direct or circumstantial other than finding the name on the poll book, will be required of the vote having been given by such minor in the county or precinct where the vote is assailed.

In that branch of the case relating to the conduct of election officers the law of Kentucky provided for the appointment of two judges and a clerk for the county by the county court, and that in case of failure to appoint, or failure of any or all of the appointees to attend, the sheriff should, immediately preceding the election, appoint proper persons to act in their stead; that the sheriff or other presiding officer should "open the polls by 10 o'clock in the morning" of the day of election;

that the judges and clerk should be sworn and attend to receiving the votes until the completion of the election and the return; that voting should be done publicly and viva voce "in presence of said judges and sheriff."

In Garrard County one judge declined serving, and the other not having appeared at 9 a.m. when the sheriff opened the election (the law requiring him to do it "by 10") the sheriff appointed the second judge. About 10 o'clock, when the originally appointed judge appeared, the second appointee of the sheriff resigned the duties. On the second day of the election the sheriff was absent for three hours, the two judges continuing to receive votes in his absence.

The committee held that the sheriff was not authorized to appoint the second judge until 10 o'clock, as the law intended to allow until that time for the arrival of the judges. Not until that time could a judge be said to have failed to attend. Therefore the committee rejected the votes taken before 10, during the officiating of the second appointee, who resigned as soon as the regular judge arrived and did not "attend to receiving the votes" until the election and return were completed.

The committee also rejected the votes taken in the absence of the sheriff, since, under the letter of the law, the voting must be in his presence. The State had prescribed the "manner" of holding the election, and the votes were not taken in the prescribed manner. In support of this action the committee cited the cases of Jackson and Wayne (1791), Patton (1793), Morris (1795), Lyon and Smith (1795), McFarland and Purviance (1804), Spaulding and Mead (1805), McFarland and Culpepper (1807), Bassett and Bayley (1813), Scott and Easton (1816).

As a result of the corrections made in accordance with the above principles, the committee found Thomas P. Moore entitled to the seat and so reported.

55. The Kentucky election case of Letcher v. Moore, continued.

The House in 1834 reversed the decision of its committee that recorded votes on the poll book could not be changed by oral testimony.

The House reversed the rule of its committee that a vote might be rejected from the poll on the testimony of more than one witness that the voter was unknown in the county.

There being doubt as to the regularity of the appointment of an election judge, the committee rejected the votes cast while he officiated; but the House reversed the ruling.

It being impracticable for the House to determine with any certainty who was elected, the seat was declared vacant.

The case was considered in the House during the period from May 13 to June 12, the House disregarding the report and going into the case itself. On June 4 the House decided that the votes cast in Garrard County while the second judge appointed by the sheriff was officiating should be counted; also that the votes cast during the absence of the sheriff should be counted.

The House also reversed the action of the committee in the case of the theological students and decided that their votes should be counted.

Also the House reversed the principle laid down by the committee that recorded votes, on the poll book could not be changed by oral testimony; also votes which the committee rejected on the testimony of more than one witness, that the voters were unknown in the county, were restored by the House.

On June 12 a proposition that Mr. Letcher was entitled to the seat was decided in the negative, yeas 112, nays 114. And then, after unavailing efforts to amend, the House agreed, by a vote of 114 yeas to 103 nays, to a resolution that there be a new election, "it being impracticable for the House to determine with any certainty who is the rightful representative."

56. The prima facie election case of Belknap v. Richardson, from Michigan, in the Fifty-third Congress.

An instance wherein the Clerk and the House honored credentials, regular in form and issued legally by the proper officer, but annulled by the State supreme court.

There being conflicting credentials, the House honored those first issued, although by reason of a revision of returns the court had annulled the said prior credentials.

On August 7, 1893,¹ during the organization of the House, and while the Speaker was administering the oath to Members, the State of Michigan was called and Mr. Julius C. Burrows, of that State, objected to the oath being administered to Mr. George F. Richardson.

The Speaker directed Mr. Richardson to stand aside.

The other Members and Delegates having been sworn in, Mr. Charles T. O'Ferrall, of Virginia, offered this resolution:

Resolved, That George F. Richardson be now sworn in as a Representative for this Congress from the Fifth district of the State of Michigan.

Mr. Burrows offered the following substitute for this:

Whereas the credentials upon which George F. Richardson claims a seat in the Fifty-third Congress from the Fifth Congressional district of the State of Michigan have been annulled and made void by reason of the judgment of the supreme court of that State; and

Whereas in pursuance and compliance with such judgment and with the laws of said State, the State board of canvassers of Michigan have determined, declared, and certified that Charles E. Belknap is duly elected a Representative to the Fifty-third Congress of the United States of America from the Fifth Congressional district of the State of Michigan; Therefore,

Resolved, That Charles E. Belknap is entitled to be sworn in as a Member of this House on his prima facie case.

By unanimous consent the consideration of these resolutions was deferred until the organization of the House should be perfected.

On August 8, after debate and after a motion to commit had been negatived, by a vote of yeas 128, nays 193, the substitute was negatived, yeas 114, nays 199, and Mr. O'Ferrall's resolution was agreed to. Then the oath was administered to Mr. Richardson.

On this case, as stated in the Clerk's explanation, both parties presented regular credentials, those presented by Mr. Richardson being exactly similar to those on which the other Michigan Members were seated. But in the case of Mr. Richardson there had been in one of the counties of his district—the county of Ionia—a recount which the supreme court of the State had declared illegal, and as a result of the action of the court there appeared a plurality of votes for Mr. Belknap. So a new certificate was issued, signed by the same officials who signed the Richardson cer-

¹First session Fifty-third Congress, Record, pp. 201, 202, 226–238.

tificate (although not by the same individuals, there having been a change in the State government), and certifying the election of Mr. Belknap. The certificate furthermore stated that Mr. Belknap had the largest number of votes and was elected "in accordance with the laws of said State and the decision of the supreme court of Michigan annulling the certificate heretofore illegally issued to George F. Richardson and is issued in lieu thereof."

In the course of the debate the action of Clerk George M. Adams in the Florida case was cited.

A resolution was adopted to allow Mr. Belknap to contest.¹

57. The Florida prima facie election case of Bisbee v. Hull in the Forty-sixth Congress.

The Clerk and the House honored credentials, regular in form and issued by a competent officer, although the fact was notorious that the State courts had found a different result.

On March 18, 1879,² while the Speaker was administering the oaths to Members at the time of the organization of the House, the State of Florida was called and Mr. Noble A. Hull presented himself to be sworn. Mr. William P. Frye, of Maine, requested that he stand aside, objecting to the administration of the oath to him.

When the oath had been administered to the other Members, Mr. John T. Harris, of Virginia, offered this resolution:

Resolved, That Noble A. Hull be now sworn in as a Representative in this Congress from the Second district of the State of Florida.

Mr. Frye offered the following as a substitute:

Whereas the credentials upon which Noble A. Hull claims a seat * * * have been annulled and made void by the judgment of the supreme court of that State; and

Whereas, in pursuance and in compliance with such judgment and with the laws of said State, the State board of canvassers of Florida have determined, declared, and certified that Horatio Bisbee, jr., is duly elected a Representative, etc.; Therefore,

Resolved, That Horatio Bisbee, jr., is entitled to be sworn in as a Member of this House on his prima facie case.

On March 19 Mr. Frye withdrew the preamble and resolution and offered the following:

Resolved, That the question of the prima facie as well as the final right of Horatio Bisbee, jr., and Noble A. Hull, contestants, respectively, claiming a seat in this House from the Second district of Florida, be referred to the Committee of Elections, hereafter to be appointed; and until such committee shall have reported in the premises and the House have decided such question neither of said contestants shall be admitted to a seat.

Mr. Frye stated in support of his resolution that because of irregularities in the count in two of the counties of the district, the majority which should have been for Mr. Bisbee had been changed so as to show the election of Mr. Hull. The supreme court of the State ordered a review by the State canvassing board, which resulted in the demonstration that Mr. Bisbee had been elected. But the governor, who had already issued a certificate to Mr. Hull, on the first return of the canvassing board, declined to revise his action and issue a certificate to Mr. Bisbee. Mr. Bisbee

¹ Record, p. 1359.

² First session Forty-sixth Congress, Record, pp. 6, 27; Journal, pp. 12, 20, 21.

applied to the supreme court of the State for a mandamus to compel the governor to issue the certificate. The court held that the governor ought to issue the certificate, but that the court could not compel him to. A dissenting judge held that the court might compel the governor. Mr. Frye cited the case of Davidson and Purman in the preceding Congress, where there were two certificates from two governors, and where the Clerk placed on the roll the name of the claimant whose certificate was in accordance with the law of the State as interpreted by the supreme court. In behalf of Mr. Bisbee, Mr. Frye and others claimed that the action of the supreme court, and the second canvass had shown the certificate issued to Mr. Hull to be void, and therefore that the prima facie right to the seat did not belong to Mr. Hull.

On the other hand, it was contended that Mr. Hull had the certificate of the governor, issued according to law and regular in form. Therefore he should be seated. The facts brought forward on the other side might be reason for an inquiry as to the final right to the seat, but not as to the prima facie right.

The question being taken on the resolution proposed by Mr. Frye it was disagreed to—yeas 137, nays 140.

The resolution proposed by Mr. Harris was then agreed to—yeas 140, nays 136. Thereupon Mr. Hull appeared and the oath was administered to him.

58. A certificate regular in form and legally issued by a competent officer was honored by both Clerk and House, although the successor of that officer had issued conflicting credentials.—On October 15, 1877,¹ at the organization of the House, while the Members-elect, whose names had been placed on the roll by the Clerk, were being sworn, Mr. Richard H. Cain, of South Carolina, was challenged and stood aside. On the succeeding day, after the disposal of the case of Mr. Joseph H. Rainey, of the same State, Mr. John B. Clarke, of Kentucky, offered the following:

Resolved, That the question of the prima facie, as well as the right of M. P. O'Connor against Richard H. Cain, contestants, respectively, claiming a seat in this House from the Second district of South Carolina be referred to the Committee of Elections, hereafter to be appointed. And until such committee shall have reported in the premises and the House has decided such question neither of said contestants shall be admitted to a seat.

In this case Mr. Cain had the regular certificate, as did Mr. Rainey, and the secretary of state (successor to the one who had issued the certificate) had issued an impeaching certificate.

In the debate it was urged that the law of elections laid down the principle that a certificate did not constitute a prima facie title to a seat in cases where there was a second impeaching certificate. In this case the same officer issued the first certificate, and also the certificate that impeached the first. It did not matter that the officer was not, in the two cases, the same person. Both certificates were from the secretary of state of South Carolina. It was not sufficient to say that one came from one political partisan and the other from another political partisan. Against this it was urged again, as in the case of Rainey, that the certificate was regular in form, in conformity with law, and must be followed.

¹First session Forty-fifth Congress, Journal, p. 16; Record, pp. 65–68.

The House, by a vote of yeas 181, nays 89, adopted the following substitute:

Resolved, That Richard H. Cain be now sworn in as a Representative, etc.

The oath was accordingly administered to Mr. Cain.

59. Neither the Clerk nor the House honored credentials issued by a lieutenant-governor in the temporary absence of the governor, revoking regular credentials.—On October 15, 1877,¹ at the organization of the House while the oath was being administered to the Members-elect, whose names had been placed on the roll by the Clerk, objection was made to Mr. C. B. Darrall, of Louisiana, and he stood aside. On the succeeding day Mr. Randall L. Gibson, of Louisiana, by whom he had been challenged, stated that he had objected because the lieutenant-governor of Louisiana, acting in the temporary absence of the governor, had issued a certificate in effect revoking the certificate originally issued to Mr. Darrall, and certifying J. H. Acklen as the Representative. Mr. Gibson proposed the following resolution, which was agreed to without opposition:

Resolved, That Mr. Darrall, of the Third district of Louisiana, be sworn in, and that the credentials of Mr. J. H. Acklen, of said district, with the papers thereunto attached, be referred to the Committee of Elections, when appointed, with instructions to report upon his right to a seat in this House from said district.

Mr. Darrall then appeared and took the oath.

60. The House confirmed the action of its Clerk who had enrolled the bearers of credentials which conformed strictly to the law, although less formal credentials had been issued at an earlier date by a recognized governor.

In making up the roll the Clerk disregarded entirely credentials issued by a person claiming to be governor, but who never exercised the functions of that office.

On October 15, 1877,² at the organization of the House, after the roll had been called by the Clerk,³ that official explained as follows:

There were received from the State of Louisiana three different sets of credentials, one set signed by John McEnery as governor of Louisiana, bearing date December 20, 1876, and declaring certain persons elected from the First, Fourth, and Sixth districts, but silent as to the persons elected from the other districts of said State. Inasmuch, however, as said McEnery was never de facto governor of Louisiana, and never in point of fact exercised or performed the functions of that office, it is not deemed necessary to make here any statement concerning the regularity or irregularity of the credentials coming from that source.

Another set of credentials is signed by William Pitt Kellogg as governor of Louisiana, with the seal of the State attached, all of which not only bear different dates, but also reached the hands of the Clerk at different times and through different channels, and simply declare the persons elected from each of the districts of said State, respectively, except the Second district, as to which no certificate seems to have been issued by said Kellogg in favor of any one. The law of Louisiana prescribing the character of the credentials by which the elections of its Representatives in Congress shall be authenticated and known provides as follows:

“That as soon as possible after the expiration of the time of making the returns of the election for Representatives in Congress, a certificate of the returns of the election for such Representatives shall be

¹First session Forty-fifth Congress, Journal, p. 20; Record, p. 69.

²First session Forty-fifth Congress, Journal, pp. 20–24; Record, pp. 51, 52, 73–76, 85–88, 89–92.

³George M. Adams, of Kentucky, Clerk.

entered upon record by the secretary of state, signed by the governor, and a copy thereof, subscribed by said officers, shall be delivered to the persons so elected, and another copy transmitted to the House of Representatives of the United States, directed to the Clerk thereof."

These credentials signed by Governor Kellogg are in no sense a compliance with the requirements of the laws of Louisiana. They do not even purport to be entered on the record by the secretary of state and there signed by the governor, but are, on the contrary, a simple declaration by him that certain persons are elected without even stating the sources of his information, and no more constitute credentials within the meaning of the laws of Louisiana than a simple statement from the treasurer or other State official would be.

The other set of credentials is signed by Francis P. Nichols as governor of Louisiana, and Oscar Arroyo as assistant secretary of state, with the seal of the state attached. All of them bear date February 27, 1877, and all of them reached the hands of the Clerk at the same time, and through the channels prescribed by law. They declare the persons elected in each of the districts of Louisiana, respectively, and conflict with the certificates signed by Governor Kellogg in reference to two districts only. These credentials comply, it is thought, with the laws of Louisiana in every respect, and the Clerk has accordingly placed on the roll the names of persons contained in these credentials.

Accordingly, the Clerk had placed on the roll the names of Messrs. J. B. Elam and E. W. Robertson, bearing the credentials of Governor Nichols. These names were challenged, at the time of administering the oath, and Messrs. Elam and Robertson stood aside. On October 16 and 17 their cases were considered on motions that their cases, with those of Messrs. George L. Smith and Charles E. Nash, holding certificates from Governor Kellogg, should be referred to the Committee of Elections with instructions to determine the prima facie right.

It was urged in behalf of the Kellogg certificates that Governor Kellogg was indisputably governor de facto, that the returning board under the law having jurisdiction made returns of the election of November, 1876, and that the governor on those returns on December 27, 1876, issued certificates in form the same as used in years previous and recognized by the House as sufficient in the Forty-third Congress and on other occasions. Furthermore, it was urged that the certificates of Governor Nichols, issued after the Kellogg government expired, were based on the canvass of a new returning board provided for by a law passed after Governor Nichols came in and after the election, and that that returning board did not in fact have the returns before it.

On behalf of the Nichols certificates it was urged that the House, in determining prima facie right, had no right to travel outside of the record presented on the face of the certificates. And on the face of the certificates the credentials of Governor Nichols were exactly according to the requirements of law, and the credentials of Governor Kellogg were not. The full language of the two forms of certificates were presented to show that the Nichols certificate corresponded exactly to the technical requirements of the law, while the Kellogg certificate did not.

The House in the case of Mr. Elam adopted a substitute providing that he should be sworn in by a vote of 144 yeas to 119 nays.

Mr. Elam accordingly appeared and took the oath.

In the case of Mr. Robertson similar action was taken without any roll call, and the oath was administered.

61. It has been held that there is no roll of Delegates which the Speaker is obliged to recognize at the time of swearing in Members-elect

at the organization of the House.—On December 5, 1881,¹ during the organization of the House, the Speaker announced that all the Members had been sworn in and that the next business would be the election of a Clerk.

Mr. Martin Maginnis, Delegate from Montana, rising to a question of privilege, asked if the next business in order was not the swearing in of the Delegates from the Territories.

The Speaker² said:

The next business in order to complete, under the law, the organization of the House is the election of a Clerk. The matter of swearing in the Delegates will follow.

On December 6 all the Delegates were sworn in except the Delegate from Utah. It seems that the name of Mr. George Q. Cannon had been placed on the roll by the Clerk of the preceding House.³ The governor of the Territory, however, had given a certificate of election to Mr. Allen G. Campbell.

The Speaker stated that there were two certificates held, respectively, by two different gentlemen, and this involved a question which could not be determined in advance by either the old or the new Clerk. The Clerk of the preceding House was required to make up the roll of Members by States. But that obligation did not extend to a roll of Delegates from the Territories. There was no roll of the Delegates from the Territories which the Chair was bound to recognize.

Mr. Dudley C. Haskell, of Kansas, offered this resolution:

Resolved, That Allen G. Campbell, Delegate-elect from Utah Territory, is entitled to be sworn in as a Delegate to this House on his prima facie case.

Mr. Samuel S. Cox, of New York, made the point of order that the roll was in existence and that under the law the names of Members and Delegates whose names were on the roll should be sworn in unless objection should be made. He quoted the Revised Statutes as follows:

SEC. 31. 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.

SEC. 38. 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 thirty-one, may receive their compensation monthly, etc.

After debate the Speaker said:

The Chair regards this question as one of importance, because in some view its decision may be regarded as a guide to the action of the Clerk hereafter. Should the Chair decide with reference to these Delegates that the Clerk had the right to put their names on the roll and in that way control to some extent the matter of their being sworn in, such decision might affect future cases.

As the Chair understands it, there is a difference between the swearing in of a Member and the swearing in of a Delegate, because at all stages, even though the Clerk may place upon the roll the name of a Member of Congress from a State, the House might decide not to swear him in, notwithstanding his name is on that roll. We are therefore dealing here with a question that stands exactly as though there was before the House a Member from a State in regard to whose certificate there was a contest.

¹First session Forty-seventh Congress, Record, pp. 14, 23, 38.

²J. Warren Keifer, of Ohio, Speaker.

³See House Report No. 557, p. 12, first session Forty-seventh Congress.

The Chair reads section 31 of the Revised Statutes in the light of the object of that section, which was to repose power somewhere, to confer some authority, to make up a roll of Members to be called at the beginning of Congress, so that the House might be enabled to take the first step in its organization; that is, the election of a Speaker, and following that, perhaps, after the Members are sworn in, the election of a Clerk. There was no object in putting upon such a roll the names of Delegates, who have no right to vote, unless the Congress of the United States proposed to vest in the outgoing Clerk the sole power of determining who was entitled to seats in the incoming Congress. As the Chair understands it, that power has been vested nowhere, by law at least; not in the Speaker, and certainly not in the Clerk, but is left where it belongs, to be determined under the Constitution and laws by the House of Representatives.

The language of section 31, which has been so often read, clearly indicates that it was intended to direct that there should be placed upon the roll the names of Members of Congress elected under the "laws of their States, respectively," not under the laws relating to Territories. It is true the section refers to their being elected under "the laws of the United States;" and section 4, of Article 1, of the Constitution of the United States provides that laws may be passed by Congress directing the mode of electing Members of Congress from States. In the opinion of the Chair, that power also rests in Congress, if it chooses to exercise it.

Section 38 of the Revised Statutes, so much relied upon by some Members, refers, to use the language of the section, to "credentials in due form of law of Representatives and credentials filed with the Clerk of the House of Representatives." These words are used also, "in accordance with the provisions of section 31." A careful reading of section 31 of the Revised Statutes will show nothing at all in that section on the subject of filing credentials. It is a singular fact that section 38 refers to a section that contains nothing upon the matter of filing credentials. It furnishes us no guide, no reason, by implication or otherwise, for the inference that Delegates, as well as Members, were included in the words of section 31. The Chair therefore overrules the point of order made by the gentleman from New York.

62. It was held that under the law of 1867 the Clerk had no authority to make up the roll of Delegates.—On March 5, 1867,¹ on the second day of the session and after the Members had been sworn in, a question arose as to the swearing in of Delegates, and after debate the Speaker² said:

Until the enactment of the law under which this Congress has assembled and organized, the Clerk placed upon the roll the names of such as he saw proper to place there * * *. The law states that the Clerk shall place on the roll only the names of Representatives from those States represented in the preceding Congress³ * * *. The Chair has conferred with the Clerk upon the subject, and the Clerk says that he does not think he has the right under the law to decide upon the prima facie credentials of Delegates or place their names upon the rolls without further direction of the House.

Later the House ordered the names of such delegates as had not contests for their seats pending to be placed on the roll, and they took the oath.

63. The Senate, after debate, permitted a claimant to a seat to withdraw his credentials.—On December 14, 1875,⁴ the Senate debated at length the propriety of allowing a claimant for a seat to withdraw his credentials. The vote was finally in favor of allowing the withdrawal.

¹First session Fortieth Congress, Globe, p. 7.

²Schuyler Colfax, of Indiana, Speaker.

³This law, dated February 9, 1867, provided for the making up of the roll by the Clerk (14 Stat. L. p. 397). It is not now in force.

⁴First session Forty-fourth Congress, Record, pp. 200–2–04.