

Chapter XVIII.

CREDENTIALS AND PRIMA FACIE TITLE.¹

1. In due form from Recognized Constituency, sections 52–37.²
 2. Questions as to Validity of, sections 538–543.³
 3. In Relation to Questions as to the Fact of Election, sections 544–552.⁴
 4. Refusal of State Executives to Issue, sections 553–564.⁵
 5. In relation to Questions as to Vacancy, sections 565–570.⁶
 6. As related to Contested Elections, sections 571–588.⁷
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528. The House admits on his prima facie showing and without regard to final right a Member-elect. from a recognized constituency whose

¹ Question of prima facie title not to be reopened when once decided. Section 847 of Volume II
As related to enrollment by the Clerk. Chapter II, sections 30–60 of this volume.

As related to qualifications. Cases of Connor (sec. 469 of this volume). Roberts (sec. 474). Smoot (sec. 481), and others (secs. 415, 416, 420, 429, 432, 443, 468); also cases involving question of loyalty (secs. 443, 448, 453, 457, 460, 461, 462).

² In relation to districts distracted by war. Cases of Foster (sec. 362); Segar (sec. 363); Clements (sec. 365); Wing *v.* McCloud (sec. 368); Pigott (sec. 369); Grafflin (sec. 371); McKenzie *v.* Kitchen (sec. 374); Chandler and Segar (sec. 375); Fields (sec. 376); Flanders and Hahn (sec. 379); Johnson, Jacks, and Rogers (sec. 380); Louisiana Members (sec. 381); also Senate cases, sections 382–384.

Members-elect from States lately in secession not admitted on prima facie title. Chapter XI, sections 387–388 of this volume. Senate decisions, sections 389–395.

Delegates elected in unorganized Territories not admitted on prima facie title. Sections 405, 410 of this volume.

³ See cases of Brockenbrough *v.* Cabell (sec. 812 of this volume), and Wiggington *v.* Pacheco (sec. 927 of Vol. II).

⁴ Case of the New Jersey Members (secs. 791–794 of this volume); of Tennessee Members (sec. 521); Gilbert and Wright (sec. 520); Minnesota members (sec. 519), and a case involving apportionment (sec. 309).

⁵ Refusal of State executive to sign. Sections 353, 415 of this volume.

⁶ Cases of Mississippi Members (sec. 518 of this volume); Newton (sec. 489); Blakely *v.* Golladay (sec. 322), and cases wherein States have sent Members in excess of the apportionment (secs. 314–318 of this volume); also the Senate case of Stanton *v.* Lane (sec. 491).

⁷ See also House cases as follows: Letcher *v.* Moore (sec. 53); “Broad Seal” case (sec. 103); Smith *v.* Brown (sec. 459); Symes *v.* Trimble (sec. 452); Louisiana cases (secs. 328, 332); Chalmers *v.* Manning (secs. 44, 45); Gunter *v.* Wilshire (sec. 37); Wallace *v.* McKinley (sec. 986 of Vol. II); Atkinson *v.* Pendleton (sec. 1020 of Vol. II); McGinnis *v.* Alderson (sec. 1036 of Vol. II).

As to prima facie right when returned Member dies pending a contest. Section 735 of this volume.

Contestant not to be seated because a partial investigation reveals for him a prima facie title. Section 772 of this volume.

The certificate of the State executive is prima facie evidence only. Section 637 of this volume.

Also see Senate cases as follows: Kellogg, Spofford, and Manning (secs. 354–357); Ray *v.* McMillen (sec. 345); Finchback, McMillen, Marr, and Eustis (secs. 347–353); Sykes *v.* Spencer (sec. 342); Morgan and Lamar (sec. 359); Sanders, Power, Clark, and Maginnis (sec. 358).

credentials are in due form and whose qualifications are unquestioned.—

On September 4, 1837,¹ at the organization of the House, the Clerk was calling the roll of Members-elect by States, and had reached Mississippi when Mr. Charles F. Mercer, of Virginia, arose and having questioned the right of the two gentlemen from Mississippi present to seats, offered this resolution:

Resolved, That sufficient evidence has not been afforded to this House that John F. H. Claiborne and Samuel J. Gholson are lawfully entitled to seats therein.

It appeared in the course of the debate that the Members from Mississippi had regular credentials from the governor of the State, and one of them announced his purpose, in case he was challenged, to challenge every Member present to produce his credentials.

Mr. Mercer's resolution was laid on the table—ayes 131, noes 5—and the names of the Members from Mississippi were called.²

529. On December 1, 1856,³ Mr. John S. Phelps, of Missouri, presented the credentials of John W. Whitfield as a Delegate from the Territory of Kansas, to fill the vacancy existing by the decision of the House unseating Mr. Whitfield at the first session of the present Congress.

The credentials having been read, Mr. Phelps stated that the Delegate-elect was now present and was ready to take the usual oath.

Mr. Galusha A. Grow, of Pennsylvania, objected to the administration of the oath to the said Delegate-elect, when the Speaker⁴ said that the question was for the determination of the House, viz, Shall the oath to support the Constitution of the United States be administered to John W. Whitfield as the Delegate-elect from the Territory of Kansas?

It was urged by Mr. Phelps that, the credentials being in due form, the Delegate-elect was entitled, by prima facie right, to be sworn in. Such had been the practice of the House.

On the other hand, Mr. Grow cited the New Jersey cases, and that of Moore and Letcher, in former Congresses, as precedents to justify the objection in the present case.

The question being taken, the House, by a vote of yeas 97, nays 104, decided that the oath should not be administered to Mr. Whitfield.

Thereupon a motion was made to reconsider, and after a parliamentary struggle of long duration, the vote was reconsidered, and on December 9, the question being again taken, the House voted, by ill yeas to 108 nays, that the oath should be administered to Mr. Whitfield, and he was accordingly qualified.

530. On March 4, 1869,⁵ Mr. William Lawrence, of Ohio, submitted the following resolution during the administration of the oath to Members at the organization of the House:

¹ First session Twenty-fifth Congress, Journal, p. 4; Globe, pp. 2, 3.

² See section 518 of this volume for full explanation of the conditions under which these credentials were given.

³ Third session Thirty-fourth Congress, Journal, pp. 7, 8, 84, 85; Globe, pp. 2, 68, 69.

⁴ Nathaniel P. Banks, jr., of Massachusetts, Speaker.

⁵ First session Forty-first Congress, Journal, p. 9; Globe, p. 7.

Resolved, That A. A. C. Rogers, claiming to be the Representative in the Forty-first Congress from the Second district of Arkansas, shall not now be permitted to take the oath of office or a seat as such Representative, but his credentials shall be and are referred to the Committee of Elections when appointed.

Mr. Lawrence stated that he held a certificate from the governor of Arkansas stating that in a portion of the district which Mr. Rogers represented there had been great disorder and no fair election.

It was urged in opposition that Mr. Rogers held a certificate regular in form and that he should be sworn in, leaving his final right to the seat to be determined later.

A motion to lay the resolution on the table was agreed to, and the oath was administered to Mr. Rogers.

531. On March 4, 1869,¹ after the election of the Speaker, and while the oath of office was being administered to the Members-elect, Mr. James Brooks, of New York, proposed, when the Members from Missouri presented themselves to be sworn, the following:

Resolved, That the right of Robert T. Van Horn and David P. Dyer to seats upon this floor be inquired into by the Committee of Elections before they are permitted to be sworn in as Members of the Forty-first Congress.

The reason given for the presentation of this resolution was that the two gentlemen had not been elected, although it appeared that their credentials were regular in form. It was urged against the adoption of the resolution that, while there might be a question as to the final right of the two gentlemen to their seats, there could be no question as to their prima facie right. Mr. John F. Benjamin of Missouri submitted a motion that the oath be administered.

After further debate, Messrs. Van Horn and Dyer stood aside, and on the succeeding day the motion was put that the oath be administered to them. On a motion to lay that motion on the table, there appeared, yeas 4, nays 163. The motion that the oath be administered was then agreed to. Messrs. Van Horn and Dyer then appeared and took the oath.

532. On December 5, 1870,² at the opening of the session, the credentials of R. W. T. Duke, Member-elect from the Fifth Congressional district of Virginia, were presented to the House.

Mr. James H. Platt, jr., of Virginia, presented a resolution referring the papers in a contest against the right of Mr. Duke to a seat, as well as the credentials, to the Committee on Elections, with instructions to report at an early date on his prima facie right to a seat.

Mr. Samuel J. Randall, of Pennsylvania, urged that it was in accordance with the practice of the House to allow the Member-elect to be seated when his credentials were in due form, leaving the question of final right to the seat to be determined later. In this case Mr. Randall showed the credentials were in proper form according to the provisions of the law of Virginia.

¹ First session Forty-first Congress, Journal, pp. 9, 10; Globe, pp. 7, 10.

² Third session Forty-first Congress, Journal, pp. 7, 8; Globe, pp. 11, 12.

The House having declined by a vote by tellers of ayes 57, noes 60, to second the previous question on the motion of Mr. Platt, it was then, on motion of Mr. Randall,

Ordered, That the oath of office be administered to the said R. W. T. Duke.

533. On January 24, 1871,¹ Mr. P. M. B. Young, of Georgia, presented the credentials of Mr. Stephen A. Corker, of the Fifth Congressional district of Georgia, and asked that he be sworn in.

Mr. Benjamin F. Butler, of Massachusetts, objected, and after presenting the memorial of Thomas P. Beard, claiming the seat, moved that the petition and the credentials of Mr. Corker be referred to the Committee on Elections. The objection urged in behalf of Mr. Beard was that there had been outrage and intimidation in the district which had rendered illegal the election of Mr. Corker. It was not denied that Mr. Corker's credentials were in regular form, properly signed and sealed.

In the course of the debate on Mr. Butler's motion, Mr. Henry L. Dawes, of Massachusetts, said:

Sir, I, as the organ of the Committee on Elections for twelve years, have time and again so stated. It has been stated on behalf of that committee on the floor of this House, and it stands in the Globe, as well on the part of one side of the House as on the other, that the certificate of a Member, where there was no allegation against his eligibility, of his lack of loyalty, or other ineligibility, entitled him to be sworn in. It has been the struggle during all these disturbed times of that Committee on Elections to hold to the precedents and to the law against passion and against prejudice, so that if the party should ever fall into a minority they should have no precedent of their own making to be brought up against them to their own great injury. Now, with nothing to be gained, but with everything to be lost, by the precedent now sought to be established, I entreat the House to adhere to the ancient rule.

The question being taken, the motion of Mr. Butler was disagreed to—yeas 42, nays 147.

The question then recurred on the motion of Mr. Young that the oath be administered to Mr. Corker, and it was agreed to. Thereupon Mr. Corker appeared and took the oath.

534. On December 5, 1881² at the time of the organization of the House, and while the Speaker was administering the oath to the Members-elect, Mr. George W. Jones, of Texas, challenged Mr. Joseph Wheeler, of Alabama, and later offered the following resolution:

Resolved, That the question of the prima facie as well as the final right of Joseph Wheeler and William M. Lowe, contestants, respectively claiming a seat in this House from the Eighth district of Alabama, be referred to the Committee on Elections hereafter appointed, and until such committee shall report and the House decide such question neither of said contestants shall be seated.

The credentials of Mr. Wheeler were read, and proved to be regular in form and in accordance with the law and the Constitution.

The House, after debate, and without division, voted that Mr. Wheeler be permitted to take the oath in accordance with his prima facie right.

On the same day Mr. James R. Chalmers, of Mississippi, was challenged, and under similar circumstances, the House without division voted that he be allowed to take the oath.

¹ Third session Forty-first Congress, Journal, p. 209; Globe, pp. 703–707.

² First session Forty-seventh Congress, Journal, pp. 11, 12; Record, pp. 9–14.

535. Credentials being in regular form, and unimpeached, the House honors them, although there may be a question as to the proper limits of the constituency.

Credentials being unimpeached, the status of the district under an apportionment law is a question of final rather than prima facie right.

Forms of credentials borne by persons elected to fill vacancies.

On December 13, 1880,¹ Mr. Amos Townshend, of Ohio, presented the following credentials:

In the name and by the authority of the State of Ohio, Charles Foster, governor of said State,
to all whom these presents shall come, greeting:

By virtue of the powers conferred on me by law, I do hereby certify that at the special election held on the fifth Tuesday, being the 30th day of November, A. D. 1880, Ezra B. Taylor was duly elected Representative in the Forty-sixth Congress of the United States for the Nineteenth district of Ohio, to fill the vacancy caused by the resignation of James A. Garfield.

In testimony whereof I have hereunto subscribed my name and fixed the great seal of the State of Ohio, at Columbus, this 8th day of November, 1880.

[SEAL.]

CHARLES FOSTER, *Governor.*

MILTON BARNES,
Secretary of State.

Mr. Frank Hurd, of Ohio, objected to the immediate swearing in of Mr. Taylor, on the ground that after the election of Mr. Garfield and prior to the election of Mr. Taylor, the legislature of Ohio, had by law changed the limits of the Congressional districts of that State, and that the Nineteenth district resulting from that change of law contained one county not in the district before the change, and had lost one county that it contained before the change. After the resignation of Mr. Garfield the governor had issued the writ of election, not to the new Nineteenth district, but to the counties composing the old Nineteenth, although that district had ceased to exist. Therefore Mr. Taylor had been elected from a district that had no existence at all.

On the other hand it was argued by Mr. William McKinley, of Ohio, and by others that Mr. Taylor's prima facie right to be sworn in was perfect, the certificate raising no doubt as to its completeness and legality.

The House, after Mr. Hurd had withdrawn his objection, voted that Mr. Taylor should be sworn in, and referred the credentials to the Committee on Elections.

536. On December 19, 1883,² the credentials of Thomas G. Skinner, of the First Congressional district of North Carolina, were presented to the House. Mr. J. Warren Keifer, of Ohio, objected to the administration of the oath to him, and offered a resolution, with a preamble. This preamble recited that Walter R. Pool was at the November election, in 1882, elected to Congress from the First Congressional district of North Carolina, composed of certain counties, including the county of Bertie, but not including the county of Carteret. By Mr. Pool's death, on August 25, 1883, a vacancy occurred in the district. Since the election of said Pool the legislature of the State had redistricted the State, constituting a new First district,

¹Third session Forty-sixth Congress, Journal, p. 58; Record, pp. 102–106.

²First session Forty-eighth Congress, Journal, pp. 149, 150; Record, pp. 179–189.

which did not include the county of Bertie but did include the county of Carteret. The preamble then proceeds:

Whereas to fill the vacancy occurring as aforesaid, the governor of North Carolina ordered an election in the said new First district, by virtue of which election Hon. Thomas G. Skinner now claims a seat in this House; and

Whereas to admit him to the seat would leave the said county of Bertie without any district representation in this Congress, and the said county of Carteret would be doubly represented; therefore,

Be it resolved, That the credentials of Mr. Skinner be referred to the Committee on Elections of this House, when appointed, with power to ascertain and report all the facts pertaining to this vacancy and the said election to fill the same, at as early a day as practicable, together with the law governing the case.

Mr. Keifer cited precedents applying to the case, but after debate the House, by a vote of 117 yeas to 108 nays, preferred the following substitute:

Resolved, That Thomas G. Skinner be sworn in, and that it be referred to the Committee on Elections, when appointed, to report at the earliest practicable moment whether the said Thomas G. Skinner was elected from the First Congressional district of North Carolina as created before the last Congressional apportionment of Representatives in Congress or from a district in North Carolina created in that State since the election of Walter R. Pool, deceased, and to further report whether in the judgment of said committee said Skinner was elected from the proper district.

537. The Virginia election case of Garrison v. Mayo, in the Forty-eighth Congress.

The House should not disturb the prima facie title of a Member already seated on credentials in due form and unimpeached by anything properly presented to the House.

The House overruled the action of State officers who had rejected a county return because of a writing on the seal of the clerk's certificate.

Votes found in the wrong ballot box have been counted without proof of mistake, although there was dissent in the committee.

A question as to the best rule for elimination of an excess of ballots in the box.

Testimony as to what a voter said after election as to his vote is not admissible to prove for whom the vote was cast.

Where voters are disqualified for crime, a vote should not be rejected unless there is proper evidence of the conviction of the person offering it.

On December 3, 1883,¹ at the organization of the House, the name of Robert M. Mayo, of the First district of Virginia, appeared on the clerk's roll of members-elect, and the oath was administered to him without objection.

On December 4, Mr. J. Randolph Tucker, of Virginia, offered this resolution:

Resolved, That the certificates and all other papers relating to the election of a Representative of the First Congressional district of Virginia in the Forty-eighth Congress be referred to the Committee on Elections, when appointed, with instructions to report at as early a day as practicable which of the rival claimants to the seat from that district has the prima facie right thereto, reserving to the other party the privilege of contesting the case upon the merits.

It was at once objected, especially by Mr. William H. Calkins, of Indiana, who had been chairman of the Committee of Elections in the preceding Congress, that it was unusual, if not unprecedented, for the House to inquire into the prima

¹First session Forty-eighth Congress, Journal, pp. 21, 31; Record, pp. 3, 28, 43, 44.

facie right of a Member after he had been sworn in. The swearing in was the decision on the prima facie right.

The debate on the resolution was resumed December 5, and Mr. Tucker maintained that the House being judge of the election, returns, and qualifications of its own Members, it certainly might inquire as to the right of the Member to hold the seat during the intermediate time between the swearing in and the decision as to the final right.

Mr. Aylett H. Buckner, of Missouri, offered this resolution, which was agreed to:

Resolved, That the resolution be committed to the Committee on Elections, when formed, with instructions to report on the legal question involved therein.

On February 8, 1884,¹ Mr. Robert Lowry, of Indiana, submitted the report of a majority of the committee. The report held—

It will be observed that by the resolution adopted the former resolution was simply referred to this committee to report upon the legal question involved, without any instructions to determine whether, upon the face of the papers filed in the contested election case, and as appears by them, the contestor or contestee is prima facie entitled to the seat. This being so, especially as the contestee has been sworn in, unless the House itself shall determine to go behind the certificate of the governor (which, under some circumstances, and keeping within the rules of parliamentary law, the House, in the opinion of this committee, is empowered to do), the committee is further of the opinion, upon the legal question involved, that the certificate of the governor of the State of Virginia, showing that Robert M. Mayo was regularly elected as such Representative, being in due form, in the absence of anything properly presented to us to impeach it, is conclusive.

This conclusion is based upon the premise that the House has not instructed the committee to consider the evidence outside of the certificate referred to in the original resolution proposed by Mr. Tucker, tending to impeach the certificate of the governor of Virginia, but merely referred that resolution to the committee with instructions to report upon the legal question involved; and the certificate being regular upon its face, and the House not having authorized or directed the consideration of extrinsic evidence to impeach the commission of the sitting Member, the conclusion reached is based upon the principle that the integrity of the certificate is not duly challenged.

In order to dispose of the question submitted, the committee therefore recommends the adoption of the following resolution, and that the committee be discharged from the further consideration of this part of the case:

Resolved, That upon the legal question involved in the case of *Garrison v. Mayo*, the return of the governor, in the absence of anything appearing thereon or properly presented in connection therewith tending to impeach it, is conclusive as to the prima facie right, and that, pending the contest on the merits, the sitting Member is therefore in this case entitled to retain the seat."

It does not appear that this proposition was acted on.²

On March 20³ Mr. Henry G. Turner, of Georgia, submitted the report on the question of final right in the contest of *Garrison v. Mayo*.

As to what may be termed the actual result shown by the returns that came to the State canvassing board the report says:

Upon the basis of this statement giving Mr. Mayo a plurality of 1 vote, the board further certified that Mr. Mayo was duly elected. It is due to the governor to say that he did not sign this latter certificate.

This plurality of 1 vote, upon which Mr. Mayo was accredited as a Representative of Virginia, was obtained by the rejection of the return of the election in Gloucester County. That return was in the

¹ House Report, No. 286; Mobly, p. 53; Journal, p. 532; Record, p. 995.

² It was stated in the debate that the report was not acted on. Record, p. 2114.

³ House Report No. 954; Mobly, p. 55.

usual form, and was excluded by the board from the canvass upon the ground that the certificate of the clerk of the county court of that county was authenticated by a seal impressed upon the paper from which it appeared that the word "circuit" in the seal had the word "county" written over it. That county gave the contestant a majority over Mr. Mayo of 57 votes.

It also appears that the return from Hog Island, in Northampton County, an island situate in the bay, many miles from the mainland, was delayed for a day or two, and was therefore excluded from the count.

That precinct gave the contestant a majority of 14.

Mr. Mayo, during the argument before the committee having conceded that the majorities for contestant cast in Gloucester County and Hog Island precinct of Northampton County should be counted for contestant, no argument is necessary to justify their addition to the votes allowed to him by the State board of canvassers. Indeed, no reason can be given for their exclusion, and none was attempted.

This statement demonstrates for contestant a majority of 72 votes. It being thus made to appear that the contestant was elected, the burden is devolved upon the sitting Member to show by other evidence that he was himself elected. This he undertook to accomplish by the various methods which will now be stated.

Passing to the objections made by sitting Member, the committee considered the following questions of law:

(1) The report says:

It appears that on the day of the election in question there was a separate box for votes on constitutional amendments then submitted to the people for ratification. At Saluda precinct, in Middlesex County, 6 ballots for Congressional candidates were found in the box set apart for the constitutional amendments. The judges of election burnt these ballots. There were also found in the box provided for the reception of ballots for Members of Congress 6 ballots or tickets on the constitutional amendment. The judges of election, who are charged by law with the duty of holding the election and certifying the result, did not regard this coincidence as sufficient evidence of mistake to justify counting these votes, and no other evidence of mistake has been presented. Mr. Mayo insists that these 6 votes should be counted for him. But only 2 of the 6 are shown by any satisfactory evidence to have contained his name. The witness had the impression that one of them was a ticket for contestant, and thought, from the appearance of the paper, that the other 3 were tickets for Mr. Mayo. It is obvious, therefore, that in no view of this evidence can all of these ballots be counted for the sitting Member.

4. At Wicomico Church precinct, Northumberland, 2 ballots for Mr. Mayo were found in the box for constitutional amendments, and 2 ballots for constitutional amendments were found in the box provided for candidates for Congress. At Jamaica precinct, Middlesex, 25 ballots for Mr. Mayo were found in the constitutional amendment box, and a number (not known by the witness) of ballots for constitutional amendments were found in the box provided for the Congressional election. Waiving the question as to whether this state of facts sufficiently shows that these 27 votes for Mr. Mayo should have been counted for him under the precedents, we can not add them to the vote certified for him, because it nowhere appears in the evidence that the commissioners of election who canvassed the votes of these two counties (Middlesex and Northumberland) in fact excluded the votes in question. The testimony shows that the precinct judges at Jamaica counted and returned separately the 25 votes found for Mr. Mayo in the wrong box, and that the same was done by the judges at Wicomico precinct as to the 2 votes in like situation at that place, "so that the commissioners [at the county site] might count them or not, as they thought proper" (Record, pp. 321, 365, 369, 370). The sitting Member claims these 27 votes in addition to the votes certified for him from these two counties and allowed by the board of State canvassers. We can not accede to his demand, because he has not shown that they were rejected by the county commissioners.

While the report of the committee was unanimous as to the conclusion that sitting Member was elected, and while no minority views were presented, Mr. Ambrose A. Ranney, of Massachusetts, one of the members of the committee, said in debate¹ that he believed that votes in a wrong box should not be counted unless

¹Record, p. 2115.

a satisfactory explanation was made to show that they were put into the box by the mistake of the voter or by the error or fraud of the election officer. If it were to be held otherwise, a dishonest voter might put a vote for Congressman in each box, and so have two votes. It was true that the House had adjudicated otherwise in the case of *Cook v. Cutts*, but he dissented then and should dissent now.

(2) The report rules in another case:

Mr. Mayo claims that 7 votes cast for him at The Hague, in Westmoreland County, were illegally rejected by the precinct judges. At this precinct there were found in the ballot-box for candidates for Congress 7 more tickets than names on the poll-books. In such a case the law of Virginia requires the excessive ballots to be taken from the box by one of the judges, who shall be blindfolded, etc. In this case one of the judges (who is the witness for the sitting Member) swears that "without seeing any difference in the tickets he turned his back on the box and drew out 7 tickets." He adds that they were Mayo tickets. If the witness is to be believed, he did not see the tickets until after they were taken from the box. There seems to have been a substantial compliance with the law. But if these ballots were unfairly and illegally taken from the box and rejected from the count, it does not follow that 7 votes should be added to the votes returned for Mr. Mayo. The question remains, By what process shall we eliminate the excess of votes? We can not count more votes than were cast by the voters. Shall we count them all, and then deduct the excess from the two candidates, as suggested by one of the text writers, in proportion to the relative vote of each at the precinct where the excess occurs? We can not comply with this rule, because there is no evidence in the record showing the relative vote of each candidate at this precinct. The return of the aggregate vote cast in the entire county of Westmoreland shows that Mr. Mayo received 868 and Mr. Garrison 383. Upon the ratio of these numbers, Mr. Mayo would lose, on account of the excessive votes, more than twice as many as Mr. Garrison would lose under the rule suggested. We think the clearer course is to acquiesce in the action of the precinct judges.

(3) A question as to the evidence of how a voter voted is thus discussed:

At Wicomico precinct, Northumberland County, the name of Charles Yeatman appeared twice on the poll book. This name, where it first appeared on the poll book, was changed by the judges of election to Charles Hartman; but why this change was made is not explained. If any such person as Charles Hartman voted it was illegal, because no such name appeared on the registration book; but it is not shown how he voted. It is insisted by the sitting member that the best theory is that Charles Yeatman voted twice, and perhaps this view is correct. But there is no evidence to show how Yeatman voted, except that a witness swears that Yeatman said, on the Sunday following the election, that he voted for contestant.

Mr. Ranney also dissented from this, holding that the evidence was competent to show how Yeatman voted.¹

(4) The report rules as to evidence to justify the rejection of a vote:

We think that the vote of Henry Bromly, offered for Mr. Mayo at Wicomico Church precinct, was illegally rejected, and ought to be counted for him. We also think that three other persons whose votes would have been for Mr. Mayo, but whose votes were rejected because of alleged disqualifications on account of crime, should be counted for the sitting Member, there being no proper evidence of their conviction and punishment to be found in the record.

The decision of these questions, and the settlement of certain questions of fact, made it clear to the committee that sitting Member had not overcome the real majority of the contestant, so the committee recommended these resolutions:

Resolved, That Robert M. Mayo was not elected as a Representative to the Forty-eighth Congress from the First Congressional district of Virginia, and is not entitled to the seat.

Resolved, That George T. Garrison was duly elected from the First Congressional district of Virginia, and is entitled to his seat.

¹Record, p. 2115.

After debate,¹ the resolutions were agreed to without division, and Mr. Garrison appeared and took the oath.

538. The Kentucky election case of Chrisman v. Anderson, in the Thirty-sixth Congress.

An instance wherein the Elections Committee reported on both prima facie and final right after one of the parties to the contest had taken the oath.

A county board, charged by law with the immediate canvassing and transmittal of precinct returns, may not change a prima facie result by correcting alleged errors in precinct returns.

Returns of State officers are not binding on the House, which may go behind all returns in determining final right.

A return not certified by any of the officers of election was rejected, although on report of a divided committee.

On June 14, 1860,² the Committee on Elections reported in the Kentucky election case of Chrisman *v.* Anderson.³

This case involved two questions:

- (1) The first as to the prima facie right to the seat.
- (2) The second as to the final right, involving a question of the rejection of the vote of a precinct for informality in the return.

As to the first point, the report of the committee makes the following statement of facts:

The Fourth Congressional district of Kentucky comprises eleven counties and sixty-four voting precincts. By the laws of that State the election board at each precinct consists of two judges, a clerk (who are appointed by the county court), and the sheriff or his deputy. It is the duty of this board to count the votes cast at each precinct and certify the result, under their signatures, to the board of county canvassers. The latter board consists of the presiding judge of the county court, the clerk thereof, and the sheriff or other officer acting for him at an election.

The poll books from the different precincts are required by law to be deposited with the county clerk within two days after an election. On the next day the board (that is, the county board) shall meet in the clerk's office, between 10 and 12 o'clock in the morning, compare the polls, ascertain the correctness of the summing up of the votes, and in case of an election for a Representative in Congress, it is made the duty of the board of examiners of each county, immediately after the examination of the poll books, to make out three or more certificates in writing, over their signatures, of the number of votes given in the county for each candidate for said office; one of the certificates to be retained in the clerk's office, another the clerk shall send by the next mail, under cover, to the secretary of state, at Frankfort, and the other to be transmitted to the secretary by any private conveyance the clerk may select.

The governor, attorney-general, and secretary of state, and, in the absence of either, the auditor, or any two of them, are a board for examining the returns of elections for Representatives in Congress and certain State officers.

The State board is required when the returns are all in, or on the fourth Monday after an election, whether they are in or out, to make out, in the secretary's office, from the returns made, duplicate certificates in writing, over their signatures, of the election of those having the highest number of votes.

These are the main features of the law prescribing the mode of canvassing the votes and ascertaining the result of an election in Kentucky; and your committee believe, from an examination of the

¹ Record, pp. 2112–2117; Journal, pp. 885, 886.

² First session Thirty-sixth Congress, House Report No. 627; Bartlett, p. 328; Rowell's Digest, p. 167.

³ Mr. Anderson had received the certificate, been enrolled by the Clerk, and had taken the oath with the other Members after the election of the Speaker. Journal, p. 166.

evidence and exhibits in the case, with the exception of a single precinct (which we shall hereafter refer to), these requirements were substantially complied with.

The voting is viva voce, the name of each voter and of the candidate for whom he votes being publicly cried by the sheriff or his deputy and recorded by the clerk.

According to the summing up and certificate of the board of State canvassers, of the whole number of votes cast Mr. Anderson received 7,204 and Mr. Chrisman 7,201.

The returns were made in accordance with the above provisions of law, but after they were made certificates were received by the State canvassers from the board of three counties amendatory of the original returns. In Boyle County after the county canvassers had adjourned they reassembled to correct an alleged error, made a recount, and transmitted an amended certificate to the State canvassers. It seems that in this county the mistakes were discovered in the poll book by gentlemen to whom the county clerk had loaned them. The corrections made in the return of Boyle County and two other counties were sufficient to show a majority for the contestant.

The State board of canvassers declined to admit these corrections. The law provided that the judges should sum up the votes, certify the poll books, and "deliver them in a sealed envelope to the sheriff." The State canvassers thought that this provision for sealing the poll books negatived the idea of a correction after the books had been opened and in the hands of other persons. Furthermore, the State canvassers concluded that after the county board acted on the poll book of the whole county and their certificate had been transmitted to the secretary of state they had no power to recall or change those certificates. Their functions, which were confined to the summing up of votes and could not be construed to justify inquiry as to corrections, ceased when the return was made.

The majority of the committee approved this decision of the State canvassers. The minority disapproved it, holding that the sealing of the poll books for delivery to the county board was not the imposition of a seal of authority, but the mere act of sealing the envelope to perfect the security of returns in passing from the judges of election to the county canvassers, and also contending that it was a perversion of right that a county board should be precluded from correcting an error. The period of twenty-five days allowed by law between the meetings of the county and State canvassers suggested that such corrections were expected. The minority also urged that a precedent of the State board in 1857 justified this view. The majority denied the force of this precedent.

But while the majority of the committee found that the prima face title could not be changed, they say:

Your committee, however, do not suppose that the action of the State board is final and conclusive upon this House. In every case of a contested election we believe it to be the duty of the House, by its constituted agents, to go behind all certificates for the purpose of inquiring into and correcting all mistakes which may be brought to its notice.

The committee then proceeded, in the light of the testimony, to make corrections in the poll, showing enough errors, besides those which the county boards had sought to correct, to give a majority of 7 votes for the sitting Member.

Besides these, the majority of the committee made a change still further in favor of the sitting Member by throwing out the entire vote of Casey precinct,

because it was “not certified to by any of the officers of the election, neither judges nor clerk. Its correctness is vouched for by no one.” It appears from the debate¹ that the return came in as a mere loose piece of paper, with certain figures on it and the words “George W. Eagles, clerk.” There was nothing about it to show that it was a copy of a poll book required to be made by law and certified by the proper and legal officers.

The minority of the committee did not approve this disposal of the Casey precinct return, and say:

The answer to the objection is very simple, that the provision of the statute is directory merely, and the omission of the judges to do their duty was not intended by the legislature to disfranchise the voters. That would be punishing the innocent voters for the sin of the judges. (See *The People v. Cook*, 14 Barbour, 259; *S. C.*, 4 Selden, 67; *Truehart v. Addicts*, 2 Texas, 217; *Ex parte Heath et al.*, 3 Hill, 43; *Batman v. Meguvan*, 1 Metcalf's Ky. Rep., 535.)

It might as well be contended that if an envelope was not used for inclosing the poll book, before delivering it to the sheriff, that circumstance would vitiate the election, though the poll book was more surely protected than it could be in an envelope. The construction of the sitting Member would invalidate almost every election.

There were also certain questions as to illegal votes, easily disposed of because of the viva voce method of election.

On the whole the majority found a majority of 109 for the sitting Member, and reported a resolution declaring him entitled to the seat.

The minority found contestant entitled to a majority of at least 8 votes.

On June 16 and 18² the report was debated at length in the House, and the recommendation of the majority was agreed to—yeas 112, nays 61.

539. Although a member stated that credentials were based on forged returns, the House seated the bearer, there being no conflicting credentials.—On October 17, 1877,³ the House considered the case of Mr. Romualdo Pacheco, of California, who was challenged at the organization of the House and stepped aside without taking the oath, although his name was on the Clerk's roll.

Mr. William M. Springer, of Illinois, who had challenged Mr. Pacheco and objected to his receiving the oath, stated that by reason of fraud Mr. Pacheco's opponent had been deprived of two votes, whereby Mr. Pacheco had been declared elected by one vote. The fraud had been committed by the clerk in Monterey County, who had altered the record by changing a figure “9” to a “7.” The secretary of state had declined to certify the vote to the governor because of this fraud, but had been compelled by mandamus proceedings to certify the vote as it was certified to him by the clerks. Therefore it was claimed that fraud vitiated the credentials.

It was urged that the credentials of Mr. Pacheco were regular in form, according to the law, and that there were no other credentials. His prima facie right was therefore absolute and unquestioned.

The House, without division, voted that Mr. Pacheco be sworn in.

¹ *Globe*, P. 3076.

² *Journal*, P. 1127; *Globe*, pp. 3075, 3123–3133.

³ First session Forty-fifth Congress, *Journal*, P. 24; *Record*, pp. 92, 93.

540. The House honored credentials regular in form, but impeached by a document alleging that the election was not held on the day provided by law.—On March 4, 1871,¹ while the Speaker was administering the oath to the Members-elect at the time of the organization of the House, Mr. Job E. Stevenson, of Ohio, objected to the administration of the oath to the Tennessee delegation, and presented and had read the remonstrance of W. F. Prosser, which stated that the gentlemen of the delegation were not elected according to the laws of Tennessee, in that, as he alleged, they had not been elected on the day provided by the law.

After debate, the House, without division, agreed to a motion that the Tennessee Members be sworn in, and that the memorial and their credentials be referred to the Committee on Elections.

541. The New Mexico case of Chaves v. Clever, in the Fortieth Congress.

Credentials being impeached by a paper from a Territorial officer, the House declined to permit the oath to be administered until the prima facie right had been examined.

Credentials issued in accordance with the organic law of a Territory are recognized in preference to credentials authorized by a conflicting Territorial law.

Credentials should be based on the face of the returns and not on an examination of the votes.

On November 21, 1867,² the Speaker laid before the House credentials from the governor of New Mexico showing the election of Charles P. Clever as Delegate from the Territory. At the same time a communication addressed to the Speaker and signed by the secretary of the Territory was presented. The secretary asserted in this communication that the law of the Territory made it the duty of the secretary to give the certificate of election, that the governor had assumed that duty and given an illegal certificate, and that he, the secretary, had affixed the seal thereto under protest. The secretary further asserted that the election of Mr. Clever was shown by including votes false and fraudulent, and that Mr. J. Francisco Chaves had really been elected. The letter of the secretary showed the returns to be in favor of Mr. Clever, however.

Mr. Henry L. Dawes, of Massachusetts, referring to the precedent in the Colorado case, moved that the credentials and communication be referred to the Committee on Elections, and that neither claimant be sworn in until after investigation. This motion was agreed to without division.

On December 19³ Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, reported that Mr. Clever had the prima facie right.

It appeared that the organic law organizing the Territory provided for a certificate such as the governor had given Mr. Clever. It further appeared that in preceding years certificates had uniformly been issued in that form. A Territorial law prescribed that the votes should be returned and counted by the secretary

¹First session Forty-second Congress, Journal, p. 9; Globe, p. 7.

²First session Fortieth Congress, Journal, p. 255; Globe, p. 778.

³Journal, p. 126; Globe, pp. 291–294.

and that he should give the certificate; but the committee held that this law, if in conflict with the organic law, must yield to it.

Furthermore the letter of the secretary showed that on the face of the returns Mr. Clever had a majority; and this was as far as the secretary was authorized to go. When he attempted to say that some of Mr. Clever's votes were not good votes he trenched on the prerogatives of the House.

The question being taken on agreeing to the report, there were yeas 78, nays 31; so Mr. Clever was sworn in.

On three several occasions, December 20, 1867, and February 20, and July 25, 1868,¹ the time for taking testimony in this case was extended.

542. The case of Chaves v. Clever, continued.

Instance wherein the person seated after examination of prima facie right was unseated after examination of final right.

The returns of a precinct being shown to have been fraudulently altered, the House corrected the return by the count as made at the polls.

Although the voting place was illegally and fraudulently located, and there was intimidation at the polls as well as fraudulent alteration of the returns, the entire vote was not rejected.

Votes cast at precincts having no legal existence at the time of the election were thrown out by the House.

Returns made up from additions of names of voters on the poll books instead of from count of the ballots were rejected, although there was no evidence of error or fraud in the returns.

Poll books not being authenticated by a proper certificate as required by law, the returns of the precinct were rejected.

On February 9, 1869² Mr. S. Newton Pettis, of Pennsylvania, reported from the Committee on Elections on the final right to the seat. On the face of the returns sitting Member had received a majority of 540 votes. The committee, as a result of their investigations, found a majority of 389 for contestant. In reaching this result several questions were determined:

(1) In one precinct of Rio Arriba County, and one precinct of Mora County, the votes were apparently correctly counted at the close of the polls; but after the counting and before the probate judge sent an abstract with the poll books to the secretary of the Territory, as prescribed by law, the poll books were fraudulently altered so as to increase sitting Member's majority by 518 votes. The committee determined that this excess should be deducted, leaving the vote to stand as counted at the close of the polls.

(2) In La Junta precinct, in Mora County, it appeared that—

The place of voting was illegally and fraudulently placed beyond the settlements and resident voters of the precincts and held in a shed erected for that purpose upon an open plain, and that persons who were desirous of voting for him were grossly and violently assailed by the friends of the sitting Member, and by such means were intimidated and entirely prevented from voting, and that after the polls were closed the returns were so changed as to fraudulently increase the vote of the sitting Delegate 100, and that the great majority of persons who voted at such poll were camp followers and had no legal right to vote under the laws of the Territory.

¹Journal, pp. 131, 371, 1195; Globe, pp. 312, 1293, 4479.

²Third session Fortieth Congress, House Report No. 18; 2 Bartlett, p. 467; Rowell's Digest, p. 225.

The committee is unable to find any good reason for the fixing of a place so unusual as was the one in this instance for the holding of an election, and does believe from the evidence that coarse, improper, vulgar, and threatening language was used by the friends and followers of the sitting Member, and evidently for the purpose of intimidating and preventing persons from voting for the contestant; yet the committee can not for such reasons recommend the throwing out of the whole vote of such precinct.

It appearing, however, that the poll book had been so altered as to give 100 votes to sitting Delegate more than he was entitled to, the committee corrected the return.

(3) It appeared that pretended elections were held in several precincts which had no legal existence in September, 1867, the time of the election, but were created by the legislature of 1868. Therefore the committee were of opinion that the entire votes of such precincts should be thrown out.

(4) It appeared—

That the poll books and abstract of the probate judge of Mora County were not by him sent to the said secretary of the Territory by a special messenger, as required by law, but came to the hands of William H. Moore, acting sutler within the military reservation and post of Fort Union, and were then indorsed to Robert B. Mitchell, the governor of said Territory, and marked value \$5,000, and put in the charge of the civil express company carrying the mails, and by said express conveyed to Governor Mitchell, who produced the poll books and abstract to the secretary of said Territory.

The committee finds, upon reference to the Territorial law, a plain provision requiring the probate judge of each county to forward to the secretary of the Territory, by special messenger, a true extract of the votes cast in their respective counties, together with a poll book of each precinct, and from the testimony of Vicente Romero and Henry V. Harris that the law of the Territory in this respect was disregarded, which, to say the least, is censurable so far as the conduct of the officers in that behalf is concerned, since there is much force in the argument of contestant's counsel in favor of throwing out the entire vote of Mora County for the reason that a plain provision *of the law was violated in the transmission of the returns from that county, and especially when considered in connection with the evidence that seems to point toward the presumption that the returns as forwarded were tampered with upon the way, and the additional fact in evidence that in two districts or precincts in said county the vote of 1867 amounted to 948, although in 1866 the same precincts were in one and polled but 337 votes.

(5) In Bernalillo precinct, in the county of that name, the majority was declared for the contestant from an addition of the poll books without counting the votes in the ballot box, and although there was no evidence that the returns were incorrect or fraudulent, yet the committee recommended that the majority of 139 returned for the contestant from this precinct be stricken out.

(6) The committee also deducted the vote of Chilili precinct because "the poll books were not authenticated by a proper certificate required by law."

The report was debated at length on February 20,¹ and on that day the resolutions as reported, unseating Mr. Clever and seating Mr. Chaves, were agreed to—ayes 105, noes 10.

Mr. Chaves then appeared and qualified.

543. In the Senate, in 1857, credentials regular in form were honored, although a memorial from the State legislature impeached the election of the bearer.—On February 9, 1857,² the credentials of Graham N. Fitch as Senator-elect from Indiana, were presented in the Senate. At the same time a protest was presented from the senate of Indiana in impeachment of the election

¹Journal, p. 405; Globe, pp. 1421, 1423, 1424; Appendix, p. 248.

²Third session Thirty-fourth Congress, Globe, p. 626; Appendix to Globe, pp. 193–210.

of Mr. Fitch. A question at once arose as to whether or not the oath should be administered to Mr. Fitch on the prima facie evidence of the certificate. A long and learned debate followed, covering the precedents of the Senate from its earliest years, from the case of Mr. Kensey Johns, of Delaware, who in 1794 was not allowed to take the seat on presentation of his credentials, down to the recent case of Mr. Dixon, of Kentucky. It was held, on the one hand, that the credential, when it did not on its face suggest a doubt, should allow the oath to be taken. On the other hand, it was argued that the credential, being prima facie evidence, was liable to be rebutted at any stage.

Finally, on February 10, on a motion to commit the credentials, a test vote was had, and by a vote of yeas 12, nays 33, the motion to commit was disagreed to. Thereupon the oath was administered to Mr. Fitch.

544. There being a question as to a Member's election, he was sworn in and his credentials were referred to a committee with instructions.— On December 1, 1902,¹ on the first day of the session, the Speaker administered the oath of office to several new Members, including Mr. Carter Glass, of Virginia. No question was raised at the time the oath was taken, but later Mr. Robert W. Taylor, of Ohio, presented a resolution as follows:

Resolved, That the credentials this day presented by Carter Glass, esq., as Representative in the Fifty-seventh Congress from the Sixth district of Virginia be, and they are hereby, referred to Committee on Elections No. 1, with direction to inquire and report with all convenient speed, whether they are based upon returns of a lawful election for Members of Congress, held in Virginia, November 4, 1902, and upon what character of registration lists, and under color of what constitution or ordinances said election was held; and whether at said election the right of franchise was accorded to all citizens of Virginia alike, without regard to race or color; and whether any citizens of the United States who were entitled to vote for Members of Congress at said election were, under color of any constitution, law, statute, or ordinance, unlawfully deprived of their rights, privileges, and immunities secured to them under the Constitution and laws.

Resolved, That said committee be empowered to hold its sessions at such times and places in or out of the State of Virginia as it may seem best, and to summon before it and examine any and all persons and papers which it may deem necessary to the investigation hereby provided for, and to employ such stenographers and clerks as may be necessary to perform its business; and the expenses of such inquiry and investigation shall be paid out of the contingent fund of the House on the voucher of the chairman of said committee.

This resolution was referred to the Committee on Elections No. 1.²

¹Second session Fifty-seventh Congress, Journal, p. 6; Record, p. 4.

²On April 28, 1900 (first session Fifty-sixth Congress, Record, p. 4805), Mr. Francis R. Lassiter, of Virginia, appeared at the bar of the House with credentials in due form entitling him to his seat as Representative from the Fourth Congressional district of Virginia.

There had also been filed a protest against the seating of Mr. Lassiter, directed to "The Speaker and Members of the House of Representatives," alleging defects in the vote in the district, and signed by "James Selden Cowden, the candidate receiving the highest acknowledged opposition vote to Major Lassiter."

The certificate and protest having been read, the Speaker, David B. Henderson, of Iowa, said:

"The time has not expired for the party whose communication has been read to file notice of contest, and the Chair sees no reason why the gentleman whose credentials have been read should not be sworn in unless the House desires to take some action in the matter. [A pause.] The gentleman will please come forward and take the oath."

Mr. Lassiter came forward, accompanied by Mr. Ray and Mr. Underwood, and was duly qualified by taking the oath prescribed by law.

545. The Senate election case of Lane and McCarthy v. Fitch and Bright, from Indiana, in the Thirty-fourth and Thirty-fifth Congresses.

The Senate decided that a person presenting credentials in due form should be sworn in, although a question had been raised as to his election.

In a State whereof the constitution required two-thirds for a quorum of each house of the legislature, a Senator was elected by a majority merely of the total membership of the two houses.

In the absence of a State or Federal law regulating election of Senators the Senate declined to hold that an election must be participated in by each house in its organized capacity.

On February 9, 1857,¹ the credentials of Mr. Graham N. Fitch, of Indiana, for the term ending March 4, 1861, were presented in the Senate, and at the same time was presented a protest from the Senate of Indiana urging that he and Jesse D. Bright had not in fact been elected. The oath was administered after debate as to prima facie right of Mr. Fitch to be sworn, and the papers in the case were referred to the Committee on the Judiciary.

On March 13² Mr. Robert Toombs, of Georgia, submitted a report in favor of an investigation of the question. With this report were two documents explanatory of the issues. The first was a memorial of certain members of the Indiana house:

The undersigned, duly elected and qualified members of the house of representatives of the general assembly of the State of Indiana, hereby protest against the pretended election of Jesse D. Bright and Graham N. Fitch, on the 4th day of February, A.D. 1857, as Senators of the State of Indiana in the Congress of the United States, the former for the six years from the 4th day of March next, and the latter for the six years from the 4th day of March, 1855, by a portion of the senators and representatives of said general assembly, for the following reasons:

First. There was no agreement of the two houses of the general assembly, by resolutions or otherwise, to proceed to the appointment or election of Senators in Congress on said day, or any other day of the present session of the general assembly.

Second. There was no joint convention of the two houses of the said general assembly on said day; nor was there any law of the State authorizing a joint convention on that or any other day for the appointment or election of United States Senators; nor was there any resolution, or joint resolution, approved or adopted by the two houses of the said general assembly, or either of them, authorizing such joint convention.

Third. Said pretended joint convention was a mere assembly of a portion of the senators and representatives of the said general assembly, not in a legislative capacity, but as individuals, without any authority of law, without precedent in the history of legislature of the State, and having no legislative sanction; and said senators and representatives, when so convened, had no more constitutional right to appoint or elect Senators than any equal number of private citizens of the State.

Fourth. There was not a constitutional quorum of either house of the general assembly present in said pretended joint convention, there being only twenty-three senators and sixty-one representatives, when, by the eleventh section of the fourth article of the constitution of this State, it requires two-thirds of each house to constitute a quorum to do business, and when, by the law of the State, the number of senators is fixed at fifty and the number of representatives at one hundred in said general assembly.

Fifth. Because the undersigned, as legally elected and qualified representatives in said general assembly, have been deprived of their constitutional right to assist in the legal election of the Senators in the Congress of the United States by said illegal, revolutionary, and unauthorized election.

¹Third session Thirty-fourth Congress; Globe, pp. 626, 774; Appendix, pp. 193-210.

²Senate Report No. 2, third session Thirty-fourth Congress.

Sixth. Because the legislature of Indiana, as such legislature, either by separate action of the two houses, or otherwise, as such legislature, had no part or voice in such pretended elections, and the same were in direct violation of the third section of the first article of the Constitution of the United States and the fourth section of the said article.

Seventh. Because said pretended elections are wholly void.

Eighth. Because if said elections are held valid, such decision will destroy the legal existence of the general assembly of this State, and install in its place any mob which may see proper to take forcible possession of the house as a joint convention of the general assembly, without the concurrence of either body, the sanction of the Constitution, or authority of law.

For these and other reasons which might be named the undersigned protest against the validity of said pretended elections and ask that the Senate of the United States may declare them null and void.

Given under our hands this 4th day of February at Indianapolis, A.D. 1857.

Also this statement of Mr. Fitch:

The undersigned, a Senator of the United States from the State of Indiana, and now acting as a duly qualified Senator of the United States, submits to the honorable Judiciary Committee of the body to whom the validity of his election has been referred, the following as points upon which he believes and is advised that his own rights and the rights of his State require that evidence be taken and be before the committee in order to enable them to decide understandingly and justly in the premises.

First. That he was elected to said office by a majority of all the members composing the legislature of the State, they being then and for that purpose assembled in joint convention.

Second. That he was elected, whilst in such joint convention, by a majority of the legally qualified members of the senate of the State and of the legally qualified members of the house of representatives, respectively.

Third. That in order to ascertain the facts stated in the preceding point, he will be able, by evidence, to show that three of the persons who are contesting his election were not then, and are not now, legally members of the said State senate, and had no right whatever, under the laws and constitution of the State, to be considered, or, in any particular, to act as members of that body; and that this was at the time, and still is, well known to the other contestants.

Fourth. That in the organization of the State senate, according to the constitution, laws, and usage of the State, the lieutenant-governor presides and superintends the admission of the members, and the taking the required oaths of office. That upon this occasion, in violation of such constitution, laws, and usage, the said three members, who were without the expressly required credentials of election, the certificate of the proper and only returning officer, and whose seats were also known to be contested, and on grounds of fraud, also known to be true, were, by a presiding officer, chosen for the purpose by the members of the senate, designated as Republicans, contrary to all law, and by naked wrong, directed, notwithstanding, to be sworn in, and for the clear purpose, illegal and fraudulent in fact, of defeating an election of Senators of the United States.

Fifth. That the said convention by whom, as hereinbefore alleged, the undersigned was elected a Senator of the United States, was assembled in accordance with an express provision of the constitution of the State, and that, in accordance with the long and uniform usage of the State in that particular, the same was adjourned from day to day by the proper presiding officer thereof, and vested with the authority so to adjourn, and that each adjournment was made without objection by a majority of the senate even considering the three persons aforesaid to have been members of that body being present.

Sixth. That there is not now, in said State, as the undersigned is advised, any law for the regulation of the election of Senators of the United States, or in any way providing for the same; and that according to the best professional and judicial opinions in the State, the election is to be made by the convention of the legislature assembled under the constitution of the State, to count the votes and decide upon the election of governor and lieutenant-governor, as a power necessarily existing in the legislature, and from the obligations of the State to elect Senators.

Seventh. That before the adoption of the present State constitution there was a law regulating such election, and that although the same was no longer in force, the said convention did, as far as it was possible, conduct the present election according to the provisions thereof.

The undersigned, in conclusion, submits what, indeed, must be obvious to the committee, that as the witnesses and proofs to the matters above stated are only to be had in the State of Indiana, and can only properly be obtained by careful examination, and under the Superintendence of himself, that it can not be in his power to procure it at this or the approaching extra session of the United States Senate, even were he to abandon his duty as a Senator, which he has no right to do, and proceed at once to the place where the testimony is to be had. He further submits, therefore, that the committee will so dispose of the matter now as will enable him and the contestants at a future period to present the entire case fairly and fully before them.

No action was taken before the expiration of the Congress.

At the first of the next session the papers were again referred to the Judiciary Committee, and on January 21, 1858,¹ Mr. James A. Bayard, of Delaware, from that committee, reported a resolution:

Resolved, That in the case of the contested election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright, Senators returned and admitted to their seats from the State of Indiana, the sitting members, and all persons protesting against their election, or any of them by themselves or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting members touching all matters of fact therein contained, before any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis.

Mr. Lyman Trumbull, of Illinois, submitted views of the minority:

The legislature of Indiana, called the general assembly, is composed of a Senate of fifty members and a house of representatives of one hundred members, and two-thirds of each house is, by the constitution, required to constitute a quorum thereof. Each house is declared to be judge of the election and qualification of its members, and required to keep a journal of its proceedings. No regulation exists by law in Indiana as to the manner in which members of the State senate are to be inducted into office. No law or regulation is there existing providing the time, place, or manner of electing United States Senators.

It appears by the journal of the senate of Indiana that on the opening of the senate at the meeting of the legislature, January 8, 1857, forty-nine of the senators were present, and that all the newly elected members were duly sworn, took their seats, and continued thereafter to act with the other senators till the close of the session. The only absentee senator took his seat January 13, 1857. Protests were filed contesting the seats of three of the newly elected members, which were afterwards examined and considered by the senate, and they were each found and declared to be entitled to seats, respectively, by majorities more or less numerous, all which is entered upon and appears by the journal of said senate.

The State constitution makes it the duty of the speaker of the house of representatives to open and publish the votes for governor and lieutenant-governor in the presence of both houses of the general assembly. No provision exists by the constitution making such meeting or presence of the two houses a convention, or providing any officers therefor, or authorizing or empowering the same to transact any business whatever, except by joint vote forthwith to proceed to elect a governor or lieutenant-governor in case of a tie vote.

Both houses being, in session, the speaker notified them that he should proceed to open and publish the votes for governor and lieutenant-governor on Monday, the 12th day of January, at 2.30 o'clock p.m., in the hall of the house. Shortly before the hour arrived the president of the senate announced that he would proceed immediately to the hall of the house of representatives; and thereupon, together with such senators as chose to go, being a minority of the whole number thereof, he repaired to the hall of the house of representatives, and there, in their presence, and in the presence of the members of the house, the votes for governor and lieutenant-governor were duly counted and published by the speaker, and A. P. Willard, the then president of the senate, was declared duly elected governor and A. A. Hammon lieutenant-governor of said State.

At the close of this business, a senator present, without any vote for that purpose, declared the meeting (by him then called a convention) adjourned to the 2d day of February, 1857, at 2 o'clock.

¹First session Thirty-fifth Congress, Senate Report No. 19.

The senate hearing of this proceeding, on the 29th day of January, 1857, as appears by its journal, passed a resolution protesting against the proceedings of said so-called convention, disclaiming all connection therewith or recognizance thereof, and protesting against any election of United States Senators or any other officer thereby. On the 2d of February, 1857, the president of the senate, with a minority of its members, again attended in the hall of the house, and without proceeding to any business, and without any vote, declared the meeting (by him called a convention) adjourned until the 4th day of February, 1857, at which time the president of the senate, with twenty-four of its members, went to the hall of the house of representatives, and there they, together with sixty-two members of the house, proceeded to elect two Senators of the United States, to wit, Graham N. Fitch and Jesse D. Bright, they each receiving eighty-three votes, and no more, at their respective elections, twenty-three of which votes were by members of the senate.

Against these elections so made protests by twenty-seven members of the senate of Indiana and thirty-five members of the house of representatives of said State have been duly presented, alleging that, in the absence of any law, joint resolution, or regulation of any kind by the two houses composing the legislature of Indiana providing for holding a joint convention, it is not competent for a minority of the members of the senate and a majority, but less than a quorum, of the members of the house of representatives of said State to assemble together and make an election of United States Senators.

Of the facts as herein stated there is no dispute, as we understand.

It is now alleged by the sitting Senators, respectively, as we understand the substance of their allegations, in contradiction of the senate journal, that the three State senators whose seats were contested were not legally elected and qualified; that they were without the expressly required credentials, the certificate of the proper and only returning officer, and that they were, notwithstanding, directed to be sworn in by a presiding officer chosen for the purpose by the members of the senate designated as Republicans, for the clear purpose, illegal and fraudulent in fact, of defeating an election of Senators of the United States.

Under these circumstances we object to the adoption of the resolution for the taking of testimony to sustain these allegations, because the said election of United States Senators, so conducted, is obviously illegal and insufficient, and can not be cured by any proof of these allegations; and we insist that the Senate should now proceed to a definitive decision of the question.

The report was debated on February 15 and 16, 1858,¹ resulting in agreement to the resolution in amended form as follows:

Resolved, That in the case of the contested election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright, Senators returned and admitted to their seats from the State of Indiana, the sitting members, and all persons protesting against their election, or any of them, by themselves or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting members touching all matters of fact therein contained, before any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis: *Provided*, That the proofs to be taken shall be returned to the Senate of the United States within ninety days from the passage of this resolution: *And provided*, That no testimony shall be taken under this resolution in relation to the qualification, election, or return of any member of the Indiana legislature.

On May 24² Mr. George E. Pugh, of Ohio, from the Committee on the Judiciary, submitted a report as follows:

The Committee on the Judiciary, to whom were referred the credentials of Graham N. Fitch and Jesse D. Bright, Senators from the State of Indiana, together with the documents and testimony relative to that subject, have had the same under consideration, and report, by resolution, as follows:

Resolved, That Graham N. Fitch and Jesse D. Bright, Senators returned and admitted from the State of Indiana, are entitled to the seats which they now hold in the Senate as such Senators aforesaid, the former until the 4th of March, 1861, and the latter until the 4th of March, 1863, according to the tenor of their respective credentials.

¹First session Thirty-fifth Congress, Globe, pp. 698-710, 720-724.

²Senate Report No. 275; Globe, p. 2353; 1 Bartlett, p. 629.

On June 11¹ this resolution was debated at length, and on June 12,² Mr. Hannibal Hamlin, of Maine, proposed to amend the resolution by striking out all after the word “resolved,” and inserting:

That the case of Jesse D. Bright and Graham N. Fitch be recommitted to the Committee on the Judiciary, with instructions to report specially the grounds on which the resolution is based declaring said Bright and Fitch elected.

On motion by Mr. Trumbull to amend the proposed amendment by striking out all after the word “that” and inserting “in the opinion of the Senate, no election of a Member of this body made by the legislature of a State consisting of two branches is valid, when made in a meeting of individual members of both, unless such meeting for that purpose was prescribed by law, or had been previously agreed to by each house acting separately in its organized capacity, or is participated in by a majority of the members of each house, or is subsequently ratified in some form by each house in its organized capacity,” it was determined in the negative yeas 17, nays 26.

Mr. Hamlin’s motion was then disagreed to—yeas 16, nays 34.

On motion by Mr. Trumbull to amend the resolution by inserting after the word “are” and before the word “entitled” the word “not,” it was determined in the negative—yeas 23, nays 30.

Then the resolution reported by the Judiciary Committee was agreed to.

546. The case of Lane and McCarty v. Fitch and Bright, continued.

In 1859 the Senate declined to admit claimants of seats to the privileges of the floor.

A State legislature may not revise a decision of the United States Senate that two persons have been duly elected Senators.

A decision of the Senate, made after examination of all the facts, as to election of a Senator is judicial in its nature and final, precluding further inquiry.

At the next session of Congress, on January 24, 1859,³ the Vice-President presented a memorial of the State of Indiana, by its senators and representatives in general convention assembled, representing that it is the wish and desire of the State that the Hon. Henry S. Lane and the Hon. William Monroe McCarty be admitted to seats in the Senate of the United States as the only legally elected and constitutionally chosen Senators of the State of Indiana; which was read and referred to the Committee on the Judiciary.

On the same day Mr. William H. Seward, of New York, presented this resolution, which, on January 26, was laid on the table after debate:⁴

Resolved, That the Hon. Henry S. Lane and the Hon. William M. McCarty, who claim to have been elected Senators from the State of Indiana, be entitled to the privileges of admission on the floor of the Senate until their claims shall have been decided.”

On February 3, 1859,⁵ Mr. James A. Bayard, of Delaware, submitted from the Committee on the Judiciary a report reviewing the proceedings as to Messrs.

¹ Globe, pp. 2923–2949.

² Globe, p. 2981.

³ Second session Thirty-fifth Congress, Globe, pp. 534, 535.

⁴ Globe, pp. 599–602.

⁵ Senate Report No. 368.

Fitch and Bright up to the consideration of the resolution declaring them entitled to their seats, and continues:

The resolution was under consideration in the Senate, and fully debated at several subsequent times, and was finally, after the rejection of several proposed amendments, passed by the Senate without amendment or alteration. In the opinion of the committee, this resolution (no motion having been made to reconsider it) finally disposed of all questions presented to the Senate involving the respective rights of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright to their seats in the Senate as Senators from the State of Indiana for the terms stated in the resolution. It appears by the memorial that the legislature of Indiana, at its recent session in December last, assumed the power of revising the final decision thus made by the Senate of the United States under its unquestioned and undoubted constitutional authority to "be the judge of the qualifications of its own members." Under this assumption, it also appears by the journals of the senate and house of representatives of the State of Indiana, the legislature of Indiana, treating the seats of the Senators from that State as vacant, proceeded, subsequently, by a concurrent vote of the senate and house of representatives of the State, to elect the Hon. Henry S. Lane as a Senator of the United States for the State of Indiana, to serve as such until the 4th of March, 1863, and the Hon. William Monroe McCarty as a Senator for the same State, to serve as such until the 4th of March, A. D. 1861. Under this action of the legislature of Indiana those gentlemen now claim their seats in the Senate of the United States.

It may be conceded that the election would have been valid, and the claimants entitled to their seats, had the legislature of Indiana possessed the authority to revise the decision of the Senate of the United States that Messrs. Fitch and Bright had been duly elected Senators from Indiana, the former until the 4th of March, 1861, and the latter until the 4th of March, 1863.

In the opinion of the committee, however, no such authority existed in the legislature of Indiana. There was no vacancy in the representation of that State in the Senate; and the decision of the Senate, made on the 12th of June, 1858, established finally and (in the absence of a motion to reconsider) irreversibly the right of the Hon. Graham N. Fitch as a Senator of the State of Indiana until the 4th of March, 1861, and the right of the Hon. Jesse D. Bright as a Senator from the same State until the 4th of March, A. D. 1863.

The decision was made by an authority having exclusive jurisdiction of the subject; was judicial in its nature; and, being made on a contest in which all the facts and questions of law involving the validity of the election of Messrs. Fitch and Bright, and their respective rights to their seats, were as fully known and presented to the Senate as they are now in the memorial of the legislature of Indiana, the judgment of the Senate then rendered is final, and precludes further inquiry into the subject to which it relates.

There being, by the decision of the Senate, no vacancy from the State of Indiana in the Senate of the United States, the election held by the legislature of that State at its recent session is, in the opinion of the committee, a nullity, and merely void, and confers no rights upon the persons it assumed to elect as Senators of the United States.

The committee ask to be discharged from the further consideration of the memorial of the legislature of Indiana.

Mr. Jacob Collamer, of Vermont, presented views of the minority, on behalf of himself and Mr. Lyman Trumbull, as follows:

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 the correction of error or 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 any one 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 what cases and at whose application a rehearing will at all times be granted is not now necessary to inquire; but when new parties, with apparently legal claim, apply, and especially when a sovereign State, by its legislature, makes respectful application to be represented by persons in the Senate legally elected, and insists that the sitting members from that State were never legally chosen, we consider that

the subject should be fully reexamined, and that neither the State, the legislature, nor the persons now claiming seats can legally or justly be estopped, or even prejudiced, by any former proceedings of the Senate to which they were not parties.

At the first session of the legislature of Indiana after the present sitting members were declared by the Senate as entitled to their seats, and at the earliest time it could take action, it declared their pretended election as inoperative and void, and that the State was in fact unrepresented; and they proceeded to elect H. S. Lane and William M. McCarty as Senators of the United States for said State, according to the Constitution of the United States; and they send here their memorial, alleging that the present sitting members were never legally elected; and they show facts, in addition to what was heretofore presented to the Senate, tending, as they consider, to sustain this allegation. The said Lane and McCarty present their certificates and claim their seats. We consider the matters stated in said memorial as true. The said Lane and McCarty have presented their brief sustaining their claim to seats, which is in the words following:

Brief of W. M. McCarty and Henry S. Lane, submitted to the Judiciary Committee of the Senate.

The State is entitled to the office. The legislature is her supreme instrument and donee of the power to elect Senators. It is the creature of the constitution, which is the chart of its power, vested only in two coordinate branches; a quorum of two-thirds of the members is requisite to give either a legal entity; each is equivalent in power, with an absolute veto on the power of the other.

The legislature is a corporation aggregate, with only such power as its creator has seen fit to endow it with, to be exercised in conformity to the laws of its birth.

To the joint wisdom and counsel of these colleges is the legislative power intrusted. It is not parceled out to its component elements in integrals, neither is it vested in an amalgamated body of the two. The one is erected as a barrier to the other. The ordeal of both must be passed. This guaranty against abuse can not be broken down without destroying one of the safeguards of our Government. The sovereign voice is an unit. The power that utters it is an entirety—an invisible, intangible, artificial person. The power is in the organism called “the general assembly,” and not in the individual members. It is not the rights or powers of the members, but the delegated trust powers of the State that are wielded in senatorial elections or other exercises of legislative powers. Without a quorum of either house it did not exist—without either, the legislature did not exist, and without a legislature no election would be had.

Now, the facts are that a quorum of neither house was present at the pretended election of Messrs. Bright and Fitch, nor even a majority of the senate, nor did either house prescribe the time, place, or manner of electing.

It is of the essence of legislative power that its exercise shall be free from all restraint; each body free to deliberate and act in its duties; each entitled to its full powers. The facts are that the senate, upon eight occasions, refused to go into joint convention with the house, and at no time consented. She could not be compelled to merge her individuality, or surrender her veto power, or adopt the joint-vote mode of electing Senators; or, in other words, dilute or annihilate her power, upon the mandate of the house, as that would degrade her from an equal to an inferior. On the contrary, she had the right to determine the time, place, and manner, and did do it by resolution, to elect by separate vote, at a proper time, in which the house never concurred. Where diverse duties are imposed, she must determine which are most imperative and shall have priority.

The constitution of Indiana only provides for a joint convention upon the contingency of a tie vote for governor and lieutenant-governor. That contingency did not exist; therefore the convention did not. To say that a duty to form a joint convention creates it is as absurd as to say that the subpoena of a witness works his presence, or the commands of the decalogue their observance.

Failing to get the senate into a joint convention, a false record of that pretended fact was made, to be used as evidence, and which has been used as veritable and true, and the absolute verity and the unimpeachable quality of a record claimed for the fabrication.

The resolves of the senate are those of the whole body. The mutinous senators who usurped the name and power of the senate in said pretended convention were subject to arrest by order of that body for absence, and the attempt to nullify the will of the majority by attempting a business at a time, place, and in a manner vetoed by that body by a resolve, then unvacated and unrescinded. Said convention,

if it existed, expired with the duty that called it into life. The president of the senate, when inaugurated governor, his office as president of the senate expired, and with it that of his deputy president. The president not only usurped the power to appoint a clerk—an office not known to the law and void—who only authenticated this pretended election by interpolating it into the journal of the house. This president, whose power expired with that of his creator, arrogated that of adjourning it to a fixed day; in other words, commanding it to obey his arbitrary rescript; and, at a subsequent one, the more imperious mandate commanded them to elect Senators, no agreement whatever having been had by the house therefore as to time, place, and manner.

We aver that not only did no usage exist in Indiana, but that in no solitary instance was an election had without the consent of both houses, fixing time, place, etc., by law or resolution. While said pretended convention was in existence, but adjourned to a fixed day, numerous attempts were made in both houses to create one by the members who voted for Messrs. Bright and Fitch, thus offering evidence that they did not consider that one had been formed and was in existence. No forced convention could be had. Mutual consent was necessary, and it was never had by a vote, which is the only mode of altering the will of a legislative body.

The history of joint conventions in Indiana will also show that no other business was ever transacted than that for which it was specially convened. And we insist that the validity of the acts of a joint convention is due to the separate action of the two houses as the general assembly. It is also necessary to the validity of all elections by corporate bodies that notice be given of the time, etc., and the journals of neither house show any such notice or any conventional agreement for the same.

Upon the facts and law above no legal election could have been had.

To sustain the title of Messrs. Bright and Fitch the constitution of Indiana, depositing her legislative power in two coordinate houses, must be broken down—that which requires two-thirds of the members to exercise any of her attributes of sovereignty, and that one house can not coerce the other. Not only is this election in defiance of these injunctions, but in the face of a positive dissent by one branch, armed by the people with an absolute veto. But a presiding officer, who is no part of the legislature, usurped the powers and prerogatives of the legislature; all the forms and guaranties with which the people hedged in their legislative servant were disregarded, and it is claimed that the act is as valid as if they had been observed.

To sustain Messrs. Bright and Fitch the constitution of Indiana is made a dead letter. Will the Senate, the peculiar guardians of State rights, reared up for that especial purpose, exclude Indiana from her weight and voice in it by instruments empowered by her? Will she be allowed to interpret her own constitution and acts, or will the Senate, under any pretense, blot her out of the confederacy, and realize all those fears portrayed by some of the framers of the Constitution by an absorption of and encroachment upon State rights?

The legislative power enshrines and protects all rights subject to its jurisdiction. Prior to the confederation the several States owed this duty to their citizens. They did not surrender it, but intrusted it to the Federal for their better protection, with the right guaranteed them of a voice in the Senate as a means of enforcing this duty through the Federal instrument.

We deny that under a constitutional grant of power, with prescribed modes of its exhibition, that you can discriminate between elections and laws. The selection of a general, upon whose skill the fate of an army or the country may depend, or of a judge upon whose legal attainments and integrity the lives, liberties, and property of the citizen may depend, is of less moment than some petty law.

The same power is as requisite to the creation of the one as the other.

But it may be said that this question is *res adjudicata*.

We deny that our rights or title are barred by a decision had before they were created.

We deny that the judicial power of the Senate is capable of self-exhaustion. We deny that the political right of the State is capable of annihilation without annihilating the Constitution which creates the right.

We insist that the right to judge of the election and qualification of members must continue while the term continues.

The qualifications are continuing conditions of title.

We deny that courts are ever estopped by their own action.

We deny that sovereigns are estopped.

We deny that Indiana was, prior to this time, a party to the proceedings of the Senate, or had opportunity to allege or elicit the true facts.

We deny the power of the Senate, under the power to judge, to create Senators for Indiana.

We claim for her a superior knowledge of her own acts and grants.

We insist that the simple admission of a Senator to his seat upon credentials is a decision, and that it was never pretended this precluded his ouster if his title were not good.

If the Senate have not power to exclude foreign elements at all times, it is not equal to the duties intrusted to its guardianship.

And we will not believe that the Senate is the only tribunal on earth whose wrongs, once done, are eternal and irrevocable.

W. M. McCARTY.

H. S. LANE.

In the case of the State of Mississippi, in the House of Representatives in the Twenty-fifth Congress, the power to reexamine a decision made on an election of Members was fully considered and decided.

On February 14¹ the report was considered by the Senate, and an amendment was proposed by Mr. Seward to amend the resolution to discharge the Committee on the Judiciary by striking out all after “resolved” and inserting:

That Henry S. Lane and William M. McCarty have leave to occupy seats on the floor of the Senate pending the discussion of the report of the Committee on the Judiciary on the memorial of the legislature of Indiana declaring them her duly elected Senators, and that they have leave to speak to the merits of their rights to seats and on the report of the committee.

On motion by Mr. Pugh to amend the amendment proposed by Mr. Seward, by striking out all after “that” and inserting “the resolution of the Senate, adopted June 12, 1858, affirming the right of Graham N. Fitch and Jesse D. Bright as Senators elected from the State of Indiana, the former until the 4th day of March, 1861, and the latter until the 4th day of March, 1863, was a final decision of all the premises then in controversy, and conclusive as well upon the legislature of Indiana, and all persons claiming under its authority, as upon the Senators named in the resolution.”

On motion by Mr. Harlan—

That all the papers in this case be recommitted to the Committee on the Judiciary with instructions to inquire whether Graham N. Fitch and Jesse D. Bright or Henry S. Lane and W. M. McCarty, or any one of them, has been elected to the office of Senator of the United States from the State of Indiana as provided by the Constitution of the United States, and in accordance with the laws and usages of the State of Indiana, and report the facts connected with and bearing on the supposed election of each to the Senate, and that the contestants be allowed to appear at the bar of the Senate when such report shall be made and argue their right to seats.

After debate, a division of the motion made by Mr. Harlan was called for by Mr. Stuart; and the question being taken on the first division, viz, “that all the papers in this case be recommitted to the Committee on the Judiciary,” it was determined in the negative—yeas 14, nays 32; so the motion to recommit with instructions was disagreed to.

The question recurring on agreeing to the amendment proposed by Mr. Pugh to the amendment proposed by Mr. Seward, it was determined in the affirmative—yeas 30, nays 16.

On the question to agree to the amendment of Mr. Seward, as amended, it was determined in the affirmative—yeas 29, nays 16.

¹ Globe, pp. 1014–1019; Appendix, pp. 129–448.

On the question to agree to the resolution from the Committee on the Judiciary, amended, as follows:

Resolved, That the committee be discharged from the further consideration of the memorial of the State of Indiana, and that the resolution of the Senate adopted June 12, 1858, affirming the right of Graham N. Fitch and Jesse D. Bright as Senators elected from the State of Indiana, the former until the 4th day of March, 1861, and the latter until the 4th day of March, 1863, was a final decision of all the premises then in controversy, and conclusive as well upon the legislature of Indiana, and all persons claiming under its authority, as upon the Senators named in the resolution.

It was determined in the affirmative—yeas 30, nays 15.

547. An instance wherein the House authorized an investigation of the credentials and elections of persons already seated on prima facie showing.

Instance wherein the House ordered examination of the title to a seat on the strength of a memorial.

At the organization of the House on March 4, 1871,¹ a question was raised as to the swearing in of the Mississippi delegation, whose names were on the roll of the Clerk. But after debate the House ordered the oath to be administered to them, and the credentials to be referred to the Committee on Elections.

On April 17² Mr. Luke P. Poland, of Vermont, from the Committee on Elections, reported this resolution, which was agreed to by the House:

Resolved, That the Committee on Elections be authorized to take testimony in relation to the credentials of the sitting Members from the State of Mississippi, the validity of the election under which said Members claim seats, and the allegations touching the same, contained in the memorial of A. C. Fisk, and that said committee, for that purpose, be authorized to send for persons and papers.

548. Certain instances wherein the House has referred credentials to the Elections Committee, the oath not being administered to the bearers.—

On March 16, 1871,³ the Speaker laid before the House the credentials of Thomas H. Reeves, claiming to be a Representative at Large from the State of Tennessee. The credentials were referred to the Committee of Elections, Mr. Reeves not being, sworn in.

On March 4⁴ the credentials of J. P. M. Epping, elected Representative at Large from the State of South Carolina, were referred to the Committee of Elections, Mr. Epping not being sworn in.

On March 7⁵ the credentials of R. T. Daniels, as Member at Large from Virginia, were similarly referred to the Committee of Elections.

549. Federal law directs the issuance and prescribes the form of credentials of Senators-elect.—The Revised Statutes, section 18, 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 above law dates from July 25, 1866.

¹ First session Forty-second Congress, Journal, p. 10; Globe, pp. 7–10.

² Journal, p. 178; Globe, p. 736.

³ First session Forty-second Congress, Journal, p. 73; Globe, p. 132.

⁴ Journal, p. 13; Globe, p. 11.

⁵ Journal, p. 15; Globe, p. 16.

Section 19 of the Revised Statutes, dating also from July 25, 1866, provides:

The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State.¹

550. The Speaker declined to administer the oath to a person whose prima facie right was under investigation by the House.—On February 15, 1884² the House had under consideration the contested election case of Chalmers v. Manning. The resolution before the House was to discharge the committee from further consideration of the prima facie right to the seat, and to this was pending a substitute declaring that Manning held perfect credentials and was entitled to be sworn in.

During the debate Mr. Andrew G. Curtin, of Pennsylvania, advanced to the Clerk's desk, in company with Mr. Manning, and said:

I present Van H. Manning to be sworn in as a Member of this House upon the certificate of the governor of Mississippi, attested by the broad seal of that great and loyal State.

A point of order being made, the Speaker³ said:

The Chair thinks it unnecessary to decide any point of order in this case, because the question whether or not Mr. Manning is entitled to take the oath of office is the very question which the House is now considering and upon which it is about to vote. Of course the Chair would not undertake to administer the oath of office to any person claiming to be a Member-elect while the House is considering his right to a seat.

551. The Senate election case of David Turpie in the Fiftieth Congress. The Senate gave immediate prima facie effect to regular credentials, although a memorial impeached the regularity and legality of the election.

The Senate declined to inquire into the titles of the members and presiding officer of a legislative body, the legality of the organization being unimpeached.

On February 10, 1887,⁴ the President pro tempore laid before the Senate resolutions adopted by a joint convention of the two houses of the general assembly of the State of Indiana, reciting that at the joint convention of February 2, 1887, Hon. Alonzo G. Smith, a member of the senate of the said assembly, had declared that Hon. David Turpie had received a majority of all the votes cast in the said convention for United States Senator; that the speaker of the house of representatives presiding at the joint convention had declared that there had been no legal election of a United States Senator, and that it was believed that there were enough illegal votes cast for the said Hon. David Turpie to overcome the apparent majority of votes cast for him. This document was referred to the Committee on Privileges and Elections.

On February 16⁵ the President pro tempore presented "what purported to be the credentials of Hon. David Turpie, elected a Senator from the State of Indiana for six years from the 4th of March next."

¹ Credentials of Members of the House are in forms prescribed by the laws of the several States.

² First session Forty-eighth Congress, Record, p. 1168; Journal, pp. 587, 588.

³ John G. Carlisle, of Kentucky, Speaker.

⁴ Second session Forty-ninth Congress, Record, p. 1564.

⁵ Record, p. 1801.

These credentials were in form as follows:

THE STATE OF INDIANA, EXECUTIVE DEPARTMENT.

In pursuance of the provisions of section 18 of the Revised Statutes of the United States, I, Isaac P. Gray, governor of the State of Indiana, do hereby certify that the legislature of said State assembled in joint assembly at 12 o'clock meridian on Wednesday, the 2d day of February, 1887, pursuant to adjournment, to elect a Senator in Congress, to serve for a term of six years, commencing on the 4th day of March, 1887; that the Hon. David Turpie, of the State of Indiana, received 76 votes, being a majority of the votes of all the members of said joint assembly, and a majority of all the members elected to said legislature, all the members elected to said legislature being present and voting; and the said David Turpie was declared duly elected Senator in Congress, to represent the State of Indiana in Congress for the said term of six years, commencing on the 4th day of March, 1887.

In witness whereof I have hereunto set my hand and caused to be affixed the seal of the State, at the city of Indianapolis, this 9th day of February, in the year of our Lord 1887, the seventy-first year of the State, and of the independence of the United States the one hundred and eleventh.

ISAAC P. GRAY,

Governor of Indiana.

The above and foregoing is the certificate, and the signature thereto attached the genuine signature of Isaac P. Gray, governor.

CHARLES F. GRIFFIN,

Secretary of State.

TO HON. JOHN SHERMAN,

President of the Senate of the United States of America.

On motion of Mr. George F. Hoar, of Massachusetts, the paper was referred to the Committee on Privileges and Elections.

On March 1, 1887,¹ at a later date in the same session, Mr. Hoar offered the following, which was agreed to:

Ordered, That the Committee on Privileges and Elections be discharged from the further consideration of * * * a paper purporting to be the credentials of David Turpie, and a resolution of the joint convention of the legislature of Indiana contesting the validity of the election of David Turpie as United States Senator from that State.

On the same day, at a later time, Mr. Orville H. Platt, of Connecticut, inquired whether or not the action taken would have any effect on the question of accepting the credentials. If it would have such effect, he proposed to make a motion to reconsider.

Mr. Hoar replied:

Under the rules of the Senate all papers committed to any committee are to be returned to the files of the Senate at the expiration of the Congress, and the function of the committee itself expires with the Congress. If the credentials of Mr. Turpie had been retained by the Committee on Privileges and Elections without action until noon on the 4th day of March, under the operation of that general rule precisely the thing would have happened then that has happened this morning—that is, the paper would have gone back to the files of the Senate and the committee would have been discharged from its consideration. The only alternative to that course would have been an assumption by the committee or by the Senate at the present session to deal with the credentials of a gentleman claiming to be a Senator-elect before the time had arrived for the beginning of his term, and before he had presented himself to be heard upon the subject.

The Senate is a continuing body which was organized at the beginning of the Government in 1789, and that organization is to continue, as we fondly hope, until time shall be no more, certainly

¹Record, pp. 2461, 2474.

until the destruction of the American Constitution. It is therefore possible that it might be within the constitutional power of the Senate to determine in advance the right of a Senator to seat upon this floor, and it would be a violation of all constitutional precedent, and it would be, in my judgment, a violation of the sense of justice and propriety of the Senate and of the American people.

The effect, therefore, of this report is simply to remand to the action of the Senate to be taken after the 4th of March without prejudice—without being in the least affected by any action now (on) any question which any person may see fit to raise, and that is all. No prejudice, for no prejudice against any person who may conceive himself entitled to a seat on this floor hereafter will arise or has arisen in consequence of the report of the committee or of the Senate in accepting it.

On March 3,¹ Mr. Benjamin Harrison, of Indiana, presented a memorial of eighteen State senators of Indiana, and of the house of representatives of that State, protesting against the alleged election of Mr. Turpie. This memorial was laid on the table.

On December 5, 1887,² at the swearing in of Senators-elect, Mr. Turpie appeared and took the oath without objection. But immediately thereafter Mr. Hoar presented the memorial of a committee of members of the general assembly of Indiana in regard to Mr. Turpie's election. This paper, together with all other papers on file relating to the case, were referred to the Committee on Privileges and Elections.

On May 14³ Mr. Hoar submitted the report of the committee, as follows:

Mr. Turpie received a certificate of his election from the governor of Indiana, which constitutes a prima facie title to his seat, and has been admitted thereupon to take the oath.

The two houses of the legislature of Indiana, having failed to concur in the appointment of a Senator, met in joint convention, and after sundry ballotings, in which no person had a majority of the votes cast, a ballot was had in which Mr. Turpie received 2 more votes than all others. A quorum of said joint convention and a quorum of each house was present and voted. The proceedings were in all respects regular, and resulted in a valid election of Mr. Turpie, unless the facts which the remonstrants offer to prove constitute a valid objection.

They offer to show, first, that, there being a vacancy in the office of lieutenant-governor, the Hon. Robert S. Robertson was duly elected to fill such vacancy, and thereby became entitled by the constitution and laws of Indiana to preside over the senate; but that, on the meeting of the senate on the 6th day of January, 1887, being the first day of the session of the legislature at which said alleged election of Mr. Turpie took place, one Alonzo G. Smith usurped the office and function of such presiding officer, was supported and maintained in such usurpation by a majority of said body, excluded Mr. Robertson from said office and function, and continued so to preside and so to exclude Mr. Robertson during all the sessions of said senate, including its attendance on said joint convention, until after the said alleged election of Mr. Turpie.

Second. That before said alleged election the senate wrongfully, and for the purpose of obtaining a majority for said Turpie in said joint convention, declared two members, who had been duly and lawfully elected members thereof, not entitled to their seats, and declared two other persons, who had not been duly and lawfully elected, to be entitled to such seats, and thereupon seated such persons, and that this was done without right, without evidence, and without hearing or debate; and that said persons so seated thereafter were present and voted for Mr. Turpie in said convention, and that without such votes said Turpie would not have received a majority.

The committee are of the opinion that the facts offered, if proved, will not warrant the Senate in declaring the sitting Member not entitled to his seat. There can be no doubt that the body in question was the constitutional senate of Indiana. The journals of both houses of the legislature of the State have been submitted to us. It appears that the body was recognized as the senate by the governor and by the house of representatives. Statutes, to which its constitutional assent was necessary, were enacted and have become part of the law of the State.

¹ Record, p. 2627.

² First session Fiftieth Congress, Record, p. 4.

³ Senate Report No. 1291.

It seems to us that, without entering upon the question whether there was a vacancy in the office of lieutenant-governor which Mr. Robertson was duly elected to fill, the recognition of Mr. Smith by a majority of the senate as its lawful presiding officer, and the recognition of the senate as a lawfully organized body by the other house as well as by all its own members who remained and took part in its legislative proceedings, and by the executive department, require us to consider it as the lawful senate, lawfully organized so far as to be entitled to take part in the joint convention which elected a Senator of the United States.

We also think that the judgment of the senate of Indiana as to the title of Messrs. Branahan and McDonald, the two members in question, to their seats is binding upon the Senate of the United States. This body is made by the Constitution the judge of the elections, qualifications, and returns of its members. The senate of Indiana is likewise the judge of the election, qualifications, and returns of its own members. We must determine all questions arising out of the proceeding of the electors. But who sustain the character of electors is to be determined by the legislative body of the State. We can not inquire into the motive which controlled its judgment. In rendering that judgment, whether it shall give a hearing to parties, permit debate, examine witnesses, act upon evidence or without evidence, are matters within its own discretion. If that discretion were exercised in the manner charged by the remonstrants, a majority of the committee think that a great public crime was committed, for which the offenders are responsible to the people of Indiana. But we can not try the question.

A majority of the committee do not mean to be understood as now committing ourselves to an opinion upon the question whether the Senate can not refuse to admit to a seat a claimant who owes his election to a legislative body which is itself the result of fraud or crime, which has overcome the true will of the people, even if it have possessed itself of legislative authority, and of the technical evidence of a rightful character, or whether the judgments of such a body as to the title to seats of its individual members are entitled to any respect whatever. If that question shall hereafter unhappily arise it will be dealt with on its own merits. The committee ask to be discharged from the further consideration of the several memorials.

On May 15¹ the question of discharging the committee was debated. Mr. William E. Chandler, of New Hampshire, took exception to the latter portion of the report, which held that the judgment of the senate of Indiana was binding on the Senate of the United States on the question at issue. It seemed to him that the power of unseating Members might be carried to such an extent in a legislative body that the Senate of the United States would be justified in reviewing the decisions of the legislature. Mr. Hoar and others sustained the position of the report.

The motion to discharge the committee was agreed to without division.²

552. The Senate election case of La Fayette Grover, of Oregon, in the Forty-fifth Congress.

The credentials of a Senator-elect being regular and unimpeached, and the election having been by the one legally organized legislature,

¹Record, pp. 4145–4147.

²In 1891 the Senate considered the case of Wilkinson Call, of Florida. December 7, 1891, R. H. M. Davidson presented the credentials from the governor of Florida and at the same time a transcript of the proceedings of the two houses of the legislature of Florida in a joint convention, composed of a majority of the members of the two houses, but not of a majority of the members of each, recording what purported to be the election of Wilkinson Call. Mr. Call presented himself on the same day, claiming the right to take the oath by virtue of the proceedings of that joint convention. The facts set forth in the transcript were undisputed. The matter went over under objection to the next day, when Mr. Call was admitted to take the oath, on motion by Mr. Hoar, and the credentials were referred to the Committee on Privileges and Elections. (Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 805.)

the Senate seated the bearer at once, although charges were filed against him personally.

Discussion of the elements of a prima facie case as made out by the credentials of a Member-elect.

On March 2, 1877,¹ in the Senate, the credentials of La Fayette Grover, elected a Senator by the legislature of Oregon for the term commencing March 4, 1877, were presented.

On March 7, 1877,² Mr. Grover presented himself to be sworn, when Mr. Hannibal Hamlin, of Maine, stated that Mr. John H. Mitchell, Senator from Oregon, had certain papers relating to Mr. Grover's title to the seat, and suggested that the oath be deferred until Mr. Mitchell should be present.

Later in the day Mr. Mitchell presented the following memorial:

To the Senate of the United States:

Whereas it is currently reported and generally believed that L. F. Grover, by bribery, the corrupt use of money, and other unlawful and dishonorable means, procured his election to the Senate of the United States by the legislature of the State of Oregon at its last session; and

Whereas the said L. F. Grover, in obedience to a corrupt scheme to defraud the State of Oregon of its proper electoral vote, as the governor thereof did unlawfully, dishonestly, corruptly, and by acts of usurpation, declare elected to the office of Presidential elector for the State of Oregon, on the 6th day of December, 1876, and did issue a certificate of election to one E. A. Cronin, who had been defeated by the people for said office by more than 1,000 majority; and

Whereas the said L. F. Grover did fraudulently undertake to sustain his said act by falsely testifying as a witness concerning the same before the Senate Committee on Privileges and Elections on or about the 6th day of January, 1877:

Now, therefore, we, the undersigned, citizens of the State of Oregon, earnestly but respectfully ask that the said L. F. Grover be denied a seat in the United States Senate as a Senator from the State of Oregon until the foregoing charges are thoroughly investigated and disproved.

M. L. WILMOT AND OTHERS.

On March 8,³ at the suggestion of Mr. Aaron A. Sargent, of Pennsylvania, and after modification by Mr. Roscoe Conkling, of New York, this resolution was presented by Mr. William A. Wallace, of Pennsylvania:

Whereas, under the Constitution and the laws and the practice of the Senate, La, Fayette Grover, claiming to be a Senator from the State of Oregon—his credentials being regular and in due form and there being no contestant for the seat—and there being in said State but one body claiming to be the legislature, and but one person claiming to be the governor, and there being no doubt or dispute as to the existence of one legal, rightful State government, is entitled to admission to a seat in this body, on the prima facie case presented by such credentials, notwithstanding the objections contained in the petition of citizens of the State of Oregon against his admission: Therefore,

Resolved, That the credentials of La Fayette Grover be taken from the table and the oaths of office be now administered to him.

Resolved further, That the petition of citizens of Oregon containing charges against La, Fayette Grover lie on the table until the Committee on Privileges and Elections is organized, when they shall be referred to such committee, together with his credentials, with instructions to investigate such charges and report to the Senate as to their truth or falsity.

Mr. Conkling had suggested the words “and there being in the said State but one body claiming to be the legislature, and but one person claiming to be governor.”

¹Second session Forty-fourth Congress, Record, p. 2069.

²Special session of Senate, Forty-fifth Congress, Record, pp. 17, 22.

³Record, pp. 31–39.

In the debate Mr. Conkling went on to show that the condition set forth in these words constituted an essential element of a prima facie case. Mr. Oliver P. Morton, of Indiana, did not concur in the idea that these words should be followed to their ultimate significance. "A prima facie case, as I understand it," he said, "is one which is regular upon its face—good upon its face according to the law of the State from which it emanates. The idea that the existence of a pretended legislature can invalidate the effect and value of a prima facie case seems to me to be a contradiction in terms. If a Senator of the United States or a person elected to the Senate comes here with the certificate of the governor and the proper credentials according to the forms of law, his prima facie case is not invalidated if some other person presents a certificate which is not signed or executed according to the forms of law."

The question being taken on the preamble and the first resolution, they were agreed to without division.

The second resolution was withdrawn, on the assurance that at a later day, Mr. Grover proposed to demand an investigation.

553. The election case of James H. McLean, from Missouri, in the Forty-seventh Congress.

The State authority having declined to issue credentials to a person whose election was not disputed, the House administered the oath to him on satisfying itself of his election.

Where the fact of election was not disputed the House seated a Member-elect without reference to the Elections Committee, although the State authority had denied him credentials.

On December 15, 1882,¹ Mr. Thomas B. Reed, of Maine, claiming the floor for a question of privilege, presented the memorial of James H. McLean, which set forth that a vacancy was caused in the Second Congressional district of Missouri by the death of Thomas Allen on April 7, 1882; that on November 7, 1882, at an election duly called by the governor of the State, for the said Second district, there were cast 8,264 votes for the memorialist, 8,087 for James D. Broadhead, and 362 for B. A. Hill, the said memorialist thereby receiving the highest number of votes ;² "that the abstracts of the votes so cast and duly certified were forwarded to the secretary of state of Missouri, where the same are required by law to be sent, but that the secretary of state of said State has failed and utterly refuses to give your memorialist a certificate of his election as aforesaid." With the memorial were presented two certificates from the county clerk and recorder, giving the abstract of the votes cast.

It appeared from the remarks of Mr. Reed and from uncontradicted statements of Representatives from Missouri that there was no doubt as to the correctness of these returns; and that Mr. Broadhead, the rival candidate, did not contest the fact that Mr. McLean was elected.

It appeared that under the law of Missouri it was the duty of the secretary of state to issue the credentials, but that he had declined to do so, apparently for the

¹ Second session Forty-seventh Congress, Record, pp. 328–331.

² The highest number of votes was required for election in Missouri, although the memorial did not so specify.

reason that the State had been redistricted after the election of Thomas Allen and before the special election called to fill the vacancy caused by his death; but nothing before the House indicated whether the governor had called the special election in the old or the new district. For this reason especially Mr. Richard D. Bland, of Missouri, urged that the memorial should be referred to the committee on credentials for examination, but Mr. Reed pointed out that the only reason why Mr. McLean was not sworn in without dissent was because the secretary of state had declined to do his duty, since no one, not even his opponent, doubted his right to the seat. There was not time for Mr. McLean to compel the secretary of state by mandamus to issue the certificate, and in justice to Mr. McLean and the constituency who elected him he should be given the seat at once.

The House voted—ayes 144, noes 15—that Mr. McLean should be permitted to take the oath, and he appeared and qualified.

554. The Pennsylvania election case of Morris v. Richards in the Fourth Congress.

The governor having declined to issue credentials because of doubt as to the election, the House, in 1796, determined the final right before seating the one surviving claimant.

An election return, required by law to be made on or before a certain day, should be counted if presented after that day, provided it be otherwise correct.

A vote not returned within the time required by law, and of which the returns were not in the required form, was rejected.

A return seasonably made and in legal form, but giving certain proxy votes and votes of persons disqualified, was purged and not rejected.

On January 18, 1796,¹ the House decided that John Richards, of Pennsylvania, was entitled to a seat in the House.

This was a case in which the governor of Pennsylvania, after the election, had issued no certificate because he was in doubt whether James Morris or John Richards was elected. Mr. Morris died before the meeting of Congress. After Congress assembled Mr. Richards petitioned for the seat.

The committee found that, by the law of Pennsylvania, the county judges of election were required to meet on November 10, and that the district judges should meet on November 15, to examine the county returns and certify the result. Certain of the voters were away on the western expedition, so it was provided that army returns should be sent to the prothonotaries of the respective counties by the said 10th of November, and that on that day the prothonotaries should deliver them over to the county judges. The return of the Montgomery County soldiers was received by the prothonotary after the 10th and before the 15th, and by him delivered over to some of the county judges, two of whom made up a return and certified it on the 14th. This return was laid before the judges of the district on the 15th, but was not counted by them. The Committee on Elections reported, however, that the district judges should have counted this return, in spite of the

¹First session Fourth Congress, Contested Elections in Congress from 1789 to 1834, p. 95; Rowell's Digest, p. 45.

informality.¹ It also appeared that the vote of the Bucks County soldiers, not being returned before the 15th of November and not being canvassed by the district judges, was filed with the secretary of state on January 18, 1795. These returns were also defective on their face, being unaccompanied by a list of names of those voting. So the Committee on Elections reported that this return should not be counted. It further appeared that the return of the Northampton soldiers, which alone was properly received before the required date, November 10, contained 2 proxy votes and 16 votes of persons evidently not qualified to vote. These 16 votes were for James Morris.

The Committee on Elections, therefore, by counting the Montgomery return, rejecting the Bucks return and the 18 unauthorized votes in Northampton, found that John Richards was duly elected.

The House, in accordance with this finding, seated Mr. Richards.

555. The Pennsylvania election case of John Sergeant in the Nineteenth Congress.

Two candidates having equal numbers of votes, the governor did not issue credentials to either, but ordered a new election after they had waived their respective claims.

Candidates at an inconclusive election having waived their claims, the House held that the result of a new election might not be disturbed because of alleged errors in the first election.

Instance of an election case instituted by sundry citizens.

On January 14, 1828,² the Committee on Elections reported in the case of sundry citizens v. Sergeant, of Pennsylvania,

At the election of October 10, 1826, John Sergeant and Henry Horn had an equal number of votes. It appearing that the people had failed to make a choice, the executive seems to have considered the case in the light of a vacancy, but not to an extent sufficient to warrant him in directing another election until both Mr. Sergeant and Mr. Horn informed him in writing that they relinquished all claims to the seat in virtue of the election of 1826. In consequence of this letter the governor ordered an election to supply the vacancy, to be held on October 9, 1827.

At that election it appeared that John Sergeant was duly elected.

But the memorialists alleged that the rectification of an error which they pointed out in the count of the election of 1826—the first election—would show the election of Henry Horn.

Certain letters and ex parte depositions were submitted to the committee and decided insufficient to invalidate the rights of the sitting Member. The committee asserted that they thought it quite unnecessary to go into an investigation of the rights of the parties under the first election, because, whatever those rights were, they had been voluntarily relinquished. Therefore the committee reported the following resolution, which was agreed to without debate or division:

Resolved, That John Sergeant is entitled to a seat in this House.

¹ In a first report, which was recommitted, it was held that these returns should be rejected.

² First session Nineteenth Congress, Contested Elections in Congress from 1789 to 1834, p. 516; Rowell's Digest, p. 85.

556. The Pennsylvania election cases of Koontz v. Coffroth and Fuller v. Dawson in the Thirty-ninth Congress.

Conflicting returns rendering it impossible for a governor to issue any credentials, the Clerk enrolled neither claimant to the seat.

Neither claimant to a seat having credentials, the House referred the papers with instructions that the prima facie right be determined, without prejudice to a later contest on the merits.

In determining prima facie right the majority of the Elections Committee, in a sustained report, declined to consider papers other than those coming legally from the proper certifying officers of the district.

The House, acting on a divided report, determined the prima facie right by the returns of the district certifying officers, although they were impeached by accompanying papers.

Form of resolutions for seating a claimant on prima facie showing and for the institution of a contest on the merits.

On December 5, 1865,¹ the House agreed to the following resolution:

Resolved, That the certificates and all other papers relating to the election in the Sixteenth Congressional district of Pennsylvania be referred to the Committee of Elections, when appointed, with instructions to report, at as early a day as practicable, which of the rival claimants to the vacant seat from that district has the prima facie right thereto, reserving to the other party the privilege of contesting the case upon the merits, without prejudice from lapse of time or want of notice.

On January 26, 1866,² the Committee of Elections reported. In this case the names of neither Mr. Coffroth nor Mr. Koontz, the rival claimants for the seat, had been put on the Clerk's roll, for the reason that the governor of Pennsylvania, in his proclamation of the names of the persons elected in the various Congressional districts, had declared—

that no such returns of the election in the Sixteenth Congressional district have been sent to the secretary of the Commonwealth as would, under the act of assembly of July 2, A.D. 1839, authorize me to proclaim the name of any person as having been returned as duly elected a Member of the House of Representatives of the United States for that district.

The act of July 2, 1839, provided the following method for returning the results of an election in a Congressional district, as stated by the report:

When two or more counties compose a district for the choice of a Member of the House of Representatives of the United States, it is provided, after an election has been held, that the judges of election in each county having met, the clerks shall make out a fair statement of all the votes which shall have been given at such election, within the county, for every person voted for as such Member, which shall be signed by said judges and attested by the clerks; and one of the said judges is to take charge of said certificates of votes, and produce the same at a meeting of one judge from each county, at such place in such district as is, or may be, provided by law for that purpose. The judges of the several counties (composing such district) having met as aforesaid, are then required to cast up the several county returns and make duplicate returns of all the votes given for such office of Representative in Congress in said district, and of the name of the person elected, and to deposit one of said returns for said office of Representative in the office of the prothonotary of the court of common pleas of the county in which they shall meet, and to place the other return in the nearest post-office, sealed and directed to the secretary of the Commonwealth.

¹First session Thirty-ninth Congress, Journal, p. 32; Globe, p. 10.

²2 Bartlett, p. 25; House Report No. 12.

The said return judges are also required to transmit to the person elected to serve in Congress a certificate of his election, within five days after the day of making said return.

On the receipt of the return of the election of Members of the House of Representatives of the United States, as aforesaid, by the secretary of the Commonwealth, the governor is required (section 113) to declare, by proclamation, the names of the persons so returned as elected in the respective districts, and also to transmit, as soon as conveniently may be thereafter, the returns so made to the House of Representatives of the United States.

There were five counties in the district—Adams, Bedford, Franklin, Fulton, and Somerset.

In each of the three last counties all of the precinct judges united in certifying the results, and there was no question as to them. But in Franklin County there was a difficulty as to the selection of the judge who should present the return of the county at the meeting of the district board. Mr. Wilhelm was at first chosen, but later this action was rescinded and Mr. Laker was chosen, and appears to have become the actual possessor of the return.

In Adams and Bedford counties there was a difficulty about the counting of the soldiers' votes, and the return from each of these counties was certified by a majority only of the precinct judges. In each of these counties the minority judges made another return.

The next complication occurred when the board of district judges (composed of one judge from each county, bearing the return of his county) met to make up the district return. In fact two boards met—a Coffroth and a Koontz board.

The Koontz board appears to have been composed of the two representatives of the minority judges in Adams and Bedford counties; of Mr. Wilhelm, the superseded representative of Franklin County; of Mr. Winter, the regular representative of Fulton County, who later attended the Coffroth board; and Mr. Willis, the lawful bearer of the undisputed return of Somerset County, who did not attend the Coffroth board at all. This Koontz board made the return in the form required of the district board, and the return was transmitted to the State authorities in regular order. This return showed a majority of 32 votes for Mr. Koontz.

The Coffroth board, which assembled later in the day, was composed of the two majority judges of the counties of Adams and Bedford, of Mr. Laker, the last-chosen representative judge of Franklin County, and of Mr. Winter, the regular representative of Fulton County. This board made out in regular form a district return, and transmitted it to the State authorities in the regular way. This return showed a large majority in favor of Mr. Coffroth, but also showed on its face that the return of the county of Somerset was not included.

In point of fact, although it did not officially appear on this district return, the vote of Somerset County, which was undisputed, would have reduced but not overcome the majority showed for Mr. Coffroth by the other four counties. Mr. Coffroth's majority on this basis was 93 for the whole district.

The attorney-general of Pennsylvania, in an opinion given to the governor, maintained that the action of a majority of the return judges of a county was to be presumed to be valid; but also held that the district judges should have by adjournment endeavored to procure the complete return, including the county of Somerset.

The Committee on Elections, acting under direction of the House, examined the question as to where they should look for the *prima facie* title to the seat, and in

their conclusions the committee divided, a bare majority concurring in the report. The majority say:

The return certified by the majority certainly embraces the counties of Adams, Bedford, Franklin, and Fulton, and is an official certificate of all the returns presented, and of the aggregate returns of votes from these counties; and as the vote of Somerset County is undisputed and would not have changed the result, we see no occasion or justification, on a prima facie hearing, for going beyond the action of these return judges who met on the day and at the place fixed by law, and did all that the law required them to do.

If, however, we should waive this position and go beyond, not behind, the action of the district return judges, it would only be to ascertain the vote of Somerset County; and that being obtained and added to the other certified returns, as we have seen, still gives Mr. Coffroth the certified majority of all the votes cast in the district and the prima facie right to the seat.

Clearly the district board of return judges had no right to go behind the certified returns brought by each return judge from his county, and in determining a prima facie right to a seat the same rule would seem applicable to and binding upon the Committee on Elections and the House. But suppose we should see fit, in violation of this rule, to go behind the action of the district return judges, we come then next to the certified returns of the several boards of county return judges of each county in the district, which returns were not separately before the governor. In three of these, viz, Franklin, Somerset, and Fulton, all of the return judges unite in certifying the result, and the claimants each admitted before the committee, that on this hearing of a claim to the prima facie right to the seat, neither of them could go behind any one of these three returns thus certified.

The home vote of Bedford County is also certified by all of the return judges, and is undisputed by the claimant, but the soldiers' vote of Bedford County is certified by a majority of the return judges, as 318 for Koontz, and 94 for Coffroth, while the minority of the return judges sign another return, which, of course, is of no validity.

A majority of the return judges of Adams County certify to the returns of votes cast in that county, including the soldiers' vote, giving Coffroth 2,707 votes, and Koontz 2,366.

The minority sign another return, purporting to include the home vote and the soldiers' vote, but nothing appears on the face of the majority return, from either Adams or Bedford County, to show but what they constitute the whole board of return judges present for each of said counties.

The majority of the committee also say:

But it is claimed, on the part of Mr. Koontz, not only that the act of the majority of the county return judges in certifying these returns from Adams and Bedford is void, but that the Committee on Elections and the House, in this investigation of the prima facie right to the seat, may not only go behind these returns from Adams and Bedford, but also, in effect, behind the unanimous returns of all the other counties of Franklin, Fulton, and Somerset, so far as the soldiers' vote is concerned. The statement of such a proposition on an investigation of this kind would seem to be sufficient for its own refutation. It would be attempting to hear the case on the merits, without giving the claimants the opportunity of presenting their evidence in full; would be utterly disregarding all credentials, and would obliterate all distinction between a prima facie right on the certificates and papers from the proper certifying officers and a claim founded on the merits on a full hearing of all the evidence that might be adduced by either claimant in support of his claim. (See case of *Jayne v. Todd*, vol. 1, p. 1, Reports of Committees, first session Thirty-eighth Congress.)

It should be borne in mind that by the resolution of the House referring this case to the committee, the committee are restricted in their first examination and report to the prima facie right of either claimant to the seat; and the committee are to determine this from the certificates and papers referred to them, including always the admission of the claimants themselves before the committee; but only those papers are to be considered which come from the proper certifying officers, and which those officers are authorized by law to make, and also which are pertinent to the case.

Many papers have been referred to the committee which, on this hearing, are not evidence for any purpose.

From the legal certificates and returns of the district and county boards of return judges in this case, nothing appears in relation to the rejection of any soldiers' votes; and those who allege such rejection are

compelled to look outside of these certificates and returns and resort to papers and statements which are not legitimate evidence on this investigation and which, without further proof, would few, if any of them, be evidence of themselves on the hearing of a contest on the merits.

The committee therefore recommended the following resolution:

Resolved, That Alexander H. Coffroth, upon the certificates and papers relating to the election in the Sixteenth Congressional district of the State of Pennsylvania, has the prima facie right to the vacant seat from that district and is entitled to take the oath of office and occupy a seat in this House as the Representative in Congress from said district, without prejudice to the right of William H. Koontz, claiming to have been duly elected thereto, to contest his right to said seat upon the merits.

Resolved, That William H. Koontz, desiring to contest the right of Hon. Alexander H. Coffroth to a seat in this House as a Representative from the Sixteenth district of the State of Pennsylvania, be, and he is, required to serve upon the said Coffroth, within fifteen days after the passage of this resolution, a particular statement of the grounds of said contest, and that the said Coffroth be, and he is hereby, required to serve upon the said Koontz his answer thereto within fifteen days thereafter, and that both parties be allowed sixty days next after the service of said answer to take testimony in support of their several allegations and denials, notice of intention to examine witnesses to be given to the opposite party at least five days before their examination, but neither party to give notice of taking testimony within less than five days between the close of taking it at one place and its commencement at another, but in all other respects in the manner prescribed in the act of February 19, 1851.

The minority of the committee took the view that neither claimant had showed a prima facie case. The proclamation of the governor of Pennsylvania, which would have been the best evidence, showed that no such returns had been received as would authorize him to proclaim anyone elected. The return of the board of district judges transmitted by the governor would establish such a prima facie right if unimpeached.

But neither by a return of the district board to the secretary of the commonwealth, nor by a certificate of that board to either of the claimants, has such prima facie right been shown in this case before the committee.

The minority rather considered that the House intended the committee to determine from all the papers submitted the title to the seat. Therefore they examined into the validity of the returns of soldiers' votes and came to a conclusion favorable to Mr. Koontz.

On February 16 and 19¹ the report was debated at length, after which the question was taken on the motion of the minority to substitute resolutions declaring Mr. Koontz entitled prima facie to the seat. This motion was disagreed to—yeas 58, nays 83.

The resolutions as reported from the committee were then agreed to, and Mr. Coffroth was sworn in.

557. The cases of Koontz v. Coffroth and Fuller v. Davidson, continued.

The name of a witness who swore to his own vote not being mentioned in the notice to take depositions as required by law, the vote was rejected.

A precinct return, defective because the certificate of oaths of election officers was wanting, but supplemented by a paper containing the required certificate, was accepted by the House, the State law forbidding rejection for mere informalities.

¹Journal, pp. 282, 297, 298; Globe, pp. 887, 923–930.

Two companies of soldiers having voted together where the law required a separate poll for each, the vote was counted on testimony showing honesty and fairness in the proceedings, the law forbidding rejection for mere informalities.

Returns of soldiers' votes made to the county of their residence were not rejected by the House because a vote from another county was included, but that vote was rejected.

On July 9, 1866,¹ the Committee on Elections reported on the question of the final right, finding that Mr. Coffroth had not been elected and that Mr. Koontz was entitled to the seat.

The contestant alleged that the official count omitted in the counties of Bedford, Fulton, and Adams the votes of certain soldiers, 258 of which were cast for Mr. Koontz and 99 for Mr. Coffroth. He further alleged that certain votes of paupers had been unlawfully cast for sitting Member.

The sitting Member, besides opposing the allegations of contestant, alleged that certain votes counted for contestant in the official returns were illegal.

In the examination of contestant's claims questions of fact as to the casting and counting of soldiers' votes were largely dealt with. Certain principles were laid down by the committee, however, in determining the result.

The contestant claimed one vote at the Cuyler Hospital, in Philadelphia. The committee decided not to count this vote in the table of votes claimed by contestant for the following reason:

The committee need not examine this return, notwithstanding all informality is cured by the testimony of the voter who swears he voted for Mr. Koontz. But the name of the witness is not mentioned in the notice to take depositions, as required by the law regulating contests in elections cases, and of this the sitting Member claims the benefit. We therefore deduct one, which is estimated for Mr. Koontz in the above table.

The return of the McClellan Hospital, in Philadelphia, was claimed by the sitting Member to be fatally defective, but the committee held:

It is the duty of the committee to approach as nearly as possible the ballot box, and, by an examination of all the testimony, see that no legal voter is deprived of his just right to the elective franchise.

We find in the evidence referred to the committee by the House two properly certified papers, one, if taken by itself, defective, because the certificates of oaths are wanting, * * * but, nevertheless evidence of what it contains, to wit, the poll book and tally paper, with signatures of the judges and clerks; the other, which is not in conflict with the first, poll book, certificate of oath of officers, and names and number of electors, signed by same judges and clerks. This makes the testimony complete. The last-mentioned poll book, etc., of itself, though informal, is substantially in compliance with the law. This committee and the House are not circumscribed by the formalities that regulate proceedings of a board of return judges. They can go to the ballot box if necessary. In this instance, by looking at the two returns, no doubt remains of the fact that Mr. Koontz received three votes, which should be counted.

At Front Royal, Va., two companies of the One hundred and thirty-eighth Pennsylvania Regiment voted together, although the law directed that a poll should be opened in each company. While this was sufficient to exclude the return as a prima facie case, yet in a case on the merits the majority of the committee concluded that, as the testimony showed the voting to have been conducted honestly,

¹First session Thirty-ninth Congress, Report No. 92; 2 Bartlett, p. 138; Rowell's Digest, p. 207.

and with perfect fairness, the votes should be counted. The report also notes the fact that this decision did not affect the result.

As to the One hundred and eighty-fourth Regiment, the return of which came to Adams County, the sitting Member objected that it contained a voter of Franklin County. The committee say:

In his argument he objected to the return because it contained a voter in Franklin County.

That objection can not deprive the qualified voters of Adam County of their right, when a perfect return, as this is, is properly certified by the prothonotary.

But the certificate of prothonotary of Adam County is not evidence to us of vote in Franklin County. In the absence of other testimony we reject one vote from this return for Mr. Koontz, and count for Mr. Koontz 38, for Mr. Coffroth 21.

558. The cases of Koontz v. Coffroth and Fuller v. Davidson, continued.

Instance wherein a claimant seated after examination of prima facie title was unseated after examination of final right.

Election judges and clerks sworn by one having no legal right to administer the oath were regarded by the House as de facto officers and the returns were counted, the State law forbidding rejection for mere informalities.

The State law being silent as to the right of paupers to vote, the House has counted the votes of such persons.

Oral testimony impeaching a return already counted by return judges was held not sufficient to cause rejection of the vote, the actual return not being identified and offered.

As to the Twenty-first Pennsylvania Cavalry at City Point, Va., the committee say:

The judges and clerks were sworn by Capt. James Mickley, who was a qualified voter, but not a judge or clerk of the election who are authorized by the law to administer such oath.

The sitting Member claims this return should be deducted, because Captain Mickley was not an election officer. The soldiers' law, section fifth, says "the oath maybe administered by judges or clerks." Others may administer. But Captain Mickley not being a public officer, had no legal right to administer the oath. But the judges and clerks became, by taking the oath in good faith, public officers de facto, for the purpose of conducting the election, and their acts are valid. This principle is laid down in second Kent, page 339: "In the case of public officers who are such de facto, acting under color of office, by an election or appointment not strictly legal, or without having qualified themselves by the requisite tests, or by holding over after the period prescribed for a new appointment, their acts are held valid as respects the rights of third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice."

The decision in the Thirty-sixth Congress (see Bartlett's Election Cases, p. 313), in the case of Blair v. Barret, is also in point. We find the following language in the report, of the majority, which was sustained: "There was no evidence (referring to certain precincts) "returned with the return of votes, now before the committee, in any shape at the hearing that the judges of election were sworn. Had it appeared from the evidence that the election had been fairly conducted at these precincts, and there were no traces of fraud, no taint of the ballot box, the committee would not have been willing to have recommended a rejection of these polls. The honest electors should not be disfranchised and their voice stifled from a mere omission of the officers of election to take the oath of office." In the case before us there was not an omission, as we have seen. The evidence is, that "the election was conducted very strictly and fairly; inquiry was made as to age and payment of taxes. Those whom we were not positively certain were of age were sworn. The voters presented certificates showing the payment of tax within two years," etc.

We are therefore clearly of the opinion that this poll should be counted.

The committee finally concluded that Mr. Koontz had a majority of 40 votes. The House, on July 18,¹ without division, seated Mr. Koontz, the contestant. The committee make, as a part of their report, a compilation of the Pennsylvania election laws, among which was the following section relating to the voting of soldiers:

No mere informality in the manner of carrying out or executing any of the provisions of this act shall invalidate any election held under the same, or authorize the return thereof to be rejected or set aside; nor shall any failure on the part of the commissioners to reach or visit any regiment or company, or part of company, or the failure of any company or part of company to vote, invalidate any election which may be held under this act.

The contestant also claimed that the votes of 16 paupers should be deducted from the poll of the sitting Member in Adams County. The committee say:

The committee can not see why the 16 in Adams County should be deducted from the count of the sitting Member. Each State frames its own laws for the maintenance and care of its poor. The laws provide protectors for the poor, who, "by reason of age, disease, infirmity, or other disability," become unable to work. With regard to the exercise of the elective franchise by such, the laws of Pennsylvania are silent. As they are not expressly deprived of the right, we can not see why the unfortunate, provided for by the public, may not vote as well as if provided for by a parent or a son—certainly not until the authorities of Pennsylvania shall have decided for themselves the law, for which they have had frequent opportunities; therefore we here make no deductions.

The sitting Member claimed the deduction of certain votes on the ground that soldiers' returns improperly made up had been improperly counted in the original official count. This was attempted to be proven by testimony of clerks of county return boards, who testified that certain returns were counted by the return judges, but the actual returns so counted were not identified and made part of the record in the case.²

559. The Pennsylvania election case of Covode v. Foster in the Forty first Congress.

The governor having declined to issue credentials because of unsatisfactory returns, the Clerk declined to enroll either claimant, although the governor officially expressed an opinion that a certain one was elected.

In a case where there were no credentials the House, in examining as to prima facie right, declined to permit the election returns to be considered by the committee.

The law requiring a formal proclamation of the governor, the House declined to give prima facie effect to an informal executive communication, especially as the House had the returns.

¹Journal, p. 1039.

²On June 21, 1866, the Committee on Elections reported on the case of Fuller v. Dawson, from Pennsylvania—a case involving instances of informalities in returns of soldiers' votes under the terms of the Pennsylvania law. The majority of the committee and a large majority of the House sustained the sitting Member, whose majority depended on rather a strict requirement as to records of oaths of election officers and accuracy and regularity of returns, etc. In the debate, which occurred on July 11 and 12, it was urged that the provisions of the Pennsylvania law waiving strict requirements had not been given full effect; but the House sustained the committee and the sitting Member. (First session Thirty-ninth Congress, Journal, p. 1014; Globe, pp. 3747, 3771, 3802; House Report No. 83; 2 Bartlett, p. 126; Rowell's Digest, p. 207.)

Form of resolution instituting a contest in a case wherein neither claimant is seated on prima facie showing.

Certain papers being sent to a committee as the basis of a decision and report, the committee does not take into account other pertinent papers in possession of the House.

On March 4, 1869,¹ at the time of the organization of the House, when the Clerk's roll of Members-elect was called, it appeared that no name had been entered for the Twenty-first district of Pennsylvania. A proposition to amend the roll in this particular was superseded by a motion to proceed to the election of Speaker.

On the next day, March 5,² after the election of Speaker, the subject came up in the House again. It appeared that there were before the Clerk and also in possession of the House:

(a) The general proclamation of the governor of Pennsylvania, dated November 17 1868, declaring who were elected to Congress from the several districts of that State, but stating, in regard to the Twenty-first district:

That no such returns of the elections have been received by the secretary of the commonwealth as would, under the election laws of the State, authorize me to proclaim the name of any person as having been returned duly elected a Member of the House of Representatives of the United States for that district.

(b) The following letter from the governor to the Clerk of the House, dated some months later than the proclamation:

Pennsylvania Executive Chamber,
Harrisburg, Pa., February 28, 1869.

SIR: I have the honor to transmit herewith additional affidavits and evidences of fraud submitted to me in regard to the election of Member of Congress in the Twenty-first Congressional district of this State.

These affidavits were taken before officers properly authorized to administer oaths, and indicate the election of Hon. John Covode.

Most respectfully, your obedient servant,

JNO. W. GEARY,
Governor of Pennsylvania.

Hon. Edward McPherson,
Clerk House of Representatives, Washington, D. C.

STATE OF PENNSYLVANIA,
OFFICE OF THE SECRETARY OF THE COMMONWEALTH,
Harrisburg, Pa., February 23, 1869.

I hereby certify that the signature of John W. Geary, governor of this Commonwealth, to the attached letter, is his genuine signature; and that the accompanying affidavits and papers are the originals filed in this office from time to time since the election held on the 13th of October last.

In testimony whereof I have hereunto set my hand and caused the seal of the secretary's office to be affixed the day and year above written.

[SEAL.]

F. JORDAN,
Secretary of the Commonwealth.

(c) The affidavits reciting the alleged frauds which had determined the mind of the governor as to the right to the seat.³

¹ First session Forty-first Congress, Globe, p. 3.

² Journal, pp. 13, 14; Globe, pp. 13-16.

³ For these affidavits, see Globe, p. 452.

(d) The official returns, both of the district returning board and from the three county boards. One of the three district judges, after participating in the proceedings, had refused to sign the district returns, which was signed by two judges only. These two judges had appended a certificate of the refusal of the third judge to sign.

The Clerk had declined to put the name of either claimant on the roll on the strength of these papers.

The case being taken up in the House, Mr. George W. Woodward, of Pennsylvania, proposed a resolution that "the returns of the election" be referred to the Committee on Elections with instructions to report which claimant had the prima facie right to the seat. Mr. Glenni W. Schofield proposed a resolution seating one claimant, Mr. Covode, on the strength of the documents furnished by the governor.

Both of these propositions were finally put aside in order to adopt the following substitute proposed by Mr. Henry L. Dawes, of Massachusetts:

Resolved, That so much of the proclamation of the governor of Pennsylvania, dated November 17, 1868, as relates to the election of Representative in the Twenty-first district of that State, and the letter of said governor, dated February 23, 1869, relative thereto, together with all the papers referred to in said letter, be referred to the Committee of Elections, when appointed, with instructions to report to the House what person, according to said proclamation, letter and papers, is entitled prima facie to represent said Twenty-first district in the Forty-first Congress pending any contest that may arise concerning the right to such representation.

It is to be noticed that the returns were not included among the papers referred to the committee; and on March 18¹ Mr. Woodward proposed a resolution as follows:

That the certified returns of the return judges of the said Twenty-first district, and all the papers connected therewith now in the hands of the Clerk of the House, be referred to the Committee on Elections with the same effect as if they had been included in the resolution of the 5th instant.

After debate, in which there seemed to exist some confusion as to the real nature of the documents required of the governor to constitute a prima facie case, the House laid Mr. Woodward's resolution on the table.

On March 26² the committee reported, the report of the majority being presented by Mr. John Cessna, of Pennsylvania. After quoting the proclamation of the governor and his later letter to the Clerk of the House, the report says:

The signature of the governor to this document was duly certified by the secretary of the Commonwealth, and the seal of the State attached.

It is claimed by Mr. Covode that this letter gives him a prima facie right to the seat—it being a supplemental proclamation, as he alleges, and intended to be the decision of the governor that he, Covode, was elected in the Twenty-first district.

By the general election law of Pennsylvania (Purdon's Digest, eighth edition, section 63) it is provided, where two or more counties compose a district for the choice of a Member of the House of Representatives, that after an election has been held, the judges of election in each county having met, the clerks shall make out a fair statement of all the votes which shall have been given at such election, within the county, for every person voted for as such Member, which shall be signed by said judges and attested by the clerks; and one of the said judges is to take charge of said certificates of votes and produce the same at a meeting of one judge from each county, at such place in such district as is, or may be, provided by law for that purpose. The judges of the several counties having met, are required

¹Journal, p. 71; Globe, pp. 139–143.

²Journal, p. 122; Globe, p. 309; House Report No. 2; 2 Bartlett, p. 519; Rowell's Digest, p. 231.

(see. 64) to cast up the several county returns and make duplicate returns of all the votes given for such office of Representative in Congress in said district, and of the name of the person elected, and to deposit one of said returns for said office of Representative in the office of the prothonotary of the court of common pleas of the county in which they shall meet, and to place the other return in the nearest post-office, sealed and directed to the secretary of the Commonwealth.

The said return judges are also required (sec. 65) to transmit to the person elected to serve in Congress a certificate of his election within five days after the day of making said return.

On the receipt of the return of the election of Members of the House of Representatives of the United States, as aforesaid, by the secretary of the Commonwealth, the governor is required (sec. 113) to declare by proclamation the names of the persons so returned as elected in the respective districts, and also to transmit as soon as may be conveniently thereafter the returns so made to the House of Representatives of the United States.

The committee go on to say that their investigations were confined strictly to the papers referred to them by the committee. And they say that they believe the governor had a right to decide as he did in the letter to the Clerk, being justified in the precedents in the case of *Butler v. Lehman*. The committee further say:

As there is no prescribed form in the law of Pennsylvania for the proclamation, nor any time fixed at which it shall be issued, nor any specified mode of publication required to be made, it is difficult to see that anything is required by the proclamation named in the law more than a decision as to who is duly elected in the respective districts of the State, and notice of such decision given to the parties elected and to the House of Representatives.

A majority believes that the committee has but little discretion in the premises. The language of the resolution under which we are acting requires us to report to the House what person is entitled, *prima facie*, to represent the Twenty-first district of Pennsylvania in the Forty-first Congress, according to the papers referred to us. It would seem from this resolution of reference that the House was satisfied that some one had a *prima facie* right to the seat on these papers, and that the only inquiry for us was as to the person so entitled.

The committee is further sustained in this view from the fact that at the time these papers were referred, an effort was made in the House to refer other papers seeming to be connected with the case, and this effort was unsuccessful. This effort was subsequently repeated with a like result.

Therefore the committee, finding that the other claimant is nowhere mentioned in the papers before the committee, except in an unfavorable light, find Mr. Covode having the *prima facie* right.

Therefore the majority of the committee reported resolutions giving the seat to Mr. Covode and providing that Mr. Foster, the other claimant, might contest.

The majority of the committee¹ concede that the proclamation of the governor was legal evidence, but they do not admit the same as to the letter to the Clerk:

This letter, being unauthorized by law, has no official character. It is not the act of the governor, but the individual. It is no more legal evidence than would be the unsworn statement of any other citizen of Pennsylvania. Furthermore, it is not under the great seal of the State. It is correctly characterized in the authenticating certificate of the secretary of the Commonwealth, and in the resolution of the House, as a "letter." It does not, like a solemn proclamation, begin, "In the name of the Commonwealth of Pennsylvania," and end with the words "Given under my hand and the great seal of the State," but, like an ordinary epistle, it begins with "Sir," and ends with "Most respectfully, your obedient servant." It is true that it is subscribed "Jno. W. Geary, governor of Pennsylvania." But a letter addressed by the governor, as this is, to the Clerk of the House, recommending an applicant for a position in his department, might have been, and probably would have been, subscribed in the same way, and if so subscribed, would have had the same official character which this letter has. And an

¹H. E. Paine, of Wisconsin; John C. Churchill, of New York; Albert G. Burr, of Illinois, and Samuel J. Randall, of Pennsylvania, signed minority views.

authenticating certificate of the secretary of the Commonwealth would contribute as much of official character to such a recommendation as the secretary's certificate in this case does to the letter. Inasmuch as this letter is not legal evidence, it is not material to inquire whether, if it really were competent evidence, it would amount to prima facie proof that either claimant is entitled to the seat.

But conceding, for the moment, the right of the governor to issue a supplemental proclamation, is the document of date February 23 such an instrument as is contemplated by the law of Pennsylvania? "A proclamation" is an official notice to the public, a public declaration made by competent authority. By Webster a proclamation is defined as "publication by authority, official notice given to the public," "the paper containing an official notice to a people." But the document in question is a mere private communication sent by Governor Geary to the Clerk of this House. It has none of the elements of a proclamation, is not issued by competent authority, for it lacks authority of law; and an unauthorized act by an official has no more legal force than the same act by a private citizen. It is not addressed or directed to the public, nor is it intended for their consideration. It does not declare a result, but merely ventures an opinion, and that only incidentally, for the object alone of the document was to transmit papers, called "affidavits and evidences of fraud," to the Clerk. The Clerk himself does not consider it in any sense an official document, else he surely would have acted upon it and placed on the rolls the name of Hon. John Covode as the Member from the district in question. Further, the paper under consideration has no "great seal of the Commonwealth," as has the proclamation of November 17; and if it be said that the certificate of the secretary of the Commonwealth shows this paper to have been issued by John W. Geary, as governor, it will be seen that, by the same certificate, the secretary designates the paper in question, not as a proclamation or official document, but as a "letter" only. So far as this is a private communication we have nothing to do with it; but in so far as we are required to consider it in deciding a prima facie right to the vacant seat, the preceding comments are considered justifiable. In the view of the undersigned, for the reason aforesaid, neither the letter of February 23, nor the affidavits accompanying, have any legal value in determining the question submitted. So far as the affidavits are concerned, suppose all were considered as true and in all respects competent as testimony, what do they show? At most, that some votes were wrongfully received, and some erroneously rejected, at the election in question. They do not, nor do any papers before the committee, show how many votes were cast for anyone as a candidate in that district. The only manner in which the "affidavits" could "indicate" a result would be to furnish information whereby we might add to or subtract from the aggregate vote previously ascertained to have been cast for the respective parties; but the only ascertained result is embodied (if anywhere) in the "returns," which have been carefully excluded from consideration here, and which had been sent from the governor months before he ascertained what the affidavits in question "indicated."

The minority deny the right of the governor to do what he did:

By virtue of what law of Pennsylvania were affidavits of any character submitted to the governor for his consideration? By the sanction of what law did he transmit them to the Clerk of this House? By what legal right did he base any act of his on such affidavits, or on any affidavits connected with an election? He had already done all that in his judgment he had any authority to do; and had parted with all the records which gave him an original right to do anything whatever in the case. If he had before that time done all his duty, the duty was ended. If he had omitted any duty, in not having officially declared a result in the Twenty-first district, the time for the discharge of that duty passed, and the power to discharge it ceased, when the returns left his possession; and any later act of his in the premises was without sanction of law, of none effect, and entitled to no consideration here or elsewhere.

The authority of the case of *Butler v. Lehman* is denied after discussion of the precedent.

The minority therefore proposed a resolution declaring that the papers referred to the committee did not show what person was entitled prima facie to represent the district.

The report was debated on April 2.¹ It was pointed out that the law of Pennsylvania did not require the governor to send his proclamation to the House, but did

¹Globe, pp. 452-466.

require him to send the returns. The returns had in fact been sent, and it was asserted that these returns made out a prima facie case for Mr. Foster. But the House had excluded the Committee on Elections from taking those returns into consideration. But it was urged that the House might consider the returns if the committee did not. Mr. H. E. Paine, of Wisconsin, proposed the following resolution, which was agreed to without division:

Resolved, That the contested election case from the Twenty-first Congressional district of Pennsylvania be recommitted to the Committee on Elections with instructions to report upon the merits of the case, who is entitled to represent said district in this House, with authority to make regulations to govern the mode of conducting the contest and taking testimony.

On April 5¹ the committee reported and the House agreed to the following regulations:

Each of the claimants shall serve upon the other a notice of the grounds on which he claims the seat before June 1, 1869, and an answer to the notice of his opponent before June 20, 1869. Said Covode shall take his testimony between the 1st and 15th days, inclusive, of July, August, and September, 1869; and said Foster shall take his testimony between the 16th and last days, inclusive, of the same month. The statutory provisions regulating ordinary cases of contest shall apply to this case so far as the same are consistent with these regulations. All testimony shall be transmitted under seal, by the officers before whom the same shall be taken, to the Clerk of the House at Washington, so as to be received by said Clerk before the 15th day of October, 1869; before which days the notices, answers, evidence, and exhibits in the case shall be filed with said Clerk. And the clerk of the Committee on Elections shall immediately thereafter arrange the papers for the Public Printer, and cause the same to be printed before the 1st day of November, 1869; and printed arguments of the claimants shall be filed with the Committee on Elections on the fast day of next session.

560. The case of Covode v. Foster, continued.

An instance of rejection of a poll where irregularities in both the reception and counting of votes, cumulatively considered, showed a want of good faith and regard for law.

Participation of an unsworn person in the count may be held a contributory irregularity in justifying rejection of a poll.

On January 27, 1870,² Mr. John C. Churchill, of New York, from the Committee on Elections, submitted a report, the case being called Covode *v.* Foster. The report finds from the certificates of the return judges of the several counties in the district that Henry D. Foster had a returned majority of 41 votes. The majority of the committee were convinced that certain obviously proper corrections would increase this majority to 64.

The majority found, however, that this vote was successfully assailed by Mr. Covode. The examination of this question divided itself into several branches.

(1) In Dunbar Township, where a majority of the board of election officers belonged to Mr. Foster's party, ballots were received for a time in a cigar box and a hat, and afterwards transferred to the regular boxes, the proceeding being contrary to the requirements of Pennsylvania law; persons, some under the influence of liquor, were near the boxes during the day; one inspector of election was under the influence of liquor; challenges were disregarded, in violation of law, and evi-

¹Globe, p. 510.

²House Report No. 15, second session Forty-first Congress, 2 Bartlett, p. 600; Rowell's Digest, p. 237.

dently resulted in the voting of persons not entitled to vote; while the votes were being counted one election officer was taken sick and one, William Speers, shown to be an unscrupulous partisan of Mr. Foster, took the vacant place without being sworn, and officiated until the end of the count; six more ballots were found in the box than could be accounted for by the names on the tally list. The majority of the committee say:

From all the evidence, I think we must conclude that the returns of such an election are too unreliable to be received, and as neither party has attempted to prove what votes were cast for him at that election, that the whole poll of Dunbar Township must be rejected.

While it is well established that mere neglect to perform directory requirements of the law, or performance in a mistaken manner, where there is no bad faith and no harm has accrued, will [not] justify the rejection of an entire poll, it is equally well settled that where the proceedings are so tarnished by fraudulent, or negligent, or improper conduct on the part of the officers as that the result of the election is rendered unreliable, the entire returns will be rejected, and the parties left to make such proof as they may of votes legally cast for them.

The minority¹ do not agree to this:

We do not concur in this conclusion, believing that in such Case it should be made the duty of each party to a contest, respectively, to prove the illegal votes cast at such poll, and for whom such illegal votes were given. Those not proved to be illegal should stand; that is to say, that such poll be purged of its illegal votes only; those left to be duly counted. The merits of a contested election depend upon the finding out which of the candidates received the greatest number of legal votes. The only way to arrive at this is to show of the votes cast for each candidate those that were illegal. It is at no time justifiable to throw out an entire poll, and in this way disfranchise the whole voting population of a district, if it can be purged of its illegal portion. In this case the testimony is full as to Dunbar Township, and the illegal votes, by said testimony, can be readily and conclusively determined. This is a Pennsylvania case, and the courts of that State have, in all contested elections, held that impossibility of ascertaining the true state of the poll is the only ground for rejecting it. To show that the majority themselves are in doubt as to the justness of rejecting this entire poll, they present to the consideration of the House the condition of the poll after they have purged it of all the illegal votes alleged and proved to have been cast. This latter course should commend itself to your judgment, and while being in strict accordance with law and precedent, is, at the same time, a protection to the honest voters in every poll.

After reviewing each irregularity the minority say:

One by one we have disposed of the complaints and irregularities made against this (Dunbar) township poll. Surely, if they can not stand singly, they should not be made to prop each other and thus have force combined.

In the debate² the majority did not contend that any one of the irregularities would justify the contemplated action, but did urge that taken together they showed—

a want of that good faith and regard for law the presumption of which is the foundation of the authority which is given to the returns of an election board.

The position of the minority against the rejection of the return was analyzed in the debate³ the point being made that the rejection of returns in which no confidence could be placed was not a disfranchisement of legal voters. It was simply

¹The minority views were signed by Messrs. Samuel J. Randall, of Pennsylvania; Albert G. Burr, of Illinois, and P. M. Dox, of Alabama.

²Remarks of Mr. Churchill, *Globe*, p. 1116.

³By Mr. Luke P. Poland, of Vermont, *Globe*, p. 1158.

a declaration that the candidates could not use the discredited return to prove the votes, but must prove the votes otherwise. Not having submitted any proof, no votes could be counted.

561. The case of Covode v. Foster, continued.

Neglect of a mandatory law requiring a voting list to be furnished at a poll was, in connection with questionable acts of partisan election officers, sufficient to justify rejection of the poll.

Paupers supported in a county poorhouse were held to have gained no residence in the town by reason of this enforced stay.

The House has rejected votes of lunatics whose votes had been received by election officers and in whose cases there had been no findings in lunacy.

(2) The majority of the committee found that through the apparently intentional irregularities practiced by one Eisaman, an assessor whose duty it was to furnish the voting list at Youngstown election district, the officers of election used a list which Eisaman had posted in accordance with law, but not the list he was required to furnish for the election. The report says:

The assessor assessed persons who made no personal application to him, contrary to the law; the names of the persons so assessed he did not enter upon the list in his possession, as required by law, but upon a separate piece of paper, which was not a legal assessment; nor did he furnish any copy of this to the county commissioners at any time before the election, nor to the inspectors of elections on or before 8 o'clock on the forenoon of the day of election, as required by law. All these provisions of law are not directory merely, but mandatory, and enforced by severe penalties. (Election Laws, p. 42, sec. 85.)

But whether the assessment made by Eisaman was a legal assessment or not (and we think no legal assessment was shown to have been made), the failure of Eisaman to furnish to the inspectors a copy of the list had the same effect, so far as that election was concerned, as though no assessment whatever had been made.

The law of Pennsylvania is explicit that when the name of the person coming to vote is not found on the list furnished by the commissioners or assessors the board must examine him under oath as to his qualifications, and he must prove by at least one witness, who must be a qualified elector, that he has resided in the district at least ten days next immediately preceding the election. (Election Laws, 33, sec. 42, 2 par., 553, 580-581.) That law further provides that if any inspector or judge shall receive the name of any person whose name shall not be returned on the list furnished by the commissioners or assessor without first requiring the evidence directed by the act, the person offending shall, on conviction, be fined not less than \$50 nor more than \$200. (Election Laws, 41, sec. 81.)

The assessor having failed to furnish the inspectors with any copy of the list of taxables, the board could legally receive no vote at that election, except by requiring him to be examined as to his qualifications under oath, and to furnish the further evidence required by the act. Nothing of this kind was done; but, instead, the votes of persons were rejected because their names were not found on this paper taken from the tavern wall, and they were permitted to vote because their names were found thereon. This alone we think sufficient to invalidate the election in that district.

But the conduct of the election board was equally blameworthy with that of the assessor. From the report which had gone out that an unusually large number had been assessed at the monastery, and from the gathering of strangers there, it was believed that improper votes would be attempted to be polled, and a purpose seems to have been formed to prevent these votes being received, except upon proper examination. But from the commencement of the election until about 11 o'clock, during which time the greater part of these votes were polled, challenges were entirely disregarded.

In addition, the paper used by the election officers disappeared after the election, and there was no means of determining as to its value. Also all the election officers were of Mr. Foster's party.

Therefore the majority recommend the rejection of the entire vote of Youngstown as returned.

The minority find that the assessor performed properly all the duties in relation to the lists, except one:

But the last requirement—i. e., to make out duplicates of these lists and file one in the county commissioner's office and hand the other to one of the inspectors of the election before 8 o'clock on the morning of said election—was neglected to be done by the assessor. And because of the neglect of this one, and not the most material requirement, having fulfilled every other duty incumbent on him, and in so doing acting under the sanctity of his official oath, the majority ask now to reject this entire poll.

If there had been no official act whatever performed by the assessor necessary to the proper conduct of this election, then the committee might, with some propriety, ask for the rejection of this poll. In performing none of his duties, the officers of the election would have been compelled to close the polls or to have proceeded without official knowledge as to who were the taxables and voters of the district; even then we hold that it would have been competent for the officers of the election to have received the votes of all persons offering to vote, who, upon examination under oath, were found to have the constitutional qualifications of voters. But they were placed in no such position by the neglect of this assessor. They were not without a proper guide for the conduct of the election.

(3) It was shown that in South Union certain inmates of the local poorhouse, who were sent there from other townships, had voted for Mr. Foster. The same thing occurred at Hemphill Township. The majority of the committee conclude:

The testimony further shows (Zundell, 191) that none of these persons were assessed upon personal application, and also that none of them paid the tax upon which they were permitted to vote (192, 273), but that their names were handed to the assessor and their taxes paid by an official who understood that they would vote, and for the purpose of enabling them to vote a particular ticket, both assessment and payment of tax being illegal as against the express letter of the election laws of Pennsylvania. (Election Laws, 24, sec. 13; 40, sec. 75.) But did these persons acquire a residence in the election district where the county-house was situated, within the meaning of the law of Pennsylvania, which requires that the voter shall have resided at least ten days immediately preceding the election in the district where he offers to vote? We think not. Their residence at this place was not their own voluntary act, but the act of the public authorities, who, for reasons of economy and convenience, sent them here that they might be supported at the public expense.

The court, in *Murray v. McCarty* (2 Mun., 397), says, that to divest a person of the character of citizen of a particular place, "there must be a removal with *an intention to lay aside that character*, and he must *actually join himself to some other community*." The italics are those of the original report.

So Burrill (Law Dic., tit. Residence) defines residence as "the place which one has made his seat, abode, or dwelling." The derivation, as well as the ordinary acceptance of the term, denotes the place where the party has seated himself, and his own choice or free will in the matter is assumed. We think this the legal as well as the ordinary meaning of the term, and that accordingly the soldier who occupies a place at the command of his military superiors, the criminal who does the same thing while in custody in the hands of the criminal authorities, and the pauper who is placed and supported in the county poorhouse at the public expense, gains no residence in the town by his enforced stay. We think, therefore, that these fifteen votes should be deducted from the vote for Mr. Foster.

The minority decline to sanction the deduction of the poorhouse vote, quoting the case of *Koontz v. Coffroth*.

(4) The majority rejected the votes of certain lunatics, saying:

As to lunacy, it was held by the court in *Thompson v. Ewing* (1 Brewster, Rep., 104), that it was proper to show in a contested-election case that a voter was non compos mentis, and that without a finding in lunacy.

The minority say:

As to the lunacy vote—four in number—we desire to say that the constitutional requirements do not set up any prohibition as against simple-minded men or lunatics. The extent of the mental imbecility would seem, therefore, to have been left to the officers of the election to determine, and upon such extent of weak intellect admit or reject the vote when offered.

562. The case of Covode v. Foster, continued.

The House rejected a vote found by the judges in an irregular place and counted in spite of the fact that it caused an excess in the poll.

The House may count votes improperly rejected by election officers.

The House may count votes not cast because of intimidation practiced in presence of the election officers and which it was their duty to prevent.

(5) Certain other votes the majority reject:

To these should be added 1 vote for Foster for Congress found in the State box in Sewickly Township and counted to him, although thereby the number of votes for Congress was made one greater than the number of names on the list (377).

Also, 1 vote for Foster in South Huntingdon Township, found upon the floor at the close of the counting, a considerable crowd standing around, and counted to Foster, although thereby the number of votes for Congress was made one more than the number of names on the list of voters.

The minority say:

How such conclusion can be reached passes our comprehension. If anyone can determine that the vote in excess may not have just as likely been cast for Mr. Covode as for Mr. Foster, he will have succeeded better than can be determined by those who sign this report. So, also, with regard to one vote in South Huntingdon Township, which was found on the floor, and counted for Mr. Foster.

In the debate the majority retorted that the votes found not in the ballot box but in an irregular place was certainly the one to be deducted.

(6) The majority also counted certain votes not cast. There were votes improperly rejected, and one vote prevented by threats of violence made in the presence of the election officers, and against which it was the duty of the election officers to protect the voter.

The majority of the committee found Mr. Covode elected by 402 majority, and reported the following resolutions:

Resolved, That Henry D. Foster is not entitled to a seat in this House as Representative from the Twenty-first Congressional district of Pennsylvania.

Resolved, That John Covode was duly elected Representative in Congress from the Twenty-first Congressional district of Pennsylvania at the election held therein on the 13th day of October, 1868, and that he is entitled to a seat in this House as such Representative.

The report was debated at length on February 8 and 9,¹ and on the latter day a resolution offered as a substitute declaring Mr. Foster entitled to the seat was disagreed to—yeas 49, nays 122.

The first resolution of the majority was agreed to without division. The second resolution was then agreed to—yeas 121, nays 45.

Mr. Covode was then sworn in.

¹Globe, pp. 1114, 1121, 1149, 1154–1160; Journal, p. 291.

563. The Senate election case of Henry A. Du Pont, of Delaware, in the Fifty-fourth Congress.

A claimant to a seat in the Senate, in a case where there was no contestant and no credentials, petitioned for the seat, exhibiting evidence in support of his claim.

A Senate discussion as to incompatible offices and as to cases wherein the acceptance of one creates a vacancy in another.

A Senate committee concluded that the Journal entries of a legislative body were conclusive as to all the proceedings had and might not be contradicted by ex parte evidence.

The senate of a State having failed to adjudge a participating Member disqualified, the United States Senate, in a close decision, declined to reject the vote of the said Member for Senator.

On December 4, 1895,¹ in the Senate, Mr. John H. Mitchell, of Oregon, presented the following:

To the Senate of the United States:

The undersigned hereby claims the right to be admitted as a Senator from the State of Delaware under an election by the legislature of said State on the 9th day of May, A. D. 1895, to fill the term of six years, commencing on the 4th day of March, A. D. 1895, and herewith presents evidence in support of his claim.

H. A. DU PONT.

This paper, which was treated and described as a petition, was accompanied by a certificate of the speaker of the Delaware house of representatives, attested by the clerk of the said house, setting forth the proceedings by which it was claimed that Mr. Du Pont had been elected, and the particular question wherein a doubt as to his election was involved.

These papers, as well as others filed at a later date, were referred to the Committee on Privileges and Elections.

No request was made that Mr. Du Pont should be sworn in; but he was accorded the privileges of the floor of the Senate.

On February 18, 1896,² Mr. Mitchell presented the report of the committee, which was concurred in by Messrs. George F. Hoar, of Massachusetts; William E. Chandler, of New Hampshire; Julius C. Burrows, of Michigan; and J. C. Pritchard, of North Carolina. The minority dissented and filed views which were signed by Messrs. David Turpie, of Indiana; James L. Pugh, of Alabama; George Gray, of Delaware, and John M. Palmer, of Illinois.

As to the facts, the report says:

The legislature of the State of Delaware consists of a senate, composed of 9 senators, 3 of whom are elected from each of the three counties of the State, and a house of representatives of 21 members, 7 of whom are elected from each of the three counties of the State. When there are no vacancies in the membership, and all are present in joint assembly of the two houses for the purpose of electing a United States Senator, such joint assembly is composed of 30 members, thus requiring the votes of 16 members to elect.

¹First session Fifty-fourth Congress, Record, pp. 29, 30.

²Record, pp. 1827–1861. The report, with minority views and exhibits, is printed in full in the Record.

In the event of one vacancy caused either by death, resignation, inability to act, or for any other reason, then the joint assembly, all others being present, would be composed of 29 members, in which event the votes of 15 members would be sufficient to elect.

At the meeting of the joint assembly of the legislature of Delaware on the 9th day of May, 1895, which assembly, it is conceded, was in all respects regularly called and held in pursuance of law, the final vote was as follows:

Joint meeting proceeded to another ballot, which resulted as follows:

| | | | | | | |
|-----------------------------|---|---|---|---|---|----|
| * | * | * | * | * | * | * |
| H. A. Du Pont had | | | | | | 15 |
| Ed. Ridgley had | | | | | | 10 |
| J. Edward Addicks had | | | | | | 4 |
| Ebe W. Tunnell had | | | | | | 1 |

There being present in such joint assembly, and each casting a vote, 30 persons, each claiming to be a member of the legislature of the State of Delaware and entitled to vote for United States Senator.

It is conceded by Mr. Du Pont and by your committee that if this contention is true—that is, if each of the 30 persons so present in such joint assembly and each of whom cast a vote for Senator was a duly qualified member of the legislature of the State of Delaware and under no disability as such which would deprive him of his right to a seat in such assembly and to cast a vote for Senator—then Mr. Du Pont was not elected Senator and is not entitled to a seat in the Senate.

It is admitted upon the part of Mr. Du Pont, and such is the fact, that of the 30 persons so present and claiming a right to vote as aforesaid, 29 of them were so qualified. It is contended, however, that 1 of the 30, namely, William T. Watson, claiming to be a senator from the county of Kent, and claiming to be the speaker of the senate, and claiming the right, as such senator, to be present and participate in the proceedings of such joint assembly, and to cast his vote for Senator, was not entitled under the constitution of the State of Delaware and the laws of the land, to be present in such joint assembly, had no right to be counted therein in making up the number present, and had no right to cast his vote in such assembly for any person for Senator.

If this contention upon the part of Mr. Du Pont is correct, then it is conceded, provided the right to inquire into Watson's qualifications to vote in such assembly now exists, that, inasmuch as in that event there were but 29 members of the legislature of the State of Delaware present entitled to vote, and as it is conceded Mr. Du Pont received the votes of 15 of such members, no one of which was that of Mr. Watson, thus receiving a clear majority of all the votes cast, entitled to be cast, he was duly elected Senator, and is entitled to his seat.

The whole question involved, then, in this case is as to the right of Watson to be present in such joint assembly, and to be counted therein in making up the number present, so as to require the votes of 16 members to make an election.

The ground upon which it is claimed upon the part of Mr. Du Pont that Mr. Watson was ineligible to a seat in such joint assembly, and should not have been counted therein in making up the number constituting the same, is based on the fact that, although he had been duly elected a senator from the county of Kent, and from the commencement of the session in January, 1895, until April 9 of that year, had held and occupied a seat in the senate and had been elected speaker thereof, and served in that capacity, he had, on the 9th day of April, 1895, the governor of the State of Delaware, Joshua H. Marvil, having died the day previous, succeeded to the governorship of the State in virtue of a provision of the constitution of that State, and from that date until the 9th day of May following had continued to exercise the functions and duties of executive of the State, and has ever since and still continues to exercise the office of governor of said State, and that, therefore, on that date, May 9, 1895, he, then holding the office of and being the governor of the State of Delaware, was ineligible to a seat in said joint assembly, and had no right whatever, under the provisions of the constitution of the State and of the laws of the land, to be present, either to participate by his vote or otherwise, or to be counted therein.

Your committee hold that this contention on the part of Mr. Du Pont is well founded.

The clause in the Delaware constitution in pursuance of which Mr. Watson, as speaker of the senate became governor on April 9, 1895, and which will be commented on later in this report, is found in section 14 of Article III, and is as follows:

“Upon any vacancy happening in the office of governor by his death, removal, resignation, or inability, the speaker of the senate shall exercise the office until a governor elected by the people shall be duly qualified.”

It is conceded a vacancy in the office of governor occurred on April 8, 1895, by the death of the then governor of the State, Joshua H. Marvil; also that Senator Watson was then and on April 9, 1895, speaker of the senate, and that on this latter date he took the required oaths, was inaugurated, and entered upon the exercise of the office of governor, and has continued to hold and exercise such office ever since.

PROCEEDINGS OF THE LEGISLATURE.

The legislature of the State of Delaware met in biennial session on the first Tuesday of January, 1895, and on that day organized by the election of speakers and other officers for the senate and house of representatives. There were at that time 9 members of the senate and 21 members of the house of representatives, 3 senators and 7 representatives having been chosen from each of the three counties in the State. At the organization of the senate William T. Watson was duly elected speaker and continued in the discharge of his official duties as speaker of the senate, save during occasional absences, until the 9th day of April, 1895, the day following that on which Joshua H. Marvil, governor of the State of Delaware, died.

This legislature being charged with the duty of electing a Senator of the United States for the constitutional term of six years commencing on the 4th day of March, 1895, and having failed to elect such Senator on the second Tuesday after the meeting and organization of such legislature, convened in joint assembly on the next day, being the 16th day of January, pursuant to the provisions of the act of Congress entitled “An act to regulate the times and manner of holding elections for Senators in Congress,” approved July 25, 1866, and proceeded to vote for a United States Senator.

No one having been elected to that office on that day, the legislature, pursuant to the provisions of said act, convened in joint assembly on the following and succeeding days, Sundays excepted, until and including Thursday, the 9th day of May, 1895. No one was elected United States Senator prior to the day last named. On the 9th day of April aforesaid, immediately after the joint assembly of the two houses had separated, Senator William T. Watson, who at the time of the death of Governor Marvil, which occurred on the preceding day, had been speaker of the senate, took the official oaths prescribed for the governor of the State of Delaware, and forthwith entered upon the exercise of that office.

It is conceded that from the commencement of the voting for a United States Senator until and including the 9th day of April, Senator William T. Watson took part in such voting except during occasional absences.

Furthermore, it is a conceded fact, and if not conceded, fully borne out by the journal entries and other testimony, that from the time he took the oaths of office and assumed the functions of governor in the exercise of such office until the final joint assembly of the two houses on the 9th day of May, Governor Watson did not upon any occasion take any part either in the proceedings of the senate or of the joint assembly.

And, further, it is clear to your committee from the record and other evidence submitted that from the hour of his inauguration as governor, by taking the constitutional oaths required of a governor, his name was dropped from the roll call of the senate and was never once called, either as of speaker or as of a senator, on any roll call had on any bill, resolution, or motion until the final adjournment of the senate. Senator Alrichs, in his affidavit of date January 28, 1986 (Doc. 9, part 6, p. 1), shows this conclusively, and it is not contradicted by any affidavit filed in the case.

* * * * *

It is conceded, however, that Governor Watson did, on the 9th day of May aforesaid, enter the final joint assembly and assume the right to be counted as a member of such assembly, and the right to vote therein for a United States Senator. During this final assembly 28 ballots were had for United States Senator. The vote upon each ballot as shown by the record of such assembly was as follows:

| | Votes. |
|------------------------|--------|
| Henry A. Du Pont | 15 |
| Ed. Ridgely | 10 |
| J. E. Addicks | 4 |
| E. W. Tunnell | 1 |

William T. Watson, then governor of the State of Delaware, as aforesaid, cast his vote each time for Ed. Ridgely.

It will be seen, therefore, the whole question of the right of Mr. Du Pont to a seat in the Senate, as claimed, turns upon the single question: Had William T. Watson, then holding and exercising the office of governor of the State of Delaware, a right under the constitution of that State and the laws of the land, to exercise the office of State senator, and as such to sit in the joint assembly on May 9, 1895, to be counted therein in making up the number constituting such joint assembly, and to vote therein for a United States Senator? Your committee are clearly of the opinion he had not.

PROPOSITIONS INVOLVED.

In determining this question three different propositions are presented for our consideration:

First. Did the offices of senator and speaker of the senate, held by William T. Watson from the commencement of the session of the Delaware legislature in January, 1895, until April 9, 1895, become absolutely vacant on the inauguration of said William T. Watson as governor of the State by taking the oaths of office required of a person entering upon the exercise of that office? Or,

Second. If such offices of senator and speaker of the senate did not become absolutely vacant upon such inauguration as governor, was the right of Watson to exercise the functions of both speaker of the senate and senator held in abeyance and suspended for and during the time he should continue to hold and exercise the office of governor? Or,

Third. While holding and exercising the office of governor did said William T. Watson not only continue to hold the offices of senator and speaker of the senate, but did his right to exercise all the functions of such senator and speaker of the senate while holding and exercising the office of governor continue to exist?

The answer to either or both of the first two propositions in the affirmative settles the question in favor of the right of Mr. Du Pont to a seat, while an affirmative answer to the third proposition, which of course negatives the other two, would be a denial of his right to a seat.

The report discusses at great length the various questions involved in the case, and arrives at the following conclusions of law and fact:

(1) It is a well-settled rule of the common law that the same person shall not exercise simultaneously two incompatible offices; and further, the acceptance of one is ipso facto a resignation of the other.

(2) Under the American system executive and legislative offices are incompatible, and the same person can not exercise both simultaneously in the absence of either express or clearly implied statutory or constitutional authority; and the acceptance of the second is ipso facto a resignation of the first.

(3) There is no express or implied authority in the constitution of the State of Delaware for the simultaneous exercise by the same person of the offices of governor and senator; on the contrary, such constitution expressly interdicts such exercise of those two offices.

(4) Whether or not the offices of State senator and speaker of the senate became absolutely vacant when Speaker Watson took the oath of office, was inaugurated governor of the State, and entered upon the exercise of that office, there can be no doubt, on a fair construction of the several constitutional provisions of the State of Delaware, that his right to exercise the office of senator or speaker of the senate, or any of the functions connected therewith while he continued to hold and exercise the office of governor, was held in abeyance and absolutely suspended.

(5) The theory that Mr. Watson can exercise the office of governor of the State and State senator simultaneously, involves innumerable constitutional repugnancies, perplexing difficulties, and endless absurdities; while the opposite theory reconciles and harmonizes all the provisions of the Delaware constitution relating to the subject under consideration.

(6) That Governor Watson's exercise of the office of senator in the joint assembly on the 9th day of May, 1895, and of the office of president of such joint assembly was illegal, and his vote therein for United States Senator a nullity.

In determining the above propositions your committee reach the further following conclusions:

(7) In determining the question as to whether the Delaware senate on May 9, 1895, acted upon or judged, either actually or constructively, the qualifications of Governor Watson to a seat in the senate, the journal entries of the proceedings of the Delaware senate of that date are conclusive as to the number

and names of senators present, the motions submitted, the votes cast, and of all the proceedings had, and can not be contradicted by ex parte affidavits.

(8) The right which undoubtedly belongs exclusively to the Delaware senate to judge of the elections, returns, and qualifications of members, does not vest in such senate any exclusive right as would conclude the Senate of the United States to determine by construction whether the constitution of the State of Delaware does or does not recognize a certain seat in the senate as subject to occupation—nor does it include the power to admit members to seats not recognized by the constitution of the State as subject to occupation, or, if subject to occupation, to fill them in a manner or by a person which the State constitution forbids.

(9) Your committee, applying these rules, find as a matter of fact the Delaware senate never judged of the qualifications of Governor Watson to a seat in the senate, either on the 9th day of May, 1895, or at any other time subsequent to the date of his inauguration as governor.

(10) That on May 9, 1895, the date on which Mr. Du Pont claims to have been elected, the legislature of the State of Delaware consisted of but 29 members; there were in the joint assembly on that date but 29 members of such legislature entitled to seats in such joint assembly and entitled to be counted and vote therein. As Mr. Du Pont received 15 votes, being a majority of the whole number entitled to be cast in such joint assembly, and a majority of all the legal votes cast therein, he was legally elected Senator from the State of Delaware for the full term commencing March 4, 1895, and is entitled to be seated.

(11) The fact that such election is not certified by the governor of the State in pursuance of the statute on that subject does not invalidate such election in any respect.

Your committee, therefore, report to the Senate the following resolution and recommend its adoption:

Resolved, That Henry A. Du Pont is entitled to a seat in the Senate from the State of Delaware for the full term commencing March 4, 1895.

The minority held that because of the peculiar provisions of the constitution of Delaware the common law as to incompatibility would not apply.

The constitution of Delaware does not provide that the speaker of the senate, on the death of the governor, shall either be or become governor, but only that such speaker “shall exercise the office of governor.” It does not provide that he shall, in such an event, cease to be speaker, or cease to be senator, or that a vacancy exists in either position; and we do not think that we can amend the constitution of a State by the process of an argument in a contested seat here.

Not only is no vacancy created in such instance by the devolution of “the exercise of the office of governor” upon the speaker of the senate, but the constitution of the State expressly provides that I “each house, whose speaker shall exercise the office of governor, may choose a speaker pro tempore”—that is, a temporary speaker to preside in the room of the permanent speaker when he may be absent, thus plainly implying that there is no vacancy in the office of speaker, and that there is no vacancy in the office of senator or representative (as no one could be speaker except a member of one of the houses) by this devolution of the exercise of the office of governor.

In section 14 of the constitution, where it is provided that the speaker of the house “shall exercise the office of governor” “if there be no speaker of the senate, the distinction between the speaker of either house exercising the office of governor, and the governor as such, is very clearly implied in the phrase, “until a governor elected by the people shall be duly qualified.” And in the same section, afterwards, the person elected governor is distinguished from the temporary occupant exercising the office of governor by the recurrence three times of the phrase, “the person who exercises the office of governor.” And when the contingency arises of a vacancy in the office of governor, and there be no other person who can exercise the office of governor within the provisions of the constitution, the general assembly shall proceed to elect “a person to exercise the office of governor until a governor elected by the people shall be qualified.”

This person so chosen is not called governor, but a “person to exercise the office of governor.”

And when, in the case of a contested election, someone is to be designated to perform gubernatorial duties, it is provided “that the speaker of the senate or the speaker of the house who may then be in the exercise of executive authority” shall continue therein until a determination of the contest. It is manifestly expressed that the person exercising the executive authority is not the governor, but

that he is, and remains, and must continue to be speaker of the senate, or speaker of the house, notwithstanding the fact that the "exercise of the office of governor" may for the time being devolve upon him.

If this interpretation of the constitution of the State were at all doubtful, it is abundantly sustained by practical, contemporaneous, and continuous construction in the actual administration of the government of Delaware. Three persons, upon each of whom at different times devolved, under this clause, the exercise of the office of governor (John Sykes, Jacob Stout, and Caleb Rodney), speakers of the senate, who temporarily exercised the executive authority as such speakers, after they had exercised the office of governor ad interim, returned to the senate and served out the terms for which they had been elected as senators in the senate. No suggestion was made that they had vacated their office as senators or had become governors of the State of Delaware by reason of the temporary exercise of executive duties imposed upon them by section 14, article 3, of the constitution.

Furthermore, the minority contended:

The senate of the State of Delaware is made by law the judge of the elections, returns, and qualifications of its own members. In the case presented by Mr. Du Pont against the legality of the vote of Mr. Speaker Watson as a member of the joint convention, no question is made as to the election and return of Mr. Watson as a senator. The whole case rests upon the question of his qualifications. And even upon the subject of qualification, it is not denied that at the time he took his seat in the senate, he was fully and legally qualified to act and vote therein, but it is earnestly insisted that after he had taken his seat he did and performed certain acts and duties which deprived him of his legal qualifications, and had rendered him unqualified, disqualified, and incompetent to vote or act as a member of the senate or of the joint convention.

This position of the claimant, Mr. Du Pont, raises the most serious question in this case, which is, as to who can lawfully decide and determine as to whether or not the acts of Mr. Speaker Watson referred to destroyed or suspended his qualifications as a senator, and by consequence as a member of the joint convention.

We think that the senate of the State of Delaware, whereof he was a member, is the sole tribunal which could either hear or determine lawfully these objections to the qualifications of Senator Watson.

It is charged that he was absent from the senate from the 9th day of April, 1895, until the day of the joint convention. If he were absent in discharge of any duties, executive or official by the law of Delaware, incompatible with the office of senator, or if his absence was contumacious and perverse, this might have constituted a cause for the judgment of the State senate for his ouster from the senate, his suspension as a senator, or the vacation of his seat. If, whether present or absent, during his term, he had committed any act in violation of the laws and constitution of his State, or of the United States, this might have constituted a cause for the judgment of the State senate against him for his suspension or for his expulsion; the vacation of his seat and office, and for the issuing of a writ of election for the choice of his successor as senator from the county of Kent.

Causes for judgment of suspension, ouster, vacation, or expulsion against a sitting member or senator are not, however well founded, judgments. They have legally none of the force or effect of judgments or adjudications. There is no judgment or adjudication shown in the record or journal of the senate of Delaware on any of these objections to the qualifications of Mr. Watson as a member of that body.

If these charges or objections to his qualifications had been presented and heard in the State senate, and judgment of suspension, ouster, and vacation had been rendered against him, the case of Mr. Du Pont might have been fully made out. This Senate and court of the United States would have been bound thereby. If such a hearing had terminated in his favor, the same result would have followed. The judgment of the State senate is a finality.

As there was no hearing or judgment in respect to such charges in the State senate, the seat and office of Senator Watson remains undisturbed and unaffected thereby.

Because the State senate did not pass upon these charges or objections to the qualifications of their fellow-member, we in this body are not by law in anyway authorized to take jurisdiction. We have no authority to originate, hear, or determine any objections to the qualifications of those who acted and voted as members of the senate of the State, or to revise or review their action or non action in the premises

These considerations rest upon the great doctrine of the due distribution of powers, and of

the distinctive provinces of independent powers, to which the claimant in this case has so strongly appealed, and which we now justly invoke as showing the error of his position.

The constitution of Delaware, like that of the other States, and of the United States, declares that "each house shall judge of the elections, returns, and qualifications of its own members."

Each House of Congress is a court in such cases for the judgment of its own members, but neither is a court or can be in any form a tribunal to judge of the qualifications of any member of the State legislature.

The minority discuss in this connection the cases of *Sykes v. Spencer*, *Turpie and Clark* and *Maginnis v. Sanders and Power*. Therefore the minority concluded:

First. That if there be any questions as to the lawful qualifications of William T. Watson to act and vote as a senator, and, by consequence, as a member of the joint convention, this is not the place, the time, or the tribunal to either hear or determine such questions.

Second. The senate of the State of Delaware had paramount and exclusive jurisdiction to adjudge such questions, and, whether they exercised such jurisdiction or not, the Senate of the United States has no jurisdiction in the premises.

Third. That Mr. Watson having acted and voted as a senator and as a member of the joint convention at the time when the vote was taken under which Mr. Du Pont claims his election to a seat in this body, he is to be counted as a member of the legislature of Delaware in joint convention assembled; that the whole number of members voting, being the whole number of members of both houses, was 30; that Mr. Du Pont did not receive a majority of this whole number; that we can not make his vote of 15 a majority of such whole number by subtracting therefrom the vote of one whose right and title to vote is not shown by the record to have been adjudged against by the body of which he acted as a member.

The report was debated at length in the Senate on March 5, 9–12, 18, 20, 31, April 1, 2, 13–16, May 4, 14, 15.¹

On May 15,⁴ the question was taken on the motion of Mr. Turpie to insert the word "not" before the word "entitled" in the resolution proposed by the majority. This amendment was agreed to—yeas 31, nays 30. So it was—

Resolved, That Henry A. Du Pont is not entitled to a seat in the Senate from the State of Delaware.

564. The case of Henry A. Du Pont, continued.

The Senate has decided that, while discovery of new evidence might cause review of a decision in an election case, it should not for other reasons change a judgment once made.

On January 12, 1897,² at the next session of the Congress, Mr. Chandler presented a memorial from Henry A. Du Pont alleging that he is justly entitled to a seat in the Senate from the State of Delaware, and that under the circumstances the question of the validity of his election should again be investigated and acted upon, and that he hopes and expects to show on another consideration of the subject that he is entitled to such seat, and praying the Senate to reconsider the case and seat the petitioner.

The memorial was received and referred to the Committee on Privileges and Elections.

At later dates various petitions and memorials on the same subject were presented and referred.

¹ Record, pp. 2419, 2477, 2595, 2639, 2684, 2728, 2921, 3004, 3378, 3423, 3469, 3898, 3943, 3981, 4031, 4768, 5226, 5286.

² Second session Fifty-fourth Congress, Record, p. 706.

On March 1¹ Mr. George F. Hoar, of Massachusetts, presented the unanimous report of the Committee, as follows:

Mr. Du Pont presented to the Senate, December 4, 1895, a petition for admission as Senator from the State of Delaware for what then remained unexpired of the term beginning March 4, 1895.

It appeared that at a joint convention of the two houses of the legislature of the State of Delaware, duly held on the 9th day of May, 1895, 15 votes were cast for Mr. Du Pont and 15 votes for other candidates. One of the votes cast for other candidates was the vote of the acting governor of the State of Delaware, who had succeeded to the executive chair on the death of the governor. He was a senator and the speaker of the Delaware senate at the time of the alleged election, the term of office for which he had been elected for senator and speaker having not expired. If he were entitled to vote, Mr. Du Pont was not lawfully elected. If he were not so entitled, Mr. Du Pont had a majority of 1 vote. The question of his right to vote depended upon the question whether his accession to the executive chair by virtue of the constitution of the State should deprive him of his title to vote as a senator.

That question was the only one raised in the discussion of Mr. Du Pont's title to a seat in the Senate. The Committee on Privileges and Elections reported in his favor and there was a full discussion of the question.

On the 15th day of May, 1896, the Senate passed the following resolution by a majority of 1 vote: "*Resolved*, That Henry A. Du Pont is not entitled to a seat in the Senate from the State of Delaware for the full term commencing March 4, 1895."

Mr. Du Pont now prays to have this question reopened. The grounds of his application, as stated in his petition and by his eminent counsel in an argument addressed to the committee, are:

First. That there was a mistake in the pairs as announced when the vote on this resolution was taken, so that a senator who was in favor of Mr. Du Pont was paired against him. On investigation we find that no such mistake occurred, and that every Senator who desired to vote who was in favor of Mr. Du Pont either voted for him or was paired in his favor.

Second. That the petitioner expects to satisfy the Senate that it was wrong in its construction of the constitution of Delaware when it held that the vote of the acting governor for another candidate than Mr. Du Pont was lawful.

New Senators have entered the Chamber since the resolution just cited was adopted. Nothing else has changed. The case then stated and acted upon is the case now stated. The simple question is: Whether the Senate, notwithstanding its decision of May 15, 1896, will now admit Mr. Du Pont to a seat?

The majority of your committee now, as then, are of the opinion that this decision of the Senate was wrong; but the Senate is made by the Constitution, the judge of the elections, qualifications, and returns of its Members, and its judgment is just as binding in law, in all constitutional vigor and potency when it is rendered by one majority as when it is unanimous.

It is clear that the word "judge" in the Constitution was used advisedly. The Senate in the case provided for is to declare a result depending upon the application of law to existing facts, and is not to be affected in its action by the desire of its members or by their opinions as to public policies or public interest. Its action determines great constitutional rights—the title of an individual citizen to a high office and the title of a sovereign State to be represented in the Senate by the person of its choice. We can not doubt that this declaration of the Senate is a judgment in the sense in which that word is used by judicial tribunals. We can conceive of no case which can arise in human affairs where it is more important that a judgment of any court should be respected and should stand unaffected by caprice or anything likely to excite passion or to tempt virtue. Then the Senate decided the question it was sitting as a high constitutional court. In its action we think it ought to respect the principles, in giving effect to its own decision, which have been established in other judicial tribunals in like cases and which the experience of mankind has found safe and salutary.

We do not doubt that the Senate, like other courts, may review its own judgments where new evidence has been discovered, or where by reason of fraud or accident it appears that the judgment ought to be reviewed. The remedy which in other courts may be given by writs of review or error or bills of review may doubtless be given here by a simple vote reversing the first adjudication. We have

¹Record, pp. 2524, 2525.

no doubt that a legal doctrine involved in a former judgment of the Senate may be overruled in later cases. But there is no case known in other judicial tribunals in which a final judgment in the same case can be rescinded or reversed merely because the composition of the court has changed or because the members of the court who originally decided it have changed their mind as to the law or fact which is involved.

It seems to us very important to the preservation of constitutional government, very important to the dignity and authority of the Senate, very important to the peace of the country, that we should abide by this principle. There are few greater temptations which affect the conduct of men than the temptation to seize upon political power without regard to the obligation of law. To act upon the doctrine upon which this petition rests would expose the Senate to the temptation to reverse its own judgments and to vacate or to award seats in this Chamber according as the changing majorities should make possible. If such practice should be admitted it would, in our opinion, go far to weaken the respect due to this body and the respect due to constitutional authority.

No further action was taken on this report, but at once the Senate acted on the conclusions by admitting Mr. Richard W. Kenney to fill the seat in question.

565. The Maryland election case of Gabriel Duvall in the Third Congress.

The House declined to seat a person bearing credentials regular in form until it had ascertained whether or not the seat was vacant.

The resignation of a Member appears satisfactorily from his letter directed to the governor of his State.

In its early years the House referred credentials for examination of prima facie right after the bearer had been seated.

On March 24, 1794,¹ Mr. John Francis Mercer, of Maryland, appeared, produced his credentials, and took his seat, the oath being administered by the Speaker.

As subsequently appears, Mr. Mercer, on April 13, 1794, by letter transmitted to the governor of Maryland his resignation. He did not at that time, and apparently did not at any other time, inform the House of his resignation.

On May 31, 1794,² the Speaker laid before the House a letter from the governor of Maryland, inclosing a return of the election of Gabriel Duvall, in place of Mr. Mercer.

At the beginning of the next session, on November 7, 1794,³ these papers were referred to the Committee on Elections, who reported on November 11,⁴ as follows:

That it appears from a certificate signed by the governor of the State of Maryland, in council, and under the seal of the said State, that Gabriel Duvall was duly elected to serve in the House of Representatives of the United States, in the place of John Francis Mercer, who resigned his seat.

That the resignation of the said John Francis Mercer appears from his letter, dated the 13th of April, 1794, directed to the governor of Maryland.

Resolved, That, in the opinion of the committee, Gabriel Duvall is entitled to take a seat in the House, as one of the Representatives for the State of Maryland, in the stead of John Francis Mercer.

The resolution was agreed to, and Mr. Duvall took the oath.

566. On December 4, 1798,⁵ on the second day of the third session of the Congress, a new Member, Robert Brown, returned to serve in the House as a Mem-

¹ First session Third Congress, Journal p. 100 (Gales and Seaton, ed.).

² Journal, p. 192; Annals, p. 742.

³ Journal, p. 225, Annals, p. 871, second session, Third Congress.

⁴ Journal, p. 225; Annals, pp. 873, 874.

⁵ Third session Fifth Congress, Journal, p. 400.

ber from Pennsylvania, in the room of Samuel Sitgreaves, appointed a commissioner of the United States under the treaty with Great Britain, appeared and took his seat in the House.

Although the Journal does not so state specifically, it is evident that he must have taken the oath, since on December 14¹ he appears as voting.

On January 13, 1799,² Mr. Joseph B. Varnum, of Massachusetts, from the Committee on Elections, "to whom was referred the certificates and other credentials of the Members returned to serve in this House," made a further report, as follows:

That it appears from a letter of the governor of Pennsylvania to the Speaker of the House of Representatives, bearing date the 29th day of December, 1798, and a return of the judge of election * * * that Robert Brown has been duly elected as a Member of this House for the said district, in the place of Samuel Sitgreaves, who has resigned his seat.

That the resignation of the said Samuel Sitgreaves satisfactorily appears from his letter to the governor of Pennsylvania, bearing date the 29th day of August, 1798 (in the recess of Congress).

Your committee are therefore of opinion that Robert Brown is entitled to a seat in this House as one of the Representatives for Pennsylvania, in the room of Samuel Sitgreaves.

567. The election case of Benjamin Edwards, of Maryland, in the Third Congress.

The House declined to seat a Member-elect on presentation of a letter of a State official showing that credentials had been forwarded to the Speaker.

The House declined to seat a person bearing credentials regular in form until it had ascertained whether or not the seat was vacant.

A letter from a Member stating that his resignation has been forwarded to the governor of his State is satisfactory evidence of his resignation.

On January 1, 1795,³ the Speaker presented to the House a letter from Mr. Uriah Forrest, of Maryland, dated December 24, stating that Benjamin Edwards had been elected in his place, he having resigned to the executive of the State of Maryland. The Speaker also presented another letter from John Kilty, clerk of the council of Maryland, dated December 27, addressed to Benjamin Edwards, informing him that an attested certificate of his election as a Representative for the said State in place of Uriah Forrest had, by order of the council of the State, been transmitted to the Speaker of the House of Representatives.

The House disregarded a suggestion that Mr. Edwards be admitted at once to a seat, and referred the letters to the Committee of Elections.

On the same day the committee reported—

That it appears from a letter of the 27th of December, written by direction of the council of Maryland, signed by John Kilty, clerk of the council, and directed to Benjamin Edwards, that an attested certificate of the election of the said Benjamin Edwards, as a Representative in the room of Uriah Forrest, had, on that day, been transmitted to the Speaker of the House of Representatives.

¹ Journal, p. 408.

² Journal, p. 433.

³ Second session Third Congress, Contested Elections in Congress from 1789 to 1834, p. 92; Journal, pp. 279, 280; Annals, p. 1041.

That the resignation of the said Uriah Forrest satisfactorily appears from his letter of the 24th of December directed to the Speaker of the House of Representatives.

Resolved, That, in the opinion of the committee, the letters aforesaid are insufficient to establish the right of Benjamin Edwards to a seat in the House as one of the Representatives for the State.

On January 2 the Speaker informed the House that he had received from the governor of Maryland the certificate of Mr. Edwards. As the report of the committee had not been acted on, the certificate was referred to the committee, who made an additional report.

568. A Member-elect producing credentials showing his election to fill the vacancy caused by the decease of his predecessor, is sworn in at once, although no other notice of the decease may have been given to the House.

In the early practice it was the duty of the Committee of Elections to examine and report on the credentials of all the Members.

On January 29, 1795,¹ Mr. Aaron Kitchell returned from New Jersey in place of Abraham Clark, deceased, appeared, produced his credentials, and having taken the oath took his seat in the House.

In a similar manner, on February 9, Robert Goodloe Harper, of South Carolina, was seated in place of Alexander Gillon, deceased.

Messrs. Clark and Gillon were present at the preceding session, answering to their names on the roll call.² No notice of their deaths seems to have been given the House until the credentials of their successors were produced.

On February 14,³ the Committee of Elections, to whom the credentials were referred,⁴ although the Members were sworn in, reported that it appeared that each was duly elected, in place of his deceased predecessor, and presented a resolution:

Resolved, As the opinion of the committee, that Aaron Kitchell is entitled to a seat in this House, as one of the Representatives for the State of New Jersey, in the room of Abraham Clark, deceased.

This, and a similar resolution in the case of Mr. Harper, were agreed to by the House.

¹ Second session Third Congress, Journal, p. 308 (Gales & Seaton ed.).

² First session Third Congress, Journal, pp. 198, 210 (Gales & Seaton ed.).

³ Second session Third Congress, Journal, p. 328.

⁴ On November 7, 1794 (Journal, second session Third Congress, p. 224 (Gales and Seaton ed.)), the House had: "*Resolved*, That a standing committee of elections be appointed, whose duty it shall be to examine and report upon the certificates of election, or other credentials of the Members returned to serve in this House; and to take into their consideration all such matters as shall or may come in question, and be referred to them by the House, touching returns and elections, and to report their proceedings, with their opinion thereupon, to the House." This became a standing rule of the House defining the duty of the Committee of Elections (see Journal, first session Seventh Congress, p. 40 (Gales & Seaton ed.)), and remained a rule until the revision of 1880.

This examination of credentials of all Members, irrespective of whether or not any question had been raised, was a function of the Elections Committee from the very first. Thus, on April 18, 1789 (Journal, first session First Congress, p. 16 (Gales & Seaton ed.)), the committee reported on the credentials of all the Members who had appeared. The same course was pursued at the beginning of the Second and Third Congresses, although the form of the above resolution, specifically stating the duties of the Elections Committee, dates from the first session of the Third Congress. (Journal, first session Third Congress, p. 5 (Gales & Seaton).) The oath was administered, in ordinary cases, without waiting for the committee's report. The custom existed as late as January 3, 1820. (Journal, first session Sixteenth Congress, p. 96.)

569. The prima facie election case of Doty and Jones, from Wisconsin Territory, in the Twenty-fifth Congress.

A person appearing with credentials intended to entitle him to a seat already occupied, the House declined to seat him at once and referred the credentials.

On December 3, 1838,¹ at the beginning of the third session of the Congress, the Delegate from Wisconsin, "George W. Jones, appeared and took his seat," in the language of the Journal. Mr. Jones had also been in attendance and held the position of Delegate from Wisconsin at the preceding session.

After the roll had been called by States to ascertain the presence of a quorum, and after the new Members had been sworn in, Mr. Isaac E. Crary, of Michigan, informed the House that James Duane Doty was in attendance, and claimed to be sworn in as the Delegate in this House from the Territory of Wisconsin. At the same time Mr. Crary presented the credentials of Mr. Doty, which were read at the Clerk's table. And thereupon Mr. Crary moved that the said James D. Doty be qualified accordingly.

Objection being made by Mr. George W. Jones, who claimed to be the sitting Delegate from the Territory of Wisconsin, a motion was made by Mr. Charles F. Mercer, of Virginia, that the subject of the right to a seat in this House as the Delegate from the Territory of Wisconsin be postponed until Thursday next. This motion was agreed to.

On December 10 the subject was referred to the Committee of Elections.

570. A claimant presenting credentials for a seat occupied by a Member already sworn in, they were referred to a committee but were not acted on.

On December 3, 1872,² Mr. Samuel J. Randall, of Pennsylvania, presented credentials of Mr. Aleck Boarman as Representative-elect from the Fourth district of Louisiana, to fill a vacancy caused by the death of Mr. James McCleary. The credentials being in regular form, and there being no objection, Mr. Boarman was sworn in.

On December 4³ the Speaker announced that he had what purported to be credentials of Mr. Harry Lott for the seat. The paper was referred to the Committee of Elections.

On December 19⁴ other credentials for Mr. Lott were similarly referred.

Mr. Lott's case did not come to a decision.⁵

571. The prima facie election case of Samuel Dibble, of South Carolina, in the Forty-seventh Congress.

The House gave prima facie effect to regular credentials, although a contestant claimed the seat made vacant by death of the bearer's predecessor.

Form of credentials given to a Member-elect chosen to fill a vacancy caused by death.

¹Third session Twenty-fifth Congress, Journal, pp. 7, 46; Globe, p. 1.

²Third session Forty-second Congress; Globe, p. 14.

³Globe, p. 26.

⁴Globe, p. 315.

⁵Globe, p. 1646.

On December 5, 1881,¹ at the time of the organization of the House, and while the Speaker was administering the oath to the Members-elect, Mr. Samuel Dibble, of South Carolina, was challenged and stood aside. After the unchallenged Members had taken the oath Mr. Dibble's certificate was presented, as follows:

The State of South Carolina, by His Excellency Johnson Hagood, the governor of the State of South Carolina, to the honorable the House of Representatives of the United States of America, Forty-seventh Congress:

Whereas a vacancy in the representation from the State of South Carolina of the Second Congressional district thereof, composed of the counties of Charleston, Clarendon, and Orangeburgh, happened by the death, on April 26, A. D. 1881, of Michael P. O'Connor, who, at the general election held November 2, A. D. 1880, was chosen a Member of the said House of Representatives for said Congressional district; and

Whereas, in accordance with the Constitution of the United States, I, on May 23, A. D. 1881, issued a writ of election appointing an election to be holden on June 9, A. D. 1881, to fill such vacancy; and

Whereas the returns show that such election was duly holden, and that at said election Samuel Dibble received the greatest number of votes given at said election:

Now, therefore, I do hereby certify that the said Samuel Dibble has been duly elected a Member of the House of Representatives of the United States of America, Forty-seventh Congress, for the Second Congressional district of the State of South Carolina, composed of the counties of Charleston, Clarendon, and Orangeburgh, to fill the vacancy in the representation from said State of South Carolina of the Second Congressional district thereof, occasioned by the death of said Michael P. O'Connor.

Given under my hand and the great seal of the State of South Carolina, in Columbia, this twenty-second day of June, in the year of our Lord 1881, and in the one hundredth and fifth year of the sovereignty and independence of the United States of America.

[SEAL.]

JOHNSON HAGOOD, *Governor.*

By the governor:

R. M. SIMS, *Secretary of State.*

Mr. William H. Calkins, of Indiana, after stating that there had been a contest over the seat of Mr. O'Connor, of which as a court the House were bound to take notice, and which contest had not been disposed of, raised a question as to the right of Mr. Dibble to be sworn in on his prima facie case, the said question being stated in the following preamble and resolution:

Whereas on the 2d day of November, 1880, in conformity to law, an election was held in the Second Congressional district of the State of South Carolina for Representative in the Forty-seventh Congress of the United States, at which election there were two candidates, namely, Hon. M. P. O'Connor and Ron. E. W. M. Mackey, voted for; that as a result of said election a certificate was issued to Hon. M. P. O'Connor by the secretary of state, bearing the seal of said State, and which is now on file with the clerk of this House; and

Whereas Hon. E. W. M. Mackey, in conformity with law, served upon Ron. M. P. O'Connor notice of contest, to which the said O'Connor filed his answer; and in pursuance thereof testimony was taken and filed with the Clerk of this House, which still remains in his custody; that during the pendency of said contest, and before this House could determine it, on the 26th day of April, 1881, Ron. M. P. O'Connor died, and on the 23d day of May, 1881, the governor of the State of South Carolina issued his writ of election to fill the supposed vacancy caused by the death of Hon. M. P. O'Connor; that as a result of said special election the governor and secretary of state of said State issued to Hon. Samuel Dibble a certificate of election to fill said vacancy, under which he now claims a seat on this floor: Now, therefore,

Be it resolved, That the certificate of election presented by the Hon. Samuel Dibble, together with the memorial and protest and all other papers and testimony taken in the case of the contest of E. W. M. Mackey against M. P. O'Connor now on file with the Clerk of this House, be, and the same hereby are, referred to the Committee on Elections, when appointed, with instructions to report it at as early a day as practicable, either as to the prima facie right or the final right of said claimants to the seat as the committee shall deem proper, and that neither claimant shall be sworn in till the committee report.

¹ First session Forty-seventh Congress, Journal, p. 12; Record, pp. 14, 15.

After debate, the House voted, without division, to lay the preamble and resolution on the table.

Mr. Dibble thereupon appeared and took the oath.

572. The prima facie election case relating to Newton and Yell, of Arkansas, in the Twenty-ninth Congress.

The House seated a person bearing regular credentials on ascertaining that his predecessor in the same Congress had accepted a military office.

On February 6, 1847,¹ Thomas W. Newton appeared at the bar of the House, presented his credentials as a Representative in the Twenty-ninth Congress from the State of Arkansas, in place of Archibald Yell, and asked that the oath to support the Constitution of the United States might be administered to him and he be permitted to take his seat in the House.

Mr. George W. Jones, of Tennessee, having asked if there was any evidence before the House that Mr. Yell had resigned his seat, and none being produced, offered this resolution:

Resolved, That Thomas W. Newton, having presented credentials of his election as a Member of this House from the State of Arkansas, and the House having received no information of the death, resignation, or disqualification of Archibald Yell, heretofore elected and qualified a Member of the Twenty-ninth Congress, the said credentials be referred to the Committee of Elections, and that the said committee report thereon at the earliest practicable day.

Mr. William P. Thomasson, of Kentucky, moved the following amendment in the nature of a substitute:

That Thomas W. Newton, who now presents his credentials of election as a Member of Congress from the State of Arkansas, be sworn as a Member and take his seat; and that the credentials of his election be referred to the Committee of Elections.

In the course of the debate it was shown that the certificate of election simply showed that Mr. Newton had been chosen to fill the unexpired term of Mr. Yell. It also appeared, from an official communication to the House from the War Department, that Archibald Yell had received a commission and been mustered into the service of the United States.

The amendment proposed by Mr. Thomasson was agreed to, and the resolution as amended was also agreed to.

573. The Senate election case of Shoup and McConnell, from Idaho, in the Fifty-first Congress.

There being a question as to the vacancy to be filled, the Senate examined the case before administering the oath to a bearer of regular credentials.

Credentials signed by a governor certifying to his own election as Senator were received by the Senate without question.

A question in the Senate as to whether or not credentials should set forth at length the proceedings of the electing legislature.

On December 29, 1890,² the Vice-President laid before the Senate a communi-

¹Second session Twenty-ninth Congress, Journal, pp. 305, 306; Globe, pp. 339-341.

²Second session Fifty-first Congress, Record, pp. 843-848.

cation from the governor of Idaho, transmitting a certified copy of the proceedings of the joint session of the legislature of Idaho for the election of United States Senators, at Boise City, Idaho, December 18, 1890.

Ordered, That it lie on the table.

The Vice-President laid before the Senate the credentials of George L. Shoup and the credentials of William J. McConnell, elected Senators by the legislature of the State of Idaho; which were read.

These credentials were regular in form; but there was one peculiarity. The credentials of George L. Shoup as Senator were signed by "George L. Shoup, governor." No question was raised, however, as to the right of a governor to certify to his own election as Senator. Some question arose as to the failure of the credentials to set forth at length the procedure of the legislature in joint convention; but it was acknowledged that in many credentials this recitation at length was admitted. Moreover, in this case a certified transcript had been sent as a separate paper.

Mr. Shoup was sworn in without objection.

Then Mr. Z. B. Vance, of North Carolina, moved to refer the credentials to the Committee on Privileges and Elections.

The debate showed that the State of Idaho had been recently admitted to the Senate, and that three Senators had been elected, one to take the vacancy that seemed inevitable after March 3, 1891, under the Constitution and the practice of the Senate as to assignment of Senators to classes.

Mr. McConnell, whose credentials had been presented this day, had been chosen for the immediate vacancy, however, and it was urged that his right to be sworn in, had he been present, was perfect.

On the other hand, it was argued that the State of Idaho could not assume what action the Senate would take as to its classes. Therefore the motion to refer was justified.

A motion by Mr. George F. Hoar, of Massachusetts, that the motion to refer lie on the table, developed yeas 22, nays 15—not a quorum.

Later, a quorum being present, Mr. Hoar withdrew his motion and the credentials were referred.

On January 5¹ Mr. Hoar, from the committee, submitted this report:

That the said credentials constitute a sufficient certificate of the executive of the State under the seal thereof, properly countersigned by the secretary of said State, and certifying the election of Mr. Shoup and Mr. McConnell, respectively, as Senators from that State. Mr. Shoup has already been admitted to take the oath and has taken his seat.

The committee therefore are of the opinion that Mr. McConnell should likewise be admitted to take the oath as Senator, and that said credentials should be placed on file.

The credentials were accordingly placed on file, when Mr. McConnell appeared, and the oath prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

574. The New York election case of Noyes v. Rockwell in the Fifty-second Congress.

The Elections Committee having ascertained that contestant rightfully was entitled to prima facie title, the burden of proof was shifted to sitting Member.

¹Record, p. 906; Senate Report No. 1904.

Decision of highest court of a State on construction of a State statute should be binding on the House.

A State court decision that the formal returns of election officers should prevail over accompanying memoranda on sample ballots transmitted in accordance with law.

On April 2, 1892,¹ Mr. Charles T. O'Ferrall, of Virginia, from the Committee on Elections, presented the report of the majority of the committee² in the New York case of *Noyes v. Rockwell*.³ At the outset the committee considered a question as to the prima facie right, although sitting Member had the State certificate and had taken the seat. This question is explained in the report:

The election statute of New York provides that immediately after the closing of the polls the inspectors of election shall count the ballots and publicly proclaim the result of their count before they adjourn. They shall also make three written statements showing the result, and these statements they must complete and sign immediately after announcing the result.

"The policy of the law is to make final the action of the board at its meeting immediately following the closing of the polls. (34 N. Y. State Rep., 127.)

"The law contemplates that the duties of inspectors shall in these respects be as promptly performed as possible; for this purpose, among others, that the result may be determined and declared without any bias arising from the knowledge of its effect upon the aggregate result or from exposure to subsequent influences. (46 Hun, 390.)"

The statute also requires the inspectors of election to attach to these statements already mentioned sample copies of the various ballots cast and to write upon each the number received, like the sample. One copy of these statements the inspectors are directed to hand to the supervisor, or town or ward official, who is ex officio a member of the county board of canvassers; to file another with the county clerk of the county, who is ex officio secretary of the county board aforesaid, and to file the third copy with the town or city clerk, as a local record of the election.

When the county board of canvassers of the county of Chemung convened they found a discrepancy between the statements made in accordance with the result publicly proclaimed, completed, and signed on the night of the election and the writing or indorsements on the sample ballots attached in six districts of four wards in the city of Elmira, in the county of Chemung.

The statements indicated the following result: Noyes, 488 votes; Rockwell, 458 votes; majority for Noyes, 30 votes.

The writing or indorsements on the sample ballots gave Noyes 466 votes, Rockwell 481; majority for Rockwell, 15 votes.

A discrepancy between the statements and sample-ballots indorsements, it will be observed, of 45 votes.

The manner in which this discrepancy occurred will be shown hereafter under the heading of "Recount." Suffice it to say here that the board of county canvassers of Chemung County discarded the statements completed and signed on the night of the election, which corresponded with the publicly declared result, which gave Noyes 30 majority, and adopted the figures as shown by the indorsements on the sample ballots attached, which gave Rockwell 15 majority, and certified the same to the board of State canvassers.

On application of Mr. Noyes, Justice Smith, of the supreme court, issued a peremptory mandamus directing the board of canvassers of Chemung County to recanvass the returns. and base the new canvass on the face of the returns instead

¹First session Fifty-second Congress, House Report No. 968; Rowell's Digest, p. 474; Stofer's Digest, p. 25; Journal, pp. 152, 154-156; Record, pp. 3421, 3448, 3489, 3536-3541, Appendix, pp. 234, 244.

²The minority views were signed by Messrs. James E. Cobb, of Alabama, and E. P. Gillespie, of Pennsylvania.

³It may be observed that the sitting Member belonged to the majority party in the House, and the Committee on Elections proposed to unseat him and seat a Member of the minority party.

of on the ballots. This mandamus was issued December 2, 1890, the election having been held on the 4th of the preceding November. An appeal was had to a general term of the supreme court, and on February 3, 1891, that court affirmed and sustained the order of Judge Smith.

Thereupon Mr. Rockwell appealed to the court of appeals, the highest judicial tribunal in the State. On June 5, 1891, the court of appeals affirmed the decision of the lower court. The report of the committee says in regard to this decision and its consequences:

Justice O'Brien, of this court, in delivering the opinion of the court, concurred in by the other eight justices, except Ruger, chief justice, who did not vote, and Earl, who dissented, used this language:

"The words written into the paper by the inspectors must be deemed to express the actual and correct result of their count. They are precise and certain, and to the effect that a certain number of votes were given for a person therein named for a designated office. Not so with the writing on the ballot. That imports simply that a certain number of tickets of each variety were voted, from which and from an inspection of the sample ballots themselves the actual vote for any given candidate may or may not be accurately ascertained. * * * The act of the inspectors in stating the vote in the body of the paper, the certificate that the same is correct, and the signature of each of them to the certificate, is, so far as the county canvassers are concerned, fundamental, jurisdictional, and controlling, while the words on the ballot are subordinate and incidental, and the duty of the inspectors in respect to the same is probably directory merely." (Record, 181.)

Pending these proceedings in the courts, but after the decision of the supreme court in special session, to wit, on the 5th day of December, 1890, the State board of canvassers met, counted the figures as indorsed on the sample ballots, and not as shown by the statements of the officers of election, and awarded the certificate of election to Rockwell, and under and by virtue of it he now holds his seat.

Your committee are of the opinion that the decision of the court of last resort of a State upon the construction of a statute of that State, and in a matter before them involving the construction of a statute of that State, should be binding upon them, and therefore they held that under the decision of the said, court of appeals, affirming the lower court, Noyes was prima facie elected and was entitled to and ought to have been awarded the certificate of election, and that the burden of proof was shifted from Noyes to Rockwell, and it was incumbent upon him (Rockwell) to establish his title to the seat upon the full merits of the case.

The minority do not appear to have dissented from this conclusion, and both in their report and in the debate the differences of opinion were as to the final and not the prima facie right.

575. The case of Noyes v. Rockwell, continued.

Discussion of validity of a recount after the time when, by the terms of the law, the ballots should have been destroyed.

Registry of voters being required, the vote of a person not registered or on the registry list was rejected by the House.

The votes of persons proven to have been corrupted by bribery are rejected by the House.

A ballot accidentally placed in the wrong box should be counted.

Errors in initials or spelling of a candidate's name do not ordinarily justify rejection of the votes.

As to the final right, the majority consider—

1. The effect of a recount of the ballots in the six districts of Elmira, saying:

The statute of the State of New York does not provide for or authorize a recount of ballots in any election, but in terms renders a recount in law impossible by requiring all the ballots except those

attached as sample copies to be destroyed immediately after the completion of the count by the inspectors; and the ballots in these districts, in the language of the court of appeals, were, in contemplation of law, destroyed. They had no legal existence after the board of inspectors dissolved, the night of the election, and the board itself was *functus officio*; there was no legal custodian nor depository of the ballots; they were worthless as evidence.

But the ballots were not in fact destroyed, and a recount in whole or part was afterwards made by a portion of the election officers only, and a gain was found for sitting Member. But the majority find from the evidence that the ballots had not been safely kept.

There was no safeguard whatever thrown around them; they were in the custody of no one upon whom any responsibility rested; there was no care taken of them with a view to a possible recount; they were left exposed in every instance so that they could have been despoiled by the unscrupulous without fear of punishment, for they were in law as mere worthless paper. Full and ample opportunity was given to tamper with them and to change them.

Therefore, even if a recount were legal, no confidence could be placed in this recount, as there were abundant authorities to prove—

To recognize this recount would be in direct violation of every rule and precedent and convert a serious matter into a most ridiculous burlesque. It would, if the precedent should be followed, throw down the bars in every close contest, lead to frauds innumerable, and invite attacks without number upon the official returns of sworn officers of the law, and by boards composed of friends of each of the competing candidates, and destroy the verity of official returns.

The minority in their report ignore this recount, and in the debate Mr. Cobb declined to lay any stress on it, and although he intimated that he thought it more reliable than the first count,¹ it can hardly be said that the minority antagonized this position of the majority.

2. As to an unregistered vote the majority say:

We find that 1 vote was cast for Noyes by a party (Lewis Beach) who was not registered and whose name was not upon the registry list of voters in the district in which he voted, as required by law. We think this vote should be deducted from Noyes.

The minority concur in this.

3. As to bribed voters:

We find two parties, Sheridan and Green, who voted for Noyes, were each paid \$2 to vote the Republican ticket.

These votes should be taken from Noyes.

The minority concur in this, and would add one other to the number rejected. Mr. Nils P. Haugen, of Wisconsin, who concurred generally with the majority, dissented, holding that nothing in the evidence showed that either Sheridan or Green voted for Noyes or the Republican ticket.

4. As to a ballot in the wrong box:

It is claimed that Rockwell lost 1 vote, cast by Patrick McDermott, by the ballot being put accidentally in the wrong box by the inspector of election who received it.

The evidence is conflicting, but we think the vote should be added to Rockwell's column.

The minority concur in this.

¹Appendix, p. 245.

5. As to ballots improperly rejected:

In Chemung County there were 3 ballots cast for Hosea Rockwell, 4 for H. H. Rockwell, 1 for Hosey Rockwell, and 1 for H. Rockwell, making 9, which were rejected by the canvassing board; we think they should be counted for the contestee.

In the same county there was 1 ballot cast for H. Noyes and 1 for Henry T. Nois, and in Tomkins County 1 for Henry Noyes, making 3 which were rejected by the canvassing board. We think they should be counted for the contestant.

The minority concur in this.

576. The case of Noyes v. Rockwell, continued.

Where the law prescribes a penalty for putting a distinguishing mark on a ballot, but does not require rejection, should the ballot be rejected?

One of a series of ballots with similar distinguishing marks being shown to be corrupt, the House, overruling its committee, inferred corruption as to all.

The law forbidding a voter to reenter the polling booth, may one who failed in attempting to vote, return to effect the object?

Instance wherein the Elections Committee recommended seating of a contestant of minority party; but were overruled by the House.

6. The real turning point of the case, as appears evident from the debate,¹ was as to an alleged conspiracy to bribe, thus set forth in the minority views:

But the chief contention in this case is in regard to what are known as Doyle ballots. These were sixteen in number, and were Republican pasters containing the name of the contestant for Congress.

At the election under examination Hon. Robert Earl was the candidate for judge of the court of appeals. His name was on all the printed tickets of the Democratic and Republican parties, and was the first name on each ticket.

On the sixteen tickets above mentioned the name of Robert Earl was erased and the name of Doyle was substituted in this manner: On one ticket was the name A. Doyle; on another ticket B. Doyle; on another, C. Doyle, and so on through the series. No two tickets contained the same initial letter, except the name L. Doyle, which appeared on one ballot at two separate voting places. These several names, A. Doyle, B. Doyle, etc., were all written in pencil, and were all written, as the evidence clearly shows, by one Duncan McArthur. They were cast in the fourth and fifth districts of Waterloo. It is in proof that Duncan McArthur was an active worker for the contestant, and the proof tends to show that he was operating on the day of election with one Andrew Harmon and one B. H. Mongin. The three are shown to have been engaged in bribing voters. It is further shown by the evidence of one man who voted a Doyle paster that he was bribed.

It is contended that the taint of fraud can not attach to the whole Doyle series of votes without more convincing evidence than is to be found in the record.

Let it be remembered that fraud can rarely, if ever, be proved by direct evidence, and that the rule is that whenever a sufficient number of independent circumstances which point to its existence are clearly established, a prima facie case of its existence is made, and that if this case is not met by explanation or contradiction it becomes conclusive.

The circumstances, then, which are established in this contest and which strongly point to the guilt of the whole sixteen voters using the Doyle ballots are:

(1) The Doyle ballots were pasters which had been written on. This is contrary to law. (See section 676, Election Code of New York).

¹Mr. Cobb in debate set up an independent line of argument, which he did not mention in his report, wherein he claimed that the testimony showed the election of sitting Member irrespective of the so-called Doyle ballots. This argument, which will be considered, hardly displaced the Doyle ballots as the main issue.

(2) They were so marked as to be identified. This was contrary to law, and such marking subjected the persons engaged therein to punishment on conviction. (Sec. 686, *ib.*)

(3) The ballots were prepared, all of them, by Duncan McArthur before they were given to the voters, and Duncan McArthur was a briber of voters.

(4) One voter at least, and, as we believe, two, Ferris and Green, were bribed to cast Doyle ballots.

(5) The name Doyle was fictitious.

These facts we believe to be clearly proven.

From them it is clear that McArthur and his abettors were guilty of gross fraud. Did the sixteen voters participate in the fraud?

If not, why did they vote for a fictitious person for judge of the court of appeals? What explanation can be given for the use of a series of fictitious names—no two of them alike?

How is it that these ballots were so marked as to be identified easily? Was it a coincidence merely? If so, it could have been explained. It seems to us that these circumstances connect the whole series of Doyle ballots and make a *prima facie* case at the least. Explanations were in order. It was imperatively demanded of the parties implicated. They were accessible; they were not called.

The minority further contended that the ballots might be excluded if the marks were put on for purpose of identification, since the law of New York forbade the voter, under penalty of punishment, to put on his ballot a mark by which it could be identified. "It is a familiar principle of law," says the minority, "that when a person does an act for the doing of which he may be punished, the act is void whether it is in terms declared so or not."

The majority of the committee do not consider the evidence strong enough to establish the fact that even one voter was bribed to throw a Doyle ticket, although the testimony of Ollie Ferris might raise a suspicion as to himself. Assuming that Ferris's testimony did show that he was bribed, the majority do not admit any significance as to others:

The syllogism is this: A voted a Doyle ballot and admits he was bribed; B, C, D, and others voted Doyle ballots; therefore they were bribed.

Everything must be presumed against innocence. All these men must be presumed to be guilty because one man who voted the same ballot they did says he was bribed, and the curse of bribery must rest on them.

If it should be insisted that McArthur and Harmon were engaged in the business of bribing voters, and that this one man (Ferris), who voted one of the Doyle series of ballots, was bribed, therefore all that voted that series were bribed, why not carry the reasoning further and say that McArthur and Harmon were engaged in the business of buying votes, and that two men, Sheridan and Green, voted Republican ballots and were bribed; therefore all that voted the Republican series of ballots were bribed? There is as much reason, it seems to us, in one position as the other.

Suppose it was ascertained that E F voted one of these sixteen Doyle ballots, would any intelligent man hold that he could be indicted and put upon his trial for bribery upon the facts developed in this case? Would any man with ordinary powers to discriminate between right and wrong hold that a grand jury could find an indictment against E F for bribery upon the evidence in the record of this case? Would he even hold that any justice of the peace could be found who would send E F on to answer an indictment, on probable cause to charge him with bribery, under the facts we have stated?

We have reached our conclusion in regard to these Doyle ballots from the testimony in the record, and not upon presumptions or suspicions which may come to any imaginative mind; but if we were to enter the realm of presumptions we would prefer to presume that men are honest until the contrary is proved; that they are innocent of crime until they are proved to be guilty; if in a criminal case, to the exclusion of every reasonable doubt; if in a civil case, at least by the preponderance of evidence.

"Where the facts of a case are consistent both with honesty and dishonesty a judicial tribunal will adopt the construction in favor of innocence." (Lawson on Presumptive Evidence, 438.)

We hold that there is nothing to impeach these sixteen Doyle ballots except the one cast by Ferris, and as to that we are in doubt whether it should be excluded; but as it is not material it makes no difference.

The committee cite a decision, referred to as the Dutchess County case, rendered by the New York court, in support of this doctrine.

In debate¹ the majority combated vigorously the proposition laid down in the minority views that a ballot marked by the voter by a distinguishing mark was thereby rendered void, Mr. O'Ferrall citing a decision in New York State to the effect that while the statute forbade the voter to put a distinguishing mark on it, the law did not go to the extent of rendering the ballot void if he did.

7. A question also arose as to certain other ballots described in the report.

In this connection we deem it proper to state that there were 28 ballots cast for Rockwell in the second district of the Fifth Ward of Elmira, upon which there was a check mark on one corner and a figure 5 on some and a figure 8 on others in the corner "diagonally opposite" the corner in which the check mark appeared. It was claimed by Noyes that these marked ballots were open to as much suspicion as the Doyle ballots. Several witnesses introduced by Noyes to testify in regard to them declined to answer the questions propounded under the advice of the attorney for Rockwell, upon the ground that this was evidence which should have been introduced in chief, and that as it was introduced in the time for testimony in rebuttal it was not admissible.

A motion was made by the attorney for Rockwell to strike out this evidence upon the grounds stated, but the committee took no direct action upon the motion.

The minority urged that no effect should be given to these ballots, because evidence as to them was taken in rebuttal, because no attempt was made to show why the marks were put on them, and because no reference was made to them in the notice of contest.

8. As a part of his argument before the House,² but not as a part of his minority views, Mr. Cobb urged that the record of testimony showed the election of sitting Member independently of the Doyle ballots:

(a) Because three voters who had left the polling place after trying in vain to mail their ballots had returned and been denied an opportunity to try again. The law provided that no one who had voted should be permitted to reenter the booth; but Mr. Cobb contended that this did not apply to one who had left the booth without voting. In opposition it was contended that by leaving the booth they surrendered the right to vote. The law provided that the voter should "vote in the manner provided by law, forthwith, before leaving the enclosed space."

(b) Because in a precinct in the city of Elmira, where the certificate of the election officers differed from the figures on the ballot, and where there had been no recount, it was in evidence that the figures on the ballots were the true count, thereby giving sitting Member sufficient gain to secure his election. The majority did not deem the evidence strong enough or the circumstances certain enough to justify this conclusion.

The report was debated at length from the 19th to the 22nd of April, 1892. On the latter day a resolution proposed by the minority, declaring contestant not elected, was agreed to as an amendment—yeas 140, nays 98. Then a resolution declaring sitting Member elected was similarly adopted—yeas 128, nays 106. Then the proposition of the majority as amended was stated to the House, and a motion to recommit the case, with directions to take testimony as to the Doyle ballots and the 28 Rockwell ballots irregularly marked, was made and decided in the negative—yeas

¹ Appendix, p. 238, Remarks of Mr. O'Ferrall.

² Appendix, p. 247.

110, nays 124. The resolutions of the majority as amended were then agreed to without division.

So the contention of the majority of the committee was defeated, and the sitting Member retained the seat.

577. The Maryland election case of Mudd v. Compton in the Fifty-first Congress.

The acts of county canvassing officers being impeached, their returns must be disregarded and the precinct returns should be consulted in awarding prima facie title.

A county canvassing board having ministerial duties only are presumed to act correctly, but this presumption may be rebutted at any time by reference to precinct returns.

Ballots bearing only the last name of a candidate, or incorrect initials, should be counted when it is shown that no other person of the name is a candidate.

Under the old ballot laws the appearance of a candidate's name twice on the ballot did not prevent counting it as one vote.

It was held under the old ballot laws that a State statute as to form of ballot should not be considered mandatory so as to cause rejection of a vote wherein the intention of the voter is manifest.

A question as to how far the House, in counting votes, is bound by the requirements of the State law.

It was held under the old ballot laws that a "paster" which covered the designation of the office should not work rejection of the vote, although a State law so provided.

On February 27, 1890,¹ Mr. William C. Cooper, of Ohio, submitted the report of the majority of the Committee on Elections in the Maryland case of Mudd v. Compton.

The sitting Member had been returned by an official majority of 29 votes, which contestant assailed on the ground of irregularities and intimidation.

The examination of this case is naturally divided into three branches:

(1) As to the prima facie right.

The majority report quotes from the law of Maryland to show how the votes were canvassed and the returns made up. The canvassing board of each county made two certificates, one "to be delivered to the clerk of the county court for the county and the other to be mailed to the governor." The governor then issues a certificate to the person who, from the returns so sent to him, appears to have been elected. The report then says:

According to the law of Maryland, the duties of the presiding judges when assembled at the county seat are purely ministerial. They are to add up the votes of the precinct returns on the books of the polls and to certify the results of this addition to the governor. They can neither throw out votes certified by the precinct judges nor return votes not certified by the precinct judges. It is presumed, of course, that the presiding judges will do their work accurately, and that their returns to the governor will contain a correct summary of the votes in their county. This presumption is, however, merely a prima facie one, and can be rebutted at any time by showing that these returns were, in fact, not a correct summary of the pre

¹First session Fifty-first Congress, House Report No. 488; Rowell, p. 149.

cinct returns; and when this is done the returns to the governor must be disregarded and resort had to the primary evidence of the result of the election; that is, to the precinct returns themselves.

In this case the returns forwarded to the governor footed up for Barnes Compton 16,000 votes; for Compton, 1 vote; for Sydney E. Mudd, 15,819 votes; for S. N. Mudd, 1 vote. The contestant denies the accuracy of said returns to the governor, and files duly certified copies of the precinct returns from every precinct in the Congressional district (record, pp. 712 to 779), which show that the vote in the district for the contestant and the contestee was as follows:

| | |
|---|---------|
| For Sydney E. Mudd | 516,279 |
| For S. N. Mudd | 1 |
| For S. E. Mudd | 1 |
| For Mudd | 1 |
| “One ticket upon which Sydney E. Mudd’s name appeared twice and Mudd’s name was not counted in the above returns” | 1 |
| <hr/> | |
| Total | 16,283 |
| For Barnes Compton | 16,280 |
| <hr/> | |
| Plurality for Sydney E. Mudd | 3 |

Comparing these precinct returns with the returns made to the governor, it is found:

(1) That the returns to the governor from the counties of Howard, Anne Arundel, and Baltimore, and from the city of Baltimore, were accurate summaries of the precinct returns and were correct.

(2) That in the third district of St. Marys County there were returned by the precinct judges 1 vote for “S. E. Mudd,” and 1 vote for “Mudd,” but the presiding judges did not include these votes in their return to the governor.

(3) That the returns from the fifth and ninth districts of Charles County were not included in their returns to the governor, because at the time the presiding judges made up their returns the returns from these precincts were sealed up in the boxes which the presiding judges had no authority to open.¹ These boxes were afterwards opened by an order of court, and certified copies of the returns found in them have been filed, which show that the contestant received in these districts 432 votes and the contestee 280 votes.

(4) That the face of the precinct returns from the sixth district of Charles County shows:

“There was one ticket upon which Sydney E. Mudd’s name appeared twice and Mudd’s name was not counted in the above returns.”

(5) That in Calvert County the returns to the governor allow the contestant 1,138 votes, whereas the actual vote cast and counted in this county, and shown by the certified copies of the precinct returns (record, pp. 746 to 749), was 1,166. Mr. Mudd called the return judges of every precinct in the county (record, pp. 271–275), and proved by them that the returns then on file in the clerk’s office were the very returns which they made and were in no way altered. He proved by the editor of the Democratic paper in the county town that on the day the returns were made up he copied them for his paper and that they gave the contestant 1,166 votes. He proved by the clerk of the court that immediately upon seeing it stated in the newspapers that the return to the governor gave the contestant only 1,138 he wrote to the governor stating that a mistake had been made and asking permission to correct it. The deputy clerk of the court who made up the returns to the governor swears himself that these returns so sent on by him were erroneous and that those in the clerk’s office were correct (see record, pp. 271–275). If the precinct returns of any precinct had been altered the contestee could have offered some evidence to show that such alterations had taken place, but he did not, in fact, take any testimony whatever upon the subject. The committee believe that the contestee is simply trying to raise a technical point of evidence to defeat the contestant’s claim to 28 votes, which no one can seriously doubt the contestant received, and that the contestant’s vote in Calvert County was 1,166.

(6) That in the precinct returns from Prince George County (record, pp. 762–772) there was no mention of a vote for “Compton,” which the presiding judges in their return to the governor say was cast in the tenth district of the county, and consequently the presiding judges had no right to include

¹These returns were put into the ballot box by mistake; when once sealed the box might not be opened legally by the election officers.

it in their return to the governor. The contestant has, however, attempted to show that he was entitled to the vote, by offering in evidence a certificate of the clerk of the court of the county (record, p. 610), that on one of the tally lists of the district there appears, "one ticket for Compton," not counted for Barnes Compton;" on the other of said tally sheets, "one ticket for Compton, torn, not counted for Barnes Compton." There is no other evidence concerning this vote. The tally lists are not a part of the certificate or statement from which the law requires the presiding judges to make up their return; and if they were, their contents are not sufficiently proved by a certificate of the clerk that such and such a thing appears upon them. Public officers prove public records, not by statements as to what their contents are, but by certified copies of the documents themselves. Moreover, it would seem, from statements quoted from one of the tally lists referred to that the judges may have decided that the voter intended to cancel his ticket as to candidate for Congress by tearing it.

For these reasons the committee does not think it clear that the contestee is by the evidence entitled to this vote, but thinking it likely that such a vote may have been cast has concluded to allow it. Upon the face of the returns the committee, therefore, finds that the vote stood:

| | |
|--|--------|
| For Sydney E. Mudd | 16,279 |
| For S. E. Mudd | 1 |
| For S. N. Mudd | 1 |
| For Mudd | 1 |
| One ticket on which Mudd's name appeared twice, not counted for Mudd | 1 |
| | 16,283 |
| For Barnes Compton | 16,280 |
| For Compton | 1 |
| | 16,281 |
| Plurality for Sydney E. Mudd | 2 |

There were no persons by the name of Mudd and Compton other than the contestant and the contestee candidates for Congress at this election; and, therefore, under the well-established rule of the House, the vote for "Compton," if counted at all, should be counted for the contestee, and the votes for "S. E. Mudd," for "Mudd," and for "S. N. Mudd," for the contestant. It is well settled by the authorities that the fact that the same candidate's name is on the same ticket more than once is no reason why that ticket should not be counted as one vote for that candidate. It would therefore follow that the contestant is entitled to the one vote not counted for him, because his name is on the ticket twice. The contestee has, however, offered evidence that this ticket was not counted for the contestant, not because the name was on the ticket twice, but because the paster (upon which his name was printed) was pasted on the regular Republican ticket so as to cover up the designation of the office for which he was a candidate. If this be granted, it still remains true that whenever the intention of the voter is clear and unmistakable, effect should be given to it; and no one can have any doubt that the voter of this ticket—a straight Republican ticket—intended to vote for Mr. Mudd for the only office for which he was a candidate. No provision of a statute regulating the form of ballots will be held, or was ever intended to be held, as mandatory in contravention of such a plain and manifest intent. The committee is therefore of the opinion that contestant is entitled to this vote, and will count it.

The minority¹ say on this point:

A paster was pasted over the words "for Congress." The testimony of the judges, Sasscer and Cox, clearly shows this (record, pp. 456–457). Article 33, section 65, Statutes of Maryland (record, p. 639), required the ticket should be thrown out.

In the debate it was asserted by Mr. John F. Lacey, of Iowa, that although there might be a law of the State of Maryland, yet the House was judge of the elections of its own Members, and the House had always held that in such a case the vote should be counted.² It was replied by Mr. Moore that the law of Maryland was mandatory and that the position of the majority was unprecedented.³

¹ Minority views presented by Mr. L. W. Moore, of Texas.

² Record, p. 2394.

³ Record, p. 2408.

578. The case of Mudd v. Compton, continued.

An instance wherein an Elections Committee, in a sustained case, ascertained prima facie title after the sitting Member had taken the seat.

The Elections Committee having ascertained that prima facie title should have been awarded to contestant, the burden of proof was shifted to sitting member.

The majority conclude on this branch of the case:

The face of the returns, then, in the opinion of the committee, show that the contestant was entitled to 16,283 votes and the contestee to 16,281 votes, giving the contestant a plurality of 2 votes. Such being the case, the burden of showing that these returns (the primary evidence of the result of the election) were not correct is thrown on the contestee.

579. The case of Mudd v. Compton, continued.

Qualified voters being denied the right to vote because other persons had voted on their names, the House counted the votes for the candidate for whom they were offered without deducting the illegal votes.

The House, relying somewhat on a Federal statute, counted ballots of voters whose names after registration were omitted from the poll list, that list being conclusive on the election officers.

While notice of contest should state specifically the points on which testimony is adduced, yet the committee sometimes waives the strict requirement of the rule.

Criticism of evidence introduced in rebuttal.

(2) As to certain disputed votes, questions arose:

(a) Six persons offered their votes for contestant and were refused the right to vote by the judges, for the alleged reason that in each case some one else had previously voted on the name. The majority ruled that these votes should be cast for contestant, saying:

It is bad enough that a person who has no right to vote gets his vote in; it would be worse if by getting his vote in he kept an honest man's vote out.

The minority objected to this ruling, but the majority defended it in the debate,¹ where the subject was examined fully. It did not appear that there was any evidence as to who voted wrongfully on the names or for whom the illegal votes were cast. There would be a presumption, of course, that they were cast for the candidate for whom the six real voters would not have voted. But the majority of the committee simply contented themselves with counting the six legal votes offered and rejected.

(b) An important class of disputed votes is thus referred to by the majority report:

A large number of votes on both sides were rejected because the voters who had duly applied for registration and been registered found their names omitted from or inaccurately copied on the poll books. It is urged by the contestee that the law of Maryland makes the poll book conclusive evidence of the right of a man to vote, and that these votes can not be counted. The committee can not assent to this proposition.

¹Record, p. 2395.

The law simply lays down a rule of evidence for the judges of election, and is intended to reduce to a minimum their judicial functions. Into the qualification of voters they can not inquire. All they have the right to pass upon is the question whether or not a person offering to vote is the person whose name is on the poll book. This limitation is imposed upon them because, in the view of the Maryland law, a polling window on election day is not a proper place to investigate questions of qualification. A simple rule is laid down for the guidance of the judges, and any injustice which may be done by the application of this rule can, if necessary, be corrected by the tribunal before which the contest is made. The class of cases about which we have been speaking, together with another class represented by a vote on each side in which the voter was improperly refused registration, are the very sort of cases to provide clearly for which the third section of the act of Congress of May 31, 1870, was enacted, which section reads as follows:

“That whenever, by or under the authority of the constitution or laws of any State or the laws of any Territory, any act is, or shall be, required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance or offer to perform or acting thereon, be deemed and held as a performance in law of such act, and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had performed such act.”

The admission of such votes is in accord with the unvarying practice of Congress and the almost uniform decisions of the courts, and the committee will count all such votes properly proved on both sides.

The minority say:

The constitution of the State (article 1, section 1) prescribes the qualifications of all voters. Section 5 of the same article provides that the general assembly shall provide for a general registration of all persons possessing the qualifications prescribed by the constitution that the registration shall be conclusive evidence to the judges of the right of the person to vote, and that no person shall vote whose name does not so appear.

The legislature, in accordance with these provisions, have provided for registration, and since the adoption of the constitution of 1864, in which the same provisions appear, all elections have been held under registration laws.

The judges of election are required to take an oath to “permit all persons to vote whose names shall appear on the registry or list of voters furnished to him according to law,” and that he “will not permit anyone to vote whose name shall not be found upon said registry or list of voters.” (Record, pp. 6, 36, sec. 48.)

The contestant in his brief relies upon the act of Congress of May 31, 1870. This act was declared unconstitutional by the Supreme Court. (*United States v. Reese*, 92 U. S. Rep., p. 214.)

Over this point much discussion occurred in the House.¹ On behalf of the majority it was asserted that the law had been changed since the decision of *United States v. Reese*, and that the constitutionality of the law quoted in behalf of contestant was fully sustained by the decision in *United States v. Mumford* (16 Federal Reporter). Also the case of the *United States v. Siebold* was quoted.

(c) A question as to pleading is disposed of as follows by the majority:

The contestee has offered to prove a number of votes lost by him because of inaccuracies on the poll books, not otherwise referred to in his answer than by an allegation that in a very large number of other election districts he lost votes from this cause, and more votes from such cause than the contestant.

The contestant objects to the admission of this testimony on the ground that this general allegation does not, in the language of the statute governing contested elections, state “specifically the other grounds” upon which the sitting Member rests the validity of his election; and the committee is inclined to agree with the contestant, but as the committee in this case has no doubt that the contestee was really

¹ Record, pp. 2396, 2409, speeches of Messrs. Lacey and Dalzell.

entitled to some of the votes of this class which he has proved, the contestee will be allowed the votes he has proved he lost from inaccuracies of the poll books, whether the loss of these votes was or was not specifically alleged. The committee, however, on the same principle, will allow the contestant the votes he proved in rebuttal of the contestee's allegation in paragraph 9 of his answer, that the contestee lost more votes than the contestant because of inaccuracies on the poll books. In most cases the contestant proved how the person, whose vote he claimed to have lost in this way, would have voted had his vote been received, by the testimony of the voter himself.

The minority object, saying:

Not only did he not claim them in his notice, but he attempted in violation of every principle of law to offer his testimony in the time allowed him for rebuttal only.

This testimony was in each case specifically excepted to. (Pp. 493, 494, 556, 557.)

The attempt to make this claim in rebuttal comes directly within the case of *Lynch v. Vandiver* (Mobley, p. 659), in which the committee say that "testimony offered in rebuttal which seeks to establish facts not entered into in the direct examination, is in violation of every known principle of the laws of evidence, and will not be considered."

The contestee had no opportunity to show that these parties had not tendered their votes, or any other evidence tending to deny the claim made by contestant.

580. The case of Mudd v. Compton, continued.

Votes proven by merely showing the party affiliation of the voter have been counted by the Elections Committee.

Discussion of the degree of intimidation justifying the House in counting votes of persons prevented from reaching the ballot box.

The presence of armed and threatening persons at the polls, some personating officers of the law, was held to constitute intimidation justifying revision of the returns.

(d) As to determining how certain persons voted:

The contestee, in a much larger proportion of the votes he proved, showed how they would have voted * * * by merely proving that the voter was or had been a Democrat. The contestant objects to votes proved in this last-mentioned way being counted, on the ground that as he received a great many Democratic votes in the district, there is no certainty that these voters wanted to vote for contestee. The committee, however, has decided to allow the contestee these votes.

(e) The majority decide to recognize the validity of a recount in certain precincts, by which sitting Member gained 19 votes, although there seemed to be suspicious circumstances connected therewith.

(3) The majority of the committee decided as follows in regard to charges of intimidation:

The committee finds that the votes of the first precinct of the third district of Anne Arundel County should be thrown out. The vote, as returned in this precinct, was 168 for the contestee and 32 for the contestant. The undisputed facts concerning this precinct are that there were registered therein 475 persons, 252 of whom were white and 223 colored; that of these 475 only 206 voted, and of those who voted 191 were white men, and 15 were colored; that when the polls opened 4 white men voted, then 15 colored men, and then 187 white men. The contestant has examined 175 colored voters of this district who did not vote; of these 175, 161 were on the polling ground; many of these walked or rode many miles to the polls, and some who were temporarily away from home returned from Baltimore, Annapolis, Steelton, and other places to vote. All of these men swear that they wanted to vote (and most of them were at the polls with their tickets in their hands for the purpose of voting) for the contestant; 14 others swear that they started from their homes and walked a greater or less distance toward the polls and then turned back in consequence of what they heard as to the proceedings at the polls.

There is no dispute that there were present at the polling place, from before the opening of the polls at 8 o'clock in the morning until late in the afternoon, a number of persons who were not residents

of the precinct; that those of them who were identified were residents and registered voters of Baltimore City, and that they drove down from Baltimore, reaching the polls before any of the voters, and drove back in the late afternoon; that those men, or some of them, wore badges with the words "U. S. deputy marshal" upon them, and claimed to be such; that this claim was altogether false; that these men were armed with pistols, which at certain periods of the day they were firing within the hearing of the polling place; that there were a number of guns in a wagon which brought them from Baltimore; that before the polls opened they placed themselves within a few feet of the window at which the citizens were to vote, and that in a very few minutes after the polls opened they seized and dragged from the line two or more colored voters (among them a man of some 70 years of age, a large property owner and tax payer, a resident of the district for twenty-five years, and a universally respected citizen) and told them that they could not vote. The person just referred to (who from age and standing was evidently the most influential colored man present) asked if the colored people were not to be allowed to vote, when the crowd from Baltimore answered, "Not a damn nigger shall vote unless he votes for Cleveland." The old colored leader then told the other colored men not to make a fuss, but as they could not vote to go away peaceably. A number of them did, but the larger number remained about the polling place for some time longer and occasionally one of them would attempt to reach the polling place.

In every such instance they were met by some one of the strangers or by one of the well-known Democratic leaders of the precinct and told that they could not vote; and when they still pressed on, they were struck at and compelled to fall back. A number of colored voters still remained in the neighborhood of the polls, and, in order to get them away, the leader of the Baltimore gang—a man whom the witnesses all call "Tip Wells," but whose real name is proved to be John H. Wills—told a man named Ed. Pumphrey, a resident of the neighborhood, to go among the negroes, tell them that there was a gang of roughs from Baltimore there, that they had guns, and that more were coming down from Baltimore in the next train, and that they would have to fight these armed men if they wanted to vote. Pumphrey went down to where the negroes were, moved around among them, telling them what Wells directed him to tell, and adding that he was a deputy sheriff, that he could not protect them, and if they took his advice they would go home. He then came back and reported to those who sent him what he had done. Fifty or more of the colored voters testified that they heard Pumphrey telling them to go home; that there was a wagon load of roughs there with guns, and that more were coming, etc.

After commenting on the fact that the leaders in the intimidation were not called to rebut the charges, the majority say:

The contestee claims that if this were all so, the negroes had physical force enough to have voted if they had persisted in doing so. The committee holds that a citizen has a right to a free and unmolested approach to the ballot box and is not bound to fight his way to a polling window, especially when to do so he must come into conflict with persons who claim to be officers of the law, the truthfulness of which claims he has no means of negating, and that a candidate, whose supporters have done all in their power to make voters believe that they would suffer injury if they attempted to vote, can not be heard to say that the intimidated voters should not have believed the threats made to them.
* * * The contestant proves that he lost at least 175 votes as a result of this intimidation.

The minority, after examining the testimony, concluded that the disorder was not sufficient to have intimidated a man of ordinary firmness.

As a result of their reasoning the majority found a plurality of 154 votes for the contestant, and recommended the following:

Resolved, That Barnes Compton was not elected as a Representative to the Fifty-first Congress from the Fifth district of Maryland and is not entitled to the seat.

Resolved, That Sydney E. Mudd was duly elected as a Representative for the Fifth Congressional district of Maryland to the Fifty-first Congress and is entitled to his seat as such.

The minority dissented from this conclusion and recommended:

Resolved, That S. E. Mudd was not elected as a Representative to the Fifty-first Congress from the Fifth Congressional district of Maryland.

Resolved, That Barnes Compton was duly elected and is entitled to retain his seat.

The report was debated at length on March 19 and 20, 1890;¹ and on the latter day the question was taken on a motion to substitute the minority for the majority resolutions. This motion was disagreed to, yeas 145, nays 155. Then the resolutions of the majority were agreed to, yeas 159, nays; 145. Thereupon Mr. Mudd appeared and took the oath.

581. The West Virginia election case of Smith v. Jackson in the Fifty-first Congress.

A board of county canvassers, legally competent to recount, may make such recount even after it has certified and forwarded the result of the first count.

A county court charged by law with the duty of canvassing precinct returns may correct its returns by a supplemental certificate, which should be taken into account by the governor in issuing credentials.

On January 23, 1890,² Mr. John Dalzell, of Pennsylvania, presented the report of the majority of the Committee on Elections in the West Virginia case of Smith v. Jackson.

The governor had issued a certificate to sitting Member on finding a plurality for him of 3 votes. Contestant claimed that the true vote as shown by the returns of highest authority gave to himself a plurality of 12 votes.

Two questions therefore arose: One as to the prima facie right and another as to the final right.

(1) As to the prima facie right. Two leading questions were discussed in this branch of the case.

(a) The report says:

Under the laws of West Virginia (Code, sec. 22, ch. 3) it is made the duty of the commissioners of the county courts in each Congressional district to transmit to the governor a certificate of the result of the election within their respective counties, "and in the said certificate shall be set forth, according to the truth, the full name of every person voted for, and in words at length the number of votes he received for any office."

The commissioners of Ritchie County sent two certificates, the first giving Smith a majority of 567 votes, and the second giving Smith a majority of 570 votes, a difference of 3 votes favorable to contestant. The report says:

The second certificate correctly represented the result of a recount of the votes, made at the instance of the contestee. The governor accepted the first and rejected the second certificate, and thus took away from Smith 1 vote and added to Jackson 2 votes.

The law of West Virginia with respect to a count and recount of returns is as follows (Code, sec. 21, ch. 3):

"The commissioners of the county court shall convene in special session at the court-house on the fifth day (Sundays excepted) after every election held in their county, or in any district thereof, and the officers in whose custody the ballots, poll books, and certificates have been placed shall lay the same before them for examination. They may, if deemed necessary, require the attendance of any of the commissioners or canvassers, or other officers or persons present at the election, to answer questions under oath respecting the same, and may make such other orders as shall seem proper to procure correct returns and ascertain the true result of the said election in their county. They may adjourn from time to time, and when a majority of the commissioners is not present their meeting shall stand adjourned

¹ Record, pp. 2392, 2440-2449; Journal, pp. 364, 365.

² First session Fifty-first Congress, House Report No. 19; Rowell, p. 13; Rowell's Digest, p. 436.

till the next clay, and so from day to day till a quorum be present. They shall, upon the demand of any candidate voted for at such election, open and examine any one or more of the sealed packages of ballots and recount the same, but in such case they shall seal up the same again, etc.”

After quoting the second certificate the report says:

This certificate the governor ignored altogether, and the contestee now seeks to justify his action by saying that upon the making of the original certificate the county court was *functus officio*, powerless even to correct an error; and that a recount can be had only when the demand therefor is made prior to the issue of a certificate. This contention is directly in the teeth of the contestee's own action in demanding the recount, and is not in the judgment of your committee tenable on any ground.

The manifest purpose of the law in providing for a recount is that errors may be corrected. There can be no recount until there has been a perfected count. Whether a recount shall be necessary can not be determined till the first count is finished. No provision is made in the law as to the time when the recount must be demanded. There is no statute of limitations on the subject. To hold that a recount must be demanded on the day of the original count leads to the manifest absurdity of requiring the candidate to be present, in person or by proxy, in as many different places as there are county courts in his district at one and the same time. In the district in question there are twelve counties. If the recount was lawful, as undoubtedly it was, so then was the certificate of its result, and the governor exceeded his powers in accepting the first and ignoring the second certificate from Ritchie County.

In a similar way the governor rejected a second certificate from Calhoun, thereby taking 2 votes from contestant. This second certificate was made, not in response to a demand for a recount, but to correct an error. The certificate itself shows:

At a regular session of the county court of Calhoun County, held at the court-house of said county on Monday, the 7th day of January, 1889, on motion of A. J. Barr, it is ordered by this court that the returns of the election held in this county on the 6th day of November, 1888, as certified by the county court, held on the 12th day of November, 1888, be corrected, it appearing to the court that there is a clerical error in the returns as certified, to wit: That the record of the result of said election for a Representative in the Congress of the United States shows that Charles B. Smith received 630 votes, which should have been C. B. Smith received 632 votes.

It is therefore ordered by this court that the record of this count be corrected so as to show that C. B. Smith received, etc.

The report says of the governor's rejection of the second certificate:

He assigned no reason for his action, but counsel for contestee now seek to justify it on the grounds here in before stated—that upon the making of the first certificate the county court was *functus officio*, and had no power to correct an error, however plain and palpable, after the certificate had been issued.

It has been held that where the judges of election discover a mistake upon a recount of the ballots their supplemental return is entitled to be received (*Archer v. Allen*, Thirty-fourth Congress); and that errors, whether fraudulent or accidental, may be corrected at any time, even after certificate of election issued by the governor. (*Butler v. Lahman*, Thirty-seventh Congress—*Morton v. Daily*, Thirty-seventh Congress.)

It is believed that there is inherent in every body charged with the ascertainment of the popular will, whether its functions be judicial or ministerial, the power to correct an error when discovered and to make its conclusions express the true will of the people as disclosed by their suffrages. And it is especially to be noted that there is no suggestion from any quarter that the certificates from Ritchie and Calhoun counties, ignored by the governor, did not accurately show the exact number of votes legally cast for the respective candidates, while on the contrary it expressly appears that they did so show.

582. The case of *Smith v. Jackson*, continued.

A person having been seated on credentials regular in form but improperly issued, the Elections Committee in a sustained case, ascertained *prima facie* right in favor of contestant.

The Elections Committee, in a sustained case, shifted the burden of proof to sitting Member on ascertaining that contestant had been entitled to the credentials.

The law requiring a return to “set forth in words at length” the number of votes, the governor, in awarding certificate of prima facie right, should construe an obscure word as a word in full, not an abbreviation.

In ascertaining prima facie title the governor should make intelligible an obscure return from the records of a returning board when said board has the functions of a court of record.

(b) The remaining question arising as to prima facie right is set forth in the following statement made by the governor of West Virginia:

The commissioners of Pleasants County certify as to J. M. Jackson’s vote as follows: “S. M. Jackson received eight hundred and two votes.” The words and letters are too plain for any mistake. For the reasons heretofore given there is no authority to go behind the returns. The vote certified must be counted if enough appears to ascertain the meaning. In an action upon a note it was held: “There was no error in admitting the note sued on in evidence, because the amount thereof is written four *hund* and two and 50–100 dollars.” (Glenn v. Porter, 72 Ind., p. 525.)

So it has been held that the abbreviation in a declaration, “Damages one *thous* dollars” is not error. (1 W. L. J., Mich., 395.)

If enough appear to make the return intelligible, it should be made so.

This can not be done without striking out one letter and inserting another, or by supplying the seemingly omitted letters. Acting upon the face of the paper the latter appears more in consonance with adjudged cases. The least number would give to said Jackson 812 votes. It will be so entered.

As to this the report holds:

The governor knew—could not help knowing—even if a poor penman omitted to close his “o” so that the word looked like t-w-e, instead of t-w-o, that the word intended was *two*. Upon general principles he was bound to presume that the three letters expressed the whole word, but he was especially bound to so assume in this case, because the law, of which he pretended to be so tender, required that “the certificate shall set forth, according to the truth, the full name of every person voted for, and in words at length the number of votes he received for any office.”

The law, therefore, told him that the word about which he pretended to doubt was not an abbreviation but a number written in words at length. He gratuitously assumed the violation of this law by the county court making the certificate, as well as did violence to the commonest kind of common sense when he tortured these three letters into the word “twelve.”

He knew furthermore that “twe” is not now, never was, and probably never will be amongst sane men an abbreviation of twelve, or of twenty, or of any number known to an American. And he knew again that the letters were intended to express a number, and that there is no number known to the English language written with three letters, the first of which is “t” and the second “w” except the single number two.

But even if it were conceded that there could possibly have been a doubt as to what the word meant, then it was a patent ambiguity, which any law student could have told the governor it was his duty to explain by evidence. This he was bound to do, and could very readily have done, as will clearly appear hereafter. Had it been impossible for him to do so, the only legal alternative remaining was to strike out the word altogether as insensible, and read the return 800.

Neither process would have given the certificate to the contestee. The governor therefore guessed enough to give to that gentleman 3 of a majority.

The true vote in Pleasants County for Jackson was 802, and not 812. Nobody now claims, nor did anybody ever claim, that it was in fact anything else.

Counsel for contestee, however, without attempting to defend a trick indefensible, ingeniously argued before the committee that the governor had no legal standard by which to explain the so-called

doubtful word, and that no competent legal evidence has been produced by the contestant to show that the true vote in Pleasants County was other than as counted by the governor.

The argument is that under the laws of West Virginia the commissioners of the county court do not constitute in any proper sense a court of record, but are merely a returning board, having no judicial functions, except when making a recount, and no authority to evidence their action except by the issue of a single certificate, which is to be sent to and deposited with the governor.

Upon the faith of this proposition it is contended that the only legal record evidence of the vote in Pleasants County, as ascertained by the county court, is the certificate sent to the governor, and that the certificates procured by the contestant from the clerks of the county courts and offered in evidence, showing the results of the elections in the several counties, are not competent evidence.

These certificates, it is contended, were made without authority of law and at the instance of a court having no right to make a record.

The report next discusses the case of *Brazie v. the Commissioners of Fayette County* (25 W. Va., 213) and finds that it does not sustain the contention of counsel for sitting Member.

Aside from general principles, the report finds from West Virginia statutes that the county court is more than a mere returning board; for it is intrusted with the duty of fixing voting places; of naming election commissioners. Moreover, to it are returned certificates from the district canvassers, the ballots cast, and one set of poll books. Its clerk is by law the custodian of these records. It convenes in special session to pass on election returns, has power to summon witnesses, administer oaths, and "make such orders as shall seem proper to procure correct returns, and ascertain the true result" of the election. The fact that this court meets in "special session" indicates to the committee that it is more than a mere returning board. The report further finds:

Provision is expressly made by section 46, Acts 1881, chapter 5, for a complete record of all the proceedings of the county court, both those which relate to its general jurisdiction, exercised at its ordinary sessions, and those which relate to its exceptional jurisdiction, exercised at its special sessions.

But, in addition to the record thus provided for, there are other provisions of the law with which the position assumed by contestee's counsel and now under discussion are inconsistent.

By section 22 it is prescribed that when an election is held in a county or district for any or all of some twenty-two different officers—State, county, and Federal—"the commissioners of the county court, or a majority of them, * * * shall carefully and impartially ascertain the result of the election in their county, and in each district thereof, and make out and sign as many certificates thereof as may be necessary. * * * The said commissioners shall sign separate certificates of the result of the election within their county for each of the offices specified in this section which is to be filled;" that is, separate certificates for each of the twenty different offices, State, county, and Federal.

Section 23, still preserving the plural number and speaking of certificates, makes provision for the disposition of these certificates. As to certain offices, one of the certificates is to go to the governor; as to certain other offices, one is to go to the secretary of state; as to certain offices, one is to go to some designated public officer; the other to the candidate elected.

In all cases, with respect to every office, it is the duty of the court to sign separate certificates. As, of the separate certificates directed to be made in the case of a candidate for Congress, one only is to go to the governor, and, as no provision is made for the giving of the other to the candidate or to any public officer, it necessarily remain with the clerk of the court.

By section 5 of chapter 130 (code of West Virginia)—

"A copy of any record or paper in the clerk's office of any court, or in the office of the secretary of state, treasurer, or auditor, or in the office of surveyor of lands of any county attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original."

* * * * *

Your committee are therefore clearly of the opinion that, under the laws of West Virginia, it was competent for the governor and it was his duty to make intelligible if unintelligible the certificate

as to the vote in Pleasant County, by consulting the certificate and record of that vote on file in the clerk's office of that county, and that in default of his having done so it is competent for them and is their duty now to do it.

It is conceded that ever since the passage of the West Virginia act of 1882, which we have been discussing, it has been the custom of the county court to keep on file a duplicate certificate showing its conclusions with respect to the election of a Representative to Congress.

(2) In accordance with their reasoning as to the prima facie case the majority of the committee say:

And they are of the opinion that, on the face of the returns, the contestant was elected by a majority of 12, and was entitled to the governor's certificate of election. Such being the case, the contestant is now to be treated as if he had received the certificate, and the onus is cast on the contestee to show that the returns, if truly made, would elect him. (*Wallace v. McKinley*.)

The minority of the committee, in views presented by Mr. Charles F. Crisp, of Georgia, defend the action of the governor of West Virginia, but do not dissent from the propositions of law laid down in any branch of the case.

583. The case of *Smith v. Jackson*, continued.

When irregularity of a jurat works rejection of a poll unless canvassing officers are satisfied that the oath was taken, the counting of the poll is conclusive offset to a faulty jurat.

A slight technical error in a jurat, omitting that which may be made certain, should not cause rejection of a poll, even when the law makes rejection the penalty of improper certification of the oath.

Failure of election officers to include in their returns votes for a certain office as required by law, when said votes have been counted and tallied, does not justify rejection of the poll.

As to the final right to the seat, two classes of questions arose, first as to the effect of certain alleged irregularities in the conduct of the election; and second as to the qualifications of certain voters.

First, as to the alleged irregularities.

(a) Sitting Member asked that the poll of Ebenezer precinct be rejected because it did not appear that the commissioners who conducted the election were sworn. The report says:

The record shows that on the poll book returned to the county clerk's office the oath appeared at length and in the form prescribed by law, subscribed by each and all the commissioners, but the jurat is irregular and indefinite. It reads as follows:

"Subscribed and sworn to before me as one of the commissioners, L. F. Law, this — day of November, 1888.

"PETER CONLEY."

Both Law and Conley were commissioners, and either had the power to swear all the rest. It is very clear, even from the imperfect record, that all took the oath by subscribing to it, and that as to two at least the certificate is conclusive. Where part of the officers are sworn, others not, the election is valid. (*Fuller v. Davison*, 2 Bart., 126.) Two things are to be noted in this connection, first, that sworn or unsworn, all the commissioners were de facto election officers, and, second, that no harm resulted to anyone, either the public or an individual voter, from their failure to be regularly sworn. All authorities agree that the acts of de facto officers are to be accepted and treated as valid so far as the public and the candidates are concerned. (*Paine on Elections*, sec. 373, and cases cited.) It is a well-settled principle of law, and a very ancient one, "that the act of an officer de facto, where it is for his own benefit, is void * * * but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good." (*Cro Eliz*, 699.)

It has been repeatedly held that a certificate of unsworn officers even is *prima facie*, and the burden is on the contestant to show that the errors committed affected the result or rendered it uncertain. (*Taylor v. Taylor*, 10 Min., 107 *Whipley v. McCune*, 10 Cal., 352.)

It is contended however, that this principle does not apply in this case because the law of West Virginia provides:

“The said oath shall appear properly certified on one of the poll books of every election, and in no case shall the vote taken at any place of voting be counted unless said oath so appears, or unless it be proved to the satisfaction of the commissioners of the county court, convened at the court-house, as hereinafter required, that the oath was taken before said commissioners, canvassers, and clerks entered upon the discharge of their duties.”

But the contention must fail and the argument be against the contestee for the manifest reason that unless the oath had been taken the votes at this precinct could not have been counted. The taking of the oath was to be made to appear either upon the poll books or by proof to the satisfaction of the county commissioners. These commissioners had power, “if deemed necessary, to require the attendance of any of the commissioners or canvassers, or other officers or persons present at the election, to answer questions under oath respecting the same, and to make such other orders as shall seem proper to procure correct returns and ascertain the true result of the said election in their county.”

The commissioners of the county court must be presumed to have done all things within their power necessary to be done in the performance of their duty in accordance with law. They can not be presumed to have done anything unlawful. The votes could not have been lawfully counted unless the election officers appear to have been sworn, either by the evidence of the poll book or by other evidence satisfactory to the commissioners. The votes were counted, and if it be true, that the swearing of the officers is not proven by the poll book, it must have been otherwise proven to the satisfaction of the commissioners.

No reason, therefore, has been shown why your committee should disfranchise the voters of this district.

The majority also discuss two other precincts:

The objection made to the vote of the Murphys Mill precinct is of such a frivolous character as to merit but little discussion. It is, that the oath of the precinct commissioner does not appear properly certified on the poll book. It was not properly certified because Marion J. Bickle, a justice of the peace, who administered it, signed the jurat “Marion J. Bickle, in and for Clay district, Wood County, W. Va.,” omitting the words “justice of the peace” after his name.

He was, in point of fact, a justice of the peace, as the evidence shows. The less comment made on this objection the better, one would think, for the contestee.

The next objection is like unto the last, and relates to Wadesville precinct, Wood County. The objection here again relates to an alleged irregularity in the jurat. The oath was administered by T. J. Sands, one of the commissioners of election, but he omitted to sign with his official title.

That the oath was administered by him, that he was a commissioner and by law authorized to administer it, are facts not capable of being called in question.

The matter does not seem to merit discussion.

(b) The sitting Member asked for the rejection of Kentuck precinct on the ground that no vote was returned on the poll books by the precinct commissioners nor any certificate in the case of the candidates for Congress. The law of West Virginia, after providing for the count at the close of the polls, has this requirement:

The contents of the ballots as they are read shall be entered by the clerks under the supervision of the commissioners on tally papers for the purpose by suitable marks made opposite to or under the name of each person for any office to be filled.

As soon as the results are ascertained, the commissioners or a majority of them * * * at each place of voting shall make out and sign two certificates thereof [according to a prescribed form] and transmit one to the clerk of the county court. They shall also seal up the ballots and send them with one set of the poll books to the said clerk.

The report says:

A reference to the certificate will show that the certificates were made and signed by the commissioners holding the election, and returned to the clerks of the county and circuit court, as required by law, but that the names of contestant and contestee did not appear in said certificate, nor the office for which they were candidates and received votes. But their names were on the ballots cast at said precinct for said office, and the ballots were counted by the commissioners of election, and their names were written down by them on the tally sheets opposite or under the designation of the office for which they received votes, and the number of votes which each received was designated on said tally sheets, to wit, 152 for contestant and 72 for contestee, in the same manner as was done with respect to the names of all other candidates voted for at said election, and the tally sheets were returned with the certificates and the ballots to the clerk of the county court. The aggregate votes appearing thereby to have been cast for contestant and contestee were one less than the highest number appearing to have been cast for any other two opposing candidates. When these papers reached the commissioners of the county court, counsel for contestee demanded a recount of the votes for Jackson County, as to Representative in Congress, as he had the lawful right to do. Under this demand the commissioners of the county court recounted all the ballots cast for Representative in Congress in that county, and upon that recount the number of votes appearing to have been cast for the contestant and contestee were the same as appeared upon said tally sheets, and including these votes, the result in the county was, for contestant, 2,272 votes, and for contestee, 1,886 votes. And this result was certified to the governor.

The only irregularity here seems to have been a clerical error, in the failure of the election commissioners to insert in the certificate the result of the election at that precinct as to Representative in Congress. They did ascertain the result and wrote it correctly on the tally sheets, and when the county commissioners counted the ballots at the demand of contestee's counsel, they obtained the same result, and the ballots were there and inspected by the commissioners, and presumably by the contestee's attorney, who made the demand for recount.

But this failure of the commissioners of election to make return of the votes at this precinct could not have the effect to disfranchise the persons who voted there, and the law of West Virginia especially provides for such a case. In declaring the powers and duties of the county commissioners in ascertaining and declaring the result of the election in their respective counties, the following language is used:

"They may, if deemed necessary, require the attendance of any of the commissioners or canvassers or other officers or persons present at the election, to answer questions under oath respecting the same, and may make such other orders as shall seem proper to procure correct returns and ascertain the true result of the said election in their county."

The presumption as well as the proof is that the county commissioners ascertained, by the exercise of their powers of examination, the true result of the election, and certified accordingly. There is no pretense that they did not.

Counsel for contestee say that he, the contestee, made no demand for a recount of the vote at this precinct, and argue that the fact of such demand should appear of record. There is no law requiring the demand to be made matter of record. There is no record of demand made in any precinct, though contestee admits having made such demand in some. There is affirmative proof (Record, p. 724) that demand was made for a recount in this precinct by contestee's attorney, and neither the attorney nor the contestant was called to rebut this evidence.

The matter does not seem material nor to merit discussion, since there is no pretense that the commissioners in the exercise of their legitimate functions did not ascertain the true vote in this precinct; no pretense that it was not truly declared; no pretense that any voter suffered anything by the alleged irregularity; in fact, nothing to take this case out of the ordinary rule of law, that statutes directing the mode of proceeding of public officers are directory merely, unless there is something in the statute itself which plainly shows a different intent.

584. The case of Smith v. Jackson, continued.

No fraud being shown and no specific fraudulent act being alleged, the House declined to reject a poll because unsworn persons assisted in the count.

The holding of an election in a place other than the legal place does

not cause rejection of the poll when evidence shows that no voter was deprived of his rights thereby.

A mere technical violation of the law as to custody of ballot box, no injury being shown to anyone, does not justify rejection of the poll.

(c) Sitting Member alleged that the poll of Pine Log precinct should be excluded because of "misconduct and fraudulent acts" on the part of the election officers. It appeared from the testimony that in the night during the counting of the vote one of the three commissioners went to sleep, while another sat smoking, leaving the third commissioner to do the counting, assisted by the son of the sleeping commissioner and a man named Davis. Both the son and Davis belonged to sitting Member's party. It appeared by reference that Commissioner Rorden, who did the counting, was a Republican, while the commissioner who smoked was McKown, a Democrat. The report says:

The evidence does not show that the ballot box was in the custody of any one of the commissioners so as to require it to be sealed. Even if it was out of the custody of Dernberger, from the fact that he was asleep, it was not out of that of McKown, who was present in the room, and the counting proceeded under his observation, and his place was filled in the operation of counting by a Democrat. There is not the slightest evidence tending to show that there was any tampering with the ballot or returns, or any fraud of any character. All that was done was in the presence of at least two of the commissioners who were awake.

It appears from the evidence of Lemley (pp. 724-725) that the return from this precinct did not show any votes for contestee, but 139 votes for contestant, a mere clerical error in failing to write into the return contestee's vote, but, under the recount which was demanded by contestee the votes for him at this precinct were counted by the commissioners of the county court, and the number of them, 93, included in their return to the governor.

It is to be observed that no allegation of any specific act of fraud is alleged. Your committee are asked to presume that fraud was committed because it might have been committed, and this in the absence of any pretense that a single legal vote was excluded from, or a single illegal vote was included in, the result announced.

Your committee do not know of any principle of law that would justify them in so finding. They understand the law to be as declared in *Mann v. Cassidy* (1 Brewster, Penna., 60): "An allegation of fraud committed by election officers is immaterial unless it be also stated that the result has been affected."

(d) Sitting Member charged that in Boyer premet the voting place was at Isaac Branch's schoolhouse, one-half to three-quarters of a mile distant from McGill's post-office, which the county court had established as the legal voting place.

The report says.

The evidence tends to prove the above statement, but it is not claimed, nor does the evidence tend to show, that any person was deceived or prevented from voting thereby. Two witnesses only are examined by contestee in relation to this precinct, and one of them (Fowler, pp. 408-409) says that it was his understanding from the time he knew of the election that it was to be held at the Isaacs Branch schoolhouse, and that every voter in the precinct voted at said voting place at said election except one, and he was too sick to go to the polls. The other witness (Dunlap, p. 410), corroborates Fowler generally, and, in addition, says that the school election in 1887 was held at the same place. So that contestee by his own witnesses proves that no voter was wronged out of his vote, and that he was not injured by this change of voting places.

This case calls for the application of the rule which protects the voter against disfranchisement from the default of a public officer when such default has resulted in no injury to anyone. (*Farrington v. Turner*, 53 Mich., 27; *People v. Simonson*, 5 N. Y., 22; *Steele v. Calhoun*, 61 Miss., 556.)

The same principle was applied to several other precincts where like irregularities occurred.

(e) The report thus states another objection:

In Walton precinct, Roane County, the contestee claims that the ballot box was in the custody of one of the commissioners of election alone, in violation of law, and that the vote at this precinct, where contestant had 131 plurality, should be rejected for this reason.

The section of the law relating to this subject is as follows (Code, ch. 3, sec. 14):

“The ballot box shall have an aperture in the lid or top thereof to receive the ballots of voters. While the polls are open it shall be kept where it may be seen by the voters, and after the polls are closed, and until the votes are counted and the certificates of the result are signed, shall remain in the immediate custody of the commissioner, or anyone of them, with the consent of the others. But it shall not be opened unless two of them at least be present, and if left at any time in the custody of one of the number, shall be carefully sealed so that it can not be opened or any ballot taken therefrom or entered therein without breaking the seal, and the others shall write their names across the place or places where it is sealed.”

It was in proof that at the dinner hour on election day the ballot box was sealed, and was for about five minutes in the exclusive custody of one commissioner. During the counting, while they were resting, a Republican commissioner, Garvin, and a Republican clerk, Summers, were for a short time alone with the box, the others having stepped out. The witness Walker said, according to the report:

Walker testifies for contestee that he saw nothing in the conduct of Garvin or Summers which led him to suppose that there had been any tampering with the ballot box, and that there was nothing to indicate that there had been; that he knew Garvin well, and did not believe he did or would tamper with the ballot box, or permit it to be done; that the result of the election was about as usual at that precinct, and nothing in it to indicate that there was any tampering, and that the number of ballots tallied with the number of names on the poll books. There is a total absence of evidence tending to show any fraud or improper practices on the part of anyone in conducting the election.

The evidence fails to show that the box was “left at any time in the custody of one of the number” in contemplation of the law. While they were at dinner it was as much in the custody of the one who did not have manual possession as it was in his who did. Besides, at that time it was sealed. On the other occasion it was not left in Garvin’s custody in contemplation of law or in fact. The others stepped out only momentarily. The sealing was to be done only when the two turned it over to the third, thereby expressly charging him with the custody.

Besides, if there was any violation of law it was only technical, and did not tend to the injury or prejudice of the contestee, and can not deprive the voters of the right of having their votes counted as cast.

586. The case of Smith v. Jackson, continued.

A clear preponderance of competent evidence is required to overthrow the prima facie legality of a ballot received by the election officers.

Testimony quoting statements of the voter after election as to how he voted or as to his qualifications is inadmissible to prove illegality of a ballot, being hearsay.

In absence of direct proof of how he voted, evidence as to the voter’s party, his advocacy of candidates, or the friends who sustained his right to vote is admissible.

One who has knowingly cast an illegal vote should not be relied on to prove how he voted; but it is otherwise in case of honest mistake.

The minority of the committee did not dissent from the above conclusions of law; but joined issue on the facts (not the law) involved in the examination of

the second branch of the inquiry as to final right. The majority thus stated the principles of law by which it would be governed in determining the qualifications, of voters:

(a) A vote accepted by the commissioners holding the election is prima facie legal. Before it can be thrown out for illegality it must be satisfactorily shown by the evidence to have been cast by one not legally qualified to vote—that is to say, the presumption of legality must be overcome by a clear preponderance of competent evidence.

By competent evidence we mean such evidence as would be admitted on the trial of the issue before a judicial tribunal, except where a relaxation of the rule is made necessary by the nature of the issue.

(b) No provision is made by the statutes of West Virginia to ascertain what particular ballot any voter has deposited after it has been once placed in the ballot box. Therefore in this case it becomes necessary to ascertain for which candidate a vote was given by other means than the ticket itself.

It seems to have been taken for granted by both parties that the voters themselves could not be compelled to disclose how they voted. It may be remarked in this connection that one who would knowingly cast an illegal vote ought not to be regarded as the most reliable witness. On the other hand, when he has been honestly mistaken, we can see no reason why such voter ought not to be trusted as a witness.

In order, then, to prevent illegal voting with impunity, it becomes necessary to determine what kind of testimony shall be received in ascertaining which candidate got the benefit of the illegal vote. The committee have followed the rule which appears to them to be the most reasonable, as well as the best sustained by authority.

In the absence of direct proof, evidence showing to what political party the voter belonged, whose election he advocated, whose friends maintained his right to vote, and kindred testimony has been held admissible. Of course what the voter said at the time of voting is admissible as a part of the *res gesta*.

But what a voter said after the day of the election, either as to his qualifications, or how he voted, or whether he voted, the committee hold to be inadmissible in the absence of other testimony on the point. If such testimony can be admitted at all, which we do not concede, it certainly ought not to be received when the statement of the voter is made after the legality of his vote has been called in question. To admit this kind of testimony is to place it in the power of one not entitled to vote to have his illegal vote counted twice against the party he desires to defeat, without subjecting himself to cross-examination and without even the formality of testifying under oath.

Again, one legally qualified may, by statements after he has voted, make himself out to be disqualified without incurring any penalty, and in that way have his legal vote given to one party counted as illegal against another party. One who has not voted at all may in the same way be proved to have voted. In a close contest, with party feeling running high—perhaps party control involved—the admission of this kind of testimony would be doubly dangerous. It has nothing to commend it except a class of decisions whose authority has been weakened, if not destroyed, by later and better considered adjudications. The committee reject all such testimony as being mere hearsay of the most dangerous kind when standing alone. When the only evidence of how a man voted, or whether he was a legal voter, is the unsworn statement of the voter after the election, we have let the vote stand.

586. The case of *Smith v. Jackson*, continued.

A voter capable of making a valid will or contract or of being criminally responsible for his act, may not be disqualified as of unsound mind.

Nonprofessional evidence that a voter is an “idiot” may be given weight as a statement of fact rather than of opinion.

Nonprofessional testimony as to a voter’s “unsound mind” should be accompanied by careful definition to be of weight.

A voter ordinarily self-supporting is not to be held as a pauper because of receiving public aid temporarily.

(c) In regard to what constitutes a person of unsound mind, we have adopted the rules substantially as laid down by American courts and text-book writers, and hold that a person having sufficient intelligence to make a valid will, or to bind himself by ordinary contracts, or to be criminally responsible for his acts, is a person of sound mind. One whose will would be held invalid for no other reason than mental incapacity is a person of unsound mind.

In the record we find the oft-recurring question, "Was the voter, in your opinion, a man of unsound mind?" put to a nonprofessional witness without any attempt to define what was meant by unsoundness of mind. To the answer to such question, unaccompanied by any explanation of what the witness understood by the term, we attach very little weight.

The condition of the voter, his acts and speech, how he is regarded by those who know him, as to his competency to contract, judicial determinations, and the like evidence has been given due weight. The term "idiot" is so well understood that the statement of a witness that a person is an idiot is given more weight, as being the statement of a fact within the knowledge of the witness and not a mere opinion.

(d) Upon the question of what constitutes a pauper there is some disagreement in the authorities, but we think the following may be taken as a fair definition: A pauper is one who is continuously supported, in whole or in part, out of funds provided by the public authorities for that purpose. One who has been a public charge and afterwards became self-supporting for a sufficient time before the election to show that his ability to support himself is not a mere temporary condition may legally vote. One who, under temporary misfortune or sickness, receives public aid, but is ordinarily self-supporting, is not a pauper.

587. The case of Smith v. Jackson, continued.

A new residence may not be established by intention without an actual removal to the new place.

Residence may not be retained by a simple statement of intention when actual residence has been taken up elsewhere.

Votes of persons otherwise qualified and cast in good faith, in accordance with previous habit, should not be rejected because of disputed boundary of precinct.

(e) The law which determines the question of residence is so well settled that it does not need a restatement by the committee; the difficulty is in the application of the law to the evidence.

Absence from the place claimed as a residence, for temporary purposes, does not work abandonment; but in this case some of the witnesses and some of the commissioners of election seem to have had the view that a voting residence might be retained by the simple statement of intention to retain a certain place as a voting residence, although an actual residence had been taken up elsewhere, with no fixed intention of ever again actually living at the place where the right to vote is claimed. Others seem to think that they can establish a new residence by intention before actually and in fact moving to the new place.

We do not concur in these views. It takes both act and intention to establish a residence, and an intention to retain a residence which has been left must be an intention actually to return to it and reside in it.

(f) Some votes in this record are questioned on account of disputed or doubtful boundary lines. The committee have not thought it their duty to go into an investigation of disputed boundaries, but have counted all votes as legal when the voters were otherwise qualified and voted in good faith in the district where they believed that they had their residence, and where they had been in the habit of voting.

588. The case of Smith v. Jackson, continued.

The fact that laborers are employed in a moving gang by a corporation does not destroy the presumption that they are entitled to vote at the place of headquarters.

A vote challenged in notice of contest by either party is a proper subject of investigation.

When both sides have without objection investigated an alleged illegal vote, failure to specify it in notice of contest may not be urged.

Admission by contestant that his evidence is of doubtful sufficiency is held to amount to waiver of the allegation.

(g) In the examination of the qualifications of individual voters the majority found

Fourteen other votes, laborers on a railroad, are attacked on the ground that they had not lived in West Virginia for a year, were not residents of the district where they voted, and were employees of a corporation.

As to some of them it clearly appears that they had lived in the State a sufficient time to entitle them to vote. As to none of them is it shown by competent testimony that they had not been so resident, and the presumption is in their favor.

They belonged to a construction gang which had its headquarters where they voted; to this point they constantly returned; received their mail there; had their washing done there, and had a right to fix their residence there. Their employment by a corporation did not give them a residence, but it did not prevent them from acquiring one. Some had voted there a year before. We think the presumption of legality is in no way overcome by the evidence.

The report also disposes of two questions of practice:

(a) Two or three of these votes contestee insists should not be charged against him, because not named in contestant's notice of contest.

One of them, Michael Hobart, was challenged by contestee in his reply. The vote was illegal and cast for contestee. The committee think that a vote challenged in the notice by either party is a proper subject of investigation.

Two others were not named in either notice. The pleadings in this case are more specific than the practice before the committee requires. As a general rule, parties ought to be bound by their pleadings, but where neither party has been taken by surprise, and both have entered into the investigation, the rule should be relaxed in the interest of justice.

The evidence in regard to these voters was taken a month before contestee commenced examining his witnesses, the witnesses impeaching the votes were cross-examined on this branch of their testimony, and the contestee should be held to have waived his objections.

(b) In a final summary of his claims contestant has conceded that he has failed to establish his charges with reference to a number of named voters, and that the evidence in regard to others places them in the doubtful list. As to all such we have not felt it our duty to examine the evidence, as we take the admission to amount to a waiver, although as to some of them it may be said it takes all the benefit of presumptions to hold them valid.

As a result of their investigations of the alleged illegal votes, the majority reports finds an actual plurality of 39 for contestant, and recommends the following:

Resolved, That James M. Jackson was not elected as a Representative to the Fifty-first Congress from the Fourth Congressional district of West Virginia, and is not entitled to the seat.

Resolved, That Charles B. Smith was duly elected as a Representative from the Fourth Congressional district of West Virginia to the Fifty-first Congress, and is entitled to his seat as such.

The minority, after an examination of the alleged illegal votes, concluded that there was a majority of 23 for sitting Member, and recommended the following:

Resolved, That C. B. Smith was not elected a Representative in Congress from the Fourth district of West Virginia, and is not entitled to a seat therein.

Resolved, That James M. Jackson was duly elected a Representative in Congress from the Fourth district of West Virginia, and is entitled to retain his seat therein.

The report was debated at length on January 31 and February 1 and 3, 1890,¹ and on the latter day the question was first taken on substituting the first resolution of the minority for the first resolution of the majority, and it was decided in the negative—yeas, 135, nays 165. The question next recurred on substituting the second resolution of the minority for the second resolution of the majority, and was decided in the negative—yeas 137, nays 164.

The question recurring on the adoption of the resolutions reported by the majority, the first resolution was agreed to—yeas 166, nays 0; and the second by yeas 166, nays 0.²

Mr. Smith then appeared and took the oath.

¹Record, pp. 1001, 1010, 1025–1043; Journal, pp. 187–190.

²The rulings of Mr. Speaker Reed as to the counting of a quorum was made in connection with the consideration of this case.