

Chapter IX.

ELECTORATES INCAPACITATED GENERALLY.

1. Effect of informalities in the election. Sections 320-323.¹
 2. Intimidation and its effects. Sections 324-341.²
 3. Principles involved in Senate decisions as to competency of legislatures. Sections 342-360
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320. The North Carolina election case of *McFarland v. Purviance*, in the Eighth Congress.

The invalidity of an election in one county out of three did not justify declaring the seat vacant.

On February 29, 1804,³ the Committee on Elections reported on the North Carolina contested election case of *McFarland v. Purviance*. The committee found that in one county of the district the inspectors and clerks refused to take the oath prescribed by the State law that they should act with justice and impartiality. Therefore the committee conceived that for this reason the election in the county should be set aside.

The committee did not find the result in the remainder of the district successfully attacked, and therefore concluded that there was not sufficient legal testimony to vacate the seat of Samuel D. Purviance, although the result in one county had been set aside.

The House did not act on this report.

321. The North Carolina election case of *McFarland v. Culpepper*, in the Tenth Congress.

An election being found invalid in three out of five counties in the district, the House declared the seat vacant, declining to seat the contestant.

Early instance of rejection of the returns because election officers did not take the required oath.

The Committee on Elections rejects testimony taken *ex parte*.

¹ See also *McDuffie v. Davidson*, section 1007 of Volume II.

² See also cases of *Bruce v. Loan* (section 377 of this volume), case of *Hoge, Reed, and others* (section 622 of this volume), and case of *Switzler v. Anderson* (section 868 of Volume II).

³ First session Eighth Congress, contested elections in Congress, from 1789 to 1834, page 131.

In the North Carolina election case of *McFarland v. Culpepper*, in 1808,¹ the Committee of Elections, after setting forth the law of the State and the testimony, give in their report the following statement, which covers very well the principles on which the case was decided:

No full official lists of the polls, or number of votes given to the parties contesting, were laid before the committee, but both parties agree that the sitting Member had 2,750, and that Duncan McFarland had 2,701; that consequently John Culpepper had a majority of 49 votes.

From the above recited testimony, admitted by the committee, it appears that the inspectors and clerks officially employed in conducting the elections in Richmond, Anson, and Montgomery counties do not appear to have been sworn as the law of North Carolina expressly directs, and that the votes given in some of these counties, and at some elections in other counties, not being received by officers legally qualified, ought to be rejected.² On rejecting the returns of Richmond, Anson, and Montgomery counties, in which it appears, by the list of voters and testimony admitted, that John Culpepper had a majority of 1,578 votes, gives to Duncan McFarland a large majority of votes in these counties. Some depositions were taken before the committee respecting the elections in Moore County, taken at the instance of a friend of John Culpepper, in his absence; but though they go to prove that the elections in Moore County were not conducted agreeably to law, yet, being taken *ex parte*, they were not admitted.

From the testimony admitted it appears that John Culpepper is not entitled to a seat in the House, he not having a majority of votes legally taken; but though Duncan McFarland appears to have a large majority of votes taken agreeably to law, yet the committee are of opinion that the truth of this is doubtful; they are the more confirmed in this opinion from the sitting Member having expressed his opinion that if he had time allowed him to make a scrutiny he would prove the elections held in the other counties were also conducted contrary to law.

The committee, however, believing that the great object for which the power of judging the elections of Members was vested in Congress, was to secure to the people a representation of the majority of the citizens, the elections of Richmond, Anson, and Montgomery being rejected, give a majority of the votes given in Moore and Cumberland counties to Duncan McFarland, viz, a majority of two counties out of five, which comprise the Congressional district, and the votes of three counties are lost.

The committee are of opinion that, even presuming the votes in Moore and Cumberland to have been legally taken, it would be improper to deprive the other three counties of a representation for the fault of their election officers, etc., therefore think it most proper to give the citizens of that district an opportunity to have another election, and for this purpose submit the following resolution:

Resolved, That from the testimony laid before and admitted by the committee it appears that John Culpepper is not entitled to a seat in this House."

The House having concurred in this resolution, the governor of North Carolina was notified of a vacancy in the House from that district.

322. The Kentucky election case of *Blakey v. Golladay*, in the Fortieth Congress.

Although the claimant for a seat presented unimpeachable credentials, the House declined to seat him until it had determined that the seat was actually vacant.

Instance of an election case initiated by memorial from the person claiming the seat.

In an election case not provided for by statute the House by resolution determined the conditions of its prosecution.

The House by resolution made certified transcripts of records evidence in an election case.

¹ First session Tenth Congress, Contested Elections in Congress, from 1789 to 1834, page 221.

² See also Section 320 for another early instance of rejection of the returns in a case wherein the election officers did not take the required oath.

A resolution providing for the prosecution of an election case is presented as a question of privilege.

On July 5, 1867,¹ Mr. William D. Kelley, of Pennsylvania, presented the memorial of George D. Blakey, praying to be admitted as a Member from Kentucky. The memorial was referred to the Committee on Elections.

On July 11, 1867,² Mr. Halbert E. Paine, of Wisconsin, offered, as a question of privilege, the following:

Whereas George D. Blakey asks for admission to this House as a Representative from the Third district of Kentucky, and his competitor, Elijah Hiss, having died before the votes were canvassed, and no other person claiming a seat in this House as a Representative of said district, this case is not provided for by any statute of the United States, but is subject to the provisions of the Constitution: Therefore,

Resolved, That in this case transcripts of official records and files, and of extracts therefrom and abstracts thereof, duly certified under seal by the clerks of the several county courts in said district, shall be competent evidence before the Committee of Elections and before this House of the facts therein shown.

The question of order being raised that this resolution did not involve a question of privilege, the Speaker³ said:

Everything affecting the right of a Member to a seat is a question of privilege.

Thereupon the resolution was agreed to; yeas 92, nays 34.

On November 21, 1867,⁴ papers in the case of Mr. Blakey, as contestant, were presented in the House and referred.

On November 25, 1867,⁵ the Speaker laid before the House a certificate in regular form from the governor of Kentucky, setting forth that at an election held in the Third Congressional district of that State on August 5, 1867, J. S. Golladay received a majority of the votes cast and was duly elected Representative in the Fortieth Congress.

Mr. Henry L. Dawes, of Massachusetts, moved that the credentials be referred to the Committee of Elections, and that the said Golladay be not sworn in pending the investigation of the same.

It was explained that the Committee of Elections were not considering the claim of Mr. Blakey that he should be seated on the ground that he had received a majority of the legal votes, although a majority of the votes actually cast were found to be for the late Mr. Hise. The governor of Kentucky had assumed that there was a vacancy and had ordered an election; but the House was now investigating whether or not there was a vacancy. If Mr. Golladay should now be sworn in, and the House should later find that Mr. Blakey had been elected, the House would have two men in the same seat or Mr. Golladay would be unseated without having had the opportunity to present his case. On the other hand, it was urged that Mr. Golladay had the only prima facie evidence, and that he was entitled to take the seat pending the examination of final right; but the House agreed to the motion of Mr. Dawes; yeas 105, nays 38.

¹ First session Fortieth Congress, Journal, p. 187; Globe, p. 591.

² First session Fortieth Congress, Journal, p. 165.

³ Schuyler Colfax, of Indiana, Speaker.

⁴ Journal, p. 255.

⁵ Journal, p. 257; Globe, pp. 782-784.

323. The Kentucky election case of Blakey v. Golladay, continued.

An election invalid in 11 out of 12 counties, leaving only 737 valid votes out of 8,941, should cause the seat to be declared vacant.

The exclusion of a disloyal Member-elect would not allow a minority candidate to take the seat.

The death of the person elected creates a vacancy, although no certificate may have been awarded.

The person elected dying before credentials are issued, the minority candidate may not receive the credentials.

On December 2, 1867,¹ Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections submitted a report, which stated the case as follows:

The right of these two claimants to the same seat depends upon the validity of elections held at different times, and it therefore becomes necessary to determine in the first instance upon the legality of the election first held, for if the one which is first in point of time be valid the other can not be.

The claim of Mr. Blakey that he was duly elected such Representative rests upon the following facts:

An election for Representatives to the present Congress was ordered by the governor of Kentucky to be held on said 4th day of May last. The claimant, Mr. Blakey, and the Hon. Elijah Hise were candidates for Representatives in the Third district, and were voted for at that election. On the 27th of the same month the governor, attorney-general, and State auditor, who constitute by law a board of canvassers for counting the votes, met in pursuance of law for that purpose and certified the result of the vote on the 4th to be, in this district: For Elijah Hise, 7,740; for G. D. Blakey, 1,201.

After the election and before this canvass, to wit, on the 8th day of said May, the said Elijah Hise died, and Mr. Blakey claimed before the board of canvassers, and renews his claim before the House, that he was entitled to the certificate of election and to retain the seat as such Representative.

First, because at the time of said canvass, he, the said Blakey, was the only person then alive for whom votes had been cast for such Representative. In this the claimant has, in the opinion of the committee, wholly mistaken the function of the board of canvassers. The sole duty of the board is to ascertain the result when the polls closed on the day of election. They can in no way or particular Change or alter that result, but only ascertain and make it known. If the claimant had not, when the polls closed, a majority of the votes legally cast, nothing transpiring subsequently could give him that majority. If Elijah Hise had that majority when the polls closed, that fact is unalterably fixed. It is sometimes quite difficult to ascertain who actually had such majority at the close of the polls, but the determining of that fact determines all else pertaining to the election. A vacancy occasioned by the death of one who has received a majority of the legal votes can not depend upon whether he had or had not received a certificate of his election before his decease. The certificate is not his title to his seat, but simply one form of evidence thereof.

Second, he further claims the seat because, "by the laws of Kentucky governing elections, the judges and other officers of the county courts in said State, in the appointment of officers to hold and conduct elections in said State, are required to appoint officers representing the two political parties in the State, and that each political party should be represented in the officers of every election precinct." This provision of law, he claims, was almost totally disregarded in 11 out of the 12 counties composing this district, thereby rendering illegal the election in those counties, and that in the other county, where this provision was complied with, he received a majority of the votes cast.

After quoting the provisions of law relating to the appointment of election officers, the report considers the evidence adduced to sustain this second objection. Contestant showed by the poll books that but 23 of the election officers voted for him, while 210 voted for Mr. Hise, and 57 did not vote at all. The committee say that obviously the poll books of this election could not have been consulted by the

¹Second session Fortieth Congress, House Report No. 1; 2 Bartlett, p. 417; Rowell's Digest, p. 221.

county courts, for the appointments were made long before this election. No evidence was offered to show how these officers voted at the election next preceding their appointment. In fact, there was no evidence sufficient to show that the provisions of the law were disregarded. But it was really not necessary for the committee to determine this, for assuming that contestant's contention was right as to the 11 counties, yet—

In the remaining county, where it is claimed the law was complied with, and the election therefore valid, there were cast only 737 out of 8,941 votes; and of these 737, Mr. Blakey received 378, to 359 for Mr. Hise, leaving only a majority in this county for Mr. Blakey of 19. Of the whole vote in the district, as has been already stated, he received only 1,201. If, therefore, the election was invalid in 11 out of the 12 counties, rendering it impossible to count but 737 votes out of 8,941, no other alternative would be left but to set aside altogether such an election, and remand the case back again to the people, that they might have an opportunity to give expression to their choice in conformity to law. There is no precedent for fixing upon the district representation determined by 378 votes out of 8,941, and the committee see no reason for making one.

The third ground of contestant, that Mr. Hise was disloyal, was not sustained by evidence; and furthermore, the committee were not called on to consider the legal effect of the proposition had it been sustained, since the exclusion of a disloyal person did not allow a minority candidate to take the seat.

The committee therefore arrived unanimously at the following conclusion:

The only objection to the administering the oath of office and admission to the seat of Mr. Golladay, known to the committee, being the claim of the memorialist to be entitled to the seat by virtue of a prior election, this disposition of that claim removes all obstacle, and, in the opinion of the committee, Mr. Golladay should be admitted to the oath of office and to the seat.

The committee recommend the adoption of the following resolutions:

Resolved, That George D. Blakey is not entitled to a seat in this House as a Representative from the Third Congressional district in Kentucky.

Resolved, That the oath of office be now administered to J. L. Golladay, and that he be admitted to a seat in this House as a Representative from the Third Congressional district in Kentucky.

The report was debated on December 5, and on that day the resolutions of the committee were agreed to without division, a demand for the yeas and nays having been refused. A proposition to recommit with instructions to examine as to the loyalty of both Messrs. Hise and Golladay had been prevented by the previous question, which was ordered by 102 yeas to 22 noes.

324. The Maryland election case of Whyte v. Harris in the Thirty-fifth Congress.

In a report not approved by the House the Elections Committee recommended that a seat be vacated because of intimidation in five-sixths of the district.

In a case not sustained by the House a question of the degree of intimidation sufficient to justify rejection of the poll was discussed.

An early discussion as to what constituted a distinguishing mark on a ballot.

The Elections Committee having recommended a declaration that the seat be declared vacant, a question arose as to contestant's position.

On June 1, 1858,¹ the Committee on Elections reported in the case of Whyte v.

¹First session Thirty-fifth Congress, H. Report No. 538; 1 Bartlett, p. 257; Rowell's Digest, p. 156.

Harris, of Maryland. The contestant had alleged frauds, intimidations, and irregularity. The majority of the committee based its conclusions chiefly on two features of the case, alleged widespread intimidation in Baltimore City, and distinguishing marks on the ballots cast for sitting Member, whereby intimidation of his opponents was rendered feasible.

The majority of the committee give in their report copious extracts of testimony showing this intimidation. The minority showed that Mr. Harris had a majority of 3,243 votes in the city wards and of 75 in the districts outside the city. They contended that the evidence in relation to intimidation was too vague. Names of persons alleged to have been intimidated were given, but it was nowhere shown that they would have voted for the sitting Member. Moreover, much of the evidence as to persons intimidated was inadmissible because hearsay in its nature.

The majority of the committee, after stating that a case of riot and intimidation was new in election cases before Congress, quotes English precedents to show that violence and tumult were sufficient reasons for declaring an election void. In the American cases of *Trigg v. Precsott* and *Biddle* and *Richard v. Wing* nothing like a riot or obstruction was shown at the polls. The majority of the committee say:

Having, then, no case heretofore presented to this House involving a decision as to what extent violence, intimidation, and riot may prevail at elections to warrant a vacation of a seat, we can only refer to the numerous precedents which we find settled by other elective bodies, and to the plain teachings which we derive from our Constitution and theory of government.

In the judgment of the Committee of Elections, these require the return in this case to be set aside and the seat vacated. It can not be considered the return of an election made by the legal voters of the Third Congressional district of Maryland. An election is the free choice by those who have the right to make it, and who desire and seek to make it, uncompelled, unawed, and unintimidated. The return here was based upon votes alleged to have been cast in that Congressional district. The proofs show that at the first eight wards in the city of Baltimore, and at the twelfth election district of Baltimore County (comprising about five-sixths of the returned votes), in some to a much greater extent than others, but in all to a most culpable extent, violence, tumult, riot, and general lawlessness prevailed. That, as a consequence, the reception of illegal votes and the rejection of legal votes, the acts of disturbance and assault committed on peaceable citizens, and the intimidation of voters so predominated as to destroy all confidence in the election as being the expression of the free voice of the people of that Congressional district.

The committee are not unmindful of the magnitude of the question they present to the consideration of the House. On the one hand it involves the vacation, temporarily, of a seat in the House of Representatives; on the other, it requires an acquiescence in, if not approval of, a wanton and unjustifiable interference with the most sacred of all political rights to a free people.

The minority did not admit that there had been serious riot or intimidation, and contended that it would be a dangerous precedent to overrule the expressed will of the people because of violence at the polls.

The majority of the committee further state that the tickets used by the party of the sitting Member (the American) were distinguished by a number of red perpendicular stripes across them. The majority conceived that this was a violation of the spirit of the law providing for a ballot system, one of the great objects of which was to allow the elector to make his choice by a secret vote. Such was the intent of the Maryland law. While it might be going too far to reject such ballots, unless so provided by law, yet their use was neither creditable nor just, since it permitted intimidation.

The minority say on this point:

The constitution of the State of Maryland, article 1, section 2, provides that “the vote shall be by ballot;” and the act of assembly regulating elections, 1805, chapter 97, section 12, provides “that upon the ballot shall be written or printed the name or names of the persons voted for, and the purpose for which the vote is given, plainly designated.” It is not pretended that this was not done, and we can not for a moment admit that the marks on the ticket, or the color of the paper on which the name and office are thus plainly designated, have anything to do with the legality of the vote cast, or are to be held as infringing the law of the State.

The majority of the committee, in view of the considerations given above, recommended the following:

Resolved, That it appears to this House that there was such tumult, disorder, riot, intimidation, and injustice, in the election of a Representative to Congress from the Third Congressional district of the State of Maryland, on the 3d day of November last, in contempt of law and in violation of the freedom of elections, that the said election is void, the seat from the said district is hereby declared vacant, and the Speaker of this House be and is directed to notify the governor of said State thereof.

The minority arrived at the conclusion that the sitting member was entitled to the seat.

The case was not debated in the House on its merits. On July 11,¹ near the close of the session, the case was postponed until the next session, by a vote of 96 yeas to 80 nays,

At the next session, on December 15 and 16,² the report was called up.

A question arose over the request of Mr. Whyte that he have leave to occupy a seat on the floor and speak on the merits of the contest.

It was objected that he was no longer a contestant and not entitled to the privilege under the precedents; and it appeared, in fact, that he did not consider himself a contestant.

The House, by a vote of yeas 108, nays 90, laid on the table a resolution giving to Mr. Whyte the privilege asked.

Then the report of the committee was, without debate on its merits, laid on the table by a vote of 106 yeas and 97 nays.

So the sitting member retained his seat.

325. The Maryland election case of Harrison v. Davis in the Thirty-sixth Congress.

Discussion of the extent of intimidation sufficient to invalidate an election and justify declaring the seat vacant.

On January 31, 1861,³ the Committee on Elections reported in the case of Harrison v. Davis, of Maryland. This case was examined, and there were reports from the majority and minority of the committee; but no action was taken by the House on the recommendation of the majority, which was in favor of the sitting Member.

The principal objection of the contestant was that there had been sufficient riot and intimidation to invalidate the whole election.

¹Journal, p. 1089; Globe, pp. 2961–2964.

²Second session Thirty-fifth Congress, Journal, pp. 72, 77; Globe, pp. 102, 120.

³House Report No. 60, second session Thirty-sixth Congress, 1 Bartlett, p. 341; Rowell’s Digest, p. 168.

The majority of the committee found by a comparison with previous national and State elections that the aggregate vote of the district at this election of 1859 was 12,932, while in 1857 it was 14,494, and in 1855 it was 15,481. The committee did not consider the decrease sufficient to be significant; and as the majority of the sitting Member was returned as 7,272, it seemed evident that whatever voters might have been intimidated would not have been sufficient to change the result. As to the law applicable, the majority say:

We have now to consider the question whether the election is void by reason of riot and intimidation. The specification is, that in all the wards bands of men conspired to exclude and obstruct legal voters who intended to vote for the contestant, and did, in fact, assemble at and near the voting places armed, and by threats intimidated and by violence obstructed and drove away thousands of legal voters, and deterred many from approaching the polls.

That statement, considered as an allegation of facts which, if proved, avoid the election in point of law, is wholly insufficient.

It nowhere makes the formal allegation that the law requires: Either that the election was arrested and broken up in every ward, or that so many individuals were excluded by violence and intimidation as would, if allowed to vote, have given the contestant the majority.

Either of those grounds, if stated and proved, would have been, in law, decisive of the case; but neither is stated in the specification, and neither is proved by the evidence.

The case attempted to be made is one wholly different from either, and wholly unknown in the annals of election law.

It assumes that an election is necessarily void at which 2,000 voters are prevented by violence or threats of violence from voting—though the election was never arrested, and though 20,000 may have been cast, and all for one candidate, which is absurd.

The minority of the committee opposed this view. From their analysis of the testimony they concluded that riot and intimidation were general throughout the district, and say:

But the law obviates the necessity of inquiring as to the number of votes affected by riot, violence, and intimidation, holding the whole election dead when robbed of that freedom which is its soul and life. If there was "actual force or violence, or a display of numerical strength, accompanied with threats, and the conduct of the parties was such as to strike terror into the mind of a man of ordinary firmness, and to deter him from proceeding to the poll" (Cushing, sec. 183), the election must be declared a nullity. And such it unquestionably was at all the polls. * * * The election must, therefore, be declared a nullity.

Other questions relating to disqualified voters and the conduct of election officers were discussed, but they were subordinate to the main issue.

326. The Louisiana election cases of Jones v. Mann and Hunt v. Menard in the Fortieth Congress.

A Member whose seat was contested dying, the House did not admit a claimant with credentials until contestant's claim was settled.

The disqualification of a Member-elect does not entitle a minority candidate to the seat.

Instance of returns of an election made by military officers under authority of reconstruction acts.

Testimony taken before a notary public in disregard of the provisions of law was criticised by the Elections Committee, but given weight.

A contestant neglecting to prove the vote of the district, the Elections Committee had recourse to such official records as it deemed satisfactory.

On July 18, 1868,¹ Mr. James Mann, with other Members-elect from Louisiana, was sworn in and took his seat. He died about the 12th day of August. Mr. Simon Jones had served notice of contest on Mr. Mann, alleging frauds, irregularities, and intimidation in the wards of New Orleans lying within the district. While the Committee on Elections was considering this contest, on December 18, 1868, and January 5, 1869,² the credentials of J. Willis Menard, showing him to have been elected in place of Mr. Mann, were presented to the House and referred to the Committee on Elections. No effort was made to have Mr. Menard sworn in, Mr. Jones's title to fill the vacancy not being settled.

On February 17, 1869,³ the committee reported both on the contest of Mr. Jones, and on the claim of Mr. Menard, whose title was contested by Caleb S. Hunt.

1. As to the contest of Mr. Jones several questions arose for the decision of the committee:

(a) The contestant objected that all the testimony taken in behalf of Mr. Mann was inadmissible because taken before a notary public, an officer not authorized by the act of Congress to take testimony in such cases. This objection was taken in the first instance and returned with the testimony, and the committee find that it is good under a strict construction of the law. The committee say, however, that the view the committee have taken of the case does not render it very material whether the testimony be admitted or not, and as Mr. Mann was dead and some of the testimony related to his eligibility, they had not deemed it proper to exclude it, but would submit it to the House.

(b) A question as to the qualifications of Mr. Mann is thus disposed of:

But the contestant and his counsel further insist that Mr. Mann was constitutionally ineligible for the reason that he was not "when elected" an inhabitant of the State of Louisiana (Constitution, Art. I, sec. 2, cl. 2), and that the contestant, if he only received the next highest number of votes, should be declared elected, and the votes cast for Mr. Mann should be disregarded. In support of this position it is suggested on his part that, in the absence of any American precedent for this course, the faithful execution of the fourteenth amendment requires the establishment of such a precedent, and that, if voters may choose disqualified members, representation may be defeated in many States.

The committee does not consider the evidence adduced by the contestant in regard to Mr. Mann's residence or domicile (Mis. Doc. No. 13, pp. 20, 29, 30) sufficiently clear and conclusive to justify it in declaring Mr. Mann constitutionally ineligible at the time of his election, even if the evidence on the part of Mr. Mann were rejected; but it is not necessary to decide upon this question of ineligibility, since, if Mr. Mann were admitted to have been ineligible at the time of holding the election, and the evidence of this held to be satisfactory and conclusive, it would not aid the contestant nor entitle him to the seat, but would only show that there was a vacancy. This is fully shown by the report of the committee in the case of *Smith v. Brown* (Report No. 11, second session Fortieth Congress) sustained by the House, which, after declaring Mr. Brown not entitled to his seat by reason of disloyalty at the time of his election, at the same time refused to Mr. Smith the seat on the ground that he had not received a majority of the votes cast for Representative at said election in said Congressional district, and directed the Speaker to notify the governor of Kentucky that a vacancy existed in the representation in this House from the said Congressional district of said State.

After quoting from the report in the case referred to, the committee go on to say that as it was made prior to the adoption of the fourteenth amendment they

¹ Second session Fortieth Congress, Journal, p. 1102; Globe, pp. 4215, 4216.

² Third session Fortieth Congress, Journal, pp. 93, 104; Globe, pp. 151, 182.

³ Third session Fortieth Congress, House Report No. 27; 2 Bartlett, p. 471; Rowell's Digest, p. 226.

would, in quoting the report, intimate no opinion concerning any additional powers that might have been conferred upon Congress by the amendment. The committee also state that no statute of Louisiana provided for a minority candidate to succeed a disqualified majority candidate.

(c) The contestant had not proven the vote of the district, either in the aggregate or by precincts, so the committee had recourse to the certified returns of the military officers in command in the district, which showed a plurality of 1,150 votes for Mr. Mann. The contestant thereupon raised a question which went to the validity of the returns and credentials. The committee thus set forth this question:

The ex parte and unauthorized testimony of Mr. F. Leon, taken before a justice of the peace in this district January 11, 1869, since the death of Mr. Mann, is the only other evidence as to the votes cast at this election in this Congressional district, and it is insisted by the counsel for the contestant that such sworn statement of this witness is better evidence than the return of General Buchanan, who, as contestant claims, "had no jurisdiction over Congressional elections," and that "the sworn proof therefore stands upon higher ground than the voluntary statements of General Buchanan about a matter not within his jurisdiction."

He concedes, however, that by the reconstruction laws it is made the duty of the commanding general to receive and return the votes upon the ratification of the Constitution. The contestant and his counsel, in assuming this position above stated, seem to have overlooked the provisions of the supplementary reconstruction act of March 11, 1868, subsequent to which this election was held, which act makes provision for the election of Members of Congress at the same time that the vote is taken on the adoption of the Constitution, and declares that "the same election officers who shall make the return of the votes cast on the ratification or rejection of the Constitution shall enumerate and certify the votes cast for Members of Congress." It is considered, therefore, that the commanding general, in making and certifying the returns of the votes cast at this election for Members of Congress was acting under the authority conferred by the reconstruction laws aforesaid, and that his return is higher evidence than, or at least not inferior to, the brief, general, and somewhat vague and indefinite statement of Mr. Leon, sworn to as aforesaid.

The House of Representatives, also, in admitting Mr. Mann and his colleagues from Louisiana to their seats on the certificate of said commanding general, as also in admitting Members from Georgia and South Carolina on similar certificates, seems to have recognized this construction of the law and the jurisdiction of said officers in the matter of said election returns.

(d) Inasmuch as there was no evidence before the committee showing the returns of the various precincts, they could not proceed to apply the testimony as to frauds and intimidation—which was, moreover, not very definite—in any way to destroy Mr. Mann's plurality. They conclude:

The most favorable construction of the evidence for the contestant that could be given would not identify and count up additional votes enough in his favor to equal one-half of the majority returned for Mr. Mann, much less to give him the majority, even if all the votes assumed by witnesses to have been changed in the ballot boxes or fraudulently put in were charged to the Democratic vote, deducted from Mr. Mann's majority, and counted for the contestant. The only remedy for or correction of the evils complained of, under the state of the case as presented, would be to set aside the returns, declare a vacancy, and order a new election, as it is impossible from the evidence to purge the poll; but this the contestant does not desire or insist should be done, nor do the committee consider the evidence sufficient to justify such a course.

Therefore the committee reported a resolution declaring that Mr. Jones, the contestant, not having received a majority of the votes, was not entitled to the seat in question.

On February 27,¹ after debate, an amendment declaring Mr. Jones entitled to the seat was rejected without division, a demand for the yeas and nays being refused. Then the resolution of the committee was agreed to.

327. The Louisiana election cases of Jones v. Mann and Hunt v. Menard, continued.

The House declined to admit a claimant on the vote of three out of seven parishes, 19,078 out of 27,019 votes having been rejected.

An election to fill a vacancy being held in a newly apportioned district, the larger portion of which was new, both as to territory and people, the elections committee considered the election invalid.

A question as to whether or not the House, from historic knowledge merely, may decide that the result of an election has been invalidated by intimidation.

A seat having been adjudged vacant, the House yet declined to admit a claimant whose final right was then under examination.

Reference to historical facts in determining prima facie effect of regular credentials.

The law governing the serving of notice of contest may be departed from in a case where its observance is impracticable.

2. The examination of the contest of Hunt *v.* Menard involved several questions:

(a) In the first place, immediately after the decision of the House that Mr. Jones was not entitled to the vacancy caused by the death of Mr. Mann, a demand was made that, as Mr. Menard had presented credentials in due form, he should be sworn in pending the decision of the final right. The Committee on Elections, who had reported that neither Mr. Menard nor Mr. Hunt was entitled to the seat, resisted this proposition, it being stated that accompanying Mr. Menard's credentials was a certified statement of the governor and secretary of state giving reasons which induced them to throw out certain votes, which reasons were not good, tending to show that Mr. Menard was not really elected. It was also stated that in all cases from the reconstructed States the bearers of certificates had not been sworn in until the credentials had been examined by the committee. The question was brought to a vote in the shape of an amendment directing that Mr. Menard be sworn in pending the decision of his case. This amendment was disagreed to, yeas 57, nays 130.² In the argument it was admitted³ that the usual rule was that a person having a certificate in proper form was entitled to be sworn in in the absence of objection; but the House had at this session in the reconstructed States taken notice of historical facts, and had not sworn in Members-elect until their certificates had been examined.

(b) The majority of the committee in their report discuss a preliminary question relating to notice of contest:

It is objected, however, by Mr. Menard, that no notice of contest has been served on him as required by law, and that therefore Mr. Hunt is not properly here to contest his right to the seat. In reply to this

¹Journal, p. 470; Globe, pp. 1679–1683.

²Journal, pp. 473, 474; Globe, pp. 1683–1696.

³Globe, p. 1694.

it is urged by Mr. Hunt and his counsel that the certificate of Mr. Menard bears date November 25, 1868, and about the time when the final decision of the canvassers was made, and that as the session of Congress was to commence on the first Monday in December next succeeding, and to close on the 4th of March following, to wait the time allowed by law for giving notice and answer, and then for taking testimony, would be to permit Mr. Menard to take and hold the seat during the whole of the remaining official term, and to prevent the contest from ever being heard by this Congress, which only has jurisdiction of it. He also suggests that as no other evidence was needed by him to support his claim than the certified copy of the returns and the reasons given for their rejection, he has, by filing his protest with the House, addressed to the Speaker, stating his objections to Mr. Menard's claim to the seat, and the grounds on which he claims the same, with the evidence by which it is supported, given Mr. Menard sufficient notice, under the circumstances, and that a literal compliance with the terms of the acts of Congress was impossible without defeating him in the contest by putting off taking the evidence and the hearing of the case beyond the lifetime of the Congress to which it relates.

He also urges that the statute is directory, and has been so treated in some cases arising under it in the House, and that under the Constitution the power exists in this Congress, independent of the statute, to hear and determine this case as presented.

Were it necessary to decide this question, it is proper to say that Mr. Hunt presents some very good reasons in justification of the course he has pursued under all the circumstances of the case, but the view the committee has taken of the election itself does not, in its judgment, require that it should pass upon this objection raised by Mr. Menard, and also since it is the right of any of the legal voters of the district to petition Congress and to call in question the right of any person claiming the seat.

The minority in their views¹ thus discuss Mr. Menard's objection:

To this objection Mr. Hunt answers, that the notice of contest which he laid before the House on the 18th December, 1868 (within the thirty days required by law), was, at the time, known to him (Menard), he being present in the House at the time to present his credentials; that the grounds of contest were particularly set forth in said notice; that the contest was so limited in its range of inquiry and investigation as to require only testimony of record and construction of law; that such testimony was furnished along with the notice, and therefore Mr. Hunt submits that Mr. Menard had notice sufficient in all respects of time and particularity to put him upon his defense.

Since the passage of the act of 1851 regarding contested elections, the rulings and decisions of the Committee of Elections, sustained by the House, in respect to the construction and application of its provisions and the practice thereunder, have been most liberal in regard to the personal rights of contestants and the constitutional rights of constituencies, and the rights and powers of the House as involved more or less in every case of contested election.

After citing the cases of *Wright v. Fuller*, *Daily v. Eastabrook*, *Williamson v. Sickles*, *Vallandigham v. Campbell*, and *Chapman v. Ferguson*, the minority conclude:

In the judgment of the undersigned, in view of the facts in the premises and in the spirit of such rulings of the Committee of Elections, the notice given by Mr. Hunt as aforesaid was, for all the purposes of this contest and protection of the rights of Mr. Menard, legally and substantially sufficient.

(c) The committee found that Mr. Menard² was not elected:

From the said certified statement it will be seen that the whole number of votes cast at said election to fill such vacancy in said district was 27,019, of which votes so returned to the secretary of state 19,078 were rejected by the committee of canvassers and the returns thrown out, being a large majority of the entire vote of the district as returned, and the certificate was given to Mr. Menard on the vote of but three of the seven parishes of the district, and casting in the aggregate only a vote of 7,941. The vote of the single parish of Orleans, one of those rejected, was 11,628, being nearly four-ninths of the entire vote of the district, and 3,687 votes more than the entire vote on which the certificate was given to Mr. Menard.

The reason given in the certified statement for the rejection of the vote of the parish of Orleans, viz, "that the returns were made by the boards of supervisors of registration," shows that in this respect the returns were made as required by law, and that the objection is invalid.

¹Signed by Messrs. M. C. Kerr, of Indiana, and J. W. Chanler, of New York.

²Mr. Menard was the first colored man to present himself for a seat in the House.

By the provisions of section 25 of act No. 164, Laws of Louisiana, 1868, page 223, it is expressly made the duty of said supervisors of registration in each parish to make out and forward said returns to the secretary of state. It is unnecessary to notice further the objections stated to the returns from the other parishes rejected (although those urged against Jefferson and Terrebonne would seem to be frivolous), since, if any valid election was held there, the parish of Orleans, being properly returned, should be counted, which would give Mr. Hunt a majority over Mr. Menard so great that it would not be overcome by the vote of all or any of the other parishes, if they were counted, and in no event can Mr. Menard be shown by the returns to have received a majority vote in the district.

(d) Another reason for denying a seat to Mr. Menard and also to Mr. Hunt appeared in the fact that after the election of Mr. Mann, who was originally chosen to represent the district in question (the Second district), the State had been redistricted by the act of August 22, 1868, which so changed the boundaries of districts that the old Second district could not be recognized in the new Second. The largest portion of the new Second, both in territory and numbers, was made up of what was the old Third district, a district represented on the floor by a Member chosen at the time Mr. Mann was originally chosen to represent the old Second. The election at which Mr. Menard and Mr. Hunt were rival candidates was held after the apportionment, and in the new Second district. The committee say of this situation:

So far as the numbering of this new district is concerned it might with as much propriety have been called the Third district as the Second, and it would be difficult to say in which of the new districts as created and arranged by the act of August 22, 1868, the vacancy had occurred, or to which of the new districts the governor of the State should have issued his writ of election to fill the vacancy which the death of Mr. Mann had caused if the election to fill the vacancy was compelled to be holden under the law of 1868 creating the new districts. The only case to which the attention of the committee has been called as a precedent is that of *Perkins v. Morrison* (Bartlett's Election Case, p. 142), which is against this objection raised by Mr. Hunt, but in that case there was a minority report signed by four of the Committee of Elections, and the report of the majority was sustained in the House by the close vote of only 98 to 90, and, in the opinion of your committee, the soundest reasoning is contained in the report of the minority in that case, and sustains the objection raised here against the validity of this election.

The very objection which was urged in that case and which the majority in the concluding part of their report were compelled to admit, as a consequence of their position, is exemplified in the case now under consideration, and it is thus stated in their report:

"It was, that if the legislature of New Hampshire could change the boundaries of the district, they might have so divided it as to render it impossible to determine to which district the governor's precept should have been sent."

The act of the legislature of Louisiana of August 22, 1868, making a new division of the State into its five Congressional districts, by its terms, purports to repeal all laws and parts of laws in conflict with said act, but is silent on the subject of vacancies that might occur in the districts as then existing.

The committee then quotes the minority views in the case of *Perkins v. Morrison*, which dwells upon the impropriety of a decision which would allow a portion of the people to have two Representatives, while another should have none in whose choice they had participated. They then conclude:

This reasoning, which your committee consider as sound and pertinent, applied to the case under consideration seems to be conclusive against this election; and it may also be added that, whatever power a State legislature may have in the matter, it is absurd to say that a district when once established and a Representative chosen therein is not to continue for the whole Congress for which the election has once been operative. No election to fill the vacancy caused by the death of Mr. Mann appears to have been notified or held in the whole of said district as represented by him.

The returns on which Mr. Menard predicates his claim to the seat are from parishes wholly outside of said district, and comprised in the district which Hon. J. P. Newsham was chosen to represent and

is now representing in this House (act No. 54, Laws of Louisiana, 1864–65, p. 144), and which parishes, in the judgment of your committee, had no lawful right to participate in the election to fill the vacancy in another district, caused by the death of Mr. Mann.

But while the objection is thus fatal to Mr. Menard's claim to the seat, it is equally fatal to the claim of Mr. Hunt.

The minority¹ quote the New Hampshire case and says:

The reasoning of the majority of the committee in that case seems clear, forcible, and conclusive. The regulation of the districts is under the exclusive control of the States until, by act of Congress, it is taken from them. This jurisdiction has never yet been asserted by Congress. The State, therefore, had full power to create the new district. It did so, and then repealed all preexisting laws on the subject. The vacancy could not have been filled by an election held otherwise than under the provisions of the last law. It was therefore so held, in fact, and by order of the governor of the State.

But as we proceed to make it clear that if the entire vote cast in the election precincts now included in the Second district which were not in the old district be rejected, it will not materially change the result, or in any just sense sustain the decision of the majority in this case. The decision of the majority amounts to a denial of representation. This ought never to be done where it is possible to avoid it.

It is argued by the majority of the committee that the electors of the Second district who originally voted at the election of Mr. Mann, to serve during the Fortieth Congress, could alone legally elect a successor to fill his vacancy for the same Congress, and therefore that the recent election, November 3, 1868, to fill such vacancy, was invalid by reason of the participation therein of the electors of the several parishes and the ward which had been added to the district since Mann's election. If this argument be sound, it can fairly and legally apply only in such cases where the legitimate vote can not be separated nor sufficiently ascertainable from the illegitimate.

(e) The majority of the committee state these facts in support of a contention that there had been intimidation:

When Mr. Mann was elected, the Second district, as then constituted by the act of April 4, 1865, was wholly within the parish of Orleans, though not comprising the whole of said parish, and his aggregate vote was in April, 1868, 6,874, and the vote for Mr. Jones, as returned, was 5,634, besides 349 scattering votes given for other Republican candidates, making the aggregate vote opposed to Mr. Mann 5,983. At the late election in November, only a little over six months after, when under the act of August 22, 1868, other parishes were included in this district and a portion of the parish of Orleans, this portion of the parish of Orleans now in the district returns 11,535 votes for Mr. Hunt for both the Fortieth and Forty-first Congresses, and but 93 votes for Mr. Menard for the Fortieth Congress and 115 for Mr. Sheldon for the Forty-first Congress. The smallness and wonderful decrease of the Republican vote, the vastness and wonderful increase of the Democratic vote, and its exact coincidence for both Congresses, are all somewhat strange and not easily susceptible of satisfactory explanation on the theory of a fair and honest election.

The committee then go on to cite other things of which the House might take notice, the fact that "for some weeks immediately preceding this election civil disturbance, disorder, and crime prevailed to such extent by reason of the lawlessness of the disloyal element prevalent there that the civil authorities were unable to put it down." The committee cite the fact that the State legislature called ineffectually on the National Executive for troops, and quotes from letters of the governor. It was unsafe for loyal citizens to speak their sentiments freely, to participate in political meetings, or vote at the election. The majority therefore conclude:

¹On this branch of the question the minority were reenforced during the debate by Mr. Luke P. Poland, of Vermont. *Globe*, p. 1692.

Sufficient of these matters exist of which notice may be taken in connection with the facts in evidence in the case to justify the conclusion, in the opinion of your committee, that no valid election has been held to fill the vacancy in the said Second Congressional district.

The minority assailed vigorously this position of the committee in regard to intimidation. They denied the facts by implication, if not directly, and questioned the law. It was urged¹ in the debate that there was no allegation as to intimidation before the committee and that there was no proof of it. An election case, like a suit at law, should be decided on things asserted and proven. The letter of the governor did not amount even to *ex parte* evidence. Further in the debate the fact that the committee had proved nothing definite as to votes prevented by the alleged intimidation was urged.

The report was debated at length on February 27,² the question presented being this resolution presented by the majority of the committee:

Resolved, That neither J. Willis Menard nor Caleb S. Hunt is entitled to a seat in this House as a Representative from the Second Congressional district of Louisiana, to fill the vacancy caused by the death of James Mann.

Mr. Luke P. Poland moved to amend by striking out all after the word "resolved" and inserting a provision that the report be recommitted, with instructions to take testimony in reference to "any improper or unlawful means used to prevent a free and fair election."

Mr. Halbert E. Paine, of Wisconsin, moved to amend the amendment by adding a provision that Mr. Menard be admitted on his *prima facie* right pending consideration of the case.

Mr. Michael C. Kerr, of Indiana, by unanimous consent, submitted a substitute declaring Mr. Hunt, the contestant, entitled to the seat.

The question being first taken on the amendment of Mr. Kerr, it was decided in the negative, yeas 41, nays 137.

On the amendment of Mr. Paine there were yeas 57, nays 130, and it was rejected.

Then, on motion of Mr. Henry L. Dawes, of Massachusetts, the whole subject was laid on the table.³

328. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, Kennedy and Morey v. McCranie, Newsham. v. Ryan, and Darrall v. Bailey in the Forty-first Congress.

While the Clerk may not give *prima facie* effect to credentials not explicitly showing the bearers to be duly elected, the House has done so after examining the returns.

The House assigned *prima facie* title to a claimant, although papers accompanying the credentials raised a question as to the final right.

The House declined to consider, in the assignment of *prima facie* title, a question of law as to rejection of votes by canvassing officers.

¹ By Mr. Poland, *Globe*, p. 1692.

² *Globe*, pp. 1683–1696.

³ *Journal*, pp. 473–475.

The House has examined validity of elections and qualifications of a claimant when determining prima facie title, leaving final right for later inquiry.

The House adjudged valid for prima facie title an election wherein parishes casting 14,346 out of 27,055 votes in the district were rejected.

A resolution for the investigation of the right of a claimant to a seat presents a question of privilege.

On March 4, 1869,¹ at the organization of the House, the names of the Members-elect from the State of Louisiana were not found on the Clerk's roll, particularly the name of Lionel A. Sheldon. These Members-elect bore certificates as follows in form:

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
New Orleans, November 25, 1868.

To all to whom these presents may come:

Know ye that, in accordance with the laws of the State of Louisiana, an election was held by the qualified electors of this State on the 3d day of November, A. D. 1868, for five Members of Congress, to represent the First, Second, Third, Fourth, and Fifth Congressional districts of the State of Louisiana in the Forty-first Congress of the United States, and for one Member of Congress from the Second Congressional district to the Fortieth Congress, to fill the vacancy occasioned by the death of the Hon. James Mann.

And whereas the returns of said election made to the secretary of state, as required by law, have been carefully examined, compared, and attested by the proper officers whose duty it was to examine the same;

And whereas it has been ascertained from said returns that Lionel Allen Sheldon received 5,108 votes, and Caleb S. Hunt 2,833 votes, cast at said election:

Now, therefore, I, Henry C. Warmoth, governor of the State of Louisiana, do hereby certify that Lionel Allen Sheldon received a majority of the votes cast for Representative to the Forty-first Congress from the Second Congressional district of the State of Louisiana.

In testimony whereof I have hereunto set my hand and caused the seal of the State to be affixed this 5th day of November, in the year of our Lord 1868, and of the independence of the United States the ninety third.

[SEAL.]

H. C. WARMOTH,
Governor of the State of Louisiana.

GEO. E. BOVEE, *Secretary of State.*

The Clerk had declined to put the names of the Members-elect on the roll because the words "duly elected" did not appear in the credentials.² The law of Louisiana had provided that the proper officials "shall proceed to ascertain from the said returns the person duly elected, a certificate of which shall be * * * signed by the governor," etc. In 1865 the credentials given by the governor, in the ancient form of the State, had certified that the bearer "was duly elected a Member of the Thirty-ninth Congress."

The Clerk having declined to place the names on the roll, the House agreed to the following resolution:

Resolved, That, inasmuch as the names of Louis St. Martin, Lionel A. Sheldon, and George W. McCranie, claiming severally to be elected Representatives from the State of Louisiana in the Forty-first Congress, have been omitted by the Clerk from the roll of Members because, as is alleged, their several credentials or certificates of election do not show that they were regularly elected in accordance with

¹First session Forty-first Congress, Journal, p. 12; Globe, pp. 11-13.

²See statements of Messrs. Garfield and Stevenson in debate, Globe, pp. 11, 637, 642.

the laws of said State or of the United States, the credentials of the said severally named persons be referred to the Committee of Elections, when appointed, for inquiry and examination into the right of said persons, respectively, to be admitted on their said certificates to take the seats which they claim, with the instructions to said committee to report at as early a day as practicable.

On March 9¹ Mr. Horace Maynard, of Tennessee, as a question of privilege, presented a preamble and resolution, the former referring to an official declaration of the governor of Louisiana and a legislative report of that State as authority for statements that riot and intimidation had prevailed, and the latter providing that the committee on elections, in addition to examining the credentials,

shall inquire into the validity of the election * * * and ascertain in which of said districts, if any, a valid election was held, and shall also inquire whether the persons claiming to have been elected in such districts are qualified under the Constitution and laws to take seats as Members of this House.

A question of order being raised that this resolution did not involve a question of privilege, the Speaker² said:

Anything which goes to vindicate the right of a Member to a seat, whether an investigation or anything else, is within the privilege of the House.

This resolution was agreed to, yeas 117, nays 46.

On March 31,³ Mr. Job E. Stevenson, of Ohio, submitted the report of the majority of the committee. This report, after citing the facts as to the certificates, says:

If the case rested upon the certificate alone, the right of the holder to a seat might be questioned; but upon this point, which is involved in other cases not yet considered, the committee do not deem it necessary now to pass. By the official returns, as examined and certified according to law, it appears that Lionel Allen Sheldon received 5,108 votes and Caleb S. Hunt 2,833 votes. This official statement, which was before the committee, also showed that the following votes were rejected: For Lionel A. Sheldon 3,606, for Caleb S. Hunt 15,508. The statement gave the reasons for the rejection of these votes.

The committee proceed to say:

Whatever might be the result of a contest involving the validity of these returns, and the sufficiency of the reasons assigned for rejecting the parishes which were rejected, the returns are to be received as prima facie evidence of the result of the election, and upon them Mr. Sheldon is entitled to take the seat, subject to any contest which may be lawfully made, unless he is disqualified or the election was void.

The report then states that Mr. Sheldon was not disqualified.

In the debate it was asserted⁴ that the credentials were sufficient prima facie evidence for the House to seat Mr. Sheldon. The statute required that the Clerk in making up the roll should not put on the names of those not explicitly shown to be duly elected. The House was not governed by such strictness.

The minority⁵ also contended that the certificate was sufficient in this respect, although not in another:

A prima facie right must be founded upon and established by prima facie evidence, and prima facie evidence is that evidence which is sufficient to establish the fact, unless rebutted. Now apply this

¹ Journal, pp. 19, 20; Globe, p. 36.

² James G. Blaine, of Maine, Speaker.

³ House Report No. 4; 2 Bartlett, p. 530; Rowell's Digest, p. 232.

⁴ By Messrs. Garfield and Paine, Globe, pp. 642, 643.

⁵ Minority views signed by Messrs. A. S. Burr, of Illinois, and Samuel J. Randall, of Pennsylvania.

definition to the case under consideration. Unless rebutted, the certificate which Mr. Sheldon holds is prima facie evidence: (1) That an election was held at the time, place, and for the purpose therein expressed; and (2) that he received the highest number of votes cast at the election, which necessarily constitutes his election, and thereby establishes prima facie his right, or, in other phrase, his prima facie right to be admitted to the seat. But his certificate of prima facie evidence is rebutted by a like official and authenticated statement of equal force, and showing also (1) that the election was held at the time, place, and for the purpose therein expressed; and (2) that Mr. Hunt received the highest number of votes cast at the election, and which necessarily constitutes his election, and thereby establishes prima facie his right to be admitted to the seat. Now, what becomes of Mr. Sheldon's prima facie right? It falls, of course, unsustained by prima facie evidence; and thus his claim is of no higher validity than Mr. Hunt's in a prima facie sense, and upon the form of the papers, and in substantial merits, as made manifest on the face of the certificates, it becomes utterly worthless and proves nothing to the advantage of Mr. Sheldon. The papers, taken together, establish the vital fact that Sheldon is not elected, and that Hunt is elected by a triumphant majority of 9,627 votes. Or, rejecting the parishes of Terrebonne, St. John the Baptist, and Jefferson, he is then elected by a majority of 9,135. This conclusive result is shown by the papers and the law alone, without any resort whatever to other evidence or sources of information.

The point made by the minority is elaborated more clearly in the debate.¹ The certificate of facts, which was signed by the governor and secretary of state under seal, gave the returned vote and the reasons in law for the rejection of the returns from certain parishes. The minority contended that the reference to the law brought that law within the view of the committee, and that the question whether or not the returns were properly rejected should be settled as part of the prima facie case. Comparing this certified paper with the credentials, the minority say:

This paper springs from the same fountain; is based upon and authorized by the same law; is executed by the same officers; relates to the same subject-matter, and declares certain facts in reference thereto, from which arise, by inevitable and logical implication, different legal results and conclusions from those promulgated in the certificate to Mr. Sheldon.

In all matters pertaining to the settlement or adjudication of contested elections, the House acts judicially, and not otherwise. Whenever any legal or official papers, executed in connection with such contests, and properly brought to the knowledge of the House, are based upon, or refer to, any general laws, State or Federal, for the regulation of elections, it is the imperative duty of the House to take notice of all such laws. It is the conclusive presumption of law that the House is acquainted with them. If any action in connection with an election is based upon provisions or constructions of law, and not upon facts, the law needs not to be set out in the official paper based upon it, but the House must take judicial notice of it, and must be its own exclusive judge as to its interpretation. These rules are elementary and important, and apply with great propriety and force to this case.

To this the majority replied that the tribunal in Louisiana having jurisdiction passed on the question of law, and while the House might review the decision in determining the final right, it should not do so on the prima facie question.²

329. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

The House, going outside the allegations of the parties and ascertaining by historic knowledge disturbances causing 232 deaths, declared an election invalid.

¹ Remarks of Mr. Kerr, Globe, p. 639.

² Remarks of Mr. Cessna, Globe, p. 642.

The committee having also been instructed to inquire into the validity of the election, the majority of the committee arrived at the following conclusions of fact:

In the city of New Orleans and in Jefferson Parish, which adjoins and is practically part of the city, there was for about one week prior to and at the date of the election a reign of terror unsurpassed in the history of this country. The disloyal inhabitants, stimulated by the hope of reviving rebellion and regaining the lost cause, organized and armed, overcame the feeble resistance of the civil authorities, overawed the military commanders, and ran riot through the city, shooting down on sight and murdering in cold blood loyal citizens, white and colored, without offense or provocation, save those of loyalty and color.

By the official reports of the committee of the legislature of Louisiana appointed to investigate the facts, it appears that in these two parishes 232 Republicans were killed, shot, or otherwise maltreated—69 in Jefferson and 173 in Orleans.

This violence prevented nearly one-half the registered electors from voting.

Assuming that nearly all the electors thus prevented would have voted under peaceable conditions, the majority conclude that the election should be invalidated in part. They say:

It is evident, from the testimony referred to the committee, that in the parishes of Orleans and Jefferson there was no valid election, and the question arises whether this should invalidate the election in the other parishes of the district and set aside the entire returns.

In all the other parishes the election was quiet and the vote was as full as that usually cast in loyal States; and it would seem unreasonable and unjust that the peaceable electors of the district should be denied the right of representation because their violent neighbors attempted and failed to deprive them of that right.

The better rule would seem to be that indicated by the legislature of Louisiana, in the resolution referred to the committee, to exclude the disorderly and count the peaceable parishes, thereby defeating the violent and protecting the peaceable and law-abiding citizens in the right of representation.

The minority condemn the conclusion of the majority and the reasoning on which it is based, saying:

The parties to this contest do not allege invalidity in the election by reason of the existence of violence, intimidation, terror, or anarchy. They specifically and emphatically deny all such charges. But the majority of the committee assume the existence of such a state of disorder as should invalidate the election in this parish. The certificates afford no support or countenance to this assumption. There is no legal evidence before the committee to establish it. But the majority seem to have borrowed their faith on this subject from a report made to the legislature of Louisiana by a committee of that body. That report is not properly or legally before the committee; and if it were, it does not contain legal evidence to be used in this contest, and in every respect it is intrinsically and notoriously unfit to be received. It is wholly *ex parte* and transparently and meanly partisan, and, judged by itself, it is unworthy of respect or belief.

But the majority, by a singular disregard of the appropriate limits of an inquiry into alleged *prima facie* titles, attempts, by a process of argument and comparison of party votes and strength at a preceding election, to deduce the legal conclusion that if all the legal votes in the parish of Orleans that were not cast had been cast at the Congressional election in question, they would in fact have been cast for Mr. Sheldon, and that therefore he would have been elected, and ought now to be allowed to be sworn in as a Member. They appear to have no doubt but that every man who did not vote wanted to vote for Mr. Sheldon and that the House should now declare the result to be the same as if they had in fact all voted for Mr. Sheldon.

The majority reported a resolution giving the seat to Mr. Sheldon on his *prima facie* showing.

The report was debated in the House on April 8,¹ and a proposition of the minority that Mr. Hunt be seated was decided in the negative—yeas 44, nays 101. Then the resolution of the majority seating Mr. Sheldon was agreed to—yeas 85, nays 37.

Mr. Sheldon accordingly took the oath.

330. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

Instance wherein the House, by resolution, removed the contested cases of a State from operation of the law and prescribed a different procedure.

On the day preceding the decision to seat Mr. Sheldon, on April 7, 1869,² the House agreed to the following resolution:

Resolved, That each of the persons claiming seats in the Forty-first Congress as Representatives of the several Congressional districts of the State of Louisiana, excepting such as have been, or before the close of the present session shall be, reported by the Committee of Elections to this House as unable to take the oath prescribed in the act entitled "An act to prescribe an oath of office, and for other purposes," approved July 2, 1862, shall, on or before the 15th day of April, 1869, file with the Clerk of the House a statement of the grounds upon which he claims such seat, and a subcommittee shall be appointed by the Committee of Elections with power to administer oaths, take testimony, and send for persons and papers to investigate the facts connected with the late elections for Representatives in said several districts during the recess of Congress, at such time and places in the State of Louisiana as they may determine; and upon such investigation and upon the evidence heretofore lawfully taken in said respective cases the Committee of Elections shall at the next session of Congress report to the House whether the elections in the said several districts were lawful, regular, and valid, and which of said persons, if any, were lawfully elected to represent said districts, respectively, in the Forty-first Congress, and whether said claimants are able to take the oath of office prescribed in the act of July, 1862, with a full statement of facts in each case.

Under this resolution a question arose which was thus described and discussed when the committee reported on the final right to Mr. Sheldon's seat in the next session:

The sitting Member claims that as the resolution admitting him to the seat was subsequent to that of April 7, 1869, under which we are now proceeding, the latter does not apply to his case, and he insists that his case is to be further considered, if at all, solely under the act regulating contested elections, by which it is provided that notice of contest shall be given within thirty days after the result of the election shall have been declared. Under this act the notice should have been given within thirty days from November 25, 1868, but no notice was given until January 30, 1869; consequently the notice was not sufficient to sustain a contest "according to law," unless the objection was waived, which does not appear, the contestee having made and maintained the objection at every stage of the case. The committee thought proper, notwithstanding this objection, and subject to protest, to proceed in the examination of witnesses in this case; and while upon a rigid construction of the resolutions of the House under the technical rules of law it might be difficult to escape the conclusion claimed by the contestee, we submit the question without recommendation, and assume that the House in its discretion may enter into the consideration of the case upon its merits.

The minority took a more positive view:

In respect to the legal technicality urged by Mr. Sheldon and presented by the majority of the committee as one of the grounds of his right to the seat, viz, that as he was admitted to the seat subject

¹ Journal, pp. 199, 202; Globe, pp. 637-646.

² Journal, p. 183; Globe, p. 588.

only to a contest according to law, no person has a right to contest the seat, because he has never received any notice of contest within the time required by the law of 1851. The answer to such special pleading is, that Mr. Hunt's right to contest the seat does not now depend upon technical conformity to the law of 1851. The House resolution of 7th April not only authorizes it, but from the moment of its passage became the law and the rule under which the contest should be tried, and Mr. Hunt has complied with its requirements, and therefore is contesting according to law. The House has fallen back upon its constitutional prerogative of judging of the election and qualification of its own Members, and has taken the contest out of the hands of the parties, and commenced the case de novo. Mr. Sheldon has admitted the new status of the contest by filing his statement of the grounds of his claim, in obedience to the requirements of the resolution. Under that resolution he was admitted on prima facie right to take his seat, subject to any contest against him according to law; and Mr. Hunt, having conformed to the requirements of the House resolution, is now contesting his right to the seat in accordance with law.

331. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

The House has decided that widespread and organized intimidation might invalidate the polls, although the disorder ceased before the actual day of election, when the polls were quiet.

The poll of a district in a prior year has been referred to in deciding upon the effect of a widespread system of intimidation.

The report as to the final right was submitted on March 16, 1870,¹ by Mr. Stevenson. As this case was typical of the other Louisiana cases the report considers first the general principle underlying the contests in the five districts from the State. The majority of the committee found it established by official records as follows in regard to certain disturbed parishes distributed among the five districts:

The number of electors registered in those parishes under the reconstruction acts in 1867 was 74,106; 31,413 white and 42,693 colored; being a majority of 11,280 of colored electors.

The Republican vote, at the election in 1867 for the constitutional convention, was 38,335, being a majority of all the registered electors.

The Democratic vote was 2,482, the mass of that party not voting because, under the reconstruction acts, a majority of registered electors was requisite to the calling of a convention.

At the next election, held in April, 1868, there were 30,895 votes cast in favor of the Republican State, parish, legislative, and Congressional ticket, against 26,553, cast for independent candidates, adopted by the Democracy.

The next election was that in question, being the Presidential and Congressional election of 1868, when the number of Republican votes cast in these parishes was 3,359, of which number eight parishes cast 3,339. Three parishes cast two Republican votes each. Five parishes cast one Republican vote each. Seven parishes cast no Republican votes.

The majority find it established by testimony that previous to the election a condition of terrorism was inaugurated in the parishes in question. Oath-bound bands of armed men, organized in a secret fraternity, set on foot organized intimidation and riot, and the report says "it is estimated by those best informed that not less than 2,000 Republicans were killed, wounded by gunshots, or otherwise seriously injured." This caused the Republicans generally to avoid the polls on election day. The majority of the committee therefore propose the following rule:

If it be said that there might have been any violence, the answer is that recent events had raised a reasonable apprehension of danger, sufficient in law to cause a man of ordinary prudence to so act as to avoid the probable danger.

¹Second session Forty-first Congress, House Report No. 38; 2 Bartlett, p. 703; Rowell's Digest, p. 241.

It may be said that because the statutes of Louisiana provide that actual violence at the polls should void the election, therefore no election can be set aside for violence at any other time or place, however it may affect the minds or conduct of electors; and this may have been the view of the Democratic leaders in causing or permitting cessation of violence immediately, before the day of election, and in keeping the peace among themselves at the polls. They may have supposed that they could violate the spirit of the State statute without incurring the penalty of its letter. It is submitted that no such views of law should be allowed to prevail. Such a ruling would overturn established principles, and give license to lawlessness. The rule applicable is well expressed in the act of Congress known as the first reconstruction act, passed March 2, 1867, section 5, where it is provided as one of the essentials of valid election that it shall appear "that all the registered and qualified electors had an opportunity to vote freely and without restraint, fear, or the influence of fraud."

This act was passed with special reference to the circumstances surrounding the freedmen of the late rebellious States, and it is well adapted to test the fairness and validity of such elections. It is declaratory of an established rule of contested election law, and is at present our only available means of securing fair and peaceable elections in the reconstructed States. It should be strictly and impartially enforced until we shall be prepared to protect the voter in the exercise of his rights, or to punish those who violate them; and it may be that experience will demonstrate that the best permanent practicable means of securing fair and free elections in the reconstructed States will be such an application of this great principle as will teach all parties that they have nothing to gain by intimidation and violence. It is proposed to apply this rule to the several disputed parishes of the districts of the State of Louisiana, and under its operation to reject the returns from those parishes, if any, in which it shall clearly appear from the testimony that the electors generally had not an opportunity to vote "freely and without restraint, fear, or influence of fraud."

As to the remaining parishes in which it shall appear that the election was valid, it is proposed that the returns therefrom, when properly authenticated or proved, shall be counted, and the result in each district determined from such returns.

The minority¹ do not admit either the facts alleged to be shown by the testimony or the principle of law.

The anarchy, violence, and public disturbance in the city of New Orleans, set up by contestee and the majority of the committee as a proper ground for rejecting the returns of the election in the said five wards thereof, appears, by the testimony of the witnesses testifying on that point, to have occurred sometime prior to the election, and therefore could not necessarily in any manner interrupt the proceedings at the election, nor prevent the ascertainment of the result.

The rule of law is well settled upon the question of riot and disturbance of the public peace at elections, and has governed the decisions in all analogous cases in courts and legislative bodies, both in England and this country. It is laid down in all the leading authorities on the law of elections, under appropriate titles, viz, Hayward on County Elections; Wordsworth's Law and Practice of Elections; Curtis's Law and Practice of Elections; Rowe on Elections; Sheppard on Elections; 4 Selden; Cooley on Const. Limit.; I Peckwell, etc., and is in substance, that to invalidate or make void an election on the ground of riot and intimidation, it must appear that the proceedings at the election were interrupted and the ascertainment of the result prevented thereby. This rule furnishes the ground of the decisions by the Committee of Elections in the several cases of *Harrison v. Davis*, Contested Cases, vol. 2, p. 341; *Preston v. Harris*, vol. 2, p. 346; *Clements, of Tennessee*, vol. 2, p. 369; *Bruce v. Loan*, vol. 2, p. 519; Minority Report adopted by the House.

After quoting from some of these authorities, the minority continue—

It will be observed that these several cases were founded on allegations of riot, violence, public disorder, intimidation, and interference with voters on the day of election and at the polls; and it was sought in each case to avoid the election in whole or in part; but the committee and the House, finding that the proceedings at the election were not interrupted, and the result had been duly ascertained, declared the election in each case valid, thus sustaining the rule aforesaid; and yet, with these former

¹This Congress the Committee of Elections worked by subcommittees. Messrs. Stephenson, Burdett, and Kerr constituted the subcommittee having the Louisiana cases.

decisions by the committee and the House before them, and directly in point of the case now under consideration, the majority of the committee reports that, because of riot and disturbance of the public peace, not on the day of election and at the polls, but several days before the election, during the political campaign in the city of New Orleans, the election in the five wards aforesaid should be considered void, and that, too, not because the proceedings at the election were interrupted, or the result not ascertainable, but because a large number of Republican electors pretended that they could not vote with personal safety, notwithstanding on the day of the election no violence, threats, nor intimidation operated to give even color to such pretense.

Another rule, equally well established, is that whenever it is sought to set aside an election, in part, on the ground of illegal votes or riot and intimidation, it must be made to appear that if such illegal votes had not been received or if such riot and intimidation had not prevailed the result of the election would have been different in the whole district; for otherwise it would be wholly immaterial whether the election was void or not, in part. On this point reference is again made to the authorities before cited. This rule is self-evident, and has always heretofore been the guide of the Committee of Elections to its conclusions, and governed the House in its decisions, and is directly in point of the contest now under consideration.

332. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

The House has assigned final right to a seat from a district wherein 14,346 out of 27,055 returned votes were rejected because of intimidation.

The majority of the committee, having considered the general issue, proceed to the consideration of the case of Hunt *v.* Sheldon. It appeared that in the entire district there were cast for Mr. Sheldon 8,714 votes and for Mr. Hunt 18,341, a majority of 9,627 for the latter. But the majority of the committee found that violence and intimidation had prevailed in the parishes of Orleans and Jefferson to such an extent as to bring them within the general principles set forth at the outset. The votes cast in these two parishes were for Sheldon 787 and for Hunt 13,559, a majority of 12,772 for the latter. The rejection of these two parishes would cast out 14,346 out of the 27,055 votes cast in the district, and would change the result from a majority for Mr. Hunt to a majority for Mr. Sheldon.

After reviewing the lawlessness, intimidation, and riot in these two parishes prior to election day, the majority of the committee conclude:

The number of registered electors in the parishes of Orleans and Jefferson in 1867 was 34,766, of whom 18,697, a majority, were colored. The Republican vote cast at that election in 1867, in those parishes, was 16,083—a large majority of votes cast. The regular Republican vote of those parishes in April, 1868, was 17,106. The entire Republican vote cast in those two parishes, in November, 1868, was 1,814, being a falling off, in about six months, of over 15,000 votes, upon a largely increased registration.

The comparison is equally striking if confined to the vote in Jefferson parish alone or in that part of Orleans comprised within this Congressional district. The Republican vote in Jefferson in 1867 was 3,284; in April, 1868, 3,133; in November, 1868, 672—a decrease of nearly four-fifths. The testimony relative to the elections of 1867 and April, 1868, does not show the vote of the wards of Orleans separately, but it is understood that the population of the parish was about equally divided between the First and Second Congressional districts. The registered vote of the part of the parish within the Second district in November, 1868, was 21,314, more than half the registered vote of the parish. The Republican vote cast at the November election, 1868, was 124—probably not 2 per cent of the Republican vote.

It seems clear that there was no valid election in either of these two parishes, and that the returns from each of them should be rejected, and that the result should be determined from the returns of the other parishes of the district.

The minority opposed this view, also raising a question of fact as to the actual result even were the principles of the majority to be followed.

The report was debated on April 12,¹ and on April 13² a vote was taken on the proposition of the minority that Mr. Sheldon was not elected and that Mr. Hunt was elected. This was defeated, yeas 49, nays 123.

Then the resolution of the majority, declaring Mr. Hunt not entitled to the seat, was agreed to, yeas 119, nays 47. The second resolution, declaring Mr. Sheldon entitled to his seat, was agreed to, yeas 114, nays 51.

333. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

The House concluded that when two-thirds of the returned vote of a district had been rejected for intimidation the remainder did not constitute a valid constituency.

Instance of exclusion of a Member-elect found unable to take the test oath of loyalty.

Another contested case from Louisiana was that of Sypher *v.* St. Martin. Louis St. Martin had presented credentials in the same form as those of Mr. Sheldon and had been temporarily excluded with the other Members of the delegation. Under the resolution of April 7, 1869, the Committee on Elections examined the qualifications of Mr. St. Martin, reporting³ as follows:

It was alleged, in writing, before the committee, by said Sypher, that said St. Martin could not take the oath prescribed in the act entitled "An act to prescribe an oath of office, and for other purposes," approved July 2, 1862. The committee thereupon, in obedience to said resolution, inquired into said charge, and have found and do report to the House that Louis St. Martin, claiming the right to represent the First Congressional district of the State of Louisiana in this House, is unable to take the oath of office prescribed in the said act of July 2, 1862.

Although the House did not act on this report, the Committee on Elections considered that it disposed of the claim of Mr. St. Martin to the seat, and did not consider him as a party except in so far as his action negatived the claim of Mr. Sypher.

The report in the case of Mr. Sypher was submitted on April 18, 1870,⁴ by Mr. Stevenson. This report did not give the official returns of the district, but after reviewing the acts of violence and intimidation before the election, wherein "over 300 leading and active Republicans, white and colored, were killed, wounded, or otherwise cruelly maltreated," and after reaffirming the principles set forth in the case of Hunt *v.* Sheldon, proceeded to give the vote in the peaceable parish as 2,983 for Sypher and 2,627 for St. Martin. Therefore they proposed a resolution declaring J. H. Sypher entitled to the seat.

The minority filed no views, but in the debate⁵ Mr. Michael C. Kerr, of Indiana, after taking issue with the facts and law relied on by the majority on the question of intimidation, presented returns, alleged to be official, showing that the vote of the whole district was for Sypher 2,948 and for St. Martin 12,514. Mr. Kerr also

¹ Globe, pp. 2618, 2649.

² Journal, pp. 608–613.

³ First session Forty-first Congress, Journal, p. 180; Globe, p. 562; House Report No. 11.

⁴ House Report No. 60, second session Forty-first Congress; 2 Bartlett, p. 699; Rowell's Digest, p. 241.

⁵ Globe, p. 2791. For the whole debate, Globe, pp. 2788–2796.

claimed that the investigation had shown the actual vote cast in the entire district to have been 3,150 for Sypher and 16,059 for St. Martin. He further alleged that the registration made under the auspices of the State administration, which was of the same party as Mr. Sypher, reached a total of 29,992. Thus he claimed that Mr. St. Martin received an actual majority of the total registered vote. Citing the case of *Smith v. Brown* and the Louisiana State case of *Fish v. Collins*, he claimed that the vote from the so-called peaceable parishes did not show a proper constituency to be represented.

In the progress of the debate Mr. James A. Garfield, of Ohio, said that in the case of *Hunt v. Sheldon* he had concluded that a very large proportion of the territory and a majority of the population had been represented in these so-called peaceable parishes. He then asked how far this principle would apply in the pending case.

There was no agreement as to the actual vote, but it was admitted that St. Martin had received as high as 12,504 of the registered vote of 29,922 and that Sypher had not received over 3,150. Mr. Kerr denied that either this case or the Sheldon case conformed to the rule stated by Mr. Garfield.

On April 20¹ the resolution declaring Mr. Sypher entitled to the seat was agreed to—yeas 78, nays 73; but very soon, after a motion to adjourn had been disagreed to, a motion was made to reconsider. A proposition to table the motion to reconsider failed—yeas 79, nays 83. Then the House decided to reconsider—yeas 86, nays 79. Thereupon the question recurred on the resolution declaring Mr. Sypher entitled to the seat, when Mr. Thomas Fitch, of Nevada, proposed the following substitute:

That there was no valid election held in the First Congressional district of the State of Louisiana on the 3d day of November, 1868, and that neither J. H. Sypher nor L. St. Martin is entitled to a seat in the Forty-first Congress as Representative from the First Congressional district of the State of Louisiana.

The substitute was agreed to—yeas 99, nays 70. Then the resolution as amended was agreed to—yeas 96, nays 68.

334. The Louisiana election cases of *Hunt v. Sheldon*, *Sypher v. St. Martin*, etc., continued.

The House declared vacant a seat in a case wherein over half of the total vote of a district had been rejected for intimidation.

Mr. George W. McCranie, of the Fifth district of Louisiana, had also presented himself with a certificate from the governor of the State of Louisiana, but had not been sworn in. Under the general rule adopted the Committee on Elections reported² that he was unable to take the oath, having been engaged in rebellion.

The seat being claimed by Mr. Frank Morey, the Committee on Elections reported as to the final right on April 27, 1870.³ It appeared that the actual vote cast in the district was—for McCranie, 13,716; for Morey, 3,424, and for P. J. Kennedy, 3,076. The official returns, however, had rejected two parishes, leaving the corrected vote—for McCranie, 11,107; for Morey, 3,423, and for Kennedy, 3,076.

The grounds of contest were thus stated in the report:

¹Journal, pp. 643–650; Globe, pp. 2849–2852.

²House Report No. 10, first session Forty-first Congress.

³House Report No. 62, second session Forty-first Congress; 2 Bartlett, p. 719; Rowell's Digest, p. 243.

Mr. Morey claims the seat, and alleges that "a system of intimidation, threats, violence, and lawlessness prevailed in the parishes of Jackson, Franklin, Claiborne, Bienville, Union, Morehouse, Caldwell, and Catahoula prior to the election in November last; that Republicans were deterred and prevented by fear from voting at all, or were compelled by threats and intimidation to vote the Democratic ticket against their wishes, and that the election in the above-named parishes was a farce, a nullity, and an outrage of the rights of the law-abiding citizens of the Fifth Congressional district of Louisiana."

In the parishes thus impeached the vote was—for McCranie, 11,145; for Morey, 179; for Kennedy, 26. The committee show that this was a large falling off as compared with previous years, and explain it by the testimony showing intimidation, which prevented some from voting and compelled others to vote against their inclinations. The peaceful parishes showed a vote of 2,571 for McCranie, 3,438 for Morey, and 3,050 for Kennedy.

The committee, Mr. Stevenson submitting the report, conclude:

The House has heretofore, in the case of *Hunt v. Sheldon*, adopted the rule that where it appears that certain precincts and parishes (or counties) of a district have been carried by violence or intimidation the returns therefrom shall be rejected, and the result derived from the returns from the peaceable precincts and parishes (or counties).

In the subsequent case of *Sypher* the House refused to apply this rule to that case; and your committee, submitting to the judgment of the House, considers it a duty to reconcile these two cases if possible.

We can not advise the House to abandon the principle adopted in *Hunt v. Sheldon*, which seems of inestimable value in preventing lawless attempts upon the ballot box in the late rebellious States, where a new voting population is peculiarly exposed to violence and intimidation by the former master class, prone by habit and inclination to domineer over their former slaves; and therefore we accept the decision of the House in *Sypher's* case, not as a reversal but as a limitation of the rule adopted in *Sheldon's* case, and interpret the action of the House in *Sypher's* case to mean that the rule should not be so far extended as to apply to such a case where less than one-fourth of the legal electors of the district resided, and one-fifth of the registered vote was cast, within the peaceable parishes and precincts, and the claimant received but a small majority of that vote.

In the present case the five peaceable parishes comprise about one-third of the territory of the district and contain less than one-half the population and registered vote and return a minority of the vote actually polled.

The contestant received in these parishes 3,428. The registered vote of the district was 23,103. The registered vote of the five peaceable parishes was 10,400. The contestant received about one-seventh of the registered vote of the district and about one-third of the vote cast in the peaceable parishes.

Another objection to the claim of contestee is that if there had been a peaceable election in every parish and precinct of the district the contestant could not have received a majority or even a plurality of the votes cast, because the rejected parishes were Democratic at best. They gave a small Democratic majority at the spring election in 1868, and would have increased it considerably at a peaceable election in the fall. There were two Republican candidates, who divided their party vote about equally, and it seems probable that they would have divided it in every parish had the canvass and election been peaceable, so that the contestant must have been defeated. We therefore conclude that the claim of the contestant can not be sustained.

The committee also find that if they should consider the claim of Messrs. McCranie and Kennedy they would fall under the same rule. Therefore the following resolution was recommended:

Resolved, That there was no lawful election in the Fifth Congressional district of the State of Louisiana for Representative in the Forty-first Congress, and neither G. W. McCranie nor Frank Morey nor P. J. Kennedy is entitled to a seat as Representative in the Forty-first Congress from the Fifth Congressional district of the State of Louisiana.

The report was considered by the House on April 28.¹ Although there had been no minority views, Mr. Michael C. Kerr, of Indiana, opposed the report and proposed to the resolution an amendment declaring Mr. McCranie elected. This amendment was disagreed to—yeas 53, nays 104. Then the resolution recommended by the committee was agreed to without division.

335. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

The House considered an election valid although in five of ten parishes the vote, which was less than half the vote of the district, was rejected.

An examination of the acts necessary to justify a finding of disloyalty against a Member-elect.

A Member-elect may not take the oath until a motion to reconsider the vote determining his title is disposed of.

From the Fourth district of Louisiana the credentials were presented by Mr. Michael Ryan. He was not admitted on the prima facie showing, and on April 25, 1870,² Mr. Samuel S. Burdett, of Missouri, from the Subcommittee on Elections, presented a report dealing both with the qualifications of Mr. Ryan and with the claims of the contestant, J. P. Newsham.

1. As to the loyalty of Mr. Ryan, the report says:

The question of the ineligibility of Mr. Ryan put in issue by the contestant is first to be determined. It is admitted that contestee comes within the description of persons set out in the third section of the fourteenth article of amendments to the Constitution by having previously taken an oath as a member of the legislature of the State of Louisiana to support the Constitution of the United States. That he did give aid and comfort to the enemies of the United States is confidently asserted by contestant, and much evidence has been produced pro and con to meet that issue.

The substantive proofs adduced to sustain the charge of ineligibility are, that Mr. Ryan, in the early part of the year 1862, made a speech to a company of Confederate soldiers, encouraging them in their fight for secession. (See testimony of Harry Lott, vol. 1, p. 421; of Calhoun, p. 424, q. 8572; of Barlow, p. 587, q. 11539.) That after the inauguration of the rebellion he wore in public on several occasions the uniform of the Confederate military service and was an officer in a local or home company of troops.

These substantive charges are not seriously disputed, but the motive and circumstances of them are put in issue by Mr. Ryan. For him it is contended that he was, notwithstanding appearances, at heart a Union man. The proof of his allegiance, however, is only to be found in political associations and sentiments formed and uttered before actual war began, and, after the beginning of hostilities, of declarations against the policy of the secessionists, conversationally made in the hearing of known Union men and personal friends. It does appear generally from the evidence that Mr. Ryan from the first seriously doubted the ability of the rebel leaders to carry their designs to a successful issue, and that he comprehended and deprecated the inevitable waste and destruction that must follow such a failure; but it does not appear that he ever, after the beginning of actual strife, called in question the right of secession or the desirableness of success to the Southern arms, provided only they should succeed; much less is there anywhere to be found evidence of any hearty word spoken or deed performed favorable to the Union and for the Union's sake.

That the rebel military authorities were impressed with full confidence in his fealty to their cause is evidenced by the fact that he remained undisturbed at his home and unquestioned by them, while the few of his neighbors who were Union men in sentiment, on the bare announcement of that fact or

¹Journal, pp. 693, 694; Globe, pp. 3069–3074.

²House Report No. 61, second session Forty-first Congress; 2 Bartlett, p. 724; Rowell's Digest, p. 244.

on the merest suspicion of its existence, were compelled to seek safety by flight, or, remaining, to endure insult, imprisonment, or death; and this, too, notwithstanding that by birth, social standing, long residence, and large wealth of lands and slaves they were as fully entitled to the regard and consideration of the rebel authorities as it was possible for Mr. Ryan to be.

The minority filed no views; but in debate Mr. Kerr denied the charges of disloyalty, contending that the evidence did not prove them.

2. As to the final right—and in the debate the majority declared that the decision as to final right left little effect to the disqualification—the majority found Mr. Newsham entitled to the seat. The district comprised ten parishes, and the official returns showed a vote for Ryan of 10,385, and for Newsham of 5,606. In five of these parishes, where fraud and intimidation were charged, the returned vote was, for Ryan, 7,342; for Newsham, 46. The committee showed that in former elections in these five parishes there had been no such disparity of parties, and explained it by fraud and intimidation, which they considered proven. They conclude:

We assert the truth to be that in the contested parishes the result obtained was accompanied and secured by the use of unlawful means, and by the practice of oppressions and barbarities seldom equaled in any age or country, and that the several polls in all of said parishes ought to be excluded from the count.

Going back of the official returns, the report finds the whole number of votes cast in the district 20,500, the registration being 25,027. In the peaceful parishes they found a total vote of 13,112, of which Newsham had 7,210 and Ryan 5,902. The report concludes:

The committee does not cite the vote cast in the peaceable parishes as truly representing the popular will in those parishes. On the contrary, there were disorders, to the detriment of the contestant, in several of these parishes. Many of his supporters were by unlawful means kept from the polls and others compelled against their will to support his competitor.

The committee, therefore, recommends that the returns from such of the parishes of the Fourth district as are shown to have been controlled by the appliances of fraud and violence be excluded from the count.

A due regard for the rights of the faithful men of Louisiana, whose will was defeated, demands it, while every consideration of future peace for them and of safety to the State imperatively requires it.

We therefore recommend the adoption of the following resolutions:

Resolved, That Michael Ryan is not entitled to a seat as a Representative in the Forty-first Congress from the Fourth district of Louisiana.

Resolved, That J. P. Newsham is entitled to a seat as a Representative in the Forty-first Congress from the Fourth district of Louisiana.

The report was debated on May 20 and 21,¹ and on the latter day a resolution proposed by the minority and declaring Mr. Ryan entitled to the seat was disagreed to—ayes 54, noes 79. Then the resolution of the majority declaring Mr. Newsham entitled to the seat was agreed to—yeas 79, nays 71.

Mr. Charles A. Eldridge, of Wisconsin, moved to reconsider the vote.

Mr. Stevenson submitted that nothing was in order but the swearing in of Mr. Newsham.

¹Globe, pp. 3640, 3694–3700; Journal, p. 818.

The Speaker¹ overruled the point of order, saying—

No legislation is complete until the power to reconsider is exhausted.

On May 23² the motion to reconsider was laid on the table—yeas 94, nays 80.

Mr. Newsham then took the oath.

336. The Louisiana election cases of Hunt v. Sheldon, Sypher v. St. Martin, etc., continued.

Returns of five of twelve parishes being rejected for intimidation, the House seated a contestant on the vote of the seven peaceful parishes.

On April 28, 1870,³ Mr. Stevenson presented the report in the last Louisiana case, that of Darrall v. Bailey. The committee say that—

The bloodiest rioting and the darkest deeds which were done in the State were committed in these contested parishes of this district.

Fraud and violence were alleged as in the other districts. The report states the case as to the vote as follows:

Both parties affirm the validity of the election in seven parishes, while the contestee affirms and the contestant denies the validity of the election in five parishes, including St. Martin, from which there is no valid return, and which must, in any event, be rejected.

THE REGISTRY—WHITE AND COLORED.

The number of registered electors in the district was	28,486
Of colored electors	18,881
	<hr/>
Majority of colored voters	9,276
The colored nearly double the white voters.	

PEACEABLE AND VIOLENT.

The entire registry	28,486
	<hr/>
That of the seven uncontested parishes was	15,294
That of the contested parishes	13,192
	<hr/>
A majority in the peaceable parishes of	2,102

THE VOTE.

The vote cast (including the alleged vote of St. Martin, of which there is no return) was	26,106
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The vote in the uncontested parishes was	14,627
The vote in the contested parishes (including alleged vote of St. Martin) was	11,479
	<hr/>
Majority in the peaceable parishes	3,148

There can be no question, therefore, whether there was a valid election in the part of the district which is uncontested. It contained nearly two-thirds of the territory and a large majority of registered electors and of actual voters.

The report finds that the report from the violent parishes should be rejected, and that in the peaceable parishes Darrall had 7,436 and Bailey 7,191. The report concludes:

It may be added that the general condition of the State affected the Republican vote in these parishes, and that if peace and quiet had prevailed through the State the Republican majority would

¹ Globe, p. 3700. James G. Blaine, of Maine, Speaker.

² Journal, p. 830; Globe, p. 3733.

³ House Report No. 63, second session; 2 Bartlett, p. 754; Rowell's Digest, p. 246.

have been much heavier, and in the whole district the contestant would have received a large majority. The colored registered vote of the district was nearly double the white, and many white men would, if permitted, in peace, have sustained the Republican party. We therefore feel that the result reached is not only legally correct, but that it carries out the will of a very large majority of the people of the district, while it vindicates the rights of the people we are bound to protect.

We therefore recommend the adoption of the following resolutions:

Resolved, That Adolphe Bailey is not entitled to a seat as Representative in the Forty-first Congress from the Third district of Louisiana.

Resolved, That C. B. Darrall is entitled to his seat as Representative in the Forty-first Congress from the Third district of Louisiana.

The case was debated on July 2,¹ and on that day Mr. Kerr submitted a minority proposition declaring that Mr. Bailey was entitled to the seat and should be admitted thereto. This was negatived—yeas 37, nays 97.

The question recurring on the resolution declaring Mr. Bailey not entitled to the seat, it was agreed to without division.

Then the resolution declaring Mr. Darrall entitled to the seat was agreed to—yeas 67, nays 64.

A motion to reconsider was made, and on July 6² was laid on the table—yeas 96, nays 77.

Mr. Darrall then took the oath.

337. The first Louisiana election case of Benoit v. Boatner in the Fifty-fourth Congress.

A notice of contest, drawn in general terms, was held to cover sufficiently the various claims made upon the testimony and in the arguments.

The service of notice of contest at the residence is sufficient compliance with the law.

On March 19, 1896,³ the Committee on Elections No. 2, through Mr. R. W. Taylor, of Ohio, reported in the first case of Benoit v. Boatner, of Louisiana.

This case involved, besides the merits, the following preliminary question, thus stated by the committee:

The contestant, on the 16th day of January, 1895, caused to be served, at the place of residence of the contestee, a copy of his notice of contest. The contestee at that time was absent from the State of Louisiana, and it is admitted that under the law of that State it is sufficient notice of any suit to make service of the same at the place of residence of the defendant. The contestee moved to dismiss this proceeding on the ground that no proper notice of contest was served upon him as required by the Revised Statutes. The committee was of the opinion and held that the service of the notice in the manner stated was sufficient under the United States Statutes and was precisely the kind of notice which was held to be sufficient in the case of Manzanares v. Luna, in the Forty-eighth Congress. The contestee duly served upon the contestant his answer, and the parties proceeded to take testimony in all respects as if no question had been raised as to validity of contestant's service of notice. The contestant's notice of contest, while in general terms, was not seriously questioned as to form, and sufficiently covered the various claims made upon the testimony and in the arguments.

¹ Globe, pp. 5139–5143; Journal, pp. 1141, 1142.

² Journal, p. 1159.

³ House Report, first session Fifty-fourth Congress, No. 867; Rowell's Digest, p. 519.

338. The first Louisiana election case of Benoit v. Boatner, continued. Intimidation and fraud having destroyed the integrity of an election in 10 of 15 parishes, the House declared the seat vacant.

Discussion of the extent and degree of intimidation and fraud justifying rejection rather than purging of the poll.

A case in which the committee considered historic facts in judging validity of an election wherein appeared many irregularities on the part of election officers.

As to the merits of the case, it appeared on the face of the official returns that sitting member had a majority of 9,526. The district consisted of 15 parishes. In 5 of these the fairness of the election was not questioned. The controversy was confined to the 10 parishes where the colored males over 21 years of age numbered 21,459 and the white males over 21 years numbered 7,543. These facts the committee present from the census of 1890.

After sketching the provisions of the election law of Louisiana, the majority of the committee proceed to an analysis of the testimony in regard to the 10 parishes.

First are examined the 4 "river parishes" of East Carroll, Madison, Tensas, and Concordia, where the returns gave the sitting member 7,124 votes and 81 to the contestant. The majority call attention to the fact that in these parishes the white males over 21 years of age numbered only 1,765, while the colored males of age numbered 12,454. Therefore the colored voters must have voted in large numbers for sitting member, who was a Democrat, if the returns were true. Yet the majority feel convinced that the colored voters were all Republicans. The testimony showed that it had been a custom to count the colored voters for contestant's party; that the registration list was enormously padded; that the poll books and tally sheets had disappeared in almost every precinct of the river parishes; that no election officers could be discovered who knew anything about them; that many election officers refused to obey subpoenas, and others, on examination, refused on technical grounds to answer as to the records; that very few of the returns were sworn to, although the law requiring it was mandatory; that in some precincts the election officers signed the returns in blank; that the right of suffrage in these parishes was a farce; and that the sitting member admitted in his written statement filed with the committee that of the 7,124 votes counted for him in these 4 parishes over 6,000 ought to be excluded.

In Catahoula Parish the same character of frauds prevailed, with the addition that the alphabetical mode of voting people who were dead or not at the polls was to some extent resorted to.

The committee reviewed the remaining 5 parishes, quoting testimony which satisfied the majority that intimidation was general and that the planters very generally considered themselves as having the right to determine how their colored employees should vote.

In conclusion, the majority of the committee conclude that the right of suffrage, as recognized by the Constitution and the laws, did not exist in at least 10 of the 15 parishes. After noting the remarkable state of the vote in the river parishes, the majority say:

If no question were raised as to the validity of the election outside of the river parishes, the House in justice to itself and in the interest of fair and honest elections, giving full weight to the facts apparent

in this testimony, would be compelled to declare the election void. It could not declare the contestant elected because it can not say, and the contestant did not have it in his power to determine, how many votes the contestant would have received in those 4 parishes if a free and honest election had been conducted. It would have been physically impossible to take the testimony of 6,000 or 8,000 witnesses as to the person for whom they voted or would have voted if permitted to cast their ballots, and in addition to that the very circumstances that prevented their voting would have prevented their testifying.

This case discloses as well the difficulty in obtaining testimony and inducing men to testify as it does the intimidation practiced to prevent their voting. To invoke the rule which demands that returns from the tainted precincts be thrown out would still leave the contestee elected. It seems to us that in such a case the only thing that can be done is to declare the election void. To do otherwise would be to furnish an easy, safe, and certain mode of perpetrating a stupendous fraud, and the more stupendous the more effective.

We therefore conclude as matters of fact:

First, that fraud, violence, and intimidation so permeated the election of November 6, 1894, except in the parishes of Claiborne, Franklin, Jackson, Lincoln, and West Carroll, that there was no free expression of the popular will; that fraud, violence, and intimidation were so extensive and general as to render it certain that there was no fair and free expression by the great body of the electors, more than two-thirds of the electors of the district residing in the remaining 10 parishes.

Second, that in view of the fact that the majority for the contestee in the 11 parishes outside of the river parishes was 2,483, and that in the river parishes, where there is a majority of over 10,000 negroes of voting age, fraud was universal; that while it is impossible to determine how many votes the contestant would have received if a fair and honest election had been held, justice and good morals revolt against the proposition that any valid election was held.

We therefore hold as a proposition of law, growing out of the principle laid down in *Sypher v. St. Martin*, as follows:

“If fraud, violence, and intimidation have been so extensive and general as to render it certain that there has been no free and fair expression by the great body of the electors, then the election must be set aside, notwithstanding the fact that in some of the precincts or parishes there was a peaceable and fair election.”

The views of the minority, submitted by Mr. Joseph W. Bailey, of Texas, review the testimony, reaching a conclusion different from that reached by the majority, although admitting that certain precincts should be rejected, energetically protests against the conclusion of the majority, and says:

If permissible at all to declare an election void, it could, in our judgment, be legally done only in extreme cases where, by violence, widespread and concerted intimidation and fraud, it would become impossible to eliminate the lawful and voluntary vote from the unlawful and fraudulent and that which had been cast under the influence of fear.

In this case not only do such conditions not exist, but if every poll attacked by contestant, and against which he has adduced any evidence, be excluded from the count, contestee still has a majority of 327; but giving the evidence fair consideration, and excluding only the vote which is shown to have been fraudulent and intimidated, contestee's majority is 5,188.

Therefore the minority recommended a resolution declaring sitting member entitled to the seat.

On March 20, 1896,¹ the report was debated in the House, and then a decision was obtained on the motion to substitute the minority resolution for that of the majority. That motion was disagreed to—yeas 59, nays 132. Then without division the resolution of the majority was agreed to, declaring—

That there was no valid election held in the Fifth Congressional district of the State of Louisiana on the 6th day of November, 1894, and that neither Alexis Benoit nor Charles J. Boatner is entitled to a seat in the Fifty-fourth Congress as Representative from the Fifth Congressional district of Louisiana.

¹Journal, p. 328; Record, pp. 3035–3051.

339. The second Louisiana election case of Benoit v. Boatner in the Fifty-fourth Congress.

Where the provisions of law are insufficient to secure a decision in an election case the House prescribes by resolution the course of procedure.

On February 5, 1897,¹ Mr. Henry U. Johnson, of Indiana, from the Committee on Elections No. 2, submitted the report of the majority of the committee in the second case of Benoit *v.* Boatner, of Louisiana. At the first session of the Fifty-fourth Congress, as the result of a contest between the same parties,² the seat had been declared vacant. Thereupon, on June 10, 1896, a special election was held in the district, and Mr. Boatner was returned by 10,557 votes, against 5,989 returned for Mr. Benoit.

On December 10, 1896,³ Mr. Boatner appeared with the credentials and was sworn in. Mr. Benoit meanwhile had contested the election, charging wholesale frauds and intimidation.

On January 14, 1897,⁴ a letter from the Clerk was laid before the House announcing that if this case should take the usual course prescribed by law, allowing the full time of sixty days to be used in the preparation of briefs, it could not reach the House before final adjournment. This letter was referred, with the testimony, to the Committee on Elections No. 2, and the testimony was ordered to be printed.

On January 15⁵ the committee reported the following resolution, which was agreed to:

Resolved, That the Committee on Elections No. 2, to which the contested-election case of Alexis Benoit against Charles J. Boatner, from the Fifth Congressional district of Louisiana, has been referred, be, and is hereby, instructed and authorized to proceed to the consideration of said case, and, having first afforded to said parties a fair opportunity to be heard as to the merits of the same, to report to the House their conclusions with respect to such case in time to afford to the House an opportunity to determine the same during the present session of Congress.

340. The second Louisiana election case of Benoit v. Boatner, continued.

An election in a district was not declared void on account of invalidity in one-fifth of the parishes, affecting less than a third of the vote.

Discussion of the degree of duress which may be considered intimidation justifying rejection of a poll.

Intimidation justifying rejection of a poll may fall short of physical violence against the person and need not fall within the actual time of the election.

Although a parish, in a region wherein intimidation might be expected, showed a marvelous unanimity in the vote, the committee declined to reject the poll.

An election being held without the required poll list, and there being other suspicious circumstances, the poll was rejected.

¹ Second session Fifty-fourth Congress, House report No. 2808; Rowell's Digest, p. 526.

² See section 338 of this work.

³ Journal, p. 20.

⁴ Journal, p. 83.

⁵ Journal, p. 86.

The conduct of the election officers of a parish being thoroughly permeated by fraud, the returns were rejected.

The report of the majority of the committee, after reviewing the conditions of population, the law of the State as to elections, and noting the fact that the contestant carried the parishes where white population predominated, while the sitting Member was strongest in the so-called "colored" parishes, proceeds to examine the testimony in detail, and to make the corrections shown to be just.

1. The votes of two parishes were rejected entirely: (a) In Tensas Parish, where the commissioners of election were all supporters of the sitting member, the returns many gave him 2,067 votes, and contestant 141. In several precincts no votes at all were returned for contestant, of itself a very suspicious circumstance, but the poll lists showed that not only were dead and absent persons recorded as voting, but in many precincts the election officers returned the registered list of voters instead of the vote as actually cast. The law required the election commissioners to write down the names of the voters in exact order as they voted, but in many cases the names are recorded alphabetically. In one precinct this peculiarity permeated the entire list of 621 names. The contestant was able to examine only one witness in the parish, the officers of the law on whom he depended for the serving of subpoenas refusing or neglecting to do their duty. Although the evidence impeached the fairness and integrity of the commissioners of election in the parish, the sitting Member produced not one of them to testify. The majority of the committee were "of the opinion that the election in this parish was a sham and a fraud and that the returns therefrom ought to be wholly rejected." The minority of the committee, whose views were presented by Mr. Joseph W. Bailey, of Texas, agree that this parish should be excluded.

(b) From Ouachita Parish the returned vote was 1,777 for Boatner and 631 for Benoit. The majority of the committee concluded that the evidence "taken as a whole, establishes the fact that there was such intimidation practiced upon the colored voters as to prevent a free and fair election there, and that for this reason the vote of Ouachita Parish should be rejected from the count." The committee continue:

It appears that for many years, commencing in the year 1876, personal violence had been openly inflicted upon the colored electors by the white Democrats of the parish with a view of depriving them of their right of suffrage. This measure had worked the desired effect and had very largely deterred them from voting.

The evidence shows that this open personal injury was not deemed by these whites to be necessary in very recent years, and therefore was only occasionally inflicted. Milder, but nevertheless lawless and coercive expedients were accordingly substituted for it by them. The colored voter, with a vivid recollection of the great wrongs to which he had been subjected, needed only to be threatened with a recurrence of these wrongs in order to deprive him of his free will, and either keep him from the polls altogether, or else compel him to vote the Democratic ticket.

Accordingly, the latter-day plan and the one employed at this election by the friends and supporters of Boatner consisted in "visiting" him before the election and in threatening him with the consequences in the event he dared to vote his own sentiments.

The Democratic planters claimed and exercised the right to vote their "black hands" for Boatner. These "hands" were too timid and defenseless to make any resistance and hence became the victims of this unlawful practice.

The majority of the committee also say:

In passing upon this question of intimidation the committee have had in mind certain propositions which seemed to them to be sound, and in the light of which they have reached the conclusion above announced.

They recognized the fact that coercive measures do not operate alike upon all voters. That which would have no effect whatever upon one class might, nevertheless, exert an irresistible influence upon another class.

It is therefore believed that in determining whether or not intimidation exists in any case, due regard should always be had to the mental and physical organization of the particular electors upon whom the wrong is charged to have been inflicted, their relation to the alleged wrongdoers, their condition of dependence or independence, and, indeed, to their whole environment as well as to the character and disposition of the wrongdoers themselves. Nor is it, in the opinion of the committee, either a logical or a just doctrine that the oppressive acts which will avoid an election must necessarily be of such a character as to overpower the will of voters of reasonable courage and intelligence. Such a principle as this would, in its practical operations, result in the disfranchisement of the weak and the ignorant electors, who should ever be the object of the law's solicitude, and in the arrogation of political power into the hands of the electors who are strong and well informed.

It is evident, too, that physical violence against the person of the elector is not the sole criterion by which the existence or nonexistence of intimidation is to be determined, since some electors might be beaten without being at all terrorized, while other electors might be put in great fear without the striking of a single blow. Nor do the committee believe that in passing upon the question as to whether intimidation prevailed the examination should be limited to the unlawful acts committed against the voters at the very time of the election in contest. It is often the case that preceding occurrences, although somewhat remote in point of time, give great significance and momentum to recent acts of oppression, and thus become very proper subjects for examination and consideration.

The minority of the committee do not consider that the evidence supports the conclusions of the majority as to intimidation, and do not assent to the exclusion of the vote.

2. In other parishes the majority of the committee corrected, but did not reject, the entire returns.

(a) In Concordia the returns gave sitting Member 1,675 votes and contestant 46. In several precincts no votes at all were returned for contestant. The testimony showed some informalities and irregularities, but there was other testimony that the election was fairly and honestly conducted. The committee, therefore, except for a slight correction in one precinct, did not interfere with the vote as returned, "although they regard the practical unanimity of the electors upon one candidate as one of the most remarkable occurrences in modern politics."

(b) At Madison Parish one witness testified as to intimidation and one as to bribery, but the committee determined that the returned vote should stand.

(c) In Catahoula Parish the majority of the committee reject the entire vote of the Jonesville precinct, which returned 497 for Boatner and none for Benoit. In this precinct the election officers were all of sitting Member's party, the registrar of the parish failed to furnish the poll list, as required to do by law, and there was evidence to show not only that the returned vote was greater than the number of voters in the precinct, but also that it was far larger than the number who actually voted. The committee say:

In the absence of the poll list it was of course impossible to hold a fair and honest election, for the reason that it could not be definitely known who was entitled to vote.

In Glade precinct, where 115 votes were returned for sitting Member and none for contestant, uncontradicted testimony showed that only 30 honest votes were polled, all for Boatner. Therefore the committee credited him only with that number.

A similar correction was made at Robertson precinct, where the election officers swore that the tally sheets had been tampered with and their names thereto forged. The testimony of these officers, who were partisans of sitting Member, indicated that 23 honest votes were probably cast for sitting Member and 2 for contestant. The committee adopt these figures instead of 135 for sitting Member and 2 for contestant as returned.

The majority of the committee, in conclusion, find that with all the deductions and rejections there still remains a majority of 802 for sitting Member. Therefore they conclude:

While the evidence establishes the fact that flagrant frauds were perpetrated in all of Tensas Parish, and in a portion of Catahoula Parish, and that intimidation prevailed generally throughout the parish of Ouachita, still the committee do not feel justified in recommending that the election be held void and the seat declared vacant, for the reason that these three parishes constitute only one-fifth of the total parishes of the district, and their entire rejected vote does not amount to one-third of the vote cast therein at the election.

The committee are not sure that the fraud and intimidation were so extensive and general throughout the district as to render it certain that there was not a free and fair expression by the great body of the electors, however strongly they may suspect this to have been the case.

The resolutions confirming sitting Member in his seat were agreed to without division on February 15.¹

341. The Louisiana election case of Beattie v. Price, in the Fiftyfourth Congress.

An election having been peaceable in three-fourths of a district, it was not declared invalid because of violence and intimidation in the remainder.

On February 5, 1897,² Mr. Robert W. Tayler, of Ohio, from the Committee on Elections No. 2, submitted the report of a majority of the committee in the case of Beattie v. Price, of Louisiana. The official returns gave the sitting Member a plurality of 5,766 votes over the contestant, which the contestant sought to overcome, alleging fraud, violence, and intimidation.

As to a preliminary question the committee say:

An important preliminary question arose on the motion made by the contestee to suppress a portion of the contestant's evidence on the ground that it had not been taken in compliance with the law. This objection in the main was to the effect that no proper notice had been given that the testimony of the witnesses would be taken and that there was no evidence of the official character of the persons before whom the testimony was taken.

Your committee has examined all of the testimony in the case, but, in view of the conclusion at which it has arrived, it is not necessary to decide upon this preliminary motion. We have considered the testimony as if it had been regularly taken, but are not to be understood as approving or justifying the taking of testimony without serving notice on the opposite side of the names of witnesses to be examined.

¹Journal, p. 174.

²House Report No. 2812, second session Fifty-fourth Congress; Rowell's Digest, p. 527.

The majority of the committee note the fact that the population of the district consisted of 115,533 whites and 98,916 colored people; and quote documents to show that contestant was the nominee of an organization of white Republicans who discouraged the cooperation of colored Republicans. The minority, in their views (subscribed to by Messrs. Henry U. Johnson, of Indiana, Chester I. Long, of Kansas, and Jesse B. Strode, of Nebraska), deny this proposition, and claim that in many districts the organization invited the cooperation of colored voters.

Both majority and minority of the committee agreed that contestant had not made out a title to the seat; but join issue on the question as to whether or not there was a valid election. The majority of the committee say:

There is nothing in this case to justify the claim that there was "no free and fair expression by the great body of the electors."

So far as the testimony shows there was a "peaceable and fair election" in not only "some of the precincts and parishes," but in most of them.

There are 166 polling places in the district, and as to more than three-fourths of them there is not a syllable of testimony showing fraud, violence, or intimidation. If we were to admit all that the contestant claims as to the force and effect of the testimony respecting certain precincts, and then infer that like conditions existed in the 125 precincts concerning which there was no such testimony, we might be led to take a drastic course. If we did, we should be compelled to seat the contestant. No matter which way we look, or what construction we put on the testimony, we must hold that either the contestant or the contestee is entitled to a seat in this House.

There is evidence showing that in several of the parishes of this Congressional district there was some violence. This existed probably by reason of the momentum of earlier resorts to violence and intimidation. In the parish of Lafourche two colored men lost their lives and one disappeared. The supporters of the contestant insists that these deaths, which were violent, and the disappearance were due to the fact that the three colored men were supporters of the contestant. The testimony, while inconclusive, points in that direction as to Talley Whitehurst.

After describing the murder of Whitehurst, the majority say:

Atrocious as this crime was, whatever may have been its cause, it had but little if any effect on the election, and, coupled with every other circumstance of fraud, violence, or intimidation, testified about in the district, is very far from seriously affecting the plurality the contestee received.

The minority say, however:

In our opinion the record discloses widespread intimidation of the colored voters by the supporters of Price—intimidation practiced in a majority of the parishes of the district, the effect of which was to deter great numbers of them from attending the election and casting their ballots for Beattie.

For instance, the killing of Tally Whitehurst, a prominent colored Republican, and a supporter of Beattie, who resided in the parish of Lafourche, is clearly shown by the evidence to have been a cold-blooded and premeditated murder, perpetrated by some of the white friends and supporters of Price, a few days before the election, solely for political purposes, and to intimidate the colored voters.

It appears that this murder had the desired effect not only in Lafourche but also in one or two of the adjoining parishes.

We concur in the opinion of the committee that Beattie is not entitled to be seated, but disagree with their conclusion that Price is entitled to the seat.

We are convinced that fraud and intimidation prevailed so extensively and generally throughout the district as to prevent a free and fair expression by the great body of the electors, and we believe, therefore, that the election should be declared void and the seat left vacant.

The majority report and minority views were ordered printed when presented in the House on February 5,¹ but there is no record of further action.

¹ Journal, p. 143; Record, p. 1586.

342. The Senate election case of Sykes v. Spencer, from Alabama, in the Forty-third Congress.

The Senate gave immediate prima facie effect to credentials regular in form, but impeached by a memorial and historical facts relating to rival legislatures.

The question of the competency of the electing legislature as an inherent part of a prima facie showing discussed by the Senate.

On December 13, 1872,¹ in the Senate, Mr. Oliver P. Morton, of Indiana, presented the credentials of George E. Spencer, elected a Senator by the legislature of Alabama for the six years commencing March 4, 1873.

On February 28, 1873,² Mr. George Goldthwaite, of Alabama, presented a memorial of Francis W. Sykes, claiming the seat for which Mr. Spencer had credentials. This memorial impeached at length the title of Mr. Spencer.

On March 6, 1873,³ during the swearing in of the new Senators, Mr. Thomas F. Bayard, of Delaware, objected to the administration of the oath to Mr. Spencer, on the ground that another claimant bore credentials for the seat.

It appeared that Mr. Spencer bore credentials in regular form—or at least in form as regular as most credentials presented—and signed by a governor whose position, both de jure and de facto was unquestioned. But the Senate had knowledge, both from the memorial of Mr. Sykes and historically, that Mr. Spencer was elected by one of two legislative bodies, each claiming to be the legislature of Alabama.

It appeared that there was presented on behalf of Mr. Sykes as credentials certificates signed by the officers of the other of the two rival bodies setting forth his election.

In the debate the cases of Goldthwaite and Ransom were referred to as recent precedents.

The prima facie affect of credentials was discussed at length, and it was urged on the one side that the competency of the legislature electing was an essential question inhering in the prima facie case.

On the other hand it was urged that Mr. Spencer was certified as elected in accordance with the law of Congress (act of 1866), and the effect of that title should not be overthrown by a mere memorialist.

On March 7⁴ a motion to postpone the administration of the oath to Mr. Spencer until the next day was disagreed to—yeas 24, nays 32.

Then, after further debate, the question was taken: “Shall the oath be now administered to Mr. Spencer?” and it was decided in the affirmative without division.⁵

Thereupon Mr. Spencer appeared and took the oath.

¹Third session Forty-second Congress, Globe, p. 172.

²Globe, p. 1930. Also Senate Misc. Doc. No. 94, Third session Forty-second Congress.

³Special session of Senate, Forty-third Congress, Record, pp. 3–29.

⁴Record, p. 22.

⁵Record, p. 29.

On December 8, 1873,¹ Mr. John B. Gordon, of Georgia, submitted the following resolution; which was considered by unanimous consent, and agreed to:

Resolved, That the memorial of Francis W. Sykes, claiming to be a Senator-elect from the State of Alabama, with accompanying documents, be referred to the Committee on Privileges and Elections, with power to send for persons and papers.

343. The Senate election case of Sykes v. Spencer, continued.

A legislative body recognized by the State executive and having an elected but not certified quorum, was once preferred to a rival body having a certified but not elected quorum.

On April 20² Mr. Matt. H. Carpenter, of Wisconsin, submitted the report of the Committee on Privileges and Elections.³ The report began with a statement of the history of the case:

Mr. Sykes claims the seat now held by Hon. George E. Spencer as Senator from the State of Alabama; and his claim is based upon the assertion that the body claiming to be the legislature of the State of Alabama which elected the said Spencer was not the rightful legislature of that State, but that another body of men was such legislature; and that the latter body, on the 10th day of December, A. D. 1872, duly elected the said Sykes to be the Senator of the United States for that State for the term of six years commencing on the 4th day of March, A. D. 1873.

It is a fact that for some time after the day fixed by law for the organization of the legislature of that State, in 1872, there were two bodies, each claiming to be the legislature of that State—one known as the statehouse legislature, which pretended to elect Mr. Sykes, and the other known as the courthouse legislature, which pretended to elect Mr. Spencer; and the question is, which of these two bodies ought to be considered the rightful legislature at that time? On the 3d day of December, 1872, the court-house legislature, so called, pretended to elect Mr. Spencer. The governor of the State certified that Mr. Spencer had been duly elected on that day by the legislature of the State; and the Senate, upon that certificate, seated Mr. Spencer as a Senator for the term in question. The first question is, therefore, whether the body of men which pretended to elect Mr. Spencer can properly be regarded as the legislature of the State at the time of such pretended election. If so, Mr. Spencer's election was valid, and, of course, if that be so, Mr. Sykes can have no right to the same seat during the same term.

After further reviewing the law of Alabama and the details of the case, the report continues:

The contest between these two legislatures depends upon this: In the statehouse legislature were eight or nine members who had received regular certificates of election, but who are conceded not to have been elected. There were of this class a sufficient number, together with unquestioned members, to make a quorum in both houses of the statehouse legislature. In the court-house legislature persons claiming the seats of this class of members of the statehouse legislature assembled with others who were undoubtedly members-elect to the senate and house of representatives, and thereby constituted in numbers a quorum of the two houses at the court-house. And the question is, whether at the time the election of Spencer took place by the court-house legislature that legislature, composed of a quorum of the persons actually elected, should be regarded as the legislature of the State; or whether the statehouse legislature, a quorum in both houses being made by this class of persons who in fact were not elected but had the regular certificates of election, should be regarded as the legal legislature. And this again depends upon another question: Whether for the time being, and until some decision by

¹ First session Forty-third Congress, Record, p. 79.

² Record, p. 3186; Senate Report No. 291.

³ This committee consisted of Messrs. Oliver P. Morton, of Indiana; Matt. H. Carpenter; John A. Logan, of Illinois; J. L. Alcorn, of Mississippi; Henry B. Anthony, of Rhode Island; John H. Mitchell, of Oregon; Bainbridge Wadleigh, of New Hampshire; Wm. T. Hamilton, of Maryland, and Eli Saulsbury, of Delaware.

the two houses could be arrived at, the eight or nine persons holding certificates without the election or the eight or nine persons elected but having no certificates are to be considered as entitled to act and form part of the legislature of the State.

The report then quotes the law as to contesting elections, and concludes:

It is not pretended that the persons who were elected, but had not received certificates of election, took the steps required by this statute to contest the seats of the persons who held the certificates, but had not been elected. It is claimed, and with great force, that, until a contest, in the manner provided by law, the members who had received the certificates of election, although those certificates had been erroneously delivered and they were not in fact elected, were entitled to sit as members of the legislature. It is undoubtedly true that had all the persons claiming to be members of the legislature met in the statehouse, and the two houses had proceeded there to organize, the persons holding the certificates, without the election, would have been entitled to their seats until the persons who had been elected, but had received no certificates, should make contests for their seats and their claim should be determined by the houses themselves.

The matter, then, comes to this: The statehouse legislature was the legislature in form, and the court-house legislature was the legislature in fact. While these two pretended legislatures were in existence, each claiming to possess the legislative power of the State, Spencer was elected to the Senate by the court-house legislature, and Sykes was elected by the statehouse legislature. Spencer was first elected, and on the day of his election the court-house legislature was recognized by the governor as the legal legislature of the State. Therefore, in determining as to the right of Spencer or Sykes to this seat, the Senate is compelled to choose between the body in fact elected, organized, acting, and recognized by the executive department as the legislature, and another body, organized in form, but without the election and without a recognition on the part of the executive of the State at the time they pretended to elect Sykes. When we consider that all the forms prescribed by law for canvassing and certifying an election, and for the organization of the two houses, are designed to secure to the persons actually elected the right to act in the offices to which in fact they have been elected, it would be sacrificing the end to the means were the Senate to adhere to the mere form, and thus defeat the end which the forms were intended to secure.

The persons in the two bodies claiming to be the senate and house of representatives who voted for Spencer constituted a quorum of both houses of the members actually elected; the persons in the statehouse legislature who voted for Sykes did not constitute a quorum of the two houses duly elected, but a quorum of persons certified to have been elected to the two houses. Were the Senate to hold Sykes's election to be valid, it would follow that erroneous certificates, delivered to men conceded not to be elected, had enabled persons who in fact ought not to vote for a Senator to elect a Senator to misrepresent the State for six years. On the other hand, if we treat the court-house legislature as the legal legislature of the State, it is conceded that we give effect to the will of the people as evidenced by the election. So that, to state the proposition in other words, we are called upon to choose between the form and the substance, the fiction and the fact; and, considering the importance of the election of a Senator, in the opinion of your committee the Senate would not be justified in overriding the will of the people, as expressed at the ballot box, out of deference to certificates issued erroneously to persons who were not elected.

In the opinion of your committee it is not competent for the Senate to inquire as to the right of individual members to sit in a legislature which is conceded to have a quorum in both houses of legally elected members. But undoubtedly the Senate must always inquire whether the body which pretended to elect a Senator was the legislature of the State or not; because a Senator can only be elected by the legislature of a State. In this case, Spencer having been seated by the Senate, and being *prima facie* entitled to hold the seat, the Senate can not oust him without going into an inquiry in regard to the right of the individual persons who claim to constitute the quorum in these respective bodies at the courthouse and at the statehouse. We can not oust Spencer from his seat without inquiring and determining that the eight or nine individuals who were elected were not entitled to sit in the legislature of the State because they lacked the certificates. But if the Senate can inquire into this question at all, it must certainly inquire for the fact rather than the evidence of the fact. It can not be maintained that when the Senate has been compelled to enter upon such an examination it is estopped by mere *prima facie* evidence of the fact, and the certificate is conceded to be nothing more than *prima facie* evidence. But

the Senate must go back of that to the fact itself, and determine whether the persons claiming to hold seats were in fact elected. When we do this we come to the conceded fact that these persons lacking the certificate had in fact been elected, and that the persons who claimed to be the quorum of the two houses were in fact the persons who, in virtue of the election, were entitled to constitute the quorum of both houses.

So that, in any view of the matter which your committee can take, we are of opinion that Mr. Sykes makes no case entitling him to the seat now occupied by Mr. Spencer, and your committee ask to be discharged from the further consideration of the memorial of Mr. Sykes.

The minority views were subscribed by Messrs. Saulsbury and Hamilton, took issue with the majority, and argued elaborately that the statehouse legislature was the real legislature, and that it alone might decide as to the elections of its own members.

The report was debated at length on May 27 and 28,¹ and at the conclusion of the debate the question recurred on the resolution of the committee:

Resolved, That the Committee on Privileges and Elections be discharged from the further consideration of the memorial of Francis W. Sykes.

On motion by Mr. Hamilton, of Maryland, to amend the resolution by striking out all after the word “resolved” and in lieu thereof inserting—

That the Hon. George E. Spencer, not having been elected a Senator from the State of Alabama by the lawful legislature of that State, is not entitled to a seat in this body.

After debate, it was determined in the negative—yeas 11, nays 33.

On motion by Mr. Hamilton, of Maryland, to amend the resolution by striking out all after “resolved” and in lieu thereof inserting—

That Francis W. Sykes, having been duly and legally elected a Senator from the State of Alabama for the constitutional term commencing March 4, 1873, is entitled to the seat in this body now held by the Hon. George E. Spencer.

It was determined in the negative.

The question recurring on the resolution reported by the Committee on Privileges and Elections, viz:

Resolved, That the Committee on Privileges and Elections be discharged from the further consideration of the memorial of Francis W. Sykes.

On the question to agree thereto, it was determined in the affirmative.

344. The Senate election case of Sykes v. Spencer, continued.

Decision of a committee, acquiesced in by the Senate, that an election case once definitely settled might not be reopened.

On Thursday, December 16, 1875,² Mr. Spencer, rising to a question of privilege, referred to certain charges made in the legislature of Alabama, and proposed a resolution for an investigation of the subject so far as he was concerned personally. But on suggestion from Mr. Saulsbury, he modified it by broadening its scope, and in that form it was agreed to as follows:

Resolved, That the Committee on Privileges and Elections are hereby instructed to investigate into and inquire whether in the election of George E. Spencer as a Senator in Congress from the State of Alabama there were used, or caused to be used and employed, corrupt means or corrupt practices to secure

¹ Record, pp. 4287, 4325–4330; Appendix, p. 323.

² First session Forty-fourth Congress, Record, pp. 232, 233.

his election to the seat he now holds; and that said committee be empowered to administer oaths, to send for persons and papers, to take testimony, to employ stenographers and such clerical assistance as they may deem necessary, and to sit during the recess of Congress, if considered advisable, and to report the result of their investigations as soon as practicable.

Later, especially on January 24, 1876,¹ Mr. Goldthwaite presented the report of a joint committee of the general assembly of Alabama with evidence thereto relating to Mr. Spencer's election, and a memorial of the general assembly praying that the seat held by Mr. Spencer might be declared vacant.

On May 20,² Mr. Morton, from the Committee on Privileges and Elections, submitted a report as follows:

This testimony was *ex parte* in its character, very much of it hearsay, and could not be received by the committee as evidence.

The question whether Mr. Spencer was elected by the lawful legislature of Alabama, raised in the memorial referred to, and in the specifications filed before the committee by the counsel, Mr. Morgan, who represented the State of Alabama, was considered by a majority of the committee to have been fully settled in the contest for the seat occupied by Mr. Spencer, before made, in the Senate by Mr. Sykes.

The question in that contest was whether what was known as the court-house legislature, by which Mr. Spencer was elected, or the capitol legislature, by which Mr. Sykes was elected, was the lawful legislature of Alabama. After full consideration and argument of counsel, it was determined by the committee and afterwards by the Senate that the court-house legislature was the lawful one, and that Mr. Spencer and not Mr. Sykes was entitled to the seat.

The question having been definitely settled, it was considered by the committee that it was not competent for the committee or the Senate to reopen it, and that it must be treated as *res adjudicata*.

Upon the other branch of the inquiry, as to whether Mr. Spencer, or his friends, had been guilty of bribery, corruption, or other unlawful practices in procuring his election, the committee made faithful and diligent inquiry. Mr. Morgan, counsel for the accusers, subpoenaed and examined many witnesses, and, after the testimony was over, supported the charge against Mr. Spencer by a lengthy argument.

Those charges were not proven in any respect. No witness testified that Mr. Spencer had given, directly or indirectly, or offered to give money, or anything of value, in consideration of votes or support, in the Alabama legislature; nor was it shown that any of his friends had done so. Some hearsay testimony was offered to the effect that certain persons had said that they had received money in consideration for voting for Mr. Spencer for the Senate; but this testimony was ruled out by the committee. The persons alleged to have made these statements were competent witnesses, but were not produced, nor was it proven that any money had been paid to them for such a purpose by anybody, whether a known friend of Mr. Spencer or not.

The counsel for the accusers complain strongly of the rejection of such testimony; but its illegality and worthless character were too plain to require argument, and had it been admitted it might have contributed to make some scandal, but would have proved nothing. Attempts were made to offer the hearsay statements against Mr. Spencer of persons who were not shown to have been engaged with him in any conspiracy to procure his election by corruption or undue means, and by whose statements made in his absence he could not be bound by any known principle of law, which were also rejected by the committee.

While hearsay evidence was thus excluded, the door was thrown open widely to prove the payment of money by any person to any member of the legislature, or to be used with the legislature, to procure Mr. Spencer's election, by any person, whether such person was shown to be a friend of Mr. Spencer or not.

The committee deem it unnecessary to go into the full details of the case, and having thus given the general result, beg leave to be discharged from the further consideration of the resolution and memorial, and herewith submit copies of the testimony taken before the committee.

¹Record, p. 571.

²Record, p. 3227; Senate report No 331.

Mr. Saulsbury did not concur in all portions of the report, holding that the evidence relating to the invalidity of Mr. Spencer's election should have been presented, the case not being *res adjudicata* to the extent of preventing this.

345. The Senate election case of Ray and McMillen, of Louisiana, in the Forty-second Congress.

There being rival claimants bearing credentials from rival executives and chosen by rival legislatures, the Senate did not give prima facie effect to either credentials.

On January 22, 1873,¹ in the Senate, Mr. J. R. West, of Louisiana, presented the credentials of William L. McMillen, elected to the Senate to fill the unexpired term of William P. Kellogg.

State of Louisiana.

The following resolution was adopted by the senate and house of representatives of the State of Louisiana, in joint session, on Wednesday, the 15th day of January, 1873:

Whereas it appears by the journals of each house of the general assembly of the State of Louisiana that Hon. W. L. McMillen was, on the 14th day of January, 1873, elected United States Senator to fill the unexpired term of Hon. W. P. Kellogg:

Be it resolved by the senate and house in joint session, That the said election of Hon. W. L. McMillen be testified in accordance with the law.

D. B. PENN,

Lieutenant-Governor and President of the Senate.

J. C. MONCURE,

Speaker House of Representatives.

We certify the above to be a true copy of the minutes of the senate and house of representatives, adopted in joint session, January 15, 1873.

GEORGE B. SHEPHARD,

Clerk of the House of Representatives.

E. A. BURKE,

Secretary of the Senate.

STATE OF LOUISIANA,

EXECUTIVE OFFICE,

New Orleans, January 15, 1873.

I, John McEnery, governor of the State of Louisiana, do hereby certify that Davidson B. Penn, lieutenant-governor and president of the senate; J. C. Moncure, speaker of the house of representatives; E. A. Burke, secretary of the senate, and Geo. B. Shephard, chief clerk of the house of representatives, are the officers herein designated and described, and the foregoing signatures are genuine and entitled to credence as officers aforesaid.

Given under my hand and seal of the State, this 15th day of January A. D. 1873, and of the independence of the United States the ninety-seventh.

[L. S.]

JOHN MCENERY.

By the governor:

Y. A. WOODWARD,

Assistant Secretary of State.

¹Third session Forty-second Congress, Globe, p. 766.

Mr. West further announced that there was a contest in the case, and he presented thereupon the credentials of John Ray, as follows:

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
New Orleans, January 15, 1878.

I, William Pitt Kellogg, governor of the State of Louisiana, do hereby certify that on the 15th day of January, in the year of our Lord, 1873, John Ray was duly elected by the general assembly of this State to represent this State in the Senate of the United States, to fill the vacancy occasioned by the resignation of Hon. William Pitt Kellogg.

Given under my hand and the seal of this State, this 15th day of January, A. D. 1873, and of the independence of the United States the ninety-seventh.

[L. S.]

WILLIAM PITT KELLOGG.

By the governor.

P. G. DESLONDE,

Secretary of State.

No proposition was made to administer the oath to either claimant, and the credentials of both were referred to the Committee on Privileges and Elections.

To this committee had also been directed, on January 16, a resolution instructing it to inquire whether there was any State government in Louisiana, and to report a bill ordering an election there for the purpose of establishing a government, Republican in form.

346. The Senate election case of Ray and McMillen, continued.

Discussion of the authority of a decision of a State court over the determinations of the Senate in judging of the elections of its members.

Reference to inquiry as to existence of a Republican form of government in a State.

On February 20, 1873,¹ Mr. Matt. H. Carpenter, of Wisconsin, presented the report of the committee, Messrs. John A. Logan, of Illinois; J. L. Alcorn, of Mississippi, and H. B. Anthony, of Rhode Island, concurring therewith. He also reported a bill (S. 1621) in accordance with the instructions, and the following resolutions:

Resolved, That there is no State government at present existing in the State of Louisiana.

Resolved, That neither John Ray nor W. L. McMillen is entitled to a seat in the Senate, neither having been elected by the legislature of the State of Louisiana.

The report describes at length and in detail the political complications existing in Louisiana, involving the disputes of rival returning boards for control of the election returns; of the election of November 4, 1872; the interposition of the Federal courts and Executive; the existence of two rival legislatures and the two rival executives represented by the credentials before the Senate. The questions were largely as to facts; but the report discusses one feature which was an essential point of difference in the committee. It was claimed for the State government, represented by Governor Kellogg, that it was recognized as legal by the State supreme court, the highest judicial authority in Louisiana.

¹ Globe, p. 1520; Senate election cases, Fifty-eighth Congress, special session, Senate Document No. 11, p. 482.

The report of the committee says on this point:

The only question to be settled by this suit was whether Morgan, the relator, or Kennard, the defendant, was entitled to hold the office of associate justice of the supreme court in place of Howe, resigned; and the idea that in disposing of this single question the court had any authority or jurisdiction to determine as between Warmoth and Pinchback, neither of whom was a party to the cause, which of them was entitled to exercise the office of governor, and between 200 or 300 persons, the Kellogg legislature, and as many more, the McEnery legislature, not one of whom was a party to the suit, which of the rival bodies was authorized to exercise the legislative power of that State, is too preposterous a proposition to require serious refutation.

The utmost that can be claimed for this decision is that the court recognizes the Kellogg government as a government *de facto*, which may be conceded without touching the question whether it has been established by a regular election or set up and established by the usurpation of the individuals composing it, sustained by the military forces of the United States.

The question we are considering is not a judicial question and no judicial court can determine it. The question is political in its character, and, so far as the United States have to deal with it, must be determined by the political department of this Government. We must therefore investigate the facts, and no decision of any branch of a pretended State government can estop us in this inquiry.

The people of the State are about equally divided in sentiment in regard to these two pretended governments. The people of New Orleans, which is the seat of government, support the McEnery government, two to one; and it is believed that if Federal support were withdrawn from the Kellogg government it would be immediately supplanted by the McEnery government. The people of the State, as a body, neither support nor submit to either government. Neither government can collect taxes, for the people have no assurance that payment to one will prevent collection by the other government. Business is interrupted and public confidence destroyed; and should Congress adjourn without making provision for the case, one of two things must result: Either collision and bloodshed between the adherents of the two governments, or the President must continue the support of Federal authority to the Kellogg government. The alternative of civil war or the maintenance by military power of a State government not elected is exceedingly embarrassing; and in the opinion of your committee the best solution of this difficulty is for Congress to order a reelection, and provide for holding it under authority of the United States, to the end that a government may be elected by the people, to which they will submit, or which, in case of disturbance, the United States can honestly maintain.

Mr. Lyman Trumbull, of Illinois, in individual views filed by him, said on this point:

This pretended legislature, installed in power by the aid of the United States Army, in pursuance of a void order of a United States district judge, proceeded to elect John Ray to represent the State of Louisiana in the Senate of the United States; and it is said the Senate must receive him because the supreme court of Louisiana has decided the Pinchback legislature to be the rightful legislature of the State, and that the Senate is bound to follow the decision of the State court as to what constitutes its legislature.

It is true, as a rule, that the Federal courts follow the decisions of the State courts in regard to the construction of their own constitution and laws; but it is not true that the legislative department of the Government follows the decisions of the courts upon political questions. The inquiry, what is the established government in a State, belongs to the political and not the judicial power. The Senate, by the Constitution, is made the sole and only judge of the election of its members, who can only be chosen by the legislatures of the respective States. Ordinarily the body recognized in a State as its legislature would be held by the Senate to be the body authorized to elect a Senator; but when, as in the case of Louisiana, there are two bodies in a State, each claiming to be its legislature, and each of which has chosen a person to represent the State in the Senate, in deciding between the claimants the Senate must necessarily determine which body was the rightful legislature and had authority to make the election.

In view of the facts as shown to exist in Louisiana, the decisions of its courts in favor of the validity of the Pinchback legislature are entitled to no respect whatever. As has been already shown, that legislature was not elected nor brought into being by the people of the State, but owes its existence to the void proceedings of the United States court supported by military force.

Mr. Oliver P. Morton, of Indiana, in views filed by him, said:

The Constitution says that "the Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years." The manner of constituting the legislature is left absolutely to each State, and the question of its organization must be left to be decided by such tribunals or regulations as are provided by the constitution and laws of the State; and the only question about which the Senate may inquire in determining the admission of Senators is whether they have been chosen by the legislature of the State—that legislature recognized by the State or whose organization has been accepted by other departments of the State government. Under our complex system of government, all questions of the organization of State governments, under their own laws, must be left to the decision of the tribunals in such States created for that purpose; and when such decisions have been made they must be accepted by the Government of the United States in their dealings with such States. It is no answer to this to say that in a particular case such tribunals will or have decided wrongfully. The Government of the United States has no right to review their decisions so long as the State possesses a government republican in its form.

The doctrine that all questions of election arising exclusively under the constitution and laws of a State must be left to the settlement and determination of the proper tribunals created by the State for the adjustment of such matters was distinctly recognized by the Supreme Court of the United States in the celebrated case of *Luther v. Borden*, growing out of the attempt in the State of Rhode Island to overturn the old charter government and establish a new one in its stead. In that case the Supreme Court said:

"The point, then, raised here has been already decided by the courts of Rhode Island. The question relates altogether to the constitution and laws of the State; and the well-settled rule in this court is that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of a State. Upon what ground could the circuit court of the United States, which tried this case, have departed from this rule and disregarded and overruled the decision of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals."

But the reason for the rule in *Luther v. Borden* is much stronger in this case than in that. In that case there was an attempt to set up a new constitution over the old charter, under which it was claimed that a new government had been organized throughout, involving a new supreme court, as well as legislature and State officers. But in Louisiana there is but one constitution and but one supreme court, which is recognized by all parties, and no attempt made to set up another in its stead, and the only question is as to who were elected State officers and members of the legislature under the recognized constitution and laws of the State, of which the supreme court must necessarily be the final arbiter.

There is no impeachment of the supreme court of Louisiana presented to the committee or to the country. All its members but one were placed upon the bench in 1868, before the present troubles arose, and hold their office for four years longer; and although imputations have been cast upon its action, I know of no foundation for them, and it is not legitimate for Congress to make an inquiry into its motives. The power and duty conferred upon the United States by the fourth article to guarantee to every State in the Union a republican form of government is political in its character and not subject to revision by the judiciary; but when, upon inquiry, it is ascertained that a State has an existing government in active operation, which is not obstructed by violence, in which each department is mutually recognized by the other, and which is republican in its form, there is no foundation for the interference of Congress, and no condition to which its power can attach; and although its officers may have been elected by fraud or installed without election, yet all questions in relation to them must necessarily arise under the constitution and laws of the State, and, under the decision in *Luther v. Borden*, be referred for determination to the tribunal of the State.

The bill reported by the committee was debated at great length on February 27, 1873,¹ and the bill was rejected, yeas 18, nays 20.

¹ *Globe*, pp. 1850–1896.

The resolutions reported by the committee were not acted on, and the time for which the claimants to the seat had been chosen expired without action on their claims and without either of them taking the seat.

347. The Senate election case of Pinchback, McMillen, Marr, and Eustis from Louisiana, in the Forty-third, Forty-fourth, and Forty-fifth Congresses.

There being conflicting credentials from rival claimants to the office of governor, the Senate referred the papers before considering the question of swearing in either claimant to the seat.

Instance wherein a committee, being equally divided, reported to the Senate its inability to present a proposition for action.

The Senate tabled a motion to receive a telegram relating to credentials of a claimant to a seat.

On January 21, 1873,¹ in the Senate, Mr. J. R. West, of Louisiana, presented credentials of P. B. S. Pinchback as Senator from Louisiana for the term commencing March 4, 1873. These credentials were laid on the table.

On March 3, 1873,² the Vice-President laid before the Senate a telegraphic dispatch from John McEnery, "governor of Louisiana," as follows:

I have the honor to inform you that Hon. William L. McMillen was, on the 28th instant, duly elected Senator in the Congress of the United States by the legislature of the State of Louisiana for the term commencing March 4, 1873. His credentials were mailed to him yesterday.

Mr. West having objected to the reception of the telegram, a debate arose as to its nature. It was pointed out that the credentials were often presented in the Senate in advance, but there was no validity in them until the time arrived for the person to whom they related to claim the seat. The credentials themselves from Louisiana raised no question at this time, and the dispatch was simply a notification as to them.

The question being put on the reception of the telegram, the question of reception was laid on the table.

On the same day³ Mr. Carl Schurz, of Missouri, presented a memorial from W. L. McMillen, respectfully asking the Senate to take notice of the fact of his election. This memorial was laid on the table.

On March 7, 1873,⁴ at the special session of the Senate, Mr. West presented the credentials of W. L. McMillen, which were laid on the table.

On December 4, 1873,⁵ on motion of Mr. Oliver P. Morton, of Indiana, these credentials were referred to the Committee on Privileges and Elections, no proposition being made to administer the oath to either claimant.

On December 15,⁶ Mr. Morton, from the Committee on Privileges and Elec-

¹Third session Forty-second Congress; Globe, p. 728.

²Globe, p. 2147.

³Globe, p. 2165.

⁴Special session of Senate, Forty-third Congress; Record, p. 29.

⁵First session Forty-third Congress; Record, p. 57.

⁶Record, pp. 188-191.

tions, to whom were referred the credentials of P. B. S. Pinchback and W. L. McMillen, claiming seats in the Senate as Senators from Louisiana, reported that the committee were evenly divided upon the question as to whether Mr. Pinchback was, upon his credentials, entitled to be sworn in as a member, and asked to be discharged from further consideration of the subject, and to refer the whole matter to the determination of the Senate.

Mr. Morton submitted the following resolution for consideration; which was ordered to be printed:

Resolved, That the credentials of P. B. S. Pinchback for a seat in the Senate of the United States for six years, commencing on the 4th of March, 1873, being in regular form, he is entitled under the law, and in conformity with the usages of the Senate, to be sworn in as a member; and that whatever grounds of contest there may be as to his right to a seat should be made thereafter.

Mr. Morton submitted the above resolution individually as a Senator, the committee having authorized no proposition.

348. The Senate election case of Pinchback and others, continued.

In an election case the Senate considered so far as applicable testimony taken by its committee in a former Congress, in a matter to which neither contestant was a party.

Discussion in the Senate as to whether or not the competency of the electing body is a question of determining importance in considering the prima facie effect of credentials.

The credentials of Mr. Pinchback were issued by William Pitt Kellogg, as governor, and those of Mr. McMillen by John McEnery, as governor. It appeared from the debate that Mr. Pinchback's election took place on the same day and by the same legislature that had elected John Ray, whose claim to a seat for an unexpired portion of a term as Senator had not reached a decision in the preceding Congress.¹

At the outset of the discussion, on December 15,² Mr. Orris S. Ferry, of Connecticut, moved to take from the files of the Senate for consideration in connection with this case the reports and evidence taken in the last Congress in the Louisiana case by the Committee on Privileges and Elections.

At once there arose objection to this course, it being pointed out by Mr. Roscoe Conkling, of New York, that the document in question recorded the result of an investigation in another case.

Speaking, on December 16,³ Mr. Oliver P. Morton, of Indiana, said:

This question has never been before the committee, nor has it ever been before the Senate; and so far as that volume of testimony is concerned, while I have no sort of objection to anybody referring to it for any purpose, it is no part of the *res gestae*. It is not a part of this case. It was taken before a different committee. The committee has been twice reorganized since that time. It was taken at a former session of Congress in a proceeding to which Mr. Pinchback was not a party and for which he is nowise responsible; and while it is here for reference, as every document in the document room is, and every book in the Library is, it is no part of this case.

¹ See section 345 of this work.

² Record, pp. 189, 191.

³ Record, p. 222.

Replying on January 30,¹ Mr. Matt. H. Carpenter, of Wisconsin, said on this point, speaking as to Mr. Pinchback's status:

His prima facie case is overturned. The presumption that might spring from reading these papers is rebutted by the full proof of the fact that a committee of this body unanimously, except one of its members, has reported to you, and that report lies upon your table today, or in your document rooms, that there was no State legislature and there was no State government in Louisiana on the 15th day of January last, when it is pretended Pinchback was elected. Again, the Senator says this testimony was not taken in Mr. Pinchback's case; it was taken in Mr. Ray's case, and therefore Mr. Pinchback is not to be affected by it. Why, sir, in a judicial court, for reasons that pertain to such tribunals alone, the testimony taken in a case between Smith and Jones can not be used in a case between Brown and Gray, for the reason that each is entitled to cross-examine witnesses whose testimony is to affect him.

At this point Mr. Morton interposed to say that the resolution instructing the committee to inquire whether there was any State government in Louisiana was offered on the 16th of January, 1873, and the credentials were not presented to the Senate until some time afterwards. That investigation was already ordered before the credentials were presented to the Senate.²

To this Mr. Carpenter replied:

If the investigation had no reference to Mr. Ray's case; if it was an independent proceeding ordered by the Senate to ascertain an important fact upon which we might be called to legislate, then it binds all the world; all mankind were parties to that investigation. * * * It was not a proceeding in Ray's case, and Mr. Pinchback was as much a party to the proceeding as any other citizen of the United States.³

Mr. Carpenter then proceeded to read from Lewis's Reasonings and Methods in Politics to show that the process of ascertaining facts for legislative purposes was not so formal or subject to such strict rules of evidence as in judicial departments.

So I say [he continued] that the information which is furnished to the Senate by the report and testimony of this committee not only comes within the rules of evidence upon which legislative bodies must act, but that it was obtained in a proceeding instituted by its own authority, conducted by its own members, exercising its own powers to send for persons and papers, and conducted, too, under the supervision of the Senator from Indiana himself; and I say that it is before us, as evidence in this case, and in all cases, and for all purposes. The Senator says it is before us like any other volume in the document room, or any book in the library. I am willing to accept that expression, because every book in the library which gives us a fact of history applicable to this case, every law book which discusses the questions involved in this case, and every document in any room of this Capitol which furnishes information bearing upon this subject is legitimately and properly before us this morning.

Thereafter during the debate the report in question was referred to and quoted from freely.⁴

¹Record, p. 1037.

²The record of the case of Ray and McMillen in the Forty-second Congress shows that this statement is accurate; but the credentials were referred to the committee in season to be taken into consideration in its report.

³This is not wholly accurate. On January 16, 1873, the committee were directed to require and report as to the existence of a legal State government. On January 22, the credentials of Ray and McMillen were presented and referred to the committee. On February 20 the committee reported both as to the existence of a legal State government and as to the rights of Ray and McMillen.

⁴On March 3, 1876, while this question was still pending, Mr. George F. Edmunds, of Vermont, took the same view as Mr. Carpenter took. First session Forty-fourth Congress, Record, p. 1437.

Proceeding to the merits of the case, Mr. Morton asserted¹ the proposition that if William Pitt Kellogg, who as governor issued the credentials of Mr. Pinchback, was the lawful governor, then Mr. Pinchback was entitled to take the seat without delay, and any contest to be made must be made thereafter. While he would discuss in this connection the status of the legislature, he did not consider it necessarily involved in the argument. He referred in support of this view to the precedents in the cases of Senator Goldthwaite, of Alabama, and of Potter v. Robbins, from Rhode Island.²

Mr. Carpenter did not admit that these precedents sustained Mr. Morton's argument,³ and said:

When a gentleman comes to this body with credentials in due form, showing that he has been elected by a body authorized to elect a Senator, then he has a prima facie case. The case then before the Senate (Goldthwaite case), * * * was such a case. There was a question made here as to individuals sitting in the legislature of Alabama, but there was no question that the body itself was the legislature of the State; and the better opinion is that the Senate has no authority to inquire into the right of individual members of a State legislature to sit therein, that being a question to be settled by the legislature, if there be a legislature to settle it; but the Senate has authority to inquire whether the body which has pretended to elect a Senator was the legislature of the State. The legislature alone can elect a Senator, and therefore to make a prima facie case it must be shown that the legislature has made an election.

Mr. Morton called attention to the fact that a certificate by the governor was a proper form of making known the election by the legislature, to which Mr. Carpenter replied:

A prima facie case is that which appears before an examination of the merits; but when there has been a full investigation and trial, and it is ascertained that what appeared prima facie to be the case is not the true case then the prima facie case is gone. In Robbins's case there had been no investigation, and therefore the Senate properly acted upon the prima facie case. But here a full investigation had been made before Pinchback presented his prima facie case. Whenever the Senate acts, it must act upon all the facts before it; and, in this instance, we have not only the prima facie case made by the credentials, but also the full investigation showing that Pinchback's prima facie case is false.

349. The Senate election case of Pinchback and others, continued.

Reference to principles governing recognition of a State government by the President of the United States.

The discussion, from the above points of departure, naturally divides itself into two main branches:

(1) Was Governor Kellogg the governor of the State of Louisiana when the credentials were issued?

Mr. Morton contended⁴ that he was. He had been in complete possession of the office for nearly twelve months, acting as governor in every respect; he had been recognized as such by the other State officers, by the legislature in various ways, by the State courts from the lowest to the highest; he had been recognized by the United States House of Representatives, which had seated a Member-elect bearing credentials signed by him; and, finally, he had been recognized by the

¹ Record, p. 224.

² Record, p. 222.

³ Record, pp. 1037, 1038.

⁴ Record, p. 223.

President of the United States. On this last point Mr. Morton quoted at length the decision of the United States Supreme Court in the Rhode Island case arising out of the so-called "Dorr rebellion," the case of *Luther v. Borden* (7 Howard).

Mr. Carpenter dissented¹ from this claim that Kellogg was the lawful governor. As to the point that he had held the office for a period of time and was still holding it, it was sufficient to say that he was holding it not by the voluntary consent and assent of the people of Louisiana; but by reason of support from the strong arm of the military power of the Federal Government. Under such circumstances the duration of his power was not material. If it was not rightful in the beginning, it was not rightful now. As to its recognition by the President and by the courts of Louisiana, Mr. Carpenter denied the effectiveness of both these arguments.

(a) As to the force of the decisions of the State courts in limiting the inquiry of the Senate, Mr. Morton contended² that it was obligatory to accept the decisions of State tribunals on all questions arising upon State laws. He quoted the cases of *Luther v. Borden*, and also *Webster v. Cooper* (14 Howard). Mr. Morton contended that the Senate, in accordance with this principle, should take a legislature as the State gave it. But it was objected in this connection, notably by Messrs. Eli Saulsbury, of Delaware, and John P. Stockton, of New Jersey, that the question of the existence of a legislature was directly before the Senate, and that it alone was the judge.

Mr. Carpenter discussed³ more fully the effect of the decisions of the Louisiana court, taking the ground that the courts had acted in cases not properly within their jurisdiction, and that their decisions were conflicting and therefore not within the rule making them the highest evidence of what the local law was. He cited on this point the cases of the *Ohio Life and Trust Company v. De Bolt* (16 Howard, 432), *Gelpecke v. Dubuque* (1 Wallace, 175), and *Havemeyer v. Iowa County* (3 Wallace, 294). Mr. Thomas C. McCreery, of Kentucky, also argued in the same line.⁴

(b) As to the alleged recognition of the Kellogg government by the President, the facts and law were discussed at length⁵ on December 16 and January 26 and 30, and February 2.

(2) As to the question of the legality of the legislature there was elaborate discussion and exploration of fact, the report already discussed being the basis of consideration, it being contended on the one side that the legislature was the legal body, and on the other that it was not.

On January 26⁶ Mr. Morton modified his resolution to read as follows:

Resolved, That the credentials of the Hon. P. B. S. Pinchback be referred to the Committee on Privileges and Elections; that the committee have power to send for persons and papers, and be instructed to inquire into the conduct of said Pinchback in connection with said election.

In making this change Mr. Morton announced that he had learned that there were charges of improper conduct made against Mr. Pinchback in connection with

¹ Record, p. 1053.

² Record, pp. 225, 226.

³ Record, p. 1054.

⁴ Record, p. 916.

⁵ Record, pp. 223, 1050, 1109; Appendix, p. 41.

⁶ Record, p. 915.

the election, and this was the reason for the modification. Mr. Carpenter commented¹ on this as a virtual abandonment of the prima facie claim, but Mr. Morton declined to admit that this was the significance of his action.

On January 27² the credentials of Mr. McMillen were recommitted to the Committee on Privileges and Elections.

But it does not appear that any action was taken at this session on the modified resolution presented by Mr. Morton.³

350. The Senate election case of Pinchback and others, continued.

Discussion of the form of credentials and the competency of the electing and certifying authorities behind them as elements in their efficacy.

Discussion of the status of a governor de facto as distinguished from an usurper.

On December 16, 1874⁴ the Vice-President laid before the Senate a letter of W. L. McMillen requesting the speedy action of the Senate upon his credentials as Senator elect from the State of Louisiana; which was referred to the Committee on Privileges and Elections.

On December 23⁵ Mr. Morton submitted the following resolution for consideration; which was ordered to be printed:

Resolved, That the Senate recognize the validity of the credentials of P. B. S. Pinchback as certified to by Governor William P. Kellogg, of Louisiana, under the seal of said State; and the Committee on Privileges and Elections are instructed to examine and report if said Pinchback is entitled to be admitted on the prima facie case thus made, or if such admission should be postponed until investigation is made as to the charges of corruption in his election alleged against him.

On January 22,⁶ 1875 Mr. West presented new credentials, in due form but in somewhat different form from the preceding credentials, dated January 13, 1875, and signed by "Wm. P. Kellogg" as governor, certifying that on January 12, 1875, Pinckney B. S. Pinchback had been elected to the United States Senate for the term expiring March 4, 1879—i. e., the term beginning March 4, 1873, as expressed in the credentials issued to Mr. Pinchback by William P. Kellogg on January 15, 1873.

These credentials, together with the former credentials and other papers relating to the case, were referred to the Committee on Privileges and Elections.

On February 8, 1875,⁷ Mr. Morton submitted the report of the committee, as follows:

That the certificate of William Pitt Kellogg, then and now the governor of the State of Louisiana, which certificate is verified by the great seal of the State, shows that on the 17th day of January, 1873, the Hon. P. B. S. Pinchback was elected to a seat in the Senate of the United States for the term of six years, beginning on the 4th of March, 1873, by the legislature of Louisiana, in manner and form as pre-

¹ Record, p. 1053.

² Record, p. 941.

³ It was stated in debate on January 22, 1875, that no action was taken. Record, second session Forty-third Congress, p. 647.

⁴ Record, p. 94.

⁵ Record, p. 227.

⁶ Record, p. 647.

⁷ Record, p. 1063. This report was concurred in by 4 of the 7 members present at the meeting, the whole membership of the committee being 9.

scribed by the act of Congress regulating the elections of Senators of the United States. Upon this certificate the committee are of opinion that Mr. Pinchback has a *prima facie* title to admission as a member of the Senate, and that whatever objections may exist, if any, as to the manner of his election or as to the legal character of the body by which he was elected, should be inquired into afterwards.

The committee, therefore, recommend the adoption of the following resolution:

“Resolved, That P. B. S. Pinchback be admitted as a Senator from the State of Louisiana for the term of six years, beginning on the 4th of March, 1873.”

In support of this report, on February 15¹ Mr. Morton cited the cases of Robbins, Shields, and Goldthwaite. At a later date he also cited the case of Spencer.

Minority views² were filed by Messrs. William T. Hamilton, of Maryland, and Eli Saulsbury, of Delaware. The minority begin with a discussion of the force and effect of the Kellogg credentials:

The power of the Senate, under section 5, article 1, of the Constitution, to “judge of the election, returns, and qualifications of its own members” is absolute and unlimited.

The object in this case is to seat P. B. S. Pinchback upon this certificate alone, irrespective of his election, and which in effect for the present excludes any consideration of the election itself.

It may be admitted that the general practice has been to admit the person chosen as a Senator to his seat upon credentials sufficiently authenticated either by the legislature or the governor of the State, subject, of course, to any contest that might be thereafter prosecuted in respect to his right to the seat. The credentials in themselves, it will be conceded, have no substantial value. It is the election, and the election alone, that gives to the person chosen the right to be a Senator.

The certificate of the governor of a State directed to be given by the act of Congress approved July 25, 1866, upon the election of a Senator, is but the certificate of a fact upon which the official existence of the person chosen depends. It gives to it no force whatever, and without it the election is just as good. It is merely one of the evidences of the election in a solemn form, and to which due respect should always be paid. In the act referred to there is nothing said as to what effect should be given to such a certificate. It has, however, been generally regarded as sufficient in itself to presume a lawful election of the person represented by it to be chosen. It is most certainly appropriate that this act did not define the force of such a certificate. It prescribes a duty that the governor might or might not observe. The Constitution of the United States provides for the election of Senators by the legislatures of the States. This is their absolute right. Congress may regulate the time and manner of choosing Senators, and the power of Congress over the subject is limited to this only. The right of choosing Senators belongs to the legislatures alone, and such election is alone in all cases of inquiry to be determined by its records. The governor is not known in the election; no duty is imposed upon him by the Constitution in respect to it, or in respect to its authentication. The legislature, to which is alone confided the high trust of choosing Senators, can speak through its own organization, its own officers, and its own acts, as its official record will show.

The right of election is sacred; the right of having this election determined by its own record is equally sacred; for it might be that if other independent departments of the Government, as the executive, for example, possessed the right or power of authentication in the election of a Senator, you might impinge upon the full enjoyment of the power of the legislature in the due choosing of Senators. This absolute right to choose we hold should not and does not depend for its efficiency upon the action of the executive or any other officer of the State or Federal Government.

It will be observed that the certificate such as we now have under consideration necessarily involves these elements of belief before it can have the force which is now attempted to be given to it by the report of the committee in this case: First, that the facts stated in regard to the election are true; and second, that the person certifying as governor is in fact what he represents himself to be. The efficacy sought to be impressed upon this certificate, in at once admitting the person represented to be chosen to a seat, alone depends upon the latter fact. With this in dispute the efficient power is gone. Investigation is at once inaugurated to settle the disputed point. Inquiry leads to inquiry, and the real life of

¹Record, p. 1277.

²Senate Report No. 626.

the certificate is lost in the strife, for it can be readily seen that in a contest as to whether the certificate has any validity, either by reason of the allegation that the person certifying was not in fact the governor, or from any other reason, the State might be left without a Senator, when by reference to the acts of the legislature the records would show a lawful election by a lawful body, and who could deny that a person so chosen and with such a record could not be admitted without regarding at all the contest about the certificate of the governor, or whether he was in fact governor?

We advert to this to show that a contest upon the subject of certificates at all for any legitimate cause destroys their force. It was intended that by their force alone there should be immediate unobstructed admission to a seat. It must be conceded, in order to give this effect to the certificate before us, that William Pitt Kellogg was at the time the governor of Louisiana. If he were not the governor, then it is no more than waste paper. All will admit, we presume, that this has been a subject of dispute at least since the State election which took place on the 4th day of November, A. D. 1872. A constant, earnest, and at times an aggressive protest has been made against Kellogg, as not only not entitled to be the constitutional and rightful governor of Louisiana, but as a notorious usurper, held in the position he has seized without color of right by means of the armed forces of the United States. Events occurring at the time, and continually since, and some of the most painful character, prove that he does not hold this place practically by any other tenure or power. Whatever else may be said of this notable prominent fact, all are well advised that the right of Kellogg to be governor of Louisiana is in good faith denied and resisted in every way possible to a peaceful resistance.

This at once, most naturally, opens up the inquiry as to the certificate itself, and no efficacy is to be ascribed to it until this is satisfactorily settled, for without this it is worthless for any purpose. We apprehend there is no diversity in the committee on this point. The report of the committee insists that Kellogg is the governor of Louisiana, and would proceed to show it by a course of argument and a system of evidence satisfactory to gentlemen uniting in that report. On the contrary, another course of argument, and other evidence equally satisfactory, have brought the undersigned to a very different conclusion. The broad field of inquiry and investigation is therefore opened up, for it must be manifest to an unprejudiced mind that an examination into the fact whether Kellogg was the rightful governor of Louisiana at the time he signed this certificate must bring us to his pretended election, and, with it, to the election of the body which chose Pinchback. The whole subject relating to the affairs of this State, in connection with the election held on the 4th of November, 1872, for the election of governor and other State officers and members of the legislature, becomes involved in the very first branch of the inquiry which it is conceded by all must be made and settled before any force can be imparted to the certificate.

Before entering upon this inquiry we submit most respectfully, putting it in the mildest form, whether this is not an exceptional case from the ordinary one, where it is conceded that there was a rightful governor to sign certificates and where there was a legislature to elect. It must be admitted that no such case was ever before presented to the consideration of the Senate. Notwithstanding it has been the usual practice to admit, in the first instance, persons to a seat upon such certificates, leaving the contest, if any, to be proceeded with thereafter in the usual way, yet the very first question as to the official character of the person pretending to be governor impairs, as we have before said, the wonted efficacy of such certificate; so that when in the examination of this primary question is involved the body that chose Pinchback, and in fact the whole State government of Louisiana, would it be fair, rational, and just to stop short of the substantial merits of the case when all can be settled at once?

It will be admitted, we think, that in such a controversy, opening up both the official character of the governor and the legal validity of the legislature choosing the Senator, we could determine against the validity of the certificate and at the same time determine the validity of the election upon the record of the legislature and upon its official power of election. Suppose that such certificates should be attacked for fraud, as they could be, could anyone say that such attack would involve alone the fraudulent character of the certificate, and not the rightful issue—the election itself? The attack would involve both, and, involving both, common reason would dictate that we should decide the substantial question. While we could, in such an inquiry, set aside the certificate, we would give to the person rightfully chosen his seat, and all done in the same proceeding. For if our inquiry should be alone confined to the certificate, for whatever cause, we would be exposed to the fallacy of setting it aside and then remitting the case to the governor for other or further certificate of a fact simply, when we could, and it would be our duty, ascertain the fact ourselves to end the matter.

Therefore we conceive that even in a technical sense, upon a question submitted as this is, an examination of the whole subject is necessary to come to right conclusions; but when we view it in its broad sense, and as we have it in the light of history and events daily transpiring, many of which we must or are presumed to know, as legislators and members of this body, we would consider it a gross dereliction of public duty did we confine ourselves to a technical consideration of matter not substantial when in it are involved questions of the greatest moment, and which in their proper solution demand our earnest efforts and soundest judgment.

The facts present the broadest grounds for interposition in the broadest sense to ascertain the real right and settle a question that has already given, and, until rightly settled, will give to the country the greatest concern. The facts can not be denied that imperatively call for such an interposition; mere parchment titles, mere certificates, sink into insignificance before the patent and undeniable facts which environ this case. Never before has such a case been made, and it is to be hoped that no such one will ever be made again.

A brief reference to the prominent facts will show how entirely and necessarily the whole case is before us.

The views then go on to review the facts of the State election of November 4, 1872, in Louisiana, to discuss the rival returning boards, the fraudulent returns, the rival governors and rival legislatures, and then proceed to discuss the status of Kellogg as governor:

But to recur to the question. If, in the course of the investigation, from all the facts drawn from all the sources to which we have referred, we conclude that the pretended governor is a mere usurper, then his acts are void and avail nothing. Persons hold office or place under three different tenures—first, *de jure*; second, *de facto*; and, third, as a usurper—the only three modes, we believe, known to the law; and by one or the other of these tenures does the person exercise the office or place that he holds.

The first is clothed with all the powers that right, combined with possession, can give, The second is only clothed with the powers possession can give, that possession being obtained under a color of right; and these powers are limited to certain well-defined acts. The third refers to a person undertaking to hold office without any color of right; he is a mere usurper, whose acts are void.

The distinguishing differences between officers *de jure* and *de facto* and a mere usurper are well laid down in the books in the earlier days, and the same are observed to this day. In a leading case, decided so far back as 1738, the general principles relating to officers *de jure* and *de facto* were well defined. In this case one Goldwire, “under pretense and color of being elected mayor of Christ Church, in the county of Southampton,” was presented unto William Willis, steward of the court leet, and was there sworn into the office of mayor, and, in fact, exercised the office till — day of —, 1736, and that being in the exercise of said office, and under “pretense of being elected, and sworn into the same, he issued a summons to the several burgesses of the corporation to meet,” etc., and at such meeting he nominated the defendant Lisle as one of the burgesses, and the question was whether, when he made such nomination, he was mayor *de facto*, for it was found that he had never been elected, and, if mayor *de facto*, whether he had the power to make the appointment. It was held by the court that Goldwire was not so much as a mayor *de facto*; for in order to constitute a mayor *de facto* it is necessary that there be some form or color of an election; but without this, the taking the title and regalia of the office, and the acting and being sworn in as mayor are not sufficient. Now, here it appears that Goldwire was never elected in fact; and though it be stated that he was sworn at the leet, it does not appear (as it ought) that this was agreeable to the constitution of the borough. And it is not material that he acted as mayor, as it is found that a *quo warranto* was recently prosecuted against him, pending which the present election was made, and that he was thereupon adjudged to be a usurper.” (Andrews’s Reports, *Henry v. Lisle*, 173.) The distinctions then made are continued to this day, and are as clearly defined:

“An officer *de facto* is one who exercises the duties of an office under color of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right, and on the other from an officer *de jure*, who is in all respects legally appointed and qualified to exercise the office. These distinctions are very obvious, and have always been recognized.”—(17 Connecticut, *Plymouth v. Painter*, 588; 7 Johnson, *People v. Collins*, 549; 2 Kent.)

It is claimed by some that though it be a question whether Kellogg be a governor de jure, yet he is a governor de facto, and as such his certificate of the election of Pinchback is to be recognized as equally binding upon us as if he were governor de jure.

Holding, as we do, that he is neither the governor de jure nor de facto, but a mere usurper, and a usurper not keeping himself in position by his own unaided local power, but by the aid of armed forces of a foreign power—in its true relations to this case as much a foreign power as that of Great Britain could be—we desire, briefly, to examine this phase of the subject.

Keeping in view the rulings we have cited, is Kellogg so much as a governor de facto? In disposing of this we dispose of his character as governor de jure.

As we have already noticed, the constitution of Louisiana provides that the governor shall be elected by the people. To be such de facto he must be in by color of an election. If he has no color of an election, he is nothing but a usurper, “who is one undertaking to act without a color of right.” Two propositions are to be here considered in order to arrive at correct conclusions—

1. Was Kellogg elected by a majority of the votes of the people at the election held on the 4th day of November, 1872?

2. If he was not, then had he such a color of an election as to constitute him governor de facto?

This brings us to the wider domain of fact which at every step has marked this controversy from its inception, in 1872, to the present period. In the direct examination of the matter all the facts that may tend to a correct result should be considered. We have a great variety of facts and circumstances, some historical in their character, some which we are obliged to know or are assumed to know from our constitutional relations to the State, her people, her government, her officials, whether judicial, ministerial, executive, or political, and those which we have gathered ourselves through committees of this body in the investigation had by resolution of this body passed on 16th January, 1873, and which is as follows: “*Resolved*, That the Committee on Privileges and Elections be instructed to inquire and report to the Senate whether there is any existing State government in Louisiana, and how and by whom it is constituted;” and to which committee were also referred the certificates of John Ray and W. L. McMillen, both claiming the seat in this body supposed to have been made vacant by the resignation of William Pitt Kellogg.

This committee, composed of Messrs. Morton, Carpenter, Logan, Anthony, Trumbull, Alcorn, and Hill, made a diligent and laborious investigation of all the matters connected with both questions, and made an elaborate report to the Senate, accompanied by a large amount of testimony. It is Senate Report No. 457, Forty-second Congress, third session. From all the evidence, then, and which covers and exhausts the whole subject, was Kellogg in fact elected by the people of Louisiana the governor of that State?

After examining the facts the minority conclude—

Then, so far as Kellogg is concerned, there is nothing to show that he had the slightest right, either by an election or the color of an election, to hold this office. He must therefore be regarded as a usurper; for in no other character could he hold the place, if not in that of governor de jure or de facto.

The principles are well and plainly defined in the case of *Plymouth v. Painter*, 17 Conn., already quoted, in respect to the acts of persons holding place under one or the other of these modes. The following is from page 593:

“The acts of a mere usurper of an office, without any color of title, are undoubtedly wholly void, both as to individuals and the public. But where there is a color of a lawful title, the doings of an officer, as it respects third persons and the public, must be respected until he is ousted on a quo warranto, which is the appropriate proceeding to try the validity of a title to an office, and in which it would be necessary for him to show a complete title in all respects; although in a suit against a person for acts which he would have an authority to do only as an officer, he must, in order to make out a justification, show that he is an officer de jure; because the title to the office being directly drawn in question, in a suit to which he is a party, may be regularly decided. So where he sues for fees, or sets up a title to property by virtue of his office, he must show himself to be an officer de jure.”

It is here laid down—

First. That the acts of a usurper are void.

Secondly. That the acts of an officer in by a color of title—that is, an officer de facto, where the rights of third persons or the public are concerned—are to be respected.

Thirdly. That where he is directly concerned he must show himself to be an officer de jure whenever the direct issue is made, either as to title, or fees, or as a trespasser, or otherwise.

If Kellogg, then, be a usurper, the certificate relied upon in this case has no value for any purpose. But let us assume, for the sake of the argument, that Kellogg was governor de facto; that he was in by color of an election, and by color of an election only, and not by an election itself; with such knowledge upon our part, with the known fact, besides, that his right to the place is denied and contested, that there is a rival governor, in fact a rival government, we should proceed with great caution in giving such efficacy to his simple certificate. True, the third section of the act of Congress of 1866, making provision for the election of Senators, makes it the duty of the governor to certify the election to the President of the Senate; it still stops short of prescribing the force of such a certificate. No doubt Congress intended that ordinarily it should be regarded as sufficient for admission to a seat, but it must be manifest that this certificate is not the real credentials of a Senator-elect, but intended originally, we may presume, as a substitute for it. The real credentials of the election is a copy of the record of the election itself, properly certified by the officers of the body electing; for Congress has no right to impose this duty upon the governor, and that neither it nor the person elected can compel the governor to issue any such certificate.

There must be design in not presenting a certified copy of the record of election by the legislature instead of depending alone upon this certificate of the governor, when it was well known that every step in the progress of this case would be contested. The declaration in the report submitted by the committee, that Kellogg was then and now the governor of Louisiana, defines the spirit of the whole proceeding; and that is that it is more of an object to get Kellogg recognized in some way as governor by this body than the admission of Pinchback to a seat in it.

Therefore should we be more careful still how we undertake, in giving ostensible credence alone to a certificate, to pass upon a higher matter—the legal character of the person giving it. Why not, in such an acknowledged condition of things, recur to his credentials, which the record of the election or a copy of it can make? But, that produced, it is too apparent that the contest would be transferred from the governor to the legislature; the legislature is out of being, and therefore the fact of an election by it can only be inquired into; but the governor is still living in the place in which he was put, and still kept by an armed force, and to be kept there if his acts are to be respected or sanctioned by us. How shall we close our eyes to the facts staring us in the face? We again beg leave to repeat that with the assumption that Kellogg is at best but a governor de facto, with a rival governor claiming the right, and with the acknowledged power to exercise it in the absence of the troops of the United States, should we not be careful, if we can in any way abstain from determining questions of the present, which concern alone the present, and which should be determined in a different way and by all branches of the Government, if to be determined at all by it? The election of Pinchback does not concern the present; the body electing him is *functus officio*. He must stand or fall by the action of that body. Let us go back to that, and upon the acts and legal validity of that body determine the right to a seat. We say again that the passage of the resolution decides only one thing, the right of membership, and binds no one to anything besides; but the fact that in doing this we have acknowledged the legal validity of Kellogg's official character may influence others or justify others in doing things to the infinite injustice of the people of Louisiana, and to the persons there claiming to be officers by virtue of a rightful election.

Again, we well understand the principles which limit and qualify the powers of an officer de facto. His acts are scanned and judged; he can do only those that are to be considered as necessary to be done; indeed, so confined in this respect that it was held, in the case of *King v. Lisle*, that the proper question in a case would be “whether the person be an officer de facto as to the particular purpose under consideration;” he can do nothing for himself; he can not set up title by virtue of his office; he can not sue for his fees or salary; he can not justify in a trespass; he can do nothing that may bring in issue his right to hold the office without showing that de jure right for the exercise of it. As a judge de facto his judgment in a litigation between third parties would be good; a sale of property under such a judgment would be good to pass title; and for the reason that third parties are not supposed to be able to inquire into the rights of one holding and exercising the duties of the office, and must therefore act upon what appears to be the right. But a sheriff de facto seizing and selling the property under that or any other judgment in a suit against him for the seizure by the owner or possessor of the property, he must for his defense show that he held his office de jure, for this concerns himself only, and he should know whether he was in right an officer.

Shorn of the general and enlarged powers of an officer de jure by the plainest principles of law, limited and circumscribed by rules founded in reason and having the sanction of ages, shall we be disposed to give to the act of such an officer—governor de facto, if even he be such—that full and unqualified effect in this case, with the extraordinary circumstances surrounding it, as if he were an officer de jure, when that act, too, bears directly upon the constitution of this body, which we are bound to guard, and upon the right of a State to have its true representatives upon this floor? In regard to the constitution of this body the direct issue is made; this pretended governor represents himself to be the governor of Louisiana, and upon this alone does the committee rest the case. It is admitted that he must be the governor to give the certificate any power whatever. In raising the question it is shown that he is only governor de facto, if governor at all, and not de jure—that is, governor for a purpose only, and that purpose to be judged of, whether proper or not, when the exigency arises. It is upon us, and it is whether we shall constitute members of this body upon the certificates of such a governor, or shall we not rather recur, as we have before inquired, into the election itself or the record of it?

Upon this body rests the duty of preserving its own organization, and of admitting its own members. Here its power is supreme, and for its independence it must depend upon this power, and its proper and legal and rational exercise; and it is to judge of the fact whether a certificate (not of a governor, as contemplated by the law, a rightful governor in all respects—but of such a governor) shall have the efficacy now asked for it.

Indeed, in this very case, in the complications in Louisiana, the troubles and disorders there, the very soul of the objection that we now urge against the recognition of this certificate is made to appear. There is trouble about the State government in that State. There is trouble as to who is the constitutionally elected governor, both claiming it, and as to which body of the two claiming to be the legislature is the real one. In this contest, where so much right is involved, and where right should be done, might it not be that, if we should admit Pinchback upon the certificate of Kellogg, we would to that extent recognize him as the rightful governor of Louisiana, and possibly direct additional power against the other side? Would this be wise, and just, and expedient; and when we know, too, that so far as the certificate in itself is concerned it adds nothing to title, but that the election constitutes this? If it is the policy to settle these disturbances in Louisiana, to recognize either governor or none, do it in the usual manner known to the laws, and that is by legislation upon the part of Congress, when the whole subject can be considered, and the remedy, if any, be applied.

351. The Senate election case of Pinchback and others continued.

The Senate in election cases investigates the legality of the legislature as organized, but refrains from questioning the titles of the component parts of an undoubted legislature.

Having thus disposed of the question of the competency of Kellogg as governor, the minority continue:

Having come to the conclusion that Kellogg was a mere usurper and the certificate not entitled to respect, or if it should be considered by some that he was the governor de facto, that even in this view no force ought to be given to his certificate, we are brought to the consideration of the main fact itself—the election of Pinchback by a legislature. While this is not technically before us, it is substantially. While the report of the committee bases its action entirely upon the force of the certificate, the resolution submits the question of admission generally. It can not be denied that the inquiry upon one branch opens up the whole subject, and one can not be well considered without considering both.

This brings us to the examination of the body organized under the returns made by the Lynch board, to which we have referred in the other branch of the case. In looking into the organization that elected Pinchback, the surreptitious inauguration of Kellogg into the gubernatorial office pales into insignificance before the fraudulent creation of this body into a legislature and of its shameless pretension to power.

Even admit that Kellogg was the rightful governor of Louisiana and that his certificate should have all the force which could properly under ordinary circumstances attach to it, still all the facts are before us, and they are of the gravest character. The question is not who are members of the legislature of Louisiana—for that body is the judge of this, and of their elections and qualifications; with these we have nothing to do; but the question is as to the legislature as organized, whether there is one in being

to elect, and whether such an one elected Pinchback. The existence of a legislature competent to elect a Senator is not only a historical fact to be known to us as any other patent fact, but it is one which is susceptible of proof.

It will be necessary again to give a brief résumé of the facts known to exist in Louisiana respecting the organization of the body claiming to be the legislature of that State, and which elected Pinchback.

After reviewing the facts, especially the mandate of Judge Durell, of the Federal court, and its enforcement by Federal troops, the minority say:

The whole proceeding from its inception down to its final consummation was a gross usurpation, accompanied with every species of fraud and tyranny. The body that was organized under this mandate and its military enforcement is not entitled to any legal existence that any American should acknowledge. The whole is a product of fraud, conspiracy, and of armed force, and is entitled to no consideration.

We wish it to be remembered that we are not inquiring into the component parts of a legislative body. Each house of the legislature must do that for itself. We are inquiring into the aggregate character of the body as organized and as it represents itself to be—a legislature; how it was brought into being; how supported; and under what authority. We find no single element in it to constitute it a legislature representing the free people of Louisiana under their constitution and laws; but, on the contrary, simply a body organized under the mandate of a Federal judge supported by the armed force of the United States, based upon a pretended election found by a returning board without a single official return, and not having a title of authority, and acting in violation and in defiance of all law. We find that body, pretending to be the legislature of Louisiana, the mere creature of a conspiracy as bold, as reckless, and as wicked as any that has ever disgraced the annals of history. We speak thus strongly because our instincts as American citizens prompt us to the reprobation it so signally deserves. This body thus organized chose P. B. S. Pinchback a Senator in Congress for the period he claims.

The large mass of the members of it were never elected in fact; the returning board declaring them to be elected had not a single power to do so; it never had an official return before it.

After reviewing the histories of the rival legislatures, the minority continue:

Can the Senate hesitate to determine between such governments? The interposition of mere force without cause and without right, by which one for the present may be put up and the other down, should not deter us in determining which is the rightful one. The soldiers of the United States should not be allowed to step in between our judgment and our duty. The day is not yet upon us, we trust, when the sword is to settle questions alone for us to determine. Taking all the facts as they appear in the case before us, from the inception of each rival body to the final consummation in their respective organizations, we can determine between them. It is our duty to do so; and we have facts sufficiently numerous and authentic to determine fairly and intelligently between them. Each has chosen Senators, and both are here with certificates.

There can be no doubt that where there are rival bodies, each claiming to be the rightful legislature of a State, and each presenting a Senator for admission upon this floor, we must judge between them, for the reason that we are to judge of the elections, the qualifications, and returns of our own members; and in this we are to know whether the body choosing a Senator is the legislature having the constitutional right to do so, and that such an one did choose a Senator.

This was clearly submitted in the case of Robbins and Potter, contesting Senators from Rhode Island. Mr. Poindexter, who submitted the majority report in that case, says:

“There was but one governor and but one senate in the State claiming to be a part of the general assembly. If there had existed another body of men, however chosen, contending for the offices of the governor and senators in the State, it will not be denied that their respective rights might be the subject of inquiry in deciding a contested election in the Senate of the United States.”

The right of the Senate is undoubted to judge in this respect. Its power is not limited, for the sound reason that its independence can only be absolutely preserved in possessing such a right. In exercising it here we should not be capricious, but governed in our conduct by rules that good sense, honest intention, and a desire for truth and justice should naturally inspire. No other department of the Government ought to control it; no other department of the Government should be allowed, under any pretext or in the exercise of any power, to trench upon it. It is a primary right, for in its free and absolute exercise the very life, existence, and organization of free legislative bodies depend.

Coming to the main point again, should the Senate hesitate between the rival governments? How can the Senate recognize the Kellogg government, stamped, as it is, all over with fraud, conspiracy, and force? There is not an element of free constitutional government in it. Mere intruders and usurpers in all departments of it, how shall the Senate, in respect for constitutional government, admit that such a body as that organized under the order of Durell shall impose upon us a Senator? We might receive with just as much plausibility and complacency a Senator from the soldiery who guarded that body when it went through the forms of choosing one. The bayonet organized it, kept it in being, protected it by day and by night, and without it no one would be here pressing a claim to a seat by virtue of any authority from it.

Speaking for ourselves, we can not in any manner acknowledge any such election. We can not give any respect or efficacy to the certificate under consideration as that of a rightful governor, and must therefore declare that in our opinion P. B. S. Pinchback is not entitled to a seat as a Senator from the State of Louisiana.

In conclusion the minority say:

It is said that the Senate is bound, or ought to be bound, by decisions of the judicial tribunals of the State when inquiring into the existence of a government or of its officers; also by the action of other departments of the State government; also by the late act of the President and by reason of the possession of the office for a length of time. We shall only briefly remark that this body is bound by nothing in the exercise of its undoubted power. But admitting that any or all of these combined should have more or less influence upon the judgment of the Senate in coming to conclusions, we may be permitted to say that, in regard to the judicial action of the courts of Louisiana in relation to this subject, the question in issue never was fairly presented, and with the further remark that it is painfully evident that a majority of the court deciding cases having relevancy at all to the subject was in complicity with the Kellogg government to maintain its power; and so with the other departments of the State government, for all depended for their very existence upon the official being of Kellogg. As to the action of the President having any binding force upon the Senate, we say that his power to act relates alone to one thing, and that is the suppression of violence when legally called upon for aid in suppressing such violence. His action can not bind beyond the simple fact and its real dependents; it decides no right for us or for Congress. One word as to the continuous possession of Kellogg and which it is claimed gives him some standing to be considered in this body. His possession is that of fraud and force, and this possession is to-day only held by this force. It is the possession of might against right, and the weakness of the title will at once be witnessed upon the withdrawal of the force which keeps him in place. In our opinion, there is nothing in the matters that would be set up to secure a recognition of the Kellogg government. The whole is a crime against our civilization and a blot upon our free institutions.

The resolution proposed by the majority of the committee was debated on February 15, 16, and 17, 1875,¹ and on the latter day, by a vote of yeas 39, nays 22, it was laid on the table. Mr. Lot M. Morrill, of Maine, who made the motion to lay on the table, explained that he did so from no spirit of hostility to the resolution, but simply because the Senate needed to proceed to other business.² And thereafter during the Forty-third Congress the resolution remained on the table.

On March 5, 1875,³ when the Senate met in special session, at the beginning of the Forty-fourth Congress, Mr. Morton offered this resolution:

Resolved, That P. B. S. Pinchback be admitted as a Senator from the State of Louisiana for the term of six years beginning on the 4th of March, 1873.

¹Record, pp. 1277–1289, 1306–1310, 1327–1353, 1358–1382.

²Record, p. 1382.

³Special session Senate, Forty-fourth Congress, Record, p. 2.

This resolution was debated at length on March 8, 9, 10, 12, and 13,¹ and on the latter day a motion was submitted by Mr. George F. Edmunds, of Vermont, to amend the resolution by inserting the word “not” before the word “admitted.”

This amendment was debated on March 15 and 16,² and on the latter day further consideration was postponed until the second Monday in December next, the vote being yeas 33, nays 30.

352. The Senate election case of Pinchback and others, continued.

The Senate declined to seat the bearer of credentials signed by a person exercising the authority of a governor, it being objected that the signer was an usurper and that there was no election by a valid legislature.

Discussion as to how far the Senate, in considering an election case, should follow a decision of a State court as to the competency of the legislature.

Discussion of the powers of the Senate under the constitutional authority to judge the elections and returns of its members.

Instance wherein an unsuccessful contestant for a seat in the Senate was permitted to withdraw his credentials.

Discussion as to the required form for Senate credentials under the law.

Discussion of the judicial knowledge which must exist to justify giving prima facie effect to credentials.

On Thursday, December 9, 1875,³ at the first or regular session of the Forty-fourth Congress, Mr. West presented the following letter:

WASHINGTON, D.C., *December 8, 1875.*

To the Honorable the President and members of the Senate of the United States:

The undersigned would respectfully ask permission to withdraw his credentials as Senator-elect by the McEnery legislature from the State of Louisiana.

Respectfully,

W. L. McMILLEN.

At the same time Mr. West presented and had read an open letter from Mr. McMillen to John McEnery, claimant to the governorship of Louisiana. In this letter he explained how he had contested with John Ray for the remainder of the term ending March 4, 1873, and with Pinckney B. S. Pinchback for the full term beginning at that date, and how a question as to the respective bodies represented by himself and his opponents had prevented an award of the seat. He then continues—

In November, 1874, the successors to the general assembly electing me were chosen, and after continued effort the difficulties in the way of organization of the assembly were composed.

Under the auspices of a committee of Congressmen, a plan of adjustment was agreed upon, the parties thereto embracing many of the gentlemen who honored me with their support in 1872–3, and the settlement resulted in the formation of a general assembly largely Democratic and conservative in the lower house, and generally accepted as legitimate by both of the political parties of the State; and said assembly so constituted, at their extra session in April last, did formally recognize W. P.

¹ Record, pp. 3–7, 9–17, 17–25, 32–41, 41–53.

² Record, pp. 55–62, 62–91.

³ First session Forty-fourth Congress, Record, p. 190.

Kellogg as the executive of Louisiana. Further, the House of Representatives of the Congress of the United States, with a large Democratic majority, following the action of the preceding Republican House, did, on the 6th instant, recognize the final and determining action of the present legislature of the State of Louisiana relative to the State government thereof by seating, *prima facie*, the six members of Congress-elect from said State bearing the credentials of W. P. Kellogg, and refusing at the same time to recognize your competency to exercise executive functions for Louisiana.

The letter then goes on to state that as the issues are determined a further contest by him could have no beneficial effect. and he considers it his duty to withdraw his credentials.

The letter having been read, Mr. West offered the following—

Ordered, That the request of William L. McMillen, heretofore claiming a seat in the Senate from the State of Louisiana, for the return of his credentials be granted.

On December 14¹ the order was debated at length, it being objected that the credentials were transmitted to the Senate in pursuance of law, and that they belonged to its archives and should not be withdrawn. But by a vote of yeas 30, nays 28, the order was agreed to.

On December 20² Mr. Thomas F. Bayard, of Delaware, by consent of the Senate, presented and had laid on the table a paper purporting to be the credentials issued by John McEnery as governor, showing the appointment of Robert H. Marr as Senator from Louisiana to fill the vacancy caused by the resignation of William L. McMillen.

On January 18, 1876,³ Mr. Allen G. Thurman, of Ohio, presented the credentials of James B. Eustis, of Louisiana, for the term beginning March 4, 1873. These credentials were not from the governor of the State, but consisted simply of duly certified transcripts of the proceedings of the legislature of Louisiana resulting in the election of Mr. Eustis. At once a question was raised by Mr. Roscoe Conkling, of New York, who called attention to the fact that the laws of the United States required that the credentials of a Senator should be certified by the governor of the State.⁴ Mr. Thurman replied that there was no method of coercing a governor who should refuse to sign the certificate, and the requisition of the statutes could not be understood as constituting the certificate of the governor the only evidence of the election of a Senator by a State legislature. In return Mr. Conkling called attention to the fact that the papers nowhere alleged that the governor had refused to give the ordinary credentials, and the papers themselves were not those on which the Senate should rely as *prima facie* evidence.

Mr. Thurman cited the case of Mr. Sykes, of Alabama wherein, the governor having refused to sign credentials, a transcript of proceedings had been accepted as title papers of the party.

¹ Record, pp. 200–204.

² Record, p. 248.

³ Record, pp. 451–455.

⁴ Sections 18 and 19 of the Revised Statutes provide:

“It shall be the duty of the executive of the State from which any Senator has been chosen to certify his election, under the seal of the State, to the President of the Senate of the United States.

“The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State.”

On January 24,¹ on motion of Mr. Morton, the papers purporting to be the credentials of Mr. Eustis were referred to the Committee on Privileges and Elections.

On January 26² Mr. West presented a memorial of certain State senators of Louisiana in relation to the election of Mr. Eustis, and was referred to the Committee on Privileges and Elections.

On January 28³ Mr. Morton, from that committee, presented the following report:

That in their opinion there is no vacancy in the office of Senator from the State of Louisiana, P. B. S. Pinchback having been elected in January, 1873, to the term beginning on the 4th of March, 1873. They therefore recommend that the papers relating to Mr. Eustis be laid upon the table.

Three members of the committee announced their dissent from the report.

On February 3,⁴ on motion of Mr. Morton, the Senate proceeded to the consideration of the resolution submitted by him on March 5, 1875, the pending question being the motion of Mr. Edmunds to insert "not" before the word "admitted."

The debate on this proposition went on during February 4, 7, March 1, 3, 7, and 8.⁵

Mr. James L. Alcorn, of Mississippi, who had originally concurred in the report which found that there was no legal State government in Louisiana in 1873, sketched briefly the developments in the situation.⁶

McEnery's legislature was finally dispersed, and he was driven from the field, and Kellogg was left in possession. Congress refused to do anything. Kellogg, in spite of all local opposition, maintained his government. His official position was recognized in the State of Louisiana. It became an accepted authority throughout the United States, so far as it could be emanating from the governor of a State. Finally the House of Representatives, at the last session of Congress, passed a formal resolution recognizing the Kellogg government. The Senate of the United States, subsequent to that time, passed a resolution to the same effect.

Therefore Mr. Alcorn urged that the certificate of Governor Kellogg should be good, and should be honored.

While it was denied,⁷ especially by Mr. George F. Edmunds, of Vermont, that the Senate had in express terms recognized Kellogg as governor, and while a reference to the resolution showed that it was merely an approval of the action of the President "in protecting the government in Louisiana, of which W. P. Kellogg is the executive," yet Mr. Edmunds admitted that Kellogg was the executive.

But Mr. Edmunds denied⁸ that the question was narrowed merely to the credentials. He showed that the pending resolution covered final as well as prima facie right. But even narrowing the case down to the credentials, he denied the effect of the Kellogg certificate:

What is this paper? It bears the great seal of the State of Louisiana. How do we know that to be the great seal of the State of Louisiana? We know it upon precisely the same ground that we know

¹ Record, p. 574.

² Record, p. 637. The memorial is found in Senate Miscel. Doc. No. 41, Forty-fourth Congress, first session.

³ Record, p. 706.

⁴ Record, p. 866.

⁵ Record, pp. 886-889, 907-913, 1382-1392, 1436-1444, 1511-1516, 1545-1558.

⁶ Record, p. 1383.

⁷ Record, p. 1389.

⁸ Record, pp. 1436, 1437.

that there is a legislature of the State of Louisiana, or that there is not a legislature of the State of Louisiana, or that in the year 1863 there was no legislature of the State of North Carolina—I mean no constitutional legislature under the Constitution of the United States. How, then, do we get at the first knowledge, the first step, on the subject of this *prima facie*? We get it by the judicial knowledge—to borrow a phrase of art which we are supposed to possess, whether, in fact, we do or not—that this seal is the seal of the State of Louisiana. We do not get it by proof; we do not get it by attempting to hear, try, or determine the question; but we get it, as I say, by that judicial knowledge which the laws of the land impute to everybody called upon to administer, as we are here, either legislative or judicial functions. Therefore * * * this paper, on the face of it, is an official paper, emanating from some executive authority or person acting in executive capacity in the State of Louisiana. Does our judicial knowledge stop there? * * * No, sir. That is not the law; it is not common sense. This body, in my opinion—and the law is all one way upon the subject—was in a constitutional and legal sense just as well advised of the state of legality or the want of the state of legality of the legislature that elected this man before the inquiry made by the Committee on Privileges and Elections as afterwards. That inquiry, in the judicial sense, was an inquiry to inform the conscience of the Senate just as we refer to a lexicon or to a law book or to a precedent in our statutes. We are bound to know, in short, what are the legislatures of the various States, which bodies, if there are two, or whether a particular body, if there be only one, is the government of that State or is the chief officer of any department of it. * * * If that be true, then this paper is not a *prima facie* case, as it is called, unless we also have the judicial knowledge that the body of men who purport to have elected him was the legislature of the State of Louisiana.

Mr. Morton, on the other hand, urged that in the recent case of Senator Spencer, of Alabama,¹ the Senate, under conditions the same, had honored the credentials.

Proceeding to discuss the status of the legislature, Mr. Edmunds referred² to the fact that the decision of the supreme court of Louisiana was the ground on which the validity of the legislature was affirmed. While denying that the supreme court had actually declared the legislature legal, he would, for purpose of argument, admit the contention. He then said:

The Constitution, which is the supreme law of the land, says that not the supreme court of Louisiana, not the supreme court of any State, but we, here, under a personal oath, each one of us to do justice according to the law, shall be the judge for this purpose of what the law of the State of Louisiana is. Sir, I am not ready to abdicate; I have no right to abdicate. This provision of the Constitution making us the judge, first, last, and always, of the election of a Senator, was inserted from the gravest considerations, not only of public convenience, but of public safety. The fathers of the country in their wisdom did not intend that this Government should be broken down as so many of its predecessors had been by the factions and storms of localities in States, but to compose this National Government there should be this perpetual and supreme tribunal, which was itself to be the judge of the election of its members, and nobody else was. It was not a concurrent jurisdiction; it was an exclusive one.

On this question also, Mr. Allen G. Thurman, of Ohio, who concurred in the view that the competency of the legislature was vital in the case, said:³

There is one conclusive answer to all that has been said about the decisions of the supreme court of Louisiana, and that is that the question before us is to be decided by this Senate, and by this Senate alone, and that the decision of no court, not even if it were the Supreme Court of the United States, has even the force of a precedent on a question like this. The Constitution makes the Senate the sole judge of the elections, returns, and qualifications of its members. It can not, therefore, be bound by the decision of any other tribunal or any other body of men.

¹Record, p. 1441.

²Record, p. 1439.

³Record, p. 910.

On March 8, 1876,¹ the amendment proposed by Mr. Edmunds was agreed to, yeas 32, nays 29. Then the resolution as amended was agreed to, yeas 32, nays 29. So it was—

Resolved, That P. B. S. Pinchback be not admitted as a Senator from the State of Louisiana for the term of six years beginning on the 4th of March, 1873.

353. The Senate election case of Pinchback and others, continued.

The Senate has admitted a person elected while the case of another claimant to the seat was yet pending.

In determining an election case the Senate has taken notice of the journals of a State legislature.

In a case wherein a governor declined to sign the credentials of a Senator-elect the Senate admitted the claimant after examination of final right.

On March 8, 1877,² at the beginning of the Forty-fifth Congress, Mr. Thurman called attention to the fact that the decision in the Pinchback case had settled that there was a vacancy, and therefore removed the ground on which the committee had reported against the claim of Mr. Eustis in the preceding Congress. Therefore he proposed, and the Senate on the next day agreed to, a resolution taking the credentials of Mr. Eustis from the files and referring them to the Committee on Privileges and Elections.

On December 1, 1877,³ Mr. Bainbridge Wadleigh, of New Hampshire, from the Committee on Privileges and Elections, submitted a report as follows:

Mr. Eustis claims to have been elected on the 12th of January, 1876. The body which elected him was that formed by what is known as the Wheeler compromise, and there is no doubt that it was the lawful legislature of Louisiana.

Two questions arise in this case: First, whether Mr. Eustis was lawfully elected; second, whether at the time of his election a vacancy existed which the legislature of Louisiana had the right to fill.

The legislature of Louisiana on the 12th day of January, 1876, consisted of a house containing 111 members and a senate with 36 senators. On the 11th day of January, 1876, the house voted to go into an election for United States Senator, and the senate on the same day refused to do so. On the 12th day of January, it appearing that there had been no election on the day before, 64 members of the house and 12 members of the senate, being a majority of all entitled to seats in both houses, met in joint convention and elected Mr. Eustis.

Your committee find that although the senate refused to take part as such in said election, and although a minority of the senate only did take part in it, yet there was a substantial compliance with the act of Congress of 1866. Upon the constitutionality of that act your committee express no opinion. The Senate has repeatedly, however, by its action affirmed its constitutionality; and your committee feel bound by the precedents which the Senate has established.

The second question, whether or not a vacancy existed at the time of Mr. Eustis's election which the legislature of Louisiana had the right to fill, is one of some difficulty. At the time of said election Mr. P. B. S. Pinchback was the claimant for the same seat under two elections—one in 1873, the other in 1875. His credentials and claims under said elections had been presented to the Senate and by it referred to the Committee on Privileges and Elections. Said committee, on the 5th day of March, 1875, reported a resolution to the Senate that Mr. Pinchback be admitted thereto. On the 8th day of March, 1876, that resolution was amended so as to change it to a resolution that he be not admitted. The resolution was passed as thus amended on the same day.

¹ Record, pp. 1557, 1558.

² Special session Senate, Forty-fifth Congress, Record, p. 39.

³ First session Forty-fifth Congress, Record, p. 800.

Your committee feel bound to regard that vote of the Senate as a final adjudication of the claims of Mr. Pinchback and a decision that he had no right to a seat. Mr. Eustis's election took place while Mr. Pinchback's case was pending in the Senate, and it may be contended with much force that until the final adjudication by the Senate of Mr. Pinchback's claims there was no vacancy which the legislature was authorized to fill.

This question arose at the first session of the Twenty-third Congress, in the case of *Potter v. Robbins*, where a majority of the special committee of the Senate held that the legislature of Rhode Island had no authority to proceed to the election of another Senator until the seat of the Senator-elect had been vacated by a solemn decision of the Senate of the United States. Silas Wright, of New York, made a report in behalf of the minority of said committee, in which it was contended that if the election of Mr. Robbins was not made by the lawful legislature of the State it was absolutely void, and that therefore Mr. Potter's election while Mr. Robbins's claim to a seat in the Senate was still pending was valid.

Your committee do not question the soundness of the rule laid down in that case, but are not disposed to apply it to this case, where the circumstances are very different. In the case of *Potter v. Robbins* Mr. Robbins had been admitted to the Senate, the committee had before it both his credentials and those of Mr. Potter; but here there is no contest. The Senate never admitted Mr. Pinchback to his seat, but decided that he had no right thereto.

This seat has long been vacant. Mr. Eustis is the only person who appears to claim it. The lawful character of the legislature which elected him is admitted. His election was substantially in compliance with the law of Congress. No one appears to contest his right to a seat. Under these circumstances your committee believe that Mr. Eustis should be admitted to the Senate, and report a resolution to that effect and recommend its passage.

Therefore the committee recommended the following:

Resolved, That James B. Eustis is lawfully entitled to a seat in the Senate of the United States from the State of Louisiana, from the 12th day of January, 1876, for the term ending March 3, 1879, and that he be admitted thereto upon taking the proper oath.

On December 10,¹ when the report came before the Senate, Mr. John J. Ingalls, of Kansas, announced that, with two of his associates on the committee, he dissented from the report.

Mr. Ingalls urged in the first place that the report did not touch the question of the credentials, which were irregular and not in the form required by law. It had not been made to appear why the executive of Louisiana had declined to issue credentials. In opposition to this it was replied that a witness before the committee had testified to the committee that the governor had declined to issue the certificate on the ground that Mr. Pinchback had been elected to the seat. Moreover, the question before committee was not one as to the prima facie title only, but also referred to the case on its merits.

Taking up the first point touched by the report of the committee, Mr. Ingalls contended that there was nothing before the Senate to show how many senators and how many representatives constituted the legislature of Louisiana under the constitution of Louisiana, since the papers of Mr. Eustis did not show this. It was replied that the journals of the house and senate were before the committee; but Mr. Ingalls insisted that the pamphlets purporting to be such journals were not properly authenticated. To this Mr. Allen G. Thurman, of Ohio, replied, in effect, that the Senate were bound to take notice of the laws and journals of a legislature. The journals were put in evidence before the committee and were not denied, it was also stated in this connection that the Senate should take official notice of the constitution of the State.

¹Second session Forty-fifth Congress, Record, pp. 82-87.

Mr. Ingalls also contended that the election of a Senator being by the legislature, a quorum of both houses were necessary to constitute the joint convention referred to in the law of 1866, and that the law might not constitutionally provide that a Senator could be elected in a joint convention wherein less than a quorum of one body was present. To this Mr. Thurman replied that in electing a Senator in joint convention the legislature did not act in its organized capacity as a legislature. Otherwise one branch might veto the election of a Senator. It was in view of a condition of this sort which had arisen in Indiana that the law of 1866 was passed.

As to the second point treated in the report, Mr. Ingalls urged that there was no vacancy. The election was held before the Senate had acted on Mr. Pinchback's claim. When the Senate did act it simply declared that Mr. Pinchback be "not admitted to a seat in the Senate." In the case in the Twenty-third Congress, to which the report of the majority referred, it was held that a vacancy did not occur until it was officially ascertained and declared by the Senate. In reply, it was stated that the case in the Twenty-third Congress was one wherein there was a contestant. But in this case no one appeared to oppose.

The question being taken on the resolution reported by the committee, it was agreed to—yeas, 49; nays, 8.

Thereupon Mr. Eustis appeared and took the oath.

354. The Senate election case relating to Kellogg, Spofford, and Manning, of Louisiana, in the Forty-fifth and Forty-sixth Congresses.

The Senate declined to give immediate prima facie effect to credentials regular in form, but from a State where there were rival claimants to the governorship and rival legislatures.

On January 20, 1877,¹ in the Senate, Mr. Oliver P. Morton, of Indiana, presented the credentials of William Pitt Kellogg, as Senator-elect from Louisiana, for the term of six years commencing March 4, 1877.

On March 5, 1877,² at the time of the organization of the Senate in the Forty-fifth Congress, Mr. Kellogg advanced to the Secretary's desk to take the oath, when Mr. Lewis V. Bogy, of Missouri, objected to the administration of the oath on the ground that there were two legislatures in Louisiana, and that there would be a contest. On March 6, Mr. James G. Blaine, of Maine, offered the following:

Resolved, That the oaths prescribed by law be now administered by the Vice President to William Pitt Kellogg, whose credentials as a Senator from the State of Louisiana were presented on the 20th of January, 1877.

To this Mr. Thomas F. Bayard, of Delaware, proposed on March 7:

Strike out all after the word "resolved," and in lieu thereof insert "the credentials of William Pitt Kellogg, claiming to be a Senator from the State of Louisiana, do now lie upon the table until the appointment of a Committee on Privileges and Elections, to whom they shall be referred."

The resolution was debated on March 6 and 7. It was urged that while ordinarily a certificate in regular form was sufficient for a prima facie case, yet in this case there were two persons claiming to be governor and two bodies claiming to be the legislature. This fact was well known. Mr. Kellogg's credentials were

¹Second session Forty-fourth Congress, Record, p. 762.

²Special session of Senate, Forty-fifth Congress, Record, pp. 1, 2, 15, 16, 17-23.

signed by Stephen B. Packard, as governor, but it was alleged by Mr. Bayard that there was no proof that Mr. Packard was either de jure or de facto governor, and in reality he was neither. There was the same uncertainty as to the legislature.

On March 7,¹ Mr. Bayard's amendment was agreed to—yeas 35, nays 29. Then the resolution as amended was agreed to—yeas 43, nays 21.

355. The Senate election case relating to Kellogg and others, continued.

There being two conflicting credentials, the Senate declined to give immediate prima facie effect to either, although the electing and certifying government behind one had been swept away by force.

On October 17, 1877,² Mr. Allen G. Thurman, of Ohio, presented the credentials of Henry M. Spofford, as Senator-elect from Louisiana, for the term of six years commencing March 4, 1877. These credentials were signed by Francis T. Nichols, as governor of Louisiana, bore date of June 20, 1877, and stated that the election of Mr. Spofford had been accomplished on April 24, 1877.

On October 18,³ the Senate resumed consideration of the resolution presented the day before by Mr. Thurman:

Resolved, That Henry M. Spofford, whose credentials as Senator from the State of Louisiana have this day been read, be now sworn and admitted as such Senator.

Mr. George F. Edmunds, of Vermont, objected that while the Spofford credentials might be prima facie correct, yet there were on the files of the Senate other credentials in favor of Mr. Kellogg. So the records of the Senate antagonized the prima facie standing of the Spofford credentials.

In support of Mr. Thurman's motion it was urged that the Senate might take judicial notice of the history of the country, which showed that the legislature electing Mr. Kellogg had ceased to exist, and that Mr. Packard had ceased to be de facto governor.

Finally, after debate, the resolution proposed by Mr. Thurman was amended and agreed to as follows:

Resolved, That the credentials of Henry M. Spofford, claiming to be a Senator from the State of Louisiana, be referred to the Committee on Privileges and Elections; and the said committee shall also consider and report upon the credentials of William Pitt Kellogg.

On October 25⁴ the Senate gave the Committee on Privileges and Elections authority to take testimony in the case.

356. The Senate election case, relating to Kellogg and others, continued.

A person ascertained by a majority of the committee to be legally elected and certified was seated by the Senate, although both executive and legislature were displaced by force before the Senate acted.

There being rival legislatures, the Senate, in deciding an election case, investigated the titles of the legislators, even to the circumstances of their elections.

¹ Record, p. 23.

² First session Forty-fifth Congress, Record, p. 78.

³ Record, pp. 99–106.

⁴ Record, p. 150.

In a Senate election case, by consent of the parties, testimony taken by Senate and House committees in proceedings to which neither contestant was a party, was admitted for what it was worth.

An instance wherein the Senate indorsed the principle that a legislator whose presence was forcibly obtained and who refused to vote might be counted as part of the quorum.

On November 26, 1877,¹ Mr. Bainbridge Wadleigh, of New Hampshire, submitted the report of the committee, accompanied by the following resolutions:

Resolved, That William Pitt Kellogg is, upon the merits of the case, lawfully entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th day of March, 1877, and that he be admitted thereto upon taking the proper oath.

Resolved, That Henry M. Spofford is not entitled to a seat in the Senate of the United States.

In their report the committee say:

Mr. Kellogg claims to have been elected on the 10th day of January, 1877. Aft. Spofford claims to have been elected on the 24th of April, 1877. In an inquiry into these cases upon their merits, the first question which arises is, whether the body which elected Mr. Kellogg was the lawful legislature of Louisiana at the time of such election.

There was in said State on the 6th of November, 1876, an election for governor, lieutenant-governor, and members of the general assembly. The statements of the votes cast at such election were required by law to be sent to a board of returning officers for all elections in the State. Said returning officers were by law authorized and required to ascertain, return, and certify the election of members of the general assembly. No other tribunal was clothed with that power or duty. They were required to report their decisions to the secretary of state, and it was by law provided that the secretary of state should transmit to the clerk of the house of representatives and secretary of the senate of the last general assembly a list of the names of such persons as, according to the decisions of the returning officers, were elected to either branch of the general assembly.

It was the duty of the said clerk and secretary to place the names of such persons so furnished upon the roll of the house and senate, respectively, and those representatives and senators whose names were so placed by the clerk and secretary, and none others, were competent to organize the house of representatives or senate.

The secretary of state, in obedience to the statute, transmitted to the clerk of the former house and secretary of the senate a list of the names of persons by the said returning officers decided to have been elected to either branch of the general assembly, and from the list thus furnished the clerk and secretary organized each house of the State legislature on the 1st day of January, 1877.

By the constitution of Louisiana the house of representatives is composed of 120 members and the senate of 36 members. There is no doubt that 61 members of the house constitute a quorum of that body, and that 19 members constitute a quorum of the senate. There were present at the organization, and took part in the proceedings, 8 senators holding over, and 11 newly elected—19 in all—having the certificates of said returning officers, which was a quorum, and 68 representatives, thus declared to have been elected, being 7 over a quorum. After such organization the members of the two houses assembled in joint convention on the 10th day of January, 1877, to elect a Senator of the United States.

Upon reading the journal of each house it was found that no election of Senator had been made the day before. The roll of each house was called, and it was found there were present in the joint convention 17 senators and 66 representatives, they composing a majority of all the members of the general assembly of the State. Nominations were then made for Senator, and a viva voce vote was had, and William Pitt Kellogg received the votes of 17 senators and 66 representatives, and was declared by the president of the senate (the presiding officer of the joint convention) to have received a majority of all the votes of the general assembly, and to have been duly elected a Senator of the United States for the term of six years beginning on the 4th day of March, 1877.

¹ Senate Report No. 16, first session Forty-fifth Congress.

Your committee find that said election was held strictly in accordance with the act of Congress of 1866 to regulate the times and manner of holding elections for Senators. The credentials of Mr. Kellogg are signed by Stephen B. Packard as governor of the State of Louisiana, and bear date the 11th day of January, 1877.

It appears to your committee that Mr. Packard was on that day the lawful governor of the State of Louisiana.

The report goes on to show that by returns duly transmitted by the returning officers and duly counted by the legislature it was ascertained that Mr. Packard was elected governor. The report then continues:

Upon the facts herein before stated your committee are of the opinion—

First, that the returning officers of Louisiana were a lawful tribunal, solely authorized and required to ascertain, return, and certify to the election of members of the general assembly.

Second, that those, and only those, who held certificates of election from said returning officers were entitled to seats in the general assembly at the organization thereof.

Third, that the body which first organized with a quorum of the members in each branch thereof, having such certificates, and which was duly recognized by the lawful governor of said State, was the lawful legislature.

The proof before your committee seems conclusive that at the time the legislature which elected Kellogg was organized there were present a quorum of each house thereof then lawfully entitled to seats therein; that at the time of his election there were present a quorum of the general assembly then lawfully entitled to seats therein, all of whom voted for said Kellogg, and that said legislature was recognized by the lawful governor of said State. It was, however, contended by Mr. Spofford that it was the duty of your committee to go behind the certificates of the returning officers and investigate the elections of individual members of the general assembly. At his request your committee did investigate such elections and find the following facts:

Of the lawful election of 57 members of the house of representatives which aided in electing Mr. Kellogg there is no dispute whatever, and they now sit in the Nicholls house, which took part in the election of Mr. Spofford. Three more of the members of the Packard house, from the parish of Orleans, were until recently admitted on all hands to have had a majority of the votes cast, and your committee find that they were lawfully elected. Besides these 60 members of the house, there were 11 more whose election is disputed by Mr. Spofford upon the ground that they did not receive a majority of the votes cast. Of the 21 members of the senate which participated in the election of Mr. Kellogg, there were 16 whose right to hold their seats is admitted.

The election of 3 more from the twelfth, eighteenth, and twenty-second senatorial districts is disputed upon the ground that they did not receive a majority of the votes cast. Two more, Baker and Kelso, were not declared elected by the returning board, but were seated by a vote of the senate acting under its constitutional right to judge of the election of its own members.

Complaint is made by Mr. Spofford that one Steven, a lawful senator, was taken against his will into the senate and detained there against his will for the purpose of making a quorum. Your committee believe there is no good reason for such complaint. If the senate had organized with a quorum of members lawfully entitled to seats therein, as was the case, it had the undoubted right to compel the attendance of absent members.

The senators and members whose title to seats is disputed on the ground that they did not receive a majority of the votes cast were those declared elected by the returning board on account of the rejection of the votes cast at certain polls in the parishes of East Baton Rouge, De Soto, West Feliciana, Lafayette, Morehouse, Ouachita, and Webster; in the twelfth senatorial district, composed of the parishes of East Feliciana, West Feliciana, and Pointe Coupée; the eighteenth senatorial district, composed of the parishes of Ouachita and Caldwell; and the twenty-second senatorial district, composed of the parishes of Natchitoches, De Soto, Red River, and Sabine.

There were no votes rejected in the parishes of Sabine, Pointe Coupée, and Red River. A comparatively small number of the votes were rejected on account of the obvious illegalities, informalities, and misconduct of the election officers, and there is little complaint on account of the rejection of such votes. The rest were rejected on account of violence and intimidation which prevented a fair election. The

evidence of such intimidation is overwhelming and irrefutable. Many of the Republican leaders were killed, others were tortured, others driven into exile. Companies of armed men paraded the parishes by night, carrying terror wherever they went.

After citing facts as to these intimidations the committee proceed to a complaint of Mr. Spofford that the returning officers were guilty of fraud in rejecting the returns of the parishes before mentioned, and also in having committed forgery in altering the statement of votes from the parish of Vernon. "But the law is clear," says the report, "that, even had the returning officers been guilty of fraud, or had mistakenly exceeded their authority, it was the right and duty of the persons returned by them as elected to take their seats in the general assembly."

The report, after citing section 141 of Cushing's Law and Practice of Legislative Assemblies and a New Hampshire case occurring in 1875 (56 N. H. Reports), continues:

When your committee decided to go behind the certificates of the returning officers and to seek the real merits of the case in the thousands of pages of printed testimony taken for the use of the Senate and House, Mr. Spofford contended that your committee should simply ascertain the number of votes deposited in the ballot boxes at the election. Your committee believe, however, that if their inquiry is to extend beyond the question as to who were the lawful governor of Louisiana and the lawful members of the general assembly, it should go far enough to ascertain how far the freedom of election was impaired by intimidation, violence, and crime. The law on this subject is thus stated by Cushing in his Law and Practice of Legislative Assemblies, pages 67, 68, section 181:

"The great principle which lies at the foundation of all elective governments and is essential, indeed, to the very idea of election is that the electors shall be free in the giving of their suffrages. This principle was declared by the English Parliament, with regard to elections in general, in a statute of Edward I, and, with regard to elections of members of Parliament, in the Declaration of Rights. The same principle is asserted or implied in the constitutions of all the States of the Union. Freedom of election is violated by external violence, by which the electors are constrained, or by bribery, by which their will is corrupted; and in all cases where the electors are prevented, in either of these ways, from the free exercise of their right, the election will be void without reference to the number of votes thereby affected."

The evidence clearly proves, and your committee believe, that by intimidation, violence, and crime freedom of election was utterly destroyed at those polls in the ten parishes heretofore referred to, whose votes were rejected by the returning officers; that in throwing out such polls and declaring the Republican candidates elected the returning officers did that which they believed to be legal, and which was really equitable and just and what the two houses of the general assembly would have been bound in law to do with the facts before them. They believe, therefore, that the members by whose votes the general assembly was organized, and a sufficient number of the members by whose votes Mr. Kellogg was elected, were not only lawfully but equitably entitled to their seats.

It is contended by Mr. Spofford that the legislature which elected Mr. Kellogg and the governor who signed his credentials have vanished from political existence and ceased to have any authority in the State of Louisiana, and that therefore, if for no other reason, his own election is valid. Your committee find that at and after the organization of the legislature which elected Mr. Kellogg an overwhelming array of armed and organized military force was used to destroy and crush out the lawful State government of Louisiana. By it the courts were overthrown and annihilated, and under its constantly impending menace the lawful legislature gradually melted away and its terrorized members sought safety in the so-called Nicholls legislature or abdicated their rights.

By such and perhaps other equally illegal means the so-called Nicholls legislature at length came to contain an undisputed majority of the members lawfully elected to the general assembly; and on the 24th day of April that legislature chose Mr. Spofford, the contestant, a Senator of the United States. Your committee are of the opinion that his claim is not well founded. Until and after the election of Mr. Kellogg, Governor Packard and what is known as his legislature were de facto and de jure the government of Louisiana. Upon that legislature devolved the duty of electing a Senator of the United

States. That duty was performed by them in the election of Mr. Kellogg. No subsequent events, especially successful revolution through treasonable force, could undo what had been lawfully done. The doctrine contended for by Mr. Spofford, if established, would render insecure all political vested rights. It would offer a premium to overthrow by force the result of every sharply contested election, and at no distant day reduce this country to the unhappy condition of those wretched communities which are continually a prey to disorder and civil war.

The minority views, signed by Messrs. Eli Saulsbury, of Delaware, A. S. Merrimon, of North Carolina, and Benjamin H. Hill, of Georgia, found that the Nicholls legislature had a quorum in both houses, and declared that had it not been for the unlawful action of the returning board there would have been no pretense for the Packard legislature, which assembled under protection of United States troops.

The minority deny that at any time the Packard senate had a quorum, since it had secured the required number by force.

Then Mr. Steven, a "holding over" senator, sitting in "the Nicholls legislature," happened to be in the State house on business, and the sergeant-at-arms of the Packard legislature seized and took him into the senate chamber to try and restore their nominal quorum. He was taken by force, and against his will and protest, and he did not participate in anything done. The seizure of Mr. Steven was a disgraceful proceeding, and the object had in view was to make a nominal quorum in order to admit as senators, upon a feigned contest, Baker and Kelso, two candidates who were defeated at the polls, and who did not even hold certificates of election from the returning board. Steven did not vote, refused to participate, and without him there was no quorum present when Kelso and Baker were admitted.

As to the Packard legislature the minority say:

Treachery and fraud mark every lineament of the so-called "Packard legislature" from its incipency, and the Senate can not escape seeing this. But apart from fraud, where there are two rival bodies of men in a State, each claiming in good faith to be the lawful legislature, and each contests the right of the other from the beginning of their existence, and such contest is continued without intermission until one prevails and absorbs the other, so that the latter completely disappears, and all the coordinate branches, and all the authorities, and the great mass of the people of the State, and the President and courts of the United States, recognize the prevailing body as the lawful legislature, and all its acts passed from its beginning as laws of the State, and recognize no single act of the body so absorbed and totally disappearing, can the Senate of the United States, many months after it has so completely disappeared, recognize the body thus disappearing as the legislature of the State by admitting to the Senate as a Senator a person who claims to have been elected by such a body of men?

The statement of the proposition irresistibly suggests the answer—it can not. The Senate may have the physical power to do so—it has not the right to do so—it can only do so by the arbitrary exercise of lawless despotic power. Such an act on the part of the Senate could only be regarded as a defiance of the authority, right, and will of the State and an insult to its dignity; it would shock the moral sense of the American people, and afford cause for profound distrust and alarm for the safety of our system of government.

An important question arose as to the evidence admitted in this case. The majority report frequently cites the reports of the Field and Morrison committees of the House of Representatives, and the Howe and Sherman committees of the Senate. The minority views explain this:

The contestants were each requested to indicate what testimony he desired to produce, and after debate they were requested to confer and see what state of facts they could agree upon touching controverted material points at issue. Statements were submitted to Mr. Kellogg touching the result of the election in parishes indicated, and Mr. Kellogg made a statement in that respect in reply. These statements were received as evidence, and it was further agreed to receive the testimony, or so much thereof as may be pertinent, taken by Congressional committees commonly known as the "Howe com-

mittee," the "Morrison committee," the "Sherman committee," and the "Field committee," touching Louisiana affairs. Mr. Spofford did not object to the reception of this testimony, but he strenuously insisted on being allowed to take testimony in support of the several allegations specified by him.

In the debate, on November 28,¹ Mr. Hill, who signed the minority views, explained that—

The committee well knew that much testimony had been taken both by the Senate and House on a former occasion involving some, but only some, of the issues between these contestants; but knowing that that testimony was not taken in this case, and therefore was not legal testimony without their admission, the committee called first upon these contestants to make statements before the committee as to what points they desired evidence taken upon.

Mr. Hill went on to say that Mr. Kellogg insisted on the evidence in the Howe and Sherman reports, which had been taken by the Senate, and Mr. Spofford that he would agree to that if the evidence of the Field and Morrison committees of the House of Representatives could be referred to as evidence in precisely the same manner for what they were worth. All the testimony in these reports was taken before the election for Senator was had, and was not taken with reference to the rights of the parties to this contest; but it did bring out many facts concerning the election of the governor and legislature in Louisiana which it was material for the Senate to understand in considering this question.

In addition, Mr. Spofford had asked to be permitted to take certain testimony which he specified in addition. The minority held that he should have this right.

We are of opinion that the testimony so proposed by Mr. Spofford is material, and ought, in justice to him and the Senate, to have been received. Besides, it can not be truly said that the respective claims of the contestants have been decided upon their "substantial merits" when one of them is not allowed to produce material testimony which he offers and is anxious to produce. And it may be that a decision made by the Senate now, without fair opportunity to produce such testimony, may be reviewed and reversed at some future time. It is well to put an end to controversy now by allowing both the contestants the fullest and fairest opportunity to produce all material testimony. We think, therefore, that the whole matter ought to be recommitted to the committee, to the end the proposed testimony may be taken.

The resolutions proposed by the majority were debated on November 28, 29, and 30,² the principal question being as to the request of Mr. Spofford. In his request he had specified certain testimony intended to show wrongdoing by Mr. Kellogg in connection with the proceedings of the returning board; but on behalf of the majority it was asserted that in this point the testimony of the reports accepted as evidence was full and conclusive.

On November 30³ Mr. Saulsbury moved to recommit the subject, with instructions to take the testimony referred to. This motion was disagreed to—yeas 29, nays 29.

Mr. Hill then moved the following substitute amendment to the first resolution proposed by the committee:

That Henry M. Spofford be admitted as a Senator from the State of Louisiana on a prima facie title, and subject to the right of William Pitt Kellogg to contest his seat.

¹ Record, pp. 740, 741.

² Record, pp. 730, 749, 767.

³ Record, p. 778.

This motion was disagreed to—yeas 27, nays 29.¹

The resolutions of the committee were then agreed to—yeas 30, nays 28.

And on the same day Mr. Kellogg appeared and took the oath.

357. The Senate election case relating to Kellogg and others, continued.

A Senate election case having been once decided, an attempt to reopen it failed after a favorable report from a committee and elaborate discussion.

Discussion in the Senate of the doctrine of res adjudicata as applied to an election case.

At the beginning of the next Congress, on March 21, 1879,² Mr. Benjamin F. Jonas, of Louisiana, presented in the Senate the petition of Henry M. Spofford praying for the reopening of his case. The petition was referred to the Committee on Privileges and Elections.

On April 16³ Mr. Hill of Georgia, reported from that committee the following:

Resolved, That the Committee on Privileges and Elections be authorized to have printed for its use the arguments before it in the case of Spofford against Kellogg relative to a seat in the Senate from the State of Louisiana, with such evidence, papers, and documents relative to the case as it may deem proper.

Mr. Edmunds, of Vermont, made objection to the resolution if it contemplated the taking of evidence in order to reopen a case which he considered settled; but on a suggestion of Mr. George F. Hoar, of Massachusetts, the resolution was modified and agreed to as follows:

Resolved, That the Committee on Privileges and Elections be authorized to have printed for its use the arguments before it in the case of Spofford against Kellogg relative to a seat in the Senate from the State of Louisiana, with such other proceedings in relation to the case as it may deem proper.

On May 1⁴ Mr. Saulsbury, from the Committee on Privileges and Elections, reported a resolution as follows:

Resolved, That the Committee on Privileges and Elections, to which was referred the memorial of Henry M. Spofford, praying permission to produce evidence relating to the right of Hon. William Pitt Kellogg to the seat in the Senate held by him from the State of Louisiana, and in support of the claim of said petitioner thereto, be, and said committee is hereby, instructed to inquire into the matters alleged in said petition, and for that purpose said committee is authorized and empowered to send for persons and papers, administer oaths, and do all such other acts as are necessary and proper for a full and fair investigation in the premises. Said committee may, in its discretion, appoint a subcommittee of its own members to make such investigation in whole or in part, which subcommittee shall have authority to employ a clerk, stenographer, and sergeant-at-arms, and shall have all the powers of the general committee to administer oaths and send for persons and papers, and may make such investigation either in Washington or in the State of Louisiana, and said committee or its subcommittee may sit in vacation.

On May 2⁵ the resolution came up for consideration, when Mr. George F. Hoar, of Massachusetts, proposed the following amendment in the nature of a substitute:

Whereas on the 25th day of October, 1877, the Senate unanimously adopted the following resolution:

Resolved, That the Committee on Privileges and Elections on the contested cases of William Pitt Kellogg and Henry M. Spofford, claiming seats as Senators from the State of Louisiana, and whose cre-

¹ Record, p. 797.

² First session Forty-sixth Congress, Record, p. 33.

³ Record, p. 469.

⁴ Record, p. 1011.

⁵ Record, p. 1022.

dentials have been referred to such committee, be authorized to send for persons and papers, and administer oaths, with a view of enabling said committee to determine and report upon the title, respectively, on the merits of each of said contestants to a seat in the Senate.”

And whereas on the 26th day of November, 1877, said committee reported the following resolutions:

“*Resolved*, That William Pitt Kellogg is, upon the merits of the case, entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th day of March, 1877, and that he be admitted thereto upon taking the proper oath;

“*Resolved*, That Henry M. Spofford is not entitled to a seat in the Senate of the United States;”

And on the 30th day of November, 1877, the Senate adopted said resolution, and thereafter on the same day said Kellogg was duly admitted to take the oath and took his seat as a Senator from said State for said term:

Resolved, That said proceedings are final and conclusive upon the right of said Kellogg and the claim of said Spofford to said seat for said term.

As the grounds on which it was proposed to reopen the case became of importance, the text of the petition¹ was often referred to. After the purely formal portions, Mr. Spofford went on as to the claims of himself and Mr. Kellogg:

That a partial or imperfect investigation of their respective claims to the above-mentioned seat in the Senate was had before the said committee, but the case made by your petitioner against the claim of the said Kellogg was not fully heard by the committee, because they came to a sudden determination to close the same without giving him opportunity to adduce proof, which he had constantly offered to adduce if leave were granted, having a material bearing upon the contest for said seat against Kellogg's claim; that the pendency of a controversy in the Senate relative to the disposition to be made of another contest between other parties over another seat led to the hurried closing of the evidence in the case between said Kellogg and petitioner by the committee, a majority of whom speedily made a report in favor of said Kellogg's claim; that this abrupt closing of the case and refusal of petitioner's request for leave to take evidence was against the remonstrance of petitioner, who desired to make a formal protest, but was told that no precedent was known for such a practice; that the report of the committee, made while the other controversy just referred to was under debate in the Senate, led to confusion in considering, discussing, and disposing of the two cases; that for the reasons aforesaid petitioner's case against the said Kellogg never had a full examination and hearing upon its merits, either in the committee or in the Senate, and should therefore, petitioner most respectfully submits, be reexamined, to the end that justice may be done.

Petitioner further represents that the State of Louisiana, through its legislature (as will fully appear by a joint resolution of the two houses of the general assembly, approved February 1, 1878, to which reference is here made), has protested against the admission and retention of said Kellogg in said seat and the exclusion of your petitioner therefrom as leaving unfulfilled that provision of the Constitution of the United States which declares “that the Senate of the United States shall be composed of two Senators from each State, to be chosen by the legislature thereof, for six years.”

Petitioner further represents that he ever has been and still is ready to furnish evidence to establish the five specifications upon which he was not permitted to take proof heretofore, and particularly evidence of the direct and active interference of said Kellogg in the preparation of illegal complaints or protests against polls of which he had no knowledge.

Petitioner further represents that since the contest aforesaid and very recently he has discovered new and material evidence to prove that the election of said Kellogg was null and void, by reason of improper, illegal, and corrupt influences exerted by him in person to bring about his own election as Senator; to prove that he obtained and held the title of governor by corrupt bargain, not by election, and then used the power, patronage, and resources of the governor's office to procure the return and organization of a general assembly for the purpose of electing him Senator, and afterwards employed both menace and bribery among those whom he had assisted to have returned as members to induce them to vote for him as Senator; and that but for such illegal and corrupt interference personally exerted by the said Kellogg he would not have secured the nominal election under which he claims his seat. All of which petitioner now offers to prove upon a review of the case.

¹Second session Forty-sixth Congress, Senate Report No. 388, p. 5.

The resolution reported from the committee and the amendment proposed by Mr. Hoar formed an issue which was debated at length on May 2, 6, and 7.¹ It was urged in opposition to the resolution of the committee that the case was one falling under the doctrine of *res adjudicata*. In support of this position Mr. Angus Cameron, of Wisconsin, cited² as precedents the Fitch and Bright case, the Spencer case, and the Butler and Corbin case, and also the cases of Bogy and Cameron, all Senate cases.

The doctrine of *res adjudicata* was debated at great length, both abstractly and in reference to the constitutional functions of the Senate in judging the elections of its own Members.³

On behalf of the committee it was urged that the petition set forth a new ground not touched on in the original case, viz, the alleged corruption of the legislature by Mr. Kellogg, and that this justified the reopening of the case.

On May 7,⁴ Mr. Edmunds proposed to the resolution of the committee an amendment so that the inquiry as to the matters alleged in the petition should go "so far only as relates to any charge in said petition of personal misconduct on the part of said Kellogg which may render him liable to expulsion or censure."

This amendment was disagreed to—yeas 20, nays 27.

Thereupon Mr. Roscoe Conkling, of New York, moved to amend the committee's resolution by adding:

Providing that the inquiry hereby authorized shall be confined to the matters alleged in the memorial of Mr. Spofford to be new and different from those covered by the previous inquiry.

This amendment was disagreed to—yeas 20, nays 27.

Mr. Edmunds proposed as an amendment the lines "recognizing the validity and finality of the previous action of the Senate in the premises," which was disagreed to—yeas 20, nays 27.

Mr. Conkling then proposed the following:

Provided, That such questions in said case as were fully considered and adjudged in the former investigation shall not be opened under this resolution.

Which was disagreed to—yeas 20, nays 27.

Mr. John A. Logan, of Illinois, proposed the following amendment, which was disagreed to—yeas 19, nays 28:

Provided, That said committee be further empowered and directed to make inquiry and take testimony upon the matter as to whether any unlawful or corrupt means were employed to disorganize the body by which William Pitt Kellogg claims to have been elected to the Senate, or to organize that by which the memorialist claims to have been elected or to secure the alleged election of the memorialist.

One amendment proposed by Mr. George F. Hoar to the committee resolution was agreed to without debate. It added thereto the words:

And said committee are further instructed to inquire and report whether bribery or other corrupt or unlawful means were resorted to to secure the alleged election of the memorialist.

¹ First session Forty-sixth Congress, Record, pp. 1022–1024, 1071–1087, 1099–1123.

² Record, pp. 1077–1079.

³ Note particularly the speech of Mr. Matt. H. Carpenter, of Wisconsin, Record, p. 1100.

⁴ Record, pp. 1112–1123.

The question was then taken on the amendment in the nature of a substitute already pending, and it was disagreed to—yeas 17, nays 26.

The original resolution of the committee, as amended, was then agreed to—yeas 26, nays 17.

On June 21 the Committee on Privileges and Elections, or one of its subcommittees, was authorized to sit during the recess of Congress.

On February 9, 1880,¹ the Vice-President laid before the Senate resolutions of the Louisiana legislature denying the validity of Mr. Kellogg's election and protesting against his continuance as Representative of the State. These resolutions were referred to the Committee on Privileges and Elections. Also, on February 12² a memorial of certain members of that legislature, affirming the legality of Mr. Kellogg's election, was presented and referred. Also, on February 17, a memorial from certain citizens was presented and referred.

On March 22³ the report of the committee and the minority views were presented. The report was submitted by Mr. Hill, of Georgia, and was accompanied by the following resolutions:

Resolved, That, according to the evidence now known to the Senate, William P. Kellogg was not chosen by the legislature of Louisiana to the seat in the Senate for the term beginning on the 4th day of March, 1877, and is not entitled to sit in the same.

Resolved, That Henry M. Spofford was chosen by the legislature of Louisiana to the seat in the Senate for the term beginning on the 4th of March, 1877, and that he be admitted to the same on taking the oath prescribed by law.

In the report, which was concurred in by Messrs. Saulsbury; Hill; Frances Kernan, of New York; James E. Bailey, of Tennessee; Luke Prior, of Alabama, and Zebulon B. Vance, of North Carolina, the facts as to the election by the legislature were briefly stated, and then the committee go on to state that they have investigated the subject as directed to do by the Senate.

The memorialist and the sitting Member appeared before the committee in person and by counsel. On the 5th of June, 1879, the full committee commenced the examination of witnesses in this city. The examination was continued in November and December by a subcommittee in the city of New Orleans, and was again resumed by the full committee in this city, and was continued until both parties announced they had no further testimony to offer. Nearly 150 witnesses have been examined, and over 1,200 printed pages of testimony have been taken and are herewith reported to the Senate, with the conclusions of law and fact at which the committee have arrived.

In the opinion of your committee, the evidence, now for the first time fully taken, clearly and abundantly establishes the following facts:

I. That said William Pitt Kellogg, then holding the office of governor of the State of Louisiana, and pending the canvass in said election of 1876, did conspire with divers persons, and in aid of such conspiracy did fraudulently use the influence and power of his office of governor, to prevent a fair, free, and legal election in said State, to the end that he might procure from the commissioners of election the return of a legislature a majority of whose members should be of the Republican party and presumed to be favorable to his election to the Senate.

II. That, having failed in this, the said William Pitt Kellogg, still holding the office of governor, did conspire with divers persons, and in aid of such conspiracy did fraudulently use the influence and power of his office of governor, to change the result as returned by the commissioners of election, to

¹Second session Forty-sixth Congress, Record, p. 749.

²Record, p. 833.

³Record, p. 1758; Senate Report No. 388; Record, p. 1758.

the end that he might procure, through false certificates of election, the organization of a pretended legislature a majority of whose members should be of the Republican party, and supposed to be favorable to his election to the Senate.

III. That said William Pitt Kellogg did conspire with divers others to prevent, and by force, through the metropolitan police, aided by the Army of the United States, did prevent the lawfully elected members of the legislature, and especially those of the Democratic party, from assembling in the halls of the senate and house of representatives in the Statehouse of the said State of Louisiana; and did, by threats, by the use of money, by the promise of offices, and by other corrupt practices, compel and induce to assemble in said halls, respectively, a mob of his coconspirators, against the will of the people of Louisiana, many of whom had not been elected, and some of whom had been neither elected or certified, to the end that he might procure a pretended legislature for the inauguration of Stephen B. Packard as governor, who, he well knew, had not been elected, and from which mob he might procure the form of his own election to the Senate, and which pretended election he knew such pretended governor would certify.

IV. That said William Pitt Kellogg having thus corruptly procured the assembling of a body of persons pretending to be a legislature, in which were included persons not elected, and from which had been forcibly excluded persons who had been elected and certified as members, did, by bribery, by the use of money and the promise of offices, and by other corrupt practices, induce said body of persons to go through the form of choosing him to a seat in the Senate of the United States.

V. That said William Pitt Kellogg, well knowing that the facts now proven to exist did exist, did falsely represent that no such facts existed or could be proven, seeking thereby to induce a majority of the committee, without taking the evidence which has now been taken, to make a report declaring his title to the seat, and with intent to induce a majority of the Senate to admit him to the seat so fraudulently claimed.

VI. That, to prevent the discovery of the briberies, frauds, and corruptions now proven to exist, the said William Pitt Kellogg did procure a large number of the persons composing said pretended legislature to be appointed to public offices of profit in the custom-house at New Orleans and elsewhere, as inducement not to disclose the truth. That, after other persons, officers, and members of said pretended legislature had freely and voluntarily admitted, under oath, their knowledge of said briberies and corruptions, and had been summoned to appear as witnesses before your committee, and were under the protection of the Senate, said William Pitt Kellogg did, by bribery and corrupt practices, induce such witnesses to testify falsely that they had not made such admissions, or that, if they had made them, they were not true.

The report then goes on to review the testimony by which they considered their conclusions justified and then go on to discuss the question as to the reopening of the case:

Your committee are unable to see how an impartial legal mind can read the evidence taken and doubt the guilt of the sitting member upon every charge which has been made against him, notwithstanding so many of the witnesses must be admitted to be disreputable.

But the sitting member, through his very able counsel, also insisted, with great earnestness and skill before your committee, that the Senate at a former session having, "after and upon evidence going to the merits of the case," declared that Kellogg was "upon the merits of the case entitled to the seat," this decision is final and conclusive, and cannot now be reexamined and reversed. This was the first and chief position on which the title of the sitting member was made to rest. Your committee have fully considered the question thus presented, and can not doubt the correctness of the conclusions at which they have arrived.

Stated in the light of the facts now known and herewith reported to the Senate, this position would read thus: That though the sitting member was not, in fact, chosen by the legislature of Louisiana, and though the body of men alleged to have elected him was assembled through fraud, was held together by force, and was controlled by bribery and corruption, and all this was accomplished by a conspiracy to defraud the State and people of Louisiana, of which conspiracy the sitting member was himself the chief, yet, the Senate having decided in ignorance and by the suppression of these facts that the sitting member was entitled on the merits to the seat, the Senate is compelled to allow him to retain the seat after full

knowledge that every fact which was assumed to exist when he was admitted is and was false and untrue. The reply to such a position is sufficiently furnished in the statement of the position itself. But your committee will not rest the argument here, and will consider it in the light of precedent and law. Counsel for the sitting member says:

"If, therefore, this committee and the Senate shall set aside this judgement on the merits it will present to the country and the world a spectacle not seen before in the century of our national existence just closed."

We might justly reply to this that this case, in the facts now proven, already presents to the country and the world a spectacle not before seen in this century or any previous century of this or any other nation. We trust such a spectacle will never again be presented, and that it may not be it ought to be now condemned by all men, and especially by this Senate. If it shall be understood that seats once procured in this body by any means, however false and fraudulent, which bad men may employ cannot be taken away, this Senate may soon be largely composed of members not chosen by the legislatures of the States. Successful frauds will displace the positive requisition of the Constitution in the elections of Senators. A case without precedent can not be decided by precedent. Fraud has certainly become a powerful agent in our politics, but we are not willing to admit it has yet become the supreme law above review and beyond remedy.

But while no case like this was ever before presented for decision, yet principles have been announced in other cases which will furnish some guide to a proper determination of this question.

In the case of Bright and Fitch, in the Thirty-fifth Congress, the rehearing asked was refused because "all the facts and questions of law involved were as fully known and presented to the Senate on the former hearing as they were then presented in the memorial of the legislature asking a rehearing." It was held that in such a case the judgment first rendered by the Senate "was final, and precluded further inquiry into the subject."

In the Butler and Corbin case, in the Forty-fifth Congress, the report of the minority of the Committee on Privileges and Elections correctly stated that no allegation was made "that testimony was before excluded which ought to have been admitted, or that testimony was admitted which ought to have been excluded; no request by either party to produce testimony had been denied, and no pretense that testimony then offered and excluded can now be produced. The jurisdiction is the same; the parties are the same; the subject-matter of contest is the same, the facts are the same, and the questions of law are the same." The report further said: "If, on the former hearing, Mr. Corbin had been denied the privilege of introducing material facts which he offered to produce; if he presented material facts now which were then unknown; if all the facts and questions of law now known and presented were not then as fully known and presented, the undersigned will not undertake to say his petition for a rehearing ought not, in justice and right, to be gravely heard and considered on the merits." The Senate adopted these views, though it is a significant fact that a large and intelligent minority of the Senate voted to unseat Mr. Butler and to admit Mr. Corbin, when not a single new fact or question of law had been presented or offered.

Your committee freely admit that a decision rendered on the merits ought not to be afterwards reviewed and reversed on light or even doubtful grounds. In the courts the familiar rule is that new evidence to authorize a reversal "ought to be material and such as would probably produce a different result." In this case your committee are willing to apply a much stronger test, though there is no reason why a stronger should be required. Let us adopt and apply the rule so strongly and forcibly expounded by a distinguished member of this Senate in the following language:

"The Senate would do manifest injustice were it hastily and without the most plain and most manifest reason to reverse a decision that had been made seating a Senator on this floor. The case must be extremely strong that would justify such a proceeding. All that I am free to admit, but to say that the technical rule of *res adjudicata* that applies to courts of justice applies in this Chamber on a question of this kind is to confound all distinctions and to disregard all the laws of this body." (Congressional Record of May 7, p. 24.)

Let us now apply this rigid rule to the present case:

1. On the former hearing not a single witness was examined. Some admissions were made by the parties, and some reports of investigations by Congressional committees not on the issues involved in this contest "were agreed to be considered in evidence as far as they were pertinent." This was done only to narrow the field of investigation.

On this hearing nearly 150 witnesses have been examined, making over 1,200 printed pages of testimony of the most material and controlling character.

2. On the former hearing the memorialist begged and pleaded for the privilege of having witnesses called and examined on five points not covered by the admissions and reports above referred to, and by which witnesses he alleged he could prove, among other things, the direct personal complicity of the sitting member in glaring frauds in the pretended legislature which elected him. All these appeals were refused by the majority of the committee, although an investigation had been previously ordered by the Senate and resolved upon by the committee, and the investigation was suddenly closed against the protest of the memorialist and a minority of the committee.

On the present hearing the witnesses have been examined, and the complicity of the sitting member in the frauds alleged has been most convincingly established.

3. On the former hearing there was no evidence and no opportunity to produce evidence showing conspiracies, briberies, and other corruptions by the sitting member to procure a fraudulent legislature, and to control the members thereof in his own election to the Senate.

On the present hearing such conspiracies, briberies, and corruptions of the most startling, unblushing, and unparalleled character have been positively testified to by numerous witnesses, and these briberies and corruptions have been shown to extend to the witnesses in the case in the very face of the Senate.

Your committee could multiply the features of contrast between the former and the present hearing in this case, but we forbear. Under the most technical rule of *res adjudicata* there is not a court in civilized Christendom which would hesitate to review and reverse a judgment so utterly unauthorized and unjust; and surely it can not be contended that the Senate can have less power than a court to annul such a decision.

Conceding then, for the argument, that the Senate in passing upon contests for seats in this body acts as a court, and that the technical rule of *res adjudicata* applies to decisions rendered in such cases, do courts not reexamine, review, and reverse their decisions? Are not appeals, writs of error, motions for new trials, and bills of review familiar to us all? The Senate, in considering such cases in the first instance, is not bound by the forms of proceedings in the courts. We have no declarations, no complaints, no bills in chancery, nor pleas, demurrers, answers, and joinders of issue in the Senate. If the Senate proceeds to original judgment without the pleading known to the courts, may not the Senate also proceed to review, reexamine, and reverse such judgments when good cause is shown, without resorting to the processes which in such cases are known to the courts? If the Senate is a court, then if the facts in a given case are such as would require the vacation of a judgment if rendered by a court, surely the Senate would also be authorized to vacate such judgment. The exclusion by the court of material testimony on the first hearing, the discovery of new and material evidence since the hearing, the existence of frauds, forgeries, briberies, and perjuries in procuring the first judgment are all well-known grounds on either one of which courts, by some of the methods of proceeding, will review and reverse such judgments. All these grounds are shown by the evidence and the records of this Senate to exist in extraordinary clearness, force, and repeated abundance in the case we are now considering. Is the Senate, by being likened to a court, to be bound by decisions which a court would rigorously vacate and annul?

But the attempt to apply to the Senate the technical rule of *res adjudicata* as it obtains in the courts is a palpable sophistry and not an argument. In the correct and forcible language of Senator Thurman, before quoted, "it confounds all distinctions and disregards all the rules of this body."

In cases where the contestants claim to represent the same State government, and the issue between them is one of informality or irregularity, or noncompliance with statutory provisions, there would be some show of reason for the application of this doctrine. In such cases there ought to be an end of litigation in the Senate as well as in the courts. A wise policy would certainly require in such cases the principle if not the rule of *res adjudicata*. It is to such cases the authorities cited by the eminent counsel for the sitting member were intended to apply.

But the questions involved in the present case rise immeasurably above such issues. They are not questions of regularity, but of authority. They are not questions of discretion, but of duty. They exist more between the State of Louisiana and this Senate than between the contestants. In their nature these questions are not merely judicial, but political in the highest sense.

The Constitution says:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof."

Can a man sit as a member of this Senate who was not chosen by the legislature of his State? But suppose, in ignorance of the fact that he was not so chosen, the Senate is induced to declare him entitled to the seat "on the merits," after investigation; does such erroneous decision supplant the Constitution and give him a title after the mistake becomes known?

Let us suppose an impossible case: Suppose a majority of this Senate should for any purpose, partisan or otherwise, seat a man in this body who they knew was not chosen by the legislature of his State, would any future Senate be compelled to continue such person in the seat? Would not such continuance be as criminal as the original admission? Will any man pretend that a plain constitutional provision can be superseded by a mistaken decision of this Senate? If the sitting member was not chosen by the legislature of Louisiana, every hour he sits on this floor after that fact is known is a violation of the Constitution. It is a question of obedience to the Constitution. Can any person estop this Senate, can the Senate estop itself, from obeying the Constitution? Can the Senate estop itself from inquiring toties quoties whether he was chosen by the legislature? Can it be so estopped by its own erroneous decision on a former hearing?

In cases like the one now before us your committee do not hesitate to adopt the language employed by those eminent constitutional lawyers—Mr. Collamer, of Vermont, and Mr. Trumbull, of Illinois—in the Fitch and Bright case in 1859. They said:

"The power of the Senate to judge of the election and qualification of its own members is unlimited and abiding. It is not exhausted in any particular case by once adjudicating the same, as the power of reexamination and correction of error and mistake, incident to all judicial tribunals and proceedings, remains with the Senate in this respect, as well to do justice to itself as to the States represented or to the persons claiming or holding seats. Such an abiding power must exist to purge the body from intruders; otherwise anyone might retain his seat who had once wrongly procured a decision of the Senate in his favor by fraud or falsehood, or even by papers forged or fabricated."

In the light of the evidence now before the Senate the sitting member was admitted by a wrongly procured decision of the Senate in his favor by means quite as criminal as those stated in the last paragraph quoted, since the means employed by him to secure his pretended election included conspiracies, bribes, and perjuries often repeated, and the knowledge of which was vigorously suppressed on the former hearing. He was not chosen by the legislature of Louisiana. He was chosen by a body of men who conspired with him to defeat the will of the State, and who excluded by force the members elected by the people in order that the conspirators might be enabled to accomplish their work.

The primary authority to determine what is the legislature of a State is and must be the State herself. When the State determines that question for herself, it is determined for all the world. In case there are two governments, or two bodies each claiming to be the true government or the true legislature of the State, and the State has not determined the controversy, the duty may devolve upon others, and in this case upon this Senate to adjudge that question *pro hac vice*.

In January, 1877, a portion of the members elected by the people united with others not elected and seized the Statehouse by cooperation with the sitting member, who was then acting as governor, were barricaded in the building, which was surrounded with troops, and refused to permit other elected members to be admitted into the building. The barricaded persons called themselves the legislature, and the excluded members met in St. Patrick's Hall and called themselves the legislature. This was the condition of things when the sitting member presented his credentials to this Senate and asked to be admitted to his seat on this floor. He was not admitted, but his credentials were referred to the Committee on Privileges and Elections. Before the committee took any action whatever the issue thus raised between these two rival bodies was settled by the State. It was decided that the body which assembled and organized in St. Patrick's Hall was the true legislature of the State. This decision was accepted by all the people of Louisiana and by all the departments of her government, by the President and House of Representatives, and by the circuit and district courts of the United States, and finally by all the persons who composed the body which seized the Statehouse. The latter, which had been known as the Packard legislature, disbanded, leaving not a resolution, or act, or other thing which has ever been recognized as authoritative, or which has been claimed to be valid, save only the pretended election of the sitting member to this Senate; and this single act has been recognized only by this Senate. The former body, which had been known as the Nicholls legislature, performed all the functions of a legislature from the beginning, passed laws which are obeyed by all the people and enforced by all the courts. All the persons who had been elected left the pretended Packard legislature and took their seats in the Nicholls

legislature, and those who had not been elected admitted they were not elected, without even a contest, and went home or into the custom-house or some other Federal office.

The regular legislature thus organized, composed of all the members elected by the people, chose the memorialist to the seat he is now claiming. The election was free, regular, legal, and without taint of corruption of any kind, and his credentials are in due form. Of a legislature which was composed, when full, senate and house, of 156 members, the memorialist received over 140 votes.

Since the former hearing in this case the supreme court of Louisiana has also decided that the officers of the Packard government had, in January, 1877, no official status, and that no acts performed by them at that time, though purporting to be performed *virtute officii*, could have the force and effect of official acts. (State ex rel. Lipo v. Peck, 30 Annual Reports, 280.)

And in addition to all this, the evidence now taken shows that the Packard legislature, which pretended to elect the sitting member, was, in fact as well as in law, not a legislature, but was a body of men assembled by fraud, held together by force and controlled by bribery, with the aid and in the interest of the sitting member.

Mr. George F. Hoar, of Massachusetts, submitted the minority views, which were concurred in by Messrs. Angus Cameron, of Wisconsin, and John A. Logan, of Illinois:

The party majority in the Senate has changed since Mr. Kellogg took the oath of office in pursuance of the above resolution. Nothing else has changed. The facts which the Senate considered and determined were in existence then as now. It is sought, by mere superiority of numbers, for the first time to thrust a Senator from the seat which he holds by virtue of the express and deliberate final judgment of the Senate.

The act which is demanded of this party majority would be, in our judgment, a great public crime. It will be, if consummated, one of the great political crimes in American history, to be classed with the rebellion, with the attempt to take possession by fraud of the State government in Maine, and with the overthrow of State governments in the South, of which it is the fitting sequence. Political parties have too often been led by partisan zeal into measures which a sober judgment might disapprove, but they have ever respected the constitution of the Senate.

The men whose professions of returning loyalty to the Constitution have been trusted by the generous confidence of the American people are now to give evidence of the sincerity of their vows. The people will thoroughly understand this matter, and will not be likely to be deceived again.

We do not think proper to enter here upon a discussion of the evidence by which the claimant of Mr. Kellogg's seat seeks to establish charges affecting the integrity of that Senator. Such evidence can be found in abundance in the slum of great cities. It is not fit to be trusted in cases affecting the smallest amount of property, much less the honor of an eminent citizen, or the title to an object of so much desire as a seat in the Senate. This evidence is not only unworthy of respect or credit, but it is in many instances wholly irreconcilable with undisputed facts, and Mr. Kellogg has met and overthrown it at every point.

The report was taken up for consideration on April 22, and thereafter was debated at length on April 23, 26, 27, and 30, May 3, 4, 7, 10, 14, 20, and June 5, 7, and 11.¹ On May 7² Mr. George F. Hoar proposed the following amendment:

Strike out all after the word "resolved" where it first appears, and insert the following:

"That in the judgment of the Senate the matters reported by the Committee on Privileges and Elections at the present session respecting the right to the seat in this body now held by William Pitt Kellogg and claimed by Henry M. Spofford are not sufficient to justify the reopening of the decision of the Senate, pronounced in its resolution adopted on the 30th day of November, A. D. 1877, that said Kellogg was, upon the merits of the case, lawfully entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th day of March, A. D. 1877, and that said Spofford was not entitled to a seat in the Senate of the United States."

¹Record, pp. 2676, 2735, 2909, 2952, 2972, 3108, 3161, 3232, 3270, 3313, 3362, 3456, 3511, 3551, 4238, 4414.

²Record, pp. 3108–3116.

The debate was elaborate, but it appeared that a portion of the majority party in the Chamber did not subscribe to the conclusions of the committee.

The minority having set up the doctrine of *res adjudicata*, the question as to the exact functions of the Senate under the constitutional provision making it the judge of the elections of its Members became one of importance. On behalf of the majority Mr. Bailey declared¹ that the Senate was not a court in the strict sense, but that its duties in judging elections were in the broadest sense political. Mr. Pryor made² an elaborate constitutional argument to show that the word "judge" did not convert the Senate into a judicial body. Mr. Hill insisted again that the Senate was a political body, not a court.³ On the other hand, Mr. Hoar argued,⁴ from the history of the Constitution that in cases of this sort the Senate acted as a judicial body. Also Senators Wade Hampton and Marion Butler, of South Carolina, differing from their party associates, held⁵ that the Senate in such cases acted as a court.

As to the doctrine of *res adjudicata* itself, Mr. Hill set forth³ the doctrine that the Senate could constitutionally judge only as to who were elected its members and could not judge as to what was the rightful legislature of a State. That decision belonged to the courts, the executive, and the people of the State itself. In this case the Senate had presumed to judge what was the legislature. That decision was void, beyond jurisdiction, attackable collaterally. Mr. George G. Vest, of Missouri, considered⁶ the decision of the supreme court of Louisiana conclusive that the Nichols legislature was the only lawful one. The Senate, in his opinion, was a "creature of the Constitution and has absolute power, irrespective of all technical rules of proceeding, to determine its own constitutional membership." The theory of Mr. Hill was combated by Mr. Matt H. Carpenter, of Wisconsin, who declared "Where a court has jurisdiction at all it has jurisdiction to decide every question necessary to the decision of the question that it must settle." Therefore the Senate could decide as to the competency of the legislature, and its conclusion was not void.

On the doctrine of *res adjudicata* Mr. Carpenter declared⁷ that the peace of society required that some things should be presumed even against notorious facts, and cited the Supreme Court case of *Fletcher v. Peck* (6 Cranch, 130). A wise rule for the courts must be a wise one for the Senate acting in its judicial capacity. Mr. Hampton, while believing that Mr. Kellogg was wrongly seated, said:⁸ "I believe we have not the power, the rightful power, to rectify the wrong." And his colleague, Mr. Butler, also declared⁹ that a Member seated on the merits of his case could be unseated only by expulsion, for he believed that the Senate expended its power when once it judged. The *Throckmorton* case (98 U. S., 61) was cited by Mr. Carpenter on this point.

¹ Record, p. 2677.

² Record, p. 3110.

³ Record, p. 3236.

⁴ Record, p. 3162.

⁵ Record, pp. 3314, 3511, 3512.

⁶ Record, p. 2973.

⁷ Record, pp. 3319, 3320.

⁸ Record, p. 3315.

⁹ Record, pp. 3511, 3512.

Messrs. Kernan, of New York, and Pendleton, of Ohio, held¹ that material or relevant facts ascertained after the decision might justify a review, but the latter considered the new evidence was not such as to justify the reopening.

As to precedents, the Gholson and Claiborne case in the House of Representatives in 1837 was cited² and its applicability as a precedent was also denied.³ The Reeder and Whitfield case in the House of Representatives in 1856 was also cited.³ It was claimed for each of these cases that the House reviewed a decision, but this was denied.

No decision on the question was reached at this session of Congress.

By the time the Third session of the Congress began, Mr. Spofford had died, and on December 7⁴ Mr. Jonas presented the credentials of Thomas Courtland Manning, appointed a Senator by the governor of Louisiana to fill the vacancy occasioned by the death of Henry M. Spofford, who claimed to be elected Senator from that State; which were referred to the Committee on Privileges and Elections.

No further action was had, Mr. Kellogg retaining the seat.

358. The Senate election case of Sanders, Power, Clark, and Maginnis, from Montana, in the Fifty-first Congress.

There being conflicting credentials resulting from elections by rival legislative bodies, the Senate declined to give prima facie effect to the papers and examined the final right.

A Senate discussion favoring recognition of a legislative body having a legally certified but not legally elected quorum in preference to one having an elected but not certified quorum.

A legislature in electing a Senator may act under the law as an assemblage of legislators rather than as two organized legislative bodies.

On January 16, 1890,⁵ in the Senate, Mr. Henry M. Teller, of Colorado, presented a paper purporting to be the credentials of Wilbur F. Sanders, chosen a Senator by the legislature of Montana, and also a paper purporting to be the credentials of Thomas C. Power, chosen a Senator by the legislature of the same State, which were read and referred to the Committee on Privileges and Elections.

These credentials were alike in form. Each recited that the senate and house of representatives had duly organized and elected as United States Senator, the bearer, whose name was given. Then the credentials⁶ proceeded as follows:

Whereas Hon. Joseph K. Toole, the governor of said State, upon the 10th day of January, A. D. 1890, did refuse to certify such election of said Wilbur F. Sanders for said Senator:

Now, therefore, I, Louis Rotwitt, secretary of the State of Montana, do hereby certify that the said Wilbur F. Sanders has been duly elected by said joint assembly Senator in Congress from said State of Montana.

In testimony whereof I have set my hand and caused the great seal of the State of Montana to

¹Record, pp. 3363, 3364, 4239.

²Record, pp. 2678, 3162.

³Record, p. 3112.

⁴Third session Forty-sixth Congress, Record, p. 15.

⁵First session Fifty-first Congress, Record, p. 633.

⁶For forms of the credentials in this case, see Record, p. 3419.

be affixed at my office in Helena, the capital of said State, in the year of our Lord, 1890, and of the independence of the United States of America the one hundred and fourteenth.

[SEAL.]

L. ROTWITT,

Secretary of State of the State of Montana.

On January 23¹ Mr. George G. Vest, of Missouri, presented a paper purporting to be the credentials of William A. Clark, and also a paper purporting to be the credentials of Martin Maginnis, elected Senators by the legislature of the State of Montana, which were read and referred to the Committee on Privileges and Elections.

On motion by Mr. Vest, and by unanimous consent,

Ordered, That, pending the settlement of the contested election cases of Senators from the State of Montana, Messrs. Wilbur F. Sanders, Thomas E. Power, William A. Clark, and Martin Maginnis be admitted to the privileges of the floor of the Senate.

These credentials were dated "The State of Montana, Executive Office," recorded the election of the bearers by the legislature, and concluded:

Now, therefore, I, Joseph K. Toole, governor of the State of Montana, do hereby certify that the said William A. Clark has been duly elected by such joint assembly to serve as Senator in Congress from the State of Montana.

In testimony whereof I have hereunto set my hand and caused the great seal of the State of Montana to be affixed. Done at my office, in Helena, in the year of our Lord, 1890, and the year of American Independence the one hundred and fourteenth.

JOS. K. TOOLE, *Governor of Montana.*

In fact, the "great seal of the State" was not affixed to the credentials. The signature of the governor was attested only by a notary public.

The credentials were referred, neither of the claimants being permitted to take the oath.

On March 24² Mr. George F. Hoar, of Massachusetts, chairman of the committee, submitted a report concurred in by himself and by Messrs. William P. Frye, of Maine; Henry M. Teller, of Colorado; William M. Evarts, of New York; and John C. Spooner, of Wisconsin. Dissenting minority views were presented by Messrs. Z. B. Vance, of North Carolina; J. L. Pugh, of Alabama; George Gray, of Delaware; and David Turpie, of Indiana.

The report first states the facts:

No distinction exists between the cases of Messrs. Sanders and Power, and no distinction exists between the cases of Messrs. Clark and Maginnis. The cases on each side have been presented and argued upon the merits of the title, and not merely upon the question presented by the certificate of the governor or of the secretary of state. The committee, therefore, have considered and report upon the whole case upon its merits.

The claimants on both sides seem to be agreed that a lawful joint convention was held in Montana by the members of the two houses of the legislature, and elected Senators by due proceedings. The dispute is which of two bodies claiming to be the lawfully organized house of representatives of Montana was entitled to that character.

There was no election of Senator by concurrent vote on the Tuesday appointed for that purpose by the statute of the United States (Rev. Stat., secs. 14, 15). On the following day one-half the members of the senate met in joint assembly with a body which had assembled and organized in a room called the Iron Hall, which body was known as the Iron Hall or Republican house, whereupon, a ballot for

¹ Record, pp. 795, 3419.

² Senate Report No. 538.

Senator being had, Mr. Sanders had a majority of all the votes cast, and was declared duly elected. No other person having such majority, the convention was adjourned until the day following, when, a ballot for Senator being held, Mr. Power had a majority of all the votes cast and was declared duly elected. If this body were the lawful house of representatives of Montana, these two gentlemen were duly chosen Senators.

On the same day the other half of the members of the senate met in joint assembly with a body which had assembled and organized in the court-house, which body was known as the Court House or Democratic house, voted for Senators by separate ballotings, adjourned from day to day, and continued balloting until Messrs. Clark and Maginnis had a majority of all the votes cast and were declared duly elected. If this body were the lawful house of representatives of Montana, these two gentlemen were duly chosen Senators.

These two bodies were composed as follows: By the constitution of Montana the house of representatives consists of fifty-five members, of whom twenty-eight are a quorum. Twenty-five persons of whose title to sit in the house of representatives and take part in its proceedings no question is made, together with five persons claiming to be entitled to sit and take part as representatives from the county of Silver Bow, met, as above stated, at the Iron Hall, at the time fixed by the constitution for the meeting of the legislature, and organized there. The auditor, who is required by the constitution to preside at the organization of the house, called them to order and presided till a speaker was chosen. Twenty-four other persons of whose title to sit in the house of representatives and take part in its proceedings no question is made, together with five other persons claiming to be entitled so to sit and take part as representatives from the county of Silver Bow, met, as above stated, at the court-house, at the time fixed by the constitution for the meeting of the legislature, and organized there.

The whole case, therefore, turns upon the question which of these two sets of five persons was entitled to sit in the house of representatives from the county of Silver Bow, take part in the organization and other proceedings down to and including the time of the election of Senators. It is not claimed that there was any adjudication of the house itself affirming or denying such title.

In determining the question as to the rights of the respective claimants to the five contested seats the committee discuss three questions:

First. Which of the two sets or groups of five members claiming to sit for the county of Silver Bow had credentials from the officer or board entitled to canvass the vote and declare the result?

On this question a sharp difference arose between the majority and minority, arising from different constructions of the laws of Montana. The majority held that the credentials issued by the State canvassing boards were the only lawful credentials. The minority sustained the credentials issued by the county clerks. The case largely turned on this issue, which was discussed at length in the reports and in the debate on the floor.

Second. If one group of five had the lawful credentials, but the other group were in fact elected, which was legally entitled to sit in the house at its original organization and remain and take part in all subsequent proceedings until the house itself had adjudicated their title, there being in existence two bodies each claiming to be the true house?

The majority report says:

It will hereafter appear that it is unnecessary to decide this question for the purposes of the present case. We believe, for reasons hereafter stated, that the certificates of the State board declared the true will and choice of the people as expressed by a majority of the votes actually and lawfully cast. But, as the matter has been discussed, it is proper to say that we are unable to see any distinction in principle between the case of a person claiming title to a seat in an assembly whose character is disputed by some other body, and in an assembly whose character is undisputed. The majority of persons having a right to seats in the house of representatives have a right to organize that house and to transact all its lawful business, including the enactment of laws and the election of Senators. Persons who have the certificates of election have such right to seats. Every act of the assembly in which they take part, and to which their consent is necessary, has as absolute validity as if their title had been affirmed by

an adjudication of the house itself. Their title is not, as is sometimes carelessly said, a *prima facie* title. It is an absolute title, continuing until the house itself has adjudicated that some other person be admitted to their place. This adjudication is only operative for the future, and has no retroactive effect whatever. When the house makes the inquiry on the merits, it may treat the credentials as *prima facie* evidence upon that question. But until the house tries the case, the credential is conclusive as to all the world.

If this be true, how can an attempted usurpation by another body of the functions of the house, to which they belong, in the least affect their right? If four certified members had come over from the court-house to the Iron Hall, according to this argument, these men, who had no title to their seats before, would at once become entitled to them. If the men who went to the court-house had never gone there or made any claim to the seats, in that case, according to this theory, the five certified members from Silver Bow would have been all right. It seems to us impossible to believe that the right of these gentlemen to sit and vote, the validity of any laws they might have helped to enact, or of the choice of any officer they might help to elect, should depend on the acts of other persons.

This question may be raised at the beginning of any session of Congress. If the certificate of the proper officer of the State give no title, surely the act of the clerk in placing the claimant's name on a roll can give none. It would be competent, if the claim we are dealing with be sound, to organize the House of Representatives of the United States with a quorum partly made up of persons having credentials and partly of persons having none, and thereby put upon the Senate, when called upon to determine whether it will recognize such a body, the necessity of going into evidence of what occurred at the popular elections and of trying the right of the Members of the House to their seats. The President must make for himself a like inquiry, and perhaps the courts a third. It might be that these bodies would come to different conclusions upon the voluminous and conflicting evidence in a contested-election case, and thus the whole Government would be thrown into confusion. We suppose that there has been more than one occasion in recent years when a majority of the Senate firmly believed that enough of the Members of the House who held credentials were not duly elected to change the political majority. If this doctrine be accepted, the party in the minority in the House may at any time associate with themselves persons enough claiming to have been chosen to make a quorum, and disregard the certificates of the executives of the States and the Clerk's roll. The Senate may then take evidence of what occurred at the polls, thereby determine who were lawfully elected, recognize the body so organized, and thereby give the persons it finds so elected the seats to which neither credentials nor judgment of the House have ever given a title.

The report in *Sykes v. Spencer*, decided by the Senate in 1873, is relied upon as supporting an opinion contrary to that which we have stated. If so, we dissent from it. But it is to be remarked that in that case, which was upon an election held less than seven years after the close of the war, the doctrine of the report is not relied upon in the debate. It is further to be observed that that case is to be distinguished from this by the fact that there it was conceded that the persons who had not certificates were duly elected. The distinction from the general rule is expressly put by Mr. Carpenter, in his report, upon this concession. When the fact there conceded is, as in the present case, disputed, and to be proved, we think there are but two ways in which it can be proved to the Senate. One is the possession of lawful credentials. The other is the judgment of the House itself, not only the final, but the sole judge of the elections, qualifications, and returns of its Members.

Mr. Gray, speaking for the minority, said they did not dissent from the proposition laid down by the majority, and did not found their case on the principles enunciated in the case of *Sykes v. Spencer*, which he declined to indorse. The ruling was considerably discussed during this debate.¹

Third. Is there evidence which warrants the Senate in finding that the persons who had the credentials were not, in fact, duly elected?

The majority and minority disagreed sharply as to which set of contestants were actually elected, and this question was discussed at length in the report and on

¹ Record, pp. 2910, 2918, 3188.

the floor. The majority found that the persons bearing the State canvassing-board credentials had in fact been elected.

On another point the majority concluded:

The suggestion has been made that, to elect a Senator, there must be in existence a legislature exercising, or at least capable of exercising, the law-making function; and that when this function is interrupted or abdicated, or has never been set in motion because either house refuses to recognize and act in concert with the other, or because the governor refuses to treat either as possessed of legislative authority, there is, in fact, no legislature in the constitutional sense, and therefore no body competent to appoint a Senator. In Montana the governor declined to recognize the Iron Hall house, and the senate, which was evenly divided politically, did not recognize either Iron Hall or Court-House.

The suggestion is ingenious, but we do not think it will bear examination. The governor is no part of the law-making power. The legislature may pass laws, if he do not assent to them. He has only the power to require the legislature to reconsider a bill or resolve they have once passed. On such reconsideration a two-thirds vote, instead of a bare majority, is essential to the enactment. (Constitution of Montana, art. 5, sec. 29.)

It would be a strange condition of things if the governor of a State, or the President of the United States, could, by a simple refusal of recognition, suspend all legislative functions, so that bills presented to him should not become laws through his inaction, or be passed over his veto. Such a theory, which rests wholly on implication, would, if adopted, neutralize plain provisions of the Constitution.

Neither house of the legislature, when once lawfully constituted, can abandon its own authority. Much less can it take away the authority of the other. Neither House of Congress can even adjourn for more than three days without the consent of the other. A like provision is in the constitution of Montana. This theory enables one house, or the executive, to overthrow at once all the constitutional securities for the preservation of the legislative power. It is utterly opposed to the act of Congress prescribing the manner of the election of Senators (Revised Statutes, secs. 14 to 19.) If no concurrent election be had, "the members of the two houses shall convene in joint assembly."

This is intended to put it out of the power of a majority of either house to prevent a choice of Senator. This provision we think clearly constitutional. It is in accordance with the legislative usage in the matter of electing officers whose choice may be prevented altogether if two distinct bodies must concur to produce a valid result.

In conclusion, the majority recommended these resolutions:

Resolved, That William A. Clark is not entitled to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Martin Maginnis is not entitled to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Wilbur F. Sanders is entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Thomas C. Power is entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana.

The report was debated at length on April 2, 3, 7-11, 15, and 16.¹ On the latter day² a motion to recommit was disagreed to—yeas 26, nays 32.

Then the question recurring on agreeing to the first two resolutions reported by the committee, Mr. Gray moved a substitute declaring Messrs. Sanders and Power not elected. This amendment was disagreed to—yeas 26, nays 32.

The two first resolutions of the committee were then agreed to—yeas 38, nays 19.

Then the question recurred on the two last resolutions of the committee, declar-

¹ Record, pp. 2906, 2968, 3101, 3136, 3188, 3228, 3279, 3378, 3419.

² Record, pp. 3433-3435.

ing Messrs. Sanders and Power entitled to the seats. A substitute amendment declaring that in the judgment of the Senate there had been no choice was disagreed to—yeas 23, nays 30.

Then the resolutions were agreed to—yeas 32, nays 26.

Messrs. Sanders and Power thereupon appeared and were sworn.

359. The Senate election cases of John T. Morgan, of Alabama, and L. Q. C. Lamar, of Mississippi, in the Forty-fifth Congress.

The Senate gave immediate prima facie effect to perfect credentials certifying election by a legally organized legislature, although it was objected that popular will had been subverted in electing the legislators.

On March 5, 1877,¹ at the time of swearing in Senators-elect, Mr. George E. Spencer, of Alabama, objected to the administration of the oath to Mr. John T. Morgan, of Alabama.

On March 7² Mr. Thomas F. Bayard, of Delaware, offered this resolution:

Resolved, That the credentials of John T. Morgan, Senator-elect from the State of Alabama, be taken from the table and that he be sworn.

On March 8³ Mr. Spencer proposed an amendment providing that the credentials be referred to a committee before the swearing in of Mr. Morgan.

It did not appear that there was any question as to the credentials, as to the title of the governor who signed them, or as to the fact that the legislature which elected him was the only legislature of the State. But it was urged that in the election of the State government the will of the people had been subverted by violence, and therefore that the action of the legislature was void.

After debate Mr. Spencer's amendment was rejected, the resolution was agreed to, and Mr. Morgan took the oath.

360. On March 3, 1877,⁴ in the Senate, the credentials of L. Q. C. Lamar, of Mississippi, for the six years commencing March 4, 1877, were presented.

On March 5,¹ at the time of swearing in Senators-elect, Mr. George E. Spencer, of Alabama, objected to the administration of the oath to Mr. Lamar because of conditions set forth in the report of the Committee on Privileges and Elections, who had investigated the recent election in Mississippi.

On March 6,⁵ Mr. William A. Wallace, of Pennsylvania, offered the following:

Resolved, That the credentials of L. Q. C. Lamar, Senator-elect from the State of Mississippi, be taken from the table and that he be sworn.

Mr. Spencer moved to amend the resolution by a substitute referring the credentials to the Committee on Privileges and Elections.

In the debate Mr. Spencer urged that the State government of Mississippi, as shown by the report of the Senate's committee, was a fraud and an usurpation. The legislature had been chosen in an election wherein violence and intimidation pre-

¹ Special session of Senate, Forty-fifth Congress, Record, p. 2.

² Record, p. 24.

³ Record, pp. 24–31.

⁴ Second session Forty-fourth Congress, Record, p. 2147.

⁵ Record, pp. 5–15.

ailed. In his view a mob could not organize a State government sufficient to make out a prima facie case.

It appeared that Mr. Lamar's credentials were issued by a governor whose title was not disputed by any other claimant and by a legislature that was unquestioned as the only legislature of the State. It was urged that the objections raised went to the fact of election, and should not prevent the swearing in of Mr. Lamar on his undisputed prima facie showing.

There was little objection to this claim; but Mr. Oliver P. Morton, of Indiana, called attention to the Pinchback case of Louisiana, and declared that it was inconsistent to seat Mr. Lamar and deny a seat to Mr. Pinchback, who bore credentials from the only recognized governor of Louisiana of an election by the recognized and existing legislature of the State. In opposition to this view it was urged, especially by Mr. Henry L. Dawes, of Massachusetts, that a rival claimant also presented credentials from a rival governor of Louisiana, and that Mr. Pinchback's case was thus so complicated that both claimants should wait until their claims could be examined.

Mr. Bainbridge Wadleigh declared that the question which arose was whether the voice which came here was really the voice of Mississippi. An usurpation should not have a voice on the floor of the Senate. He favored an examination before admitting Mr. Lamar.

The question recurring on the amendment proposed by Mr. Spencer, there appeared 1 yea (Mr. Wadleigh) and 58 nays.

Then the resolution proposed by Mr. Wallace was agreed to—yeas 57, nays 1 (Mr. Wadleigh).

Mr. Lamar then appeared and took the oath.