

Chapter XX.

CONFLICTING CREDENTIALS.

1. Decisions of the House as to prima facie title. Sections 612-627.¹
 2. Principles deduced from Senate decisions. Sections 628-633.
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612. The House has held that credentials regular in form and issued by the proper officers should not be impeached by a certificate issued later by the successors of said officers.—On October 15, 1877,² at the organization of the House, while the Members-elect who had been called on the roll of the Clerk were being sworn in, Mr. Joseph H. Rainey, of South Carolina, was challenged and stood aside. On the succeeding day Mr. Samuel S. Cox, of New York, offered the following:

Resolved, That the question of prima facie as well as the final right of J. S. Richardson and Joseph H. Rainey, contestants, respectively, claiming a seat in this House from the First district of South Carolina, be referred to the Committee of Elections, hereafter to be appointed; and until such committee shall have reported in the premises and the House have decided said question neither of said contestants shall be admitted to a seat.

It appeared from the debate, that Mr. Rainey presented a certificate from the secretary of state of South Carolina, who, under the law of the State, had the function of making out the certificate, regular in form and on the strength of which the Clerk had placed his name on the roll. But Mr. Cox presented a certificate from a subsequent secretary of state impeaching the credentials, especially upon the ground that the board of canvassers had certified the returns in contravention of an order of the supreme court of the State and also on the ground that there had been intimidation in the election. Governor Hampton, of South Carolina, while admitting that he could not with propriety express an official opinion, gave a personal indorsement to the impeachment forwarded by the secretary of state.

It was argued in behalf of Mr. Rainey that he had the prima facie right to the seat and should be seated in accordance with the practice of the House in such cases. On the other hand, it was urged that the cases of Dailey and Morton in.

¹ See also the case of Wimpy and Christy. Section 459 of this volume.

² First session Forty-fifth Congress, Journal, p. 15; Record, pp. 60-64.

1862, of Hoge and Reed in 1869, and Buttz in the preceding Congress, afforded precedents for sending the case to the Committee of Elections.

Finally Mr. Eugene Hale, of Maine, proposed the following substitute:

Resolved, That Joseph H. Rainey be now sworn in as a Representative in Congress from the First district of the State of North Carolina.

This substitute was agreed to—ayes 175, noes 108.

The resolution as amended was then agreed to and the oath was administered to Mr. Rainey.

613. The Shiel v. Thayer case, from Oregon, in the Thirty-seventh Congress.

Of two claimants, each having credentials in apparently due form, the House directed the administration of the oath to the one whom the Clerk had enrolled.

On July 4, 1861,¹ during the swearing in of Members at the organization of the House, Mr. John A. McClernand, of Illinois, submitted the following:

Resolved, That the question of prima facie as well as the final right of George K. Shiel and A. J. Thayer, contestants, respectively, claiming a seat in this House from the State of Oregon, be referred to the Committee on Elections, hereafter to be appointed, and that until said committee shall have reported in the premises and the House decided said question neither of said contestants shall be admitted to a seat.

In the course of the debate it appeared that under the constitution of Oregon the election for Members of Congress was held in June, 1860, and that in that election Mr. Shiel was elected and the proper certificate was issued to him. At the Presidential election of November, 1860, although there was no law authorizing an election of Congressmen at that time, persons in Oregon voluntarily opened polls at certain places and votes were cast for Mr. Thayer, and Mr. Thayer appears to have received a certificate of election in due form. It also appears that on this certificate Mr. Thayer's name was placed on the Clerk's roll.

The House, without division, laid the resolution on the table and the oath was administered to Mr. Thayer.

614. The Clerk having honored credentials from a de facto governor, the House confirmed the prima facie title, although there was a conflicting certificate from an alleged de jure governor.—On December 6, 1875,¹ during the swearing in of Members-elect, Mr. Fernando Wood, of New York, when the State of Louisiana was reached, challenged the right of Mr. Frank Morey, of that State, to take the oath. Mr. Morey's name had been placed on the roll by the Clerk, and he had participated in the election of Speaker. But there was a question as to the governorship of Louisiana, and Mr. Morey held a credential signed by William Pitt Kellogg, who had been recognized by the House as governor of Louisiana, while another credential, signed by John McEnery as governor, had been presented in behalf of Mr. William B. Spencer.

¹ First session Thirty-seventh Congress, Journal, p. 14; Globe, pp. 9, 10.

² First session Forty-fourth Congress, Journal, pp. 11–13; Record, pp. 168–171.

The Clerk¹ of the House, while placing Mr. Morey on the roll, had brought the other credential to the attention of the House.

Mr. Wood presented a preamble reciting the facts in regard to the two credentials and a resolution, which, after being modified at the suggestion of Mr. L. Q. C. Lamar, of Mississippi, was as follows:

Resolved, That the credentials of Frank Morey from the Fifth district of Louisiana be referred to the Committee on Elections, with instructions to report as soon as possible on his prima facie right to a seat on the floor.

It was urged that the fact that the Clerk had brought the two credentials to the attention of the House made it a case where the proper course would be to refer both credentials to the committee to determine the prima facie right. On the other hand, it was contended that Governor Kellogg was indisputably the governor de facto, and that this was sufficient to seat the Member, leaving the question of the de jure governorship to be settled by the committee which should examine into the contest.

The resolution of Mr. Wood was disagreed to, and then, on motion of Mr. James G. Blaine, of Maine,

Ordered, That the oath of office be now administered to Mr. Morey.

615. The Nebraska election case of Morton v. Daily in the Thirty-seventh Congress.

There being two conflicting credentials, the second intended to revoke the first, the House declined to reverse the action of the Clerk in enrolling the bearer of the second credentials.

A refusal of the House to strike a Member-elect's name from the Clerk's roll and a decision to administer the oath to him was held to be a final decision of prima facie right.

The House having passed on the prima facie right declined, pending decision as to final right, to reconsider the action, although examination had shown the credentials to be irregular.

On July 4, 1861,² at the organization of the House, a question arose on a contest over the seat of the Delegate from Nebraska. On motion of Mr. William A. Richardson, of Illinois, the question of administering the oath to Mr. Samuel G. Daily, who was on the roll of the Clerk as Delegate from the Territory, was deferred until after the organization of the House should be completed.

On July 5, the question coming up, Mr. Richardson moved that the name of Mr. Daily be stricken from the Clerk's roll and that the name of Mr. J. Sterling Morton be substituted.

The debate showed that in this case the governor of Nebraska had issued two certificates, the first to Mr. Morton and the second, intended to revoke the first, to Mr. Daily, the change being in consequence of a recount of the votes.

Mr. Richardson's motion was decided in the negative, 57 yeas and 75 nays, and then it was voted to administer the oath to Mr. Daily.

¹ Edward McPherson, of Pennsylvania, Clerk.

² First session Thirty-seventh Congress, Journal, p. 14; Globe, p. 13.

On July 25, 1861,¹ the House discussed a proposition to determine who should be the sitting Delegate from Nebraska pending the decision as to the final right to the seat. At the first of the session the House had admitted Samuel G. Daily to the seat on prima facie right. Mr. J. Sterling Morton petitioned that he be declared the sitting Member, but the Committee on Elections reported that the House had decided the prima facie question, and the House by laying the subject on the table virtually sustained the report.

On April 14, 1862,² the Committee on Elections reported in the case of Morton v. Daily, from the Territory of Nebraska.

At the outset the question as to the final right to the seat was complicated by a question as to prima facie right. In accordance with the findings of the board of canvassers the governor had originally issued the certificate of election to Mr. Morton. But seven months after Mr. Morton's certificate was issued, nearly two months after the term of office of Delegate had commenced, but before the session of the Congress had begun, the governor, without concurrence of the board of canvassers, and without publicity, had issued another certificate to Mr. Daily. It appeared that the seal of the new certificate was irregular, also.

The House at the beginning of the Congress had seated Mr. Daily by virtue of this certificate, and the majority of the committee say:

But the committee were of opinion that they had, in this hearing, nothing to do with the certificates; that the House had considered these certificates in deciding who should be the sitting Delegate pending the contest, and that nothing was left to the committee at this hearing but to go behind all certificates and ascertain who had a majority of the legal votes.

The minority of the committee contended that the second certificate was not only irregular but a forgery, basing their contention on an ex parte affidavit which had not been admitted by the committee as testimony. In the debate on May 6 and 7, 1862,³ this contention was discussed at length, the minority urging that such irregularities and alleged fraud at the outset should taint the title of the sitting Delegate throughout. The majority of the committee, while admitting in the debate that Mr. Daily's certificate was irregular, though not fraudulent, maintained their contention that the House had already passed on the prima facie case, and that it should not be considered in determining the final right.

616. The case of Morton v. Daily, continued.

A reservation being excluded by law from the limits of a Territory, the votes of persons residing thereon and not within the precinct as required by law were rejected by the committee.

The law requiring the voter to reside in the precinct, the votes of such as did not were rejected by the committee.

Because a county was not legally organized and the election was not held on the legal day and nonresidents voted, the entire vote of the county was rejected by the committee.

¹ House Report No. 3, first session Thirty-seventh Congress; Journal, p. 144; Globe, p. 265.

² House Report No. 69, second session Thirty-seventh Congress; 1 Bartlett, p. 402; Rowell's Digest, p. 178.

³ Globe, pp. 1973, 1995.

More illegal votes appearing than the total number cast for one candidate, the excess were deducted by the committee from the other candidate, in the absence of identifying evidence.

On the question of the final right the committee examined allegations and answers relating to several kinds of fraud and irregularity:

(a) In the northern precinct of L'eau-qui-court County there were cast 122 fraudulent votes, in the opinion of the committee. Both by the United States census and by witnesses this seemed proved to the satisfaction of the committee, and these votes, all of which were for the contestant, were rejected. The contestant did not produce the testimony of witnesses from the place itself to show that the votes were legal, but attempted to shake the credibility of witnesses for sitting Member. The minority of the committee concluded that the witnesses of the sitting Member were successfully impeached, especially as one of them made oath against his own record as an election officer, made under oath.

(b) In Monroe precinct the committee deducted 18 votes for contestant and 3 for sitting Member because they were nonresidents or inhabitants of an Indian reservation, which by the law was excluded from the limits of the Territory, and was, moreover, not within the limits of the voting precinct, although the law of the Territory required the voter to be a resident of the precinct.

(c) The poll of Buffalo County, 39 votes for the contestant, was rejected by the committee because the county was not legally organized. Moreover, the poll was held open on the day succeeding the appointed day, and several votes appeared to be cast by nonresidents.

(d) The sitting Delegate objected to the vote of Rulu precinct on the ground that certain voters were not residents of the precinct, as required by law. The committee sustained this objection, saying:

While the committee have been at all times disposed, so far as they can, consistently with the provisions of law, to give effect to the will of the voter, expressed in good faith, they do not see how they can count the vote of a nonresident of a precinct any more than they could a nonresident of the county or Territory. The provision of law that a man must vote in the precinct where he resides seems to the committee to be a wise one to prevent double voting, and they know of no way to enforce that wise provision except to insist upon its observance.

It appears that 24 nonresident whites and 5 half-breed Indians voted at this precinct, but it is uncertain for whom they all voted; but as Mr. Daily received but 9 votes in all at this precinct, 20 of them at least at least must have voted for Mr. Morton. The committee therefore reject that number from the count of Mr. Morton.

(e) The contestant objected to the poll of Falls City, alleging frauds. The majority of the committee felt that the evidence did not sustain this charge.

617. The case of Morton v. Daily, continued.

No legal notice of election at a certain precinct being given, the poll was rejected by the committee although the day of election was fixed by law.

The returns of a county, stating the actual aggregate vote for each candidate, were not rejected by the committee for defect in form.

(f) In the Grand Island precinct of Pawnee County it appeared from the cross-examination of one of Mr. Daily's (sitting Delegate) witnesses—

that no legal notice of this election was given at that precinct, although the vote seems to have been fairly cast; yet the committee deem the notice prescribed by law essential, and do not feel at liberty to say, in the absence of such notice, that all persons had an opportunity to vote. The committee are aware that the time of this election was fixed by law, and that all are presumed to know the law; but in a new country like this, in precincts newly opened and counties sparsely settled, they deem actual notice a safer rule, and therefore reject the 29 votes cast for Mr. Daily at the precinct of Grand Island, in Hall County.

(g) In certain counties the contestant objected to the form of the returns, and the minority of the committee contended in support of this objection. The majority held, however—

Mr. Morton claimed that the votes in the counties of Clay, Dodge, Cass, Hall, Johnston, Lancaster, Nemaha, Pawnee, and Washington, although counted by the board of canvassers, should all be rejected for defect in the form of return. It was not claimed by Mr. Morton that these returns were false in fact, but that the law required that "abstracts" of the vote of each county should be returned to the board of territorial canvassers, when in truth the return from each of the above-named counties was the aggregate of the vote for each of the respective candidates for office in that county. Admitting that Mr. Morton has made the true distinction, and that an aggregate of the votes thus cast for each candidate in any given county is not an abstract of such votes, is it the duty of the committee to reject the votes thus returned for that reason? If there had been no return at all of the votes cast in these counties, it would have been plainly the duty of the committee to have ascertained by other testimony, if possible, the actual vote cast in these counties. Now, as it is not denied that the returns from these counties state the actual aggregate vote cast in those counties, the committee take them as evidence of such votes, and count the votes so returned and counted by the Territorial canvassers.

618. The case of Morton v. Daily, continued.

It not being shown that the law required a record of the qualification of an election officer, the committee declined to assume from absence of the record that he was not qualified.

An affidavit taken without notice to opposing candidate and before the result had been determined was rejected as evidence.

The report of an election committee being laid on the table, the sitting Member retains the seat.

(h) Contestant objected to certain votes in Pawnee County because—

in the fourth precinct, in said county, where said Daily received 13 votes, and this respondent 7 votes, there was no legally constituted election board; those acting as judges were neither sworn nor qualified, as required by law; therefore the votes of said precinct ought to be rejected.

The committee say:

The only evidence in support of this allegation is that of Newcomb (p. 157), from which it appears that while the county commissioners appointed three persons to serve as judges of election in each of the two precincts of Wyoming and Otoe, the returns from each of those precincts were signed by only one of the persons thus appointed, with two other persons associated with him in each case, and that there is no record on file in the clerk's office of the appointment of these two persons at each precinct to act as judges of the election. The committee understand the law of Nebraska to authorize the appointment and qualification of persons to act as judges of election in the absence of those regularly appointed beforehand by the county commissioners. Mr. Morton does not show that these men thus acting were not duly qualified. He only shows that there is no record of such qualification in the county clerk's office, nor has he shown that the law requires any record thereof to be kept there. In the absence

of any certificate of such qualification, it is always a matter of proof by parole whether such judges were qualified or not. The committee do not assume that they were not qualified. The only evidence offered by Mr. Morton in support of his nineteenth allegation was a joint affidavit (p. 113 of the testimony), signed by three persons, Johnson, Wagner, and Barnard, and sworn to on the day of the election, without notice to Mr. Daily, and before the votes were canvassed, or any notice of contest whatever. The committee for this reason rejected this testimony.

(i) Contestant also alleged that Pawnee County was not organized according to law, but failed to satisfy the committee of this in face of the fact that the legislature in 1857–58 had recognized it as a county by making it a representative district.

The above are the essential issues involved in the contest, the committee finding in conclusion a majority of 150 for the sitting Delegate. On May 6 and 7¹ the report was debated at length. On the latter day the whole subject was laid on the table, yeas 64, nays 38,² thus leaving the sitting Delegate in possession of the seat.

619. The election case of Jayne and Todd, from Dakota, in the Thirty-eighth Congress.

In view of the existence of conflicting credentials, the House declined to administer the oath to a person enrolled by the Clerk as a Delegate.

Credentials in due form issued by an officer intrusted by law with that function were held to establish prima facie right against the certificate of another officer showing the actual state of the vote.

A governor empowered by law to issue credentials may certify to his own election to the House.

No law requiring the seal of the Territory to be affixed to credentials of the Delegate, the absence of the seal did not invalidate the credentials.

On December 7, 1863,³ at the organization, during the swearing in of Members and Delegates, Mr. J. B. S. Todd, who was on the Clerk's roll as Delegate from Dakota, was called.

Mr. Owen Lovejoy, of Illinois, demanded the reading of the credentials of Mr. Todd and at the same time presented the credentials of Mr. William Jayne, claiming a seat as Delegate from the same Territory.

Mr. Lovejoy then moved that the credentials of Mr. Todd be referred to the Committee on Elections. This motion was agreed to, and the oath was not administered to Mr. Todd. Mr. Todd had a credential from John Hutchinson, secretary and acting governor, which merely stated the facts to show that Mr. Todd had more votes than his opponent, William Jayne. There was also a certificate from John Hutchinson, as secretary, that he had not issued a certificate of election to anyone, and also a certified copy of a proclamation wherein John Hutchinson, secretary and acting governor, declared that William Jayne received the majority of the votes, and finally a certificate wherein William Jayne, as governor, certified that William Jayne (himself) had been elected Delegate.

¹ Globe, pp. 1973, 1995.

² Journal, p. 653; Globe, pp. 2009, 2010.

³ First session Thirty-eighth Congress, Journal, p. 13; Globe, p. 8.

The Committee on Elections reported on January 13, 1864.¹ The committee first describe the credentials. Those of Mr. Jayne consisted of:

First. A proclamation by John Hutchinson, "secretary and acting governor of the Territory of Dakota," dated November 29, 1862, bearing the seal of the Territory, "that at a general election held on the 1st day of September, 1862, in said Territory, William Jayne received a majority of the votes cast for Delegate to Congress, and was therefore duly elected Delegate to the Thirty-eighth Congress of the United States."

Second. A certificate, signed by himself, "William Jayne, governor of Dakota Territory," dated January 5, 1863, and sealed with the seal of the Territory, certifying the same facts set out in the proclamation of date November 29, 1862, signed by John Hutchinson, secretary and acting governor.

Mr. Jayne was absent from the Territory at the time the proclamation was issued, but returned before the issuing of the certificate.

The credentials of Mr. Todd were:

First. A certificate, signed by "John Hutchinson, secretary and acting governor," dated August 15, 1863, and sealed with the seal of the Territory—

that according to the canvass made by the Territorial canvassers, on the 24th day of October, 1862, of the votes for Delegate to Congress, William Jayne had a majority over J. B. L. Todd of 16 votes; and that subsequent to said canvass returns were made to this office, in due form, of votes from Pembina district, as follows: For J. B. L. Todd, 125; for William Jayne, 19, which said votes were not included in the canvass made by the Territorial canvassers, but are now on file in this office.

Second. Another certificate, signed "John Hutchinson, secretary," dated September 26, 1863, with the seal affixed, certifying—

that I have not issued a certificate of election to any person as Delegate to Congress from this Territory, that there is no record in this office of any having been issued by any person, and that I have no official knowledge of the Territorial seal having been affixed to any such certificate.

The committee, in their investigation, confined themselves entirely to the *prima facie* case, giving no attention to the question of final right.

The report makes the following statement of fact:

The election of Delegate was held, according to law, on the 1st day of September, 1862. The laws of Dakota make it the duty of the secretary of the Territory, if the returns from any county have not been received at his office within forty days after an election, to send a special messenger therefor. No messenger was sent to any county in this case. It is made the duty of the secretary, the chief justice, and the governor "to proceed within fifty days after the election, and sooner, if all the votes be received, to canvass the votes given for Delegate to Congress, and other Territorial officers, and the governor shall grant a certificate of election to the person having the highest number of votes, and shall also issue a proclamation declaring the election of such person. If either of the persons mentioned in this section as canvassers be a candidate for Delegate to Congress, such person shall take no part in the canvass of said votes." By the organic act, in the absence of the governor from the Territory, the secretary shall be acting governor.

On the 24th of October, 1862, the fifty days for the returns to be made having expired, the chief justice and secretary of the Territory, in the absence of the governor, Mr. Jayne, who was one of the candidates, proceeded to canvass the votes for Delegate, and on the 29th of October the secretary of the Territory, as acting governor, the governor being still absent from the Territory, made proclamation of the result, viz, that "William Jayne received a majority of the votes cast for Delegate to Congress, and

¹House Report No. 1.

was therefore duly elected Delegate to the Thirty-eighth Congress of the United States." A certified copy of this proclamation, under the hand of said secretary, acting governor, sealed with the seal of the Territory, Mr. Jayne presents as his credentials.

The law of the Territory also requires a certificate of the same facts to be issued by the governor to the person so declared elected. Mr. Jayne having returned to the Territory before this certificate was issued, all authority of the secretary, as governor, ceased at once; and if the certificate was to be issued at all, it must be issued by Mr. Jayne himself, he alone being governor. He accordingly, on the 5th of January, 1863, certified to the facts found by the canvassers and proclaimed by the acting governor in his absence. This certificate is also presented here, along with the proclamation of the acting governor.

The committee go on to show that here the official connection of the board of canvassers ceased and that the secretary had no authority nine months after the canvass had been made and the result announced to issue the certificate to Mr. Todd. The statement of the secretary that he had issued to no one a certificate of election and had not affixed the seal of the Territory to any certificate was of no effect, as the law did not authorize him to do either.

The committee "find that the credentials of Mr. Jayne are in strict conformity to the laws of the United States and the Territory declaring him, under the seal of the Territory and the signature of both the acting and actual governor of the Territory, to be duly elected Delegate to the Thirty-eighth Congress." Mr. Todd presented no such paper. Mr. Jayne had also presented a later certificate signed by the present governor.

The committee therefore recommended the adoption of the following:

Resolved, That William Jayne, having presented a certificate in due form of law of his election as Delegate from the Territory of Dakota to the Thirty-eighth Congress, is entitled to take the oath of office and occupy a seat in this House as such Delegate without prejudice to the right of J. B. S. Todd, claiming to be duly elected thereto, to prosecute his contest therefor according to the rules and usages of this House.

On January 15¹ the report was discussed in the House. It was urged that the certificate was irregular because issued by Governor Jayne to himself without the document being sealed by the secretary. On the other hand, it was argued that the governor might certify to his own election and that no law required the seal.

The question was taken first on an amendment declaring that neither claimant should be admitted to a seat until the final right should be determined. This was decided in the negative—yeas 66, nays 78. The resolution reported by the committee was then agreed to.²

Mr. Jayne thereupon appeared and took the oath.

620. The South Carolina election cases of Hoge and Reed and Wallace v. Simpson in the Forty-first Congress.

In case of conflicting credentials, one intended to revoke the other, the Clerk enrolled neither claimant.

In 1869 the House ordered that in all election contests wherein either claimant should be unable to take the oath of loyalty, the investigation of claimant's rights should cease pending order of the House.

¹ Globe, pp. 234–238.

² Journal, p. 148; Globe, p. 238.

After careful reconsideration of the principles of a former action, the House declined to honor credentials doubtful as to legal form and intended to revoke credentials correct in form.

Discussion of the right of certifying officers to revoke credentials already issued and issue others.

On March 4, 1869,¹ when the House was organized, the roll of the Clerk was found not to include the names of Representatives from the Third and Fourth districts of South Carolina.

On March 9² the House agreed to the following resolution:

Resolved, That the cases of the claimants to seats in the Forty-first Congress from the Third and Fourth Congressional districts of South Carolina, with all papers relating to the same, be referred to the Committee of Elections, when appointed, with instructions to report as soon as practicable which of the claimants, if either, are entitled to seats.

On March 22, 1869,³ the House agreed to the following:

Resolved, That in all contested-election cases referred to the Committee of Elections in which it shall be alleged by a party to the case, or a Member of the House, that either claimant is unable to take the oath prescribed in the act approved July 2, 1862, entitled "An act to prescribe an oath of office, and for other purposes," it shall be the duty of the committee to ascertain whether such disability exists; and if such disability shall be found to exist the committee shall so report to the House, and shall not further consider the claim of the person so disqualified without the further order of the House; and no compensation will be allowed by the House to any claimant who shall have been ineligible to the office of Representative to Congress at the time of the election, and whose disability shall not have been removed by act of Congress.

In accordance with this resolution, the committee reported⁴ that J. P. Reed, one of the claimants for the seat from the Third district, was unable to take the oath. This disposed of his claim to the seat.

But a question arose as to the prima facie right, and on April 2, after the report as to Mr. Reed's qualification had been presented, the committee reported on the prima facie right.⁵ It appeared that there were two certificates, thus described and discussed by the majority of the committee:⁶

One of these certificates was signed by three persons styling themselves canvassers for said State, and certifies that J. P. Reed was duly elected by a majority of votes in said Third district.

The other certificate was signed by four persons styling themselves canvassers for the State (three of the persons signing this being the same who signed the first-named certificate), and certifies that S. L. Hoge was duly elected by a majority of the legal votes in said Third district.

The phraseology of these certificates is somewhat different. In the certificate given to Reed, it is certified that he is duly elected by a majority of votes, while in the other it is certified that S. L. Hoge is duly elected by a majority of the legal votes of said district. It is evident, as will presently appear, that it was the intention of the canvassers to supersede, by the certificate given to Hoge, the one they had already given to Reed, and this accounts, no doubt, for the difference in the language used.

¹ First session Forty-first Congress, Journal, p. 5.

² Journal, p. 22.

³ Journal, p. 91.

⁴ House Report No. 3.

⁵ House Report No. 6; 2 Bartlett, p. 540; Rowell's Digest, p. 233.

⁶ Report submitted by Mr. John Cessna, of Pennsylvania. The minority views were signed by Messrs. Albert G. Burr, of Illinois, and Samuel J. Randall, of Pennsylvania.

It appears, also, that one of the canvassers (J. L. Neagle) who signed the certificate of Reed, withdrew his signature to said certificate in the following language:

"I therefore desire that the aforesaid certificate be considered as though my name was not attached and this same certificate to have all the force of a certificate of the election of Hon. S. L. Hoge in full force and effect.

"J. L. NEAGLE,

"Comptroller-General, South Carolina."

This withdrawal leaves but two signatures to the certificate of Reed. This, according to the Statutes at Large of the State of South Carolina (vide, sec. 35), invalidates the certificate, three canvassers being required to make a valid certificate. The question then arises, Can the canvassers, after having given one certificate, withdraw their action and give another to a different party? This question was decided in the case of *Morton v. Daily*. (Bartlett's Contested Election Cases, p. 403.)

We think, also, that this decision can be sustained upon principle. The question is entirely within the control of the State canvassers or the governor of the State (as the case may be under the law) until the roll of the House is made up by the Clerk. There is no vested right, under a certificate, that would prevent the canvassers from rectifying any error or mistake that may have occurred in their deliberations or action, until the holder of the same has been awarded his seat by the Clerk of the House.

This principle is illustrated in the case of an attorney in fact; in which case, it is not doubted, the principal can withdraw or annul the power granted at any time before its purpose is executed.

Conceding, as a majority of the committee do, the right of these canvassers to reverse their first action in the premises and give a second certificate to Mr. S. L. Hoge, we do not think it necessary to examine the mass of testimony which seems to have been taken, upon due notice to the opposite party, but we append to this report the reasons given by the State canvassers for their action in this case. (Vide Appendix, marked C.)

The committee therefore recommend the following resolution:

Resolved, That, upon the papers referred to the Committee of Elections in the contested case of *S. L. Hoge v. J. P. Reed* from the Third Congressional district of South Carolina, S. L. Hoge is prima facie entitled to a seat in the House as the Representative of said district, subject to the future action of the House as to the merits of the case.

The minority of the committee dissented, saying at the outset:

although we may not consider his papers in support of his own claim until he shall have been relieved of disabilities, we may and must consider his papers in order to determine whether the papers relied upon by his competitor show upon the face superior title to the seat in dispute.

The minority quote the law of the State constituting the board of canvassers, of which the following is a part:

XXXVII. The board when thus formed shall, upon the certified copies of the statements made by the boards of canvassers, proceed to make a statement of the whole number of votes given at such election for the various offices and each of them voted for, distinguishing the several counties in which they were given. They shall certify such statements to be correct and subscribe the same with their proper names.

XXXVIII. Upon such statements they shall then proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices, or either of them.

The minority present the statement of votes made up by the canvassers in accordance with the law, which gave J. P. Reed 11,774 votes and S. L. Hoge 8,766 votes. To Mr. Reed also was issued the certificate as to the determination reached by the board as to "what persons have been, by the greatest number of votes, duly elected to such offices." This declaration was duly signed by all the State canvassers. To Mr. Reed also was issued the certificate of the governor under the seal of the State, commissioning him as Representative.

As to the claim of Mr. Hoge, the minority say:

The only papers in support of his prima facie claim are, first, a certificate by the board of State canvassers, purporting to have been executed on the same day as that held by Mr. Reed; and second, a separate "statement of the board of State canvassers of South Carolina in the case of the election of J. P. Reed." Let us consider the certificate first. It differs from that held by Mr. Reed only in three particulars and need not therefore be set out here, except so far as the difference is to be considered. Reed's certificate declares him to "have been duly elected by a majority of votes." Hoge's declares him to "have received a majority of legal votes." The next point of difference is that Hoge's paper bears the signature of Daniel H. Chamberlain, attorney-general, in addition to the names of State canvassers signing Reed's; and last, the paper presented by Hoge bears to the left of the official signatures of the canvassers the words "Robert K. Scott, governor of South Carolina."

Before considering the "statement" let us refer to each of these points of difference in the certificates. The requirement of the law of South Carolina (sec. 38) upon the canvassers is, "shall determine and declare what persons have been, by the greatest number of votes, duly elected." Reed's paper says, "have been duly elected by a majority of votes." Hoge's says, "have received a majority of legal votes." In view of the requirements of this section, Reed's paper is a strict compliance with the statute; Hoge's a departure from the text and lack of compliance with its terms. As to the next point of difference in the fact that the attorney-general signs Hoge's paper and not Reed's, either paper is in that regard a compliance with the law (sec. 35), for by it any three of the canvassers constitute a board. And last, as to the name of Governor Scott appearing on the left of Hoge's paper, as no section of the law requires him to execute or attest such a paper, it is of no effect on the one, nor is its lack in any degree significant in the other. These are all the differences on the faces of the papers so far. Hoge presents no commission by the governor, which Reed does. Hoge shows no published certificate of the result in his favor, as required by section 43, while Reed shows strict compliance with that section.

The minority go on to cite facts which they declare prove that Hoge's certificate of election was made long subsequent to the day appearing on its face as the true date, and thus was impeached.

The minority also show that the "statement" of the canvassers (a document declaring widespread intimidation in the district whereby enough voters to have elected Mr. Hoge were deterred from voting) in its opening sentence admitted that the canvassers had "felt compelled to declare upon prima facie evidence" that J. P. Reed had been elected.

Laying stress on the fact that the "statement" bore no date, the minority say:

But, in addition, even if a public officer or a board of officers may annul an official act and, by subsequent determination, move in a different direction, there must of course be a period of time, or a point in the series of acts dependent upon each other, beyond which no such discretionary power could be exercised. As to time, let it be remembered they commenced their work as a board as early as December 1, for that is the date of their first official paper. How long, then, may they continue to act; or, in other words, what is their official term? Section 40 says:

"The board shall have the power to adjourn from day to day, for a term not exceeding five days."

Then, measured by time, all their official acts must be performed within the term of five days. But as to power, regardless of time, we deem the true rule to be that when an official act is in itself completed, and other subsequent official acts of the same or other officer have been based upon such completed act, it may not be retracted.

Therefore the minority hold that as the affair has proceeded as far as the issue of a certificate by the governor, it was too late for the board to recant.

The minority conclude:

But this statement of the canvassers not only does not assert prima facie right in Hoge, but expressly states that he received a minority of the votes, for in it they base Hoge's ultimate right on

Reed's ineligibility. They do not reverse the final decision as to the prima facie case, but admit and affirm it, declaring, however, their view of final rights or merits as follows:

"The board of State canvassers, while not deeming themselves competent to give final judgment upon the question herein involved, do submit that if such disqualification in fact exists, then the election of the said Reed is wholly illegal and void; and that in consequence thereof, S. L. Hoge, who received the next highest number of votes, is lawfully entitled to the seat as Representative of the Third Congressional district aforesaid."

S. L. Hoge, they say, "received the next highest number of votes." Next to whom? J. P. Reed; and "if Reed is disqualified, then his election is illegal and void"; and, in their judgment, as a result "in consequence thereof, S. L. Hoge, who received the next highest number of votes," ought to be admitted. Suppose Reed were not disqualified? Then his election would not be illegal and void, and Hoge would have no claim, prima facie or otherwise, to a seat here. Now, if the House is ready to adopt this theory, that the disqualification of Reed elects Hoge by a majority vote, so let it be. In so doing it will reverse its own decision in the preceding Congresses, admit its error in the case of Brown and ——, from Kentucky, in the last Congress, place majorities in control of minorities,¹ and in advance sanction party intrigue and official misconduct in suppressing the popular will.

For reasons imperfectly given above we dissent from the majority and offer as a substitute for their resolution the following:

Resolved, That J. P. Reed is not entitled, under resolution of March, 1869, to a seat from the Third district of South Carolina, by reason of ineligibility, and that S. L. Hoge is not entitled to such seat, because he was not "by the greatest number of votes duly elected" by the people of that district.

On April 8,² after little debate, the rules were suspended and the resolution of the majority was agreed to—yeas 101, nays 39.

Mr. Hoge thereupon took the oath.

The same state of facts shown in the above case was also developed in the case from the Fourth district of South Carolina, *Wallace v. Simpson*.³ The report, submitted by Mr. Samuel S. Burdett, of Missouri, discussed the principle involved at greater length than in the case of *Hoge v. Reed*. The report says:

The possession of a certificate of election does not give, create, or add to the right of representing a constituency. It is merely evidence of a fact; it does not make the fact. If, in fact, false in its recitals, as one and all of its signers declare the Simpson certificate to be, it can not create by such a false recital a state of case which exists only in recitals. The anticipated objections, that the board of canvassers, exercising ministerial functions only, could have no right to do any act save to count the returns laid before them and certify that count without question, is sufficiently answered by the case of *Butler v. Lehman* (*Contested Cases in Congress*, p. 353), and in the case of *Morton v. Daily*, page 403, in both of which cases the certifying officer did go behind the returns furnished him and declared a different result from that appearing on the face of the returns, and in both cases the House sustained the action of the officer. The last-cited case is also clearly decisive of the question of the right of certifying officers to reverse their action, even after the fact accomplished. In that case the governor of Nebraska had issued his certificate to Morton, and, after the lapse of considerable time, on the discovery of apparent fraud, revoked it and gave a second to Daily, and the House sustained his action by seating Daily.

Nor is such action to be looked on as exceptional, or dependent on the particular circumstances of cited cases. On the contrary, the principle on which this action is based is in itself most wise, nec-

¹This is the wording as printed in the report. The language is susceptible of two meanings; but the intention was evidently to express the idea that majorities would be placed under the control of minorities.

²Journal, pp. 194, 195; Globe, p. 631.

³House Report No. 7; 2 Bartlett, p. 552; Rowell's Digest, p. 235.

essary, and salutary, and the reason is well expressed in the views of the committee in the cue of *Vallandigham, v. Campbell* (Contested Election Cases, p. 230), in the following language:

“Neither the committee nor the House is bound by these rules (the usual rules and principles of evidence) in their letter and strictness, but should proceed upon more liberal principles in the investigation of truth.”—*Et seq.*, and cases cited to page 231.

The objection that justice, clearly demanded by every possible consideration of fair dealing, shall not be done, or shall be delayed, because of the omission, or technical error, or hasty and mistaken action of some intermediate official personage, or because the just end to be reached leads across the line of “*nisi prius*” practice, or precedent, can not stand. That equity might be done, and done in spite of the strict rules of law, courts of chancery were established, that through them righteous conclusions might be reached for the conclusions’ sake. By the Constitution, in all matters pertaining to the election, returns, and qualifications of its Members, the House is made “a law unto itself,” and has no other rule forced upon it for the determination of these questions than the sanction of the oath of its Members, and that due regard for the rights of constituencies which the representatives of constituencies, from the nature of their own duties and relations, must have and feel. Not that the technical rules of the law applicable to evidence and weight of evidence, the duties of officers, etc., may not be called in to aid in the proper investigation of a case, but that when called in they shall not be regarded as greater than the rights to be affected by their application.

The case of *Wallace v. Simpson* on this *prima facie* question was debated fully on January 25,¹ at the next session of Congress. Mr. Samuel J. Randall, of Pennsylvania, alleged that the secretary of state of South Carolina was ready to appear and testify that the certificates to Hoge and Wallace had been issued informally at a date later than the five days’ limit. It was replied that even if this were so the official certificate of the secretary of state to the direct contrary was on file. The report was fully considered in other aspects. The majority had proposed a resolution declaring Mr. Wallace *prima facie* entitled to the seat.

Mr. Randall moved as a substitute therefor the following:

That W. D. Simpson is not entitled, under resolution of March, 1869, to a seat from the Fourth district of South Carolina, by reason of ineligibility; and that A. S. Wallace is not entitled to such seat because he was not “by the greatest number of votes duly elected “by the people of that district.

This substitute amendment was agreed to, yeas 102, nays 73.²

The question recurring on the proposition of the majority as amended by the substitute, Mr. Randall expressed the desire to modify his substitute so that it would bear only upon the *prima facie* case. He said that his proposition as adopted went further than he had intended.

Objection being made to the modification, a motion to lay the whole proposition on the table was then agreed to without division.

Then a resolution was agreed to—ayes 63, noes 46—referring the claims of both Messrs. Simpson and Wallace to a committee to be examined as to the merits of the case.

621. The election cases of Hoge, Reed, and others, continued.

Form of resolution authorizing notice of contest and taking of testimony in case of a claimant whose opponent had been eliminated by reason of disqualifications.

¹ Second session Forty-first Congress, *Globe*, pp. 742–752.

² *Journal*, pp. 201–204.

The candidate having the largest number of votes being notoriously disqualified, the House declined to seat the candidate having the next highest number of votes.

On January 28, 1870,¹ the committee reported that Mr. Simpson was unable to take the oath required by the act of July 2, 1862, and the House discharged the committee from consideration of the case so far as it related to Mr. Simpson.

On February 10² the House, on report from the Committee on Elections, agreed to the following resolution:

Resolved, That in the case of A. S. Wallace *v.* W.D. Simpson, the time for taking testimony be extended for forty days from and after the passage of this resolution. Notice shall be given by either party wishing to take testimony, to the opposite party, according to law, ten days before commencing the same. Either party may examine witnesses before any judge, notary public, or other officer authorized to take depositions under the laws of the United States or of the State of South Carolina, at the city of Columbia. Testimony taken by said Wallace shall be confined to evidence tending to establish his claim to the seat; and testimony taken by said Simpson shall be confined to evidence relating to said claim of said Wallace.

On May 18, 1870,³ the committee having the case in charge—Messrs. John Cessna, of Pennsylvania; Eugene Hale, of Maine; and Samuel J. Randall, of Pennsylvania—submitted the report on the merits of the case. As presented in this report the case divides itself naturally into three branches.

1. The question arose as to whether or not, the candidate having a majority on the face of the returns being disqualified, the candidate being returned with the next highest vote should be seated. Mr. Cessna submitted in the report an argument that the minority candidate should be seated; but it was expressly stated in the debate⁴ that neither Mr. Hale nor Mr. Randall concurred in this view. Also, Mr. Henry L. Dawes, of Massachusetts, protested against including this as one of the grounds, and Mr. Halbert E. Paine, of Wisconsin, chairman of the Committee on Elections concurred in this view. Mr. Albert G. Burr, of Illinois, submitted an elaborate argument to show that Mr. Cessna's view was not sustained even by English precedents."

Mr. Cessna, in his report, admitted that there was no precedent in American history, but contended that the case was unique and that English precedents would justify the view for which he contended. He contended that as a question of public policy his view was abundantly justified, since in this case the disqualification was well known and the electors by their act fell under the English rule of "willful obstinacy and misconduct." Mr. Cessna says:

Was Mr. Simpson, who claims to have received a majority of the votes in this district, ineligible at the time he was voted for; and did those who cast their votes for him know the fact? The third section of the fourteenth amendment to the Constitution of the United States provides that "no person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a Member of Congress or as an officer of the United States, or as a member of any State legis-

¹ Globe, p. 854; Journal, p. 223, House Report No. 17.

² Journal, p. 295.

³ House Report No. 71; 2 Bartlett, p. 731; Rowell's Digest, p. 244.

⁴ Globe, pp. 3863–3866.

lature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof." Mr. Simpson admits, in his answer to the notice of contestant, that he "was a member of the general assembly of South Carolina in the years 1858, 1859, and 1860; that he took the oath as such to support the Constitution of the United States; that he voted for the call of the convention which passed the ordinance of secession; that he entered the Confederate army and served as major and lieutenant-colonel until the close of the year 1863, when he was elected to the Confederate congress, and that he continued a member of said congress until the close of the war; that he has engaged in open war against the United States, and as a member of the confederate Congress he did all he could in an honorable way to advance the cause in which he was engaged."

The electors in this district were, therefore, thoroughly informed of the ineligibility of Mr. Simpson at the time they voted for him. It is perfectly clear that they had actual notice of his ineligibility. But even without the actual notice to individual voters, they are equally bound, under a state of facts such as here presented. They are presumed to have known of the disqualifying article of the Constitution of the United States. They are presumed to have known that he had been a member of the general assembly of South Carolina. They are presumed to have known that he took an oath to support the Constitution of the United States as said member. They are presumed to have known that he was a member of the Confederate congress. These are presumptions of law, and charge these electors with constructive notice.

"When the ineligibility of a candidate arises from his holding or having held a public office, the people within the jurisdiction of such office are held in law to know, and are chargeable with notice of such ineligibility." (Vide Grant on Corporations, p. 109.)

In this instance there was actual as well as constructive notice of the disqualification of Mr. Simpson. All the witnesses that have been examined state that it was well known throughout the district, and the prominence of Mr. Simpson renders it very certain that this was the case. This case is distinguishable from the case of *Smith v. John Young Brown*, in the Fortieth Congress, from the fact that in that case the disqualification was doubtful, and there was no evidence that the electors knew of the disqualification. He had not served in the Confederate army; he had held no office under the constitution of the Confederacy that could charge those who voted for him with constructive notice; neither were the acts of disloyalty alleged against him of a character so notorious as to raise a presumption of knowledge upon the part of the electors of the district.

It is conceded that in cases heretofore decided by the House the doctrine here maintained has not prevailed; but it is confidently believed that in none of them was the notoriety of ineligibility raised, considered, or decided.

622. The election case of Hoge, Reed, and others, continued.

Six of the nine counties of a district being terrorized, the committee, in a sustained report, held that the three peaceful counties, casting less than half the returned vote, should determine the result.

A question as to whether an estimate of persons kept from the polls by a conspiracy to intimidate should have weight in determining the result.

When the House votes to admit a Member and the motion to reconsider is disposed of, the right to be sworn is complete and not to be deferred, even by a motion to adjourn.

An elections committee having reported as to one feature of a contest, the House discharged the committee from further consideration of that portion of the case.

(2) The registered vote of the entire district was 33,147, of which 23,905 votes were cast. The official returns gave 14,098 votes to Simpson and 9,807 to Wallace. The committee present testimony showing widespread and systematic terrorism in

six of the nine counties. Out of the total district vote of 23,905 the six counties returned 14,553, divided as follows: Simpson 9,933, Wallace 4,620. The three peaceful counties returned a total of 9,352, divided as follows: Simpson 4,165, Wallace 5,187.

The committee show by the vote in prior elections that some cause produced the phenomenon of a surprising reduction in the vote of the party to which Mr. Wallace belonged.

The committee say:

But your committee is satisfied that the elections held in these six counties were mere farces, and are entitled to no consideration as the expressed will of the people; that under no precedent or any principle of law or justice could these elections be considered valid. In the case of *Harrison v. Davis* (Contested Election Cases, vol. 2), which is probably the leading case upon the question, it is ruled "that if so many individuals were excluded by violence and intimidations as would, if allowed to vote, have given the contestant the majority, this would have been in law decisive of the case." This doctrine is conceded in the minority report in the recent case of *Hunt v. Sheldon*. But if we had no precedent, the committee would not hesitate to decide that where there was such violence and bloodshed as would intimidate men of ordinary firmness, and where a sufficient number of voters to have changed the result were kept from the polls by reason of this intimidation, it would be as fatal to the poll as if the election board had been controlled by intimidations. In the recent cases acted on by the House, from Louisiana, it was contended that there was no violence used at the polls, and therefore there was no actual obstruction to a fair election. In this instance, according to the evidence, there was a conspiracy to prevent a free election. Mr. Simpson and his friends had organized secret political clubs in all of those counties, with the avowed design of preventing Republicans from voting. They had procured an abundant supply of firearms, and were ready to make any use of them that the success of their purpose required. Their murders and threats before the election had so far done their work that their appearance at the polls fully armed and equipped was sufficient to intimidate Republican voters, both white and black, who had so recently witnessed the outrages practiced by these desperate men. At most of the polls there was violence used just in proportion to the firmness and determination manifested by the Republican voters. In counties where there were but few white Republicans the Ku-Klux, by traversing the counties for several nights before the election, beating the freedmen, shooting into their houses, and leaving coffins at their doors, so completely terrified them that it required but little effort on the day of election to drive them from the polls.

Did this violence and intimidation deter a sufficient number of voters from voting who, if they had voted, would have elected the contestant? We are clearly of opinion that it did. We think, too, that by the evidence it is fully established that a fair election in these six counties would have largely increased the majority for Mr. Wallace in the district.

The committee further say, in view of the fact that the three peaceful counties cast only 9,352 out of the 23,905 votes returned in the district:

It is sometimes urged that in cases where a fair election has been prevented by fraud and violence only in a part of a district the whole election should be set aside and a new one ordered. When a portion of the people of any district, in a peaceable and orderly manner, and in strict compliance with all the forms of law, manifest their will at the ballot box, we can see no good reason why that will should be disregarded on the ground that there were other people in the district who did not choose to obey the law, nor submit to its requirements. It will be conceded that if 30,000 of the voters of this district had decided to stay at home on the election day, and the other 3,000 had gone to the polls and voted, their choice would have been the legal choice of the whole district. And it would have made no difference whether the entire 3,000 persons who voted lived in one county or in two counties, or in the whole nine counties of the district. We can see no difference between such a case and the one now being considered.

No minority views were presented. Mr. Randall said in debate:

I here express my dissent from the conclusions of the majority of the committee, while, at the same time, I am free to say that this is the strongest case of intimidation which, so far as my knowledge extends, has been presented to this Congress.¹

(3) In the report it was further contended that in the six counties a large number of persons who would have supported Mr. Wallace were kept from the polls by intimidation, and that this class would have aggregated in the six counties a total of 5,700 votes, enough to have elected Mr. Wallace without rejecting the entire returns of those counties.

In the debate Mr. Henry L. Dawes, of Massachusetts, said he understood by this class to be meant only—

that persons who have come up to the polls and were ready to vote, who they can determine by evidence had a right to vote, were excluded. Upon that consideration * * * I should not find any fault; but on the broad phraseology of the report it is in opposition to the uniform decisions of this House, coming down from the Michigan case nearly thirty years ago.

Mr. Dawes hoped therefore that this feature of the case would be eliminated and not made a precedent.

The resolution declaring Mr. Wallace “duly elected” and entitled to the seat was agreed to without division;³ but this hardly shows the actual feeling of the House, since the vote was taken very soon after the reading of the Journal when the House was thin. The debate occurred after this vote, and dissatisfaction was expressed with the action, and a protest was made against swearing in Mr. Wallace.

But the Speaker⁴ held:⁵

When the House has voted to admit a Member, the record of the legislative action is not complete until, a motion to reconsider has been made and that motion laid on the table. When the action of the House has thus been consummated, the right of the Member to be sworn in is complete, and it is a right which the Chair is compelled to insist upon against any motion whatever. Under such circumstances the Chair would not entertain even a motion to adjourn.

Mr. Wallace was sworn in.

623. The Louisiana election cases of Sheridan v. Pinchback and Lawrence v. Sypher in the Forty-third Congress.

There being conflicting credentials, issued by different occupants of the gubernatorial chair, the Clerk enrolled neither claimant.

Credentials regular in form, and issued in accordance with law, were honored by the House, although it appeared that the governor issuing them might be merely a de facto officer.

Although apparently satisfied as to prima facie right, the House did not seat an indifferent claimant who had also filed credentials as a Senator-elect.

¹ Globe, p. 3863.

² Globe, p. 3864.

³ Journal, p. 864; Globe, pp. 3862, 3863.

⁴ James G. Blaine, of Maine, Speaker.

⁵ Globe, p. 3863.

The House declined to honor credentials regular in form, but issued in disregard of a State law requiring them to be issued after and not before the canvassing officers had made returns.

In determining prima facie right the House may take cognizance of public statutes, proclamations made by public officials under the law, and matters of history.

A pending single resolution providing for seating several claimants, the Speaker ruled that the vote might be taken separately as to each claimant.

A division being demanded on a resolution for seating several claimants, the oath may be administered to each as soon as his case is decided.

On December 1, 1873,¹ at the organization of the House, the Clerk announced that from the State of Louisiana there were unchallenged certificates only from the Third and Fifth districts, therefore he had enrolled only the members-elect from those districts.

On December 2,² after the House had organized, Mr. Benjamin F. Butler, of Massachusetts, submitted the following:

Resolved, That J. H. Sypher, of the First district, L. A. Sheldon, of the Second district of Louisiana, and P. B. S. Pinchback, a Representative at large of the same State, having the prima facie evidence of right to seats in this House, be admitted to take the oath of office, respectively.

The credentials in all these cases involved substantially the same question. The election had been held on the first Tuesday of November, 1872. The law of Louisiana provided that the returning officers of election should make their returns within ten days, and that "as soon as possible after the expiration of the time of making the returns" a certificate of the returns should be "entered on record by the secretary of state and signed by the governor," and copies be given to the Members elect and also transmitted to the Clerk of the House of Representatives.

A certificate from the secretary of state of Louisiana (presented by the Clerk of the House with the credentials on the day of organization), showed that no record of the election was entered until the 16th of December, and that the record was officially promulgated on the 17th of December.

But before the entry of this record the governor of Louisiana had given certificates like the following:

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
NEW ORLEANS, DECEMBER 4, 1872.

This is to certify that at a general election held in this State on the 4th day of November, A. D. 1872, George A. Sheridan received 64,016 votes, and P. B. S. Pinchback received 54,402 votes.

I therefore hereby declare George A. Sheridan duly elected to represent the State of Louisiana as Congressman at large in the Forty-third Congress of the United States.

Given under my hand and the seal of the State this 4th day of December, A. D. 1872, and of the independence of the United States the ninety-seventh.

H. C. WARMOTH,
Governor of Louisiana.

JACK WARTON,
Secretary of State.

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

²Record, pp. 19-28, 34; Journal, pp. 17, 19, 39.

On December 8, after the above certificate had been issued but before the record of the election was entered, a legislature met, impeached Governor Warmoth and on December 9 suspended him, Lieutenant-Governor Pinchback becoming acting governor.

After this event, the following certificate was issued:

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
NEW ORLEANS, DECEMBER 30, 1872.

Be it known that, at an election begun and held on the 4th day of November, A.D. 1872, for Member of Congress, Pinckney B. S. Pinchback received 68,947 votes, and George A. Sheridan received 58,700 votes.

Now, therefore, I, P. B. S. Pinchback, acting governor of the State of Louisiana, do hereby certify that Pinckney B. S. Pinchback received a majority of the votes cast at said election, is duly and lawfully elected to represent the State at large, State of Louisiana, in the Forty-third Congress of the United States.

Given under my hand and the seal of State this 30th day of December, A.D. 1872, and of the independence of the United States the ninety-seventh.

P. B. S. PINCHBACK.

By the acting governor:

E. B. MENTZ, *Assistant Secretary of State.*

Mr. Butler admitted the priority of the Warmoth certificates and its correctness in form, but insisted that it was impeached by the record as presented. The Pinchback certificate he maintained was also correct in form, and against it no record evidence could be produced.¹

In opposition to this view it was argued² that the Warmoth certificate was prior in time, that it was regular on its face, and in the identical form used in the preceding Congress. If it was proposed to go outside this piece of paper, then it should be noticed that Pinchback's title to the position of lieutenant-governor was questioned; that the impeachment of Warmoth was charged to be illegal; that the returns were in dispute, several returning boards claiming authority; that there had been two legislatures and two State governments, etc.

In support of the Pinchback credentials it was urged that questions as to the authority of the lieutenant-governor, governor de facto, and as to the returns and returning boards, belonged to the merits of the case and not to the prima facie case; but as part of the prima facie case the House had the right to take cognizance of public statutes, proclamations made by public officials under the law, and of matters of history.

The resolution proposed by Mr. Butler coming to a vote, the Speaker³ held that the case of each person mentioned therein might be put separately.

Thereupon the question was taken on the proposition to admit Mr. J. H. Sypher to a seat, and it was agreed to, yeas 167, nays 98.

Also the proposition to admit Mr. Sheldon was agreed to.

The question recurring on the proposition to admit Mr. Pinchback, Mr. Butler, as a question of privilege, presented Messrs. Sypher and Sheldon to be sworn in.

¹ Record, p. 20.

² Especially by Mr. Clarkson N. Potter, of New York; Record, p. 25.

³ James G. Blaine, of Maine, Speaker.

The Speaker said:

The Chair feels it to be his duty at once to administer the oath to the two Members whose prima facie right to their seats has just been declared. They are just as much entitled to vote on any question before the House as any other Member on the floor.

On December 3 the question recurred on admitting Mr. Pinchback to a seat, when, on motion of Mr. Butler, that portion of the proposition was laid on the table. It appeared that Mr. Pinchback did not wish a decision, perhaps because he had also presented credentials as a Senator-elect.

On December 3¹ the credentials of Messrs. Pinchback, Sheridan, Lawrence, and Davidson, all claimants to seats from Louisiana, were referred to the Committee on Elections with instructions to report as early as might be.

624. The election cases of Sheridan, Sypher, and others, continued.

In a case where neither claimant was seated on prima facie showing the House investigated and determined the contest, although one claimant defaulted in answering notice of contest.

Although a State returning board had been declared the legal one by the State supreme court, the House disregarded its canvass, the fact being notorious that it never had possession of the returns.

In determining final right to a seat the House has considered as evidence testimony embodied in a Senate report of the preceding Congress relating generally to the election in question.

The House has authorized a contestant to take ex parte evidence in case an indifferent opponent should neglect to answer notice of contest.

The House, in case there shall be necessity, authorizes a contestant to serve an amended notice of contest.

On May 19, 1874,² Mr. H. Boardman Smith, of New York, presented the report of the majority of the committee in the case of Sheridan *v.* Pinchback.

The report presents an additional certificate issued to Mr. Pinchback by "Wm. P. Kellogg, governor of Louisiana," under date of March 11, 1874, and intended to set at rest doubts that had "arisen as to the validity of the credentials of Hon. P.B.S. Pinchback." This certificate declared Mr. Pinchback "duly elected by a majority of the votes cast."

The two certificates constituted the whole of Mr. Pinchback's case as presented to the committee, excepting a report and an affidavit presented in rebuttal, and not objected to by Mr. Sheridan.

Mr. Sheridan in seasonable time served on Mr. Pinchback a notice of contest, as follows:

NEW ORLEANS, LA., *December 30, 1872.*

Hon. P. B. S. PINCHBACK:

I hereby notify you that I shall contest your claim or right to a seat as Congressman at large from the State of Louisiana to the Forty-third Congress for the following reasons:

First. The board which declared you elected was not a legal board.

Second. It was not in possession of the returns of the election of November, 1872, and could not, therefore, legally declare you elected.

¹Journal, p. 42; Record, p. 49.

²House Report No. 597; Smith, p. 196.

Third. The lawful returns of the election of November, 1872, show my election as Congressman at large by a majority of more than 10,000 votes.

Very respectfully,

GEO. A. SHERIDAN.

To this notice Mr. Pinchback made no answer.

The only testimony presented by Mr. Sheridan consisted of certain testimony taken by the Committee on Privileges and Elections of the United States Senate. A question arose as to the competency of this evidence. The majority of the Committee say:

This volume, which Mr. Sheridan offers in evidence, is Senate Report No. 457, third session Fortysecond Congress.

Neither Mr. Pinchback nor Mr. Sheridan was directly a party to the controversy which was pending in the Senate and in which this investigation was had. Nor was the question as to which of them had been elected Representative at large from the State of Louisiana directly or indirectly before the Senate committee.

Your committee receive the President's message to the last Congress on Louisiana affairs, and the report and accompanying exhibits of the chief supervisors of elections in that State; they also receive this volume of testimony taken by the Senate committee, "for consideration of the nature and degree" of the evidence it contains and "of the subject-matter to which the evidence is to be applied," or, in the phrase of courts, "for what it is worth."

There is not a precinct or parish return in the entire volume, nor is there parol testimony of the vote which either claimant received. Your committee are satisfied, however, that it comprises correct copies of the returns made by the returning boards known as the Lynch and Foreman boards.

In support of this decision the committee cite sections 111, 143, 210, 742, 745, 747-749 of Cushing's Law and Practice of Legislative Assemblies.

The minority views, presented by Mr. L. Q. C. Lamar, of Mississippi, concurs that this was admissible testimony:

The volume from which we have quoted was admitted and considered by the committee as evidence-relating to the rights of the parties in this contest. It is a public document, containing a record of facts and testimony obtained in a proceeding ordered by the Senate, in which Mr. Pinchback was in effect a party, as his seat in the Senate depended upon the result. We consider it not only as admissible evidence, but abundantly sufficient to determine the rights of the parties to this contest.

As applicable to this question, we cite the following authorities:

Mr. Greenleaf, in his work on Evidence, volume 1, section 491, speaking of the admissibility and effect of public documents as instruments of evidence, says:

"To render such documents, when properly authenticated, admissible as evidence, their contents must be pertinent to the issue; it is also necessary that the document be made by the person whose duty it was to make it, and that the matter it contains be such as belonged to his province, or cases within his cognizance and observation. Documents having these requisites are in general admissible to prove, either prima facie or conclusively, the facts they recite."

"Public Statutes," "Public Proclamations," "Legislative Resolutions," "Journals of either House," "Diplomatic Correspondence," "Official Gazette" are mentioned by this author as documents admissible as evidence of the facts which they recite, even in courts of justice; but a broad distinction exists, as is well recognized by the writers upon public law, between the evidence admissible before judicial tribunals and that on which legislative bodies act.

The minority further quote from Lewis's Methods and Reasonings in Politics, especially wherein it is stated that "the process of ascertaining facts for legislative purposes is not, in general, so formal, or subject to such strict rules of evidence as the procedure of executive departments, whether administrative or judicial," etc.

The debate in the House¹ explained more fully than the report the facts out of which the controversy arose. The election law of 1870, under which the election in question was held, provided that the returns from the several counties should be canvassed by the State returning board.

Before the returns of the election in question (that of 1872) had been canvassed there arose factional differences which caused a split in the returning board, one portion of the board acting by itself and being called the Wharton board. The other portion of the board was called the Lynch board. The Lynch board was sustained by the supreme court of the State as the legal board.

There having been intervention by the Federal court (Judge Durell) in support of the Lynch board, Governor Warmouth, on November 20 (after the election had been held on the first Tuesday of the month), signed a new election law passed in the spring of the year and until then not approved. He did this "to escape the clutch of Judge Durell." Under this new law he appointed a returning board called the De Feriet board.

Later, on December 11, the McEnery senate (one of the rival legislative bodies) appointed a returning board called the Foreman board.

Thus there were four returning boards, two of them created under an election law not in force when the election was held.

The supreme court of the State had sustained the Lynch board, and the chairman of the Committee on Elections insisted strongly in debate that the construction given by a local court should be conclusive on the House.

The minority views give an explanation of the situation as follows:

We repeat that it is proven that the election was held in strict conformity with these provisions, and that the governor came into the lawful possession of all the official returns of that election. At this point the contest arose over the question as to who constituted the legal returning board of the State—the one called the Lynch board, or the other, the Warmoth board. Pending that contest, the governor, on the 20th of November, 1872, approved an act passed at the preceding session of the legislature of the State, repealing the act under which the two rival boards were contesting for the returns, and providing "that five persons, to be elected by the senate from all political parties, shall be the returning officers," etc. On the same day he issued a proclamation calling a session of the legislature.

This last-named statute abolished the existing board, and therefore makes it unnecessary here to discuss which of the two was the legal one.

Under the authority vested in him by the constitution of Louisiana to fill vacancies during the vacation of the legislature, the governor proceeded to fill the board provided for by the act approved November 20, 1872, appointing De Feriet and others, known as the "De Feriet board." On the 4th of December the governor submitted the official returns (of which he had retained the custody). That board, on the 4th of December, made the compilation and canvass, declaring McEnery and the candidates on the same ticket elected by 9,000 majority, and declaring, also, who had been elected members of the legislature; which result was proclaimed by the governor and certified to by the secretary of state, in pursuance of the election law of Louisiana.

In consequence of the seizure of the State capitol of Louisiana by a Federal marshal and United States soldiers, in obedience to an order of a Federal district judge, the members and senators returned by the De Feriet board met at the city hall in New Orleans, and on the 9th day of December organized as a legislature, and was so recognized by the governor. On the 11th of December the senate elected a board of returning officers, known as the Foreman board. To this board the official returns were delivered by the secretary of the De Feriet board. This board immediately proceeded to the canvass

¹ See speech of Mr. Smith, chairman of Elections Committee, Appendix of Record, p. 422.

and compilation of these official returns, and made an official report of the result in due form, as required by law. These compiled returns were submitted to the Senate Committee on Privileges and Elections during their investigation into the facts of the election now under consideration. The original returns were also before that committee, and impeached by the parties contesting the results, except a statement by John Ray that in four parishes the names of the commissioners were forged, which fact, if it be a fact, was admitted not to have changed the result.

With the state of facts as thus set forth, the next questions arising relate to the cases of the two claimants.

(1) As to the claim of Mr. Pinchback. The majority of the committee state first that to Mr. Sheridan's notice of contest no answer was made by Mr. Pinchback, and continues:

Is Mr. Pinchback shown entitled upon the merits to this seat?

Your committee think not. Mr. Pinchback's original certificate, it was conceded, and Governor Kellogg's supplemental certificate, it is to be assumed, were issued upon the pretended canvass by the returning board known as the "Lynch board." Assuming that the Lynch board was the legal returning board, and waiving the consideration of the effect of Mr. Pinchback's default in making no response to Mr. Sheridan's notice of contest, your committee are of opinion that the fact that the Lynch board never had possession of the election returns, and therefore never canvassed them, has become a part of the political history of the country. They hold this fact to be so notorious that the House ought to take legislative notice of it in this contest, and may take like notice of it for the purpose of any appropriate legislation. They report, therefore, that upon the case as presented to your committee Mr. Pinchback is not shown to be entitled to a seat in this House.

The minority said in this connection:

According to the sworn admissions of a majority of the men composing this pretended board it is shown that it was never in possession of the lawful returns of the election.

Mr. Webster, in *Luther v. Borden* (7 How. S. C. Rep., p. 30), states briefly the principles of American politics:

"Suffrage is a delegation of political power to some individual. Hence the right must be guarded and protected against force and fraud. Another principle is that the qualification which entitles a man to vote must be prescribed by previous law directing how it is to be exercised; and also that the results must be certified to some central power, so that the vote may tell. We know of no other principle."

To validate an election there must be votes legally deposited by legal voters, and legally counted, and the result legally declared.

In Louisiana there were election laws—there was an election legally held. But in the certification of Mr. Pinchback there was no count of votes by any authority whatever. The legality of the Lynch board is a secondary question, so long as the fact exists that they were entirely without returns. A court legally constituted can not act without a case, without parties, without pleading, without evidence.

The Lynch board have simply appointed a Congressman; not determined who had been legally chosen.

The committee having unanimously reached the conclusion that Mr. Pinchback has not been shown to be elected, the question arises, was his competitor, G. A. Sheridan, elected?

Mr. Sheridan presents a certificate of his election, in due form, signed by Governor Warmoth, and dated December 4, 1872. Though Governor Warmoth was undoubtedly governor of Louisiana at the time, and the legal custodian of the returns, it was admitted in the argument before the committee that the returns had not been counted. This makes it necessary to go behind the certificate of the governor and inquire into the merits of the case as affected by the law and the facts.

(2) As to the claim of Mr. Sheridan.

Mr. Sheridan conceded that when his certificate was issued on December 4 the Congressional vote had not been canvassed by any board whatever. The only

board which returned Mr. Sheridan as elected was the Foreman board, appointed after the election by the McEnery Senate under a law enacted after the election. The majority of the committee thus speak of the Foreman board:

The return by the Foreman board of the Congressional vote was separate from the returns of the vote for other officers.

The inquiry of the Senate committee was directed wholly to the other returns.

There is no proof, and there is no presumption, that the correctness of this return was verified by comparison with the parish returns.

It is uncontroverted that, in violation of the law of Louisiana, which requires them to be opened in presence of the returning board, they were privately opened by Governor Warmoth, or by clerks in his office.

Their whereabouts since that time have not been often known. It is safe to say they have not been in the custody of the law. Some of the returns produced before the Senate committee were forgeries: p. 1095.

What credit they would be entitled to if in evidence need not be discussed, as not one of them was before the committee.

The majority furthermore proceed on questions of fact to impeach the returns of the Foreman board.

The minority, after quoting the return of the Foreman board, say:

We see no sufficient ground for rejecting this conclusion. The original returns are proved to have been received by the governor, proved to have been turned over, partially canvassed and compiled, by the De Feriet board, and proved to have been turned over from them, unaltered, to the Foreman board, which completed the canvass and compilation, and proved and admitted to have been placed in the possession of the committee, and no intimation has ever been hazarded that the official statement, of which the above is a copy, is not correct.

Following out this conclusion, the minority reported resolutions that Mr. Sheridan was entitled to the seat.

The majority did not concur in this view, and concluded their report as follows:

Your committee are now assuming that the Foreman board was the legal returning board; that McEnery, so far as the legal returns show, is the de jure governor of Louisiana, and the McEnery legislature the lawful legislature of that State. They give to the documents and proof, challenging the returns from these parishes, the same consideration, and no other, which they would be compelled to give them if the McEnery government were in office and the legality of the Foreman board unquestioned. They consider the partisan source from which this proof comes and withhold from it their implicit credence. They do not say that the crimes charged by it against the McEnery party are graver or better proven than the crimes charged against the Kellogg party. They perform, in their judgment, a duty imposed upon them by the order referring this case in reporting that these papers give ample warning to the House that the seating of Mr. Sheridan, without further evidence, may possibly cover, and in part consummate, a conspiracy against the liberties of the people of Louisiana, which was a most stupendous crime. They do not feel at liberty to report, upon the evidence before them, that this seat is vacant. The registration, election, and returns were fair and honest, as they believe, in some, if not in a majority, of the parishes of the State. That the political friends of Mr. Pinchback have not before this availed themselves of the opportunity which this contest between candidates on the respective State tickets offered, with process for witnesses and papers, to prove to the country that they carried this election, most seriously challenges the confidence and patience of the public. It is but just to say, however, that the expectation that Mr. Pinchback would be seated in the Senate is, perhaps, the reason that such an effort has not been made.

If this case be remanded for further proof and be fully developed, the result, there is reason to believe, will either demonstrate that the Kellogg government is rightfully in power or will furnish the proof that it is a usurpation.

Your committee recommend the adoption of the accompanying resolutions:

Resolved, That the evidence in this case is not sufficient to establish the right of either P. B. S. Pinchback or George A. Sheridan to a seat in this House as a Representative at large from the State of Louisiana.

Resolved, That Mr. Sheridan have leave to amend his notice of contest, if he shall so elect, serving upon Mr. Pinchback his amended notice within twenty days hereafter; that Mr. Pinchback have liberty to answer such amended notice within forty days hereafter, and that upon the service of such answer the evidence of the respective parties be taken under the existing laws of Congress in such case made and provided; and that in case of default of an answer to such amended notice, Mr. Sheridan be at liberty to take testimony *ex parte*; and in case of default to serve an amended notice of contest, Mr. Pinchback may serve a notice of contest, as provided by law, within forty days hereafter, and take testimony in like manner.

On June 8¹ the report was debated, and on June 9² a vote was taken, first, on an amendment declaring Mr. Pinchback entitled *prima facie* to the seat, and the amendment was disagreed to without division. Then the resolution reported by the minority of the committee declaring Mr. Sheridan duly elected was disagreed to—yeas 72, nays 145.

Then the resolutions reported by the majority were agreed to without division.

625. The cases of Sheridan, Sypher, and others, continued.

The original primary returns being inaccessible because of the contention of rival returning boards, the House gave credit to secondary evidence as to what they showed.

Ex parte proof, while not admitted as competent proof of the facts therein recited, was given weight as raising a suspicion of frauds justifying an investigation.

On February 24, 1875,³ Mr. Horace H. Harrison, of Tennessee, submitted the report of the majority of the committee. Speaking of the resolution under which they acted, the report says that the contestee, Mr. Pinchback, had shown a marked indifference to the contest, and had not attempted to strengthen his original claim that the Lynch board was the valid returning board. Such testimony as he had taken was confined to an attempt to show fraud sufficient in the election to overturn the claim of contestant. The report goes on to argue that the Congressional question was not in its real substance complicated with the controversies over the State government, that the Congressmen were elected under Federal supervision and at regularly conducted polls. The report says:

An election for Congress for the State at large was held under the forms of law and at the time required by law. The returns of the election were made to the governor, who, under the law of that State, was the proper officer to whom the returns were to be made. The election, so far as that of selecting Representatives in Congress was concerned, was conducted, as the proof shows, in the presence and under the supervision of supervisors appointed under the act of Congress. These returns of the election, in the hands or in custody of the governor, were placed in the possession of a returning board, and in the unfortunate conflict which took place as to who constituted the legal returning boards authorized by law to canvass the returns and promulgate the result they passed into the hands of several different returning boards, and are now said to be in the possession of John McEnery, claiming to be governor of Louisiana. If there had been no contest as to what returning board should have canvassed the

¹ Record, p. 4694.

² Journal, pp. 1139, 1141; Record, pp. 4733–4734.

³ Second session Forty-third Congress, House Report No. 263; Smith, p. 322; Rowell's Digest, p. 293.

returns and decided the result, and the returns were before the committee, these returns would constitute the best, the highest evidence of what these returns show, and of the fact of who was elected. These returns, however, not being before the committee, and the contestant in this case having used all due diligence to have them produced, and failing, we think he is entitled to secondary evidence of what these returns show.

There can be no doubt that the original returns of the election of 1872 were in possession of and canvassed by the board known as "the Forman board."

Assuming that the original "primary returns" made to the governor from all the parishes of the State but two were received by him, opened by him in the presence of the Wharton board, delivered by him to the De Ferriet board, and transmitted to the Forman board just as they had been received (and these facts the additional proof shows), we are to look to what these returns show. They show that contestant Sheridan received 65,016 votes and contestee Pinchback 54,402 votes.

As to the correctness of this tabulation we have the sworn testimony of Mitchell, Forman, and Thomas, a majority of the board; and, in addition to this, the admission of the contestee (p. 3 of additional testimony) that it is a compilation of the returns before the Forman board is conclusive.

They show a majority of 10,614 for contestant. The contestee, however, objects to this compilation of the Forman board, first, because six parishes were omitted in the compilation, and, secondly, because of alleged frauds in connection with the election throughout the State, including frauds in the city of New Orleans.

While Mr. Pinchback offers no evidence to show that the six parishes were illegally excluded from the count, still if they were illegally excluded it could not affect the result.

As to the contention that the election was rendered of no avail by reason of fraud, the majority conclude that the proof does not sustain it. The report says:

The affidavits of these parties, taken ex parte, were filed by contestee before the adoption of the resolution by the House at last session, and with the design of impeaching the correctness of the action of the Forman board. They were not received by the committee as competent or conclusive proof of the facts therein recited or the statements therein made, but only as raising a suspicion of fraud, and suggesting the propriety of an investigation * * * before a final determination.

The minority say in their views, submitted by Mr. Smith, of New York:

We would not consider their ex parte affidavits for the benefit of Mr. Pinchback. He should have examined the witnesses upon the stand. The committee said of this evidence in their former report: "It is of such a character, in the judgment of your committee, as to demand a most thorough investigation of its truth or falsity before Mr. Sheridan is seated;" and that "these papers give ample warning to the House that the seating of Mr. Sheridan, without further evidence, may possibly cover, and in part consummate, a conspiracy against the liberties of the people of Louisiana, which was a most stupendous crime."

While the committee would not consider ex parte testimony for the purpose of seating Mr. Pinchback, they can not shut their eyes to it, and to the 1,100 manuscript pages of official reports on file with the Clerk, the President's message, and the Senate testimony, for the purpose of seating Mr. Sheridan, especially after the action of the House in remanding this case, that this matter might be cleared up.

On the question of the alleged frauds the committee divided. The majority concluded:

The Congressional vote, under the supervision of United States supervisors, was at least counted fairly.

The committee have decided unanimously that the contestee, Pinchback, was not elected. The report of the majority of the committee at the last session, prepared by the chairman of the committee, on the point as to the election being a fair one, is as follows:

"They do not feel at liberty to report, upon the evidence before them, that this seat is vacant. The registration, election, and returns were fair and honest, as they believe, in some, if not in a majority, of the parishes of the State."

There is certainly nothing in the additional testimony taken in this case showing that the seat is or should be vacant, and nothing additional challenging the fairness of the election.

We therefore recommend the adoption of the following resolutions:

1. *Resolved*, That P. B. S. Pinchback was not elected a Member of Congress from the State of Louisiana from the State at large in the Forty-third Congress.
2. *Resolved*, That George A. Sheridan was duly elected a Member of Congress (for the State at large) from the State of Louisiana in the Forty-third Congress and is entitled to his seat.

The minority recommended a resolution declaring the seat vacant.

On March 3¹ the first resolution of the majority was agreed to without division or debate. The second resolution, to seat Mr. Sheridan, was agreed to—ayes 121, noes 29.

Mr. Sheridan was then sworn in.²

626. The cases of Sheridan, Sypher, and others, continued.

Forms of resolution for instituting a contest after expiration of the time fixed by law.

The abolition of certain polling places whereby it was rendered impossible for many voters to cast their ballots was held not to justify the addition of votes to the returns of the candidate injured thereby.

On December 8, 1873,³ the following resolution, reported from the Committee on Elections, was agreed to:

Resolved, That Effingham Lawrence and E. C. Davidson, from the First and Fourth Congressional districts of Louisiana, respectively, be permitted to serve upon J. Hale Sypher and George L. Smith, who are sitting Members of the same districts, respectively, notices of contest within twenty days from the passage of this resolution, and that the said sitting Members be permitted to answer the same within twenty days after the service thereof.

Resolved, That the time for the taking of testimony in each of said contested election cases is hereby extended for ninety days from the time the answer is allowed to be filed to the notice of contest.

Also, on January 13, 1874,⁴ the following was agreed to:

Resolved, That J. Hale Sypher, the sitting Member from, etc., * * * be, and he is hereby, permitted to file his answer to the notice of contest served on him by, etc., * * * within the time allowed by the resolution of the House for answer; and that such filing shall be deemed a full compliance with the law governing such matters; a copy of said answer to be forwarded by the Clerk at once to the contestant by mail.

On February 27, 1875,⁵ Mr. James B. Robinson, of Ohio, submitted the report of the majority of the committee. The facts as to credentials and returns in this case were the same as in that of Sheridan *v.* Pinchback, and the report is predicated on the result of the canvass by the Forman board. The report finds on the face of the corrected returns a majority of 1,947 votes for Mr. Lawrence, the contestant. The sitting Member contended that frauds sufficient were shown to overcome this majority. As to this question of fraud, two questions appear:

- (1) The question of abolition of polling places for fraudulent purposes.

¹Journal, pp. 636, 637; Record, p. 2232.

²Mr. Pinchback was also seeking a seat in the Senate at the same time.

³Journal, p. 83.

⁴Journal, p. 231.

⁵Second session Forty-third Congress, House Report No. 269; Smith, p. 340; Rowell's Digest, p. 300.

The majority say:

The principal ground on which the claim is based is the fact that in Plaquemines Parish the first, second, and third ward voting places were abolished for that election, by means of which a large Republican voting population was left in the upper part of that parish from 25 to 35 miles from the nearest polls. The committee characterize the abolition of these voting places as an outrage, for which there should be some relief. They, however, find that Mr. Lawrence was not a party to this wrong, and, so far as he was able, he caused restitution by tendering to all voters, irrespective of party, the free use of his steamboat, which went down from Orleans and stopped at the several landings and took voters to the polls down the river.

The committee are unable to estimate the number who failed on that account to vote, but think from the evidence, that it could not have exceeded about 350 votes altogether. The Republican vote in that parish was 1,040 in 1872. In 1874 it was 1,417, or 377 increase. As that parish was quiet, the probability is the vote of 1874 would be a fair test, but the vote for Lawrence was also increased several hundred over 1872.

The committee, however, are not able to find any principle of law on which votes could be added for that parish, even granting votes were lost to Mr. Sypher by reason of the failure to establish proper voting places, unless the provisions of the enforcement act were strictly followed, which no one claims was done.

The minority views, presented by Mr. Gerry W. Hazelton, of Wisconsin, say:

As an illustration in point, the parish of Plaquemines, in the south part of the district, is about 130 miles in length, and has always, since 1868, polled a large majority of Republican votes. The bulk of the colored population is in the north portion of the parish. In order to prevent the colored voters from participating in the election, the Democratic managers, immediately prior to the election, changed the polling places of the parish and took up or discontinued those in the portion of the parish where the colored voters resided, so that on the west side of the river no polling place was established for 47 miles from the north boundary of the parish, and on the east side for 38 miles. A more high handed and flagrant attempt to prevent the colored voters, who were known to be Republican, from participating in the election, can not be conceived. It was a wicked and shameless scheme on the part of the contestant's friends to defeat rather than to secure a fair election. It was a base prostitution of the powers emanating from the executive, wielded by or under the dictation of Democratic leaders, to consummate a dishonest and dishonorable purpose. Under the law of Louisiana the registrar, who is appointed and may be removed by the governor of the State, fixes the polling places in his parish, and may determine their number and location according to his own wishes or interests, without consulting the convenience of the voters at all.

This power was exercised in the parish of Plaquemines in such manner as to require colored voters to go as far as from Alexandria and Washington to Baltimore to vote; and to emphasize the outrage the arrangements were consummated so clandestinely that the mass of colored voters knew nothing of the discontinuance of the polling places theretofore established until the very day of the election.

(2) As to other points in the district there was a large amount of evidence of fraud, but the majority of the committee did not conceive it sufficiently shown to be sufficient to overcome Mr. Lawrence's returned majority. Therefore they reported the following:

Resolved, That J. Hale Sypher was not elected a Member of the Forty-third Congress from the First district of Louisiana.

Resolved, That Effingham Lawrence was duly elected a Member of the Forty-third Congress for the First district of Louisiana, and he is entitled to his seat.

The minority say:

Taking this evidence to be substantially true, we submit that it shows this so-called election to have been merely a wicked conspiracy to prevent an election; for there is no just sense in which that which is alleged to have transpired in this district in 1872 can be called an election.

The undersigned can not consent to enter upon the task of framing devices and spelling out methods for affirming the right of a party to a seat in the House of Representatives from the materials here supplied. We can not do it without making ourselves parties to these frauds, and encouraging their repetition.

The testimony shows gross irregularities on the part of the partisans of the contestee, which we are as far from indorsing as those on the other side. They do not seem to have been so general and systematic, and it may be claimed for them, perhaps, that they were resorted to for the purpose of counteracting the schemes and machinations of the contestant's friends, in whose hands all the machinery of the election was placed.

We are not disposed, in the light of all the evidence, to weigh one claim against the other. We think both are so tainted, so mixed with fraud, and so involved in uncertainty, that it is safer and better to refuse to affirm either.

The precedents heretofore established authorize this decision, and we think the case amply justifies us in adopting it.

We therefore recommend the adoption of the following resolution:

Resolved, That neither Effingham Lawrence nor J. Hale Sypher has shown himself entitled to a seat in the Forty-third Congress.

On March 3,¹ the report was debated briefly in the House, and then the question was taken on the proposition of the minority declaring the seat vacant. This was disagreed to—yeas 86, nays 144.

The first resolution of the majority was adopted without division, and then the second resolution was agreed to—yeas 135, nays 86.

Mr. Lawrence then appeared and took the oath.

627. The Rhode Island election case of Asher Robbins, in the Senate, in the Twenty-third Congress.

Conflicting credentials, each regular in form, being presented in the Senate at different times, those first issued and first presented were honored after the circumstances had been examined.

On December 2, 1833,² at the opening of the session of the Senate, a question was raised as to the swearing in of Mr. Asher Robbins, from the State of Rhode Island.

On January 19, 1833, in the time and manner fixed for the choice of an United States Senator, the legislature of Rhode Island had chosen Mr. Robbins. And on January 28 the governor had issued his certificate in due form to Mr. Robbins. On February 4, 1833, this certificate was presented in the United States Senate, read and entered on the Journal.

But in October, 1833, before Mr. Robbins had qualified and taken the seat, the Rhode Island legislature, meeting in a new session, adopted a declaration or act that the election of Mr. Robbins was "null and void and of no effect," and the office vacated. Thereupon, on November 1, 1833, the legislature elected Elisha R. Potter, and on the 5th of the month the governor (not the same incumbent who had issued the certificate to Mr. Robbins) issued his certificate to Mr. Potter.

These two certificates came before the Senate on December 2, and a question arose as to the prima facie right to the seat.

¹ Journal, p. 637-639; Record, pp. 2234-2235.

² First session Twenty-third Congress, Contested Elections in Congress, from 1789 to 1834, p. 877.

It was urged that neither should be sworn in until the final right to the seat was decided. But on the other hand, the argument was made that the State was entitled to the representation.

In behalf of Mr. Robbins it was urged that had the Senate been convened any time between March 4 and October, he would have been indisputably entitled to the seat. In electing him the State exercised her function of choosing a Senator, and might not again exercise it until the constitutional period should come again.

Mr. George Poindexter, of Mississippi, moved that Mr. Robbins do take the customary oath.

Mr. William R. King, of Alabama, favored the reference of the question to the Committee on Elections, to determine which should be sworn.

Mr. Henry Clay, of Kentucky, argued that the State was entitled to immediate representation, and that, as Mr. Robbins appeared to have been regularly elected and certified, and bore credentials issued prior to the credentials of Mr. Potter, he should have the seat on *prima facie* right.

Mr. Thomas H. Benton, of Missouri, declared that he had little regard for precedents; he considered them the bane of this country and England. The Senate should have more information before acting, and he moved reference of the question to a select committee.

After somewhat extended debate, this motion was disagreed to; ayes 15, noes 19.

Then Mr. Poindexter's motion was agreed to, and Mr. Robbins took the oath.

The report of the select committee appointed to investigate the case on its merits, reported the following state of facts, which appear to have been understood to some extent, at least, when the debate was held on the *prima facie* right:

The select committee to which was referred the credentials of Asher Robbins, chosen a Senator in Congress from the State of Rhode Island for the term of six years, to commence on the 4th day of March, 1833; and also the proceedings of the legislature of said State, convened on the last Monday of October, 1833, declaring the election of the said Asher Robbins void, who thereupon proceeded to elect Elisha R. Potter a Senator in Congress for six years, to commence on the 4th day of March, 1833, instead of said Asher Robbins, whose election to fill said office had been declared void as aforesaid, have had the whole subject so referred to them under their serious and attentive consideration, and submit the following report:

That it appears by the credentials of Asher Robbins and the proceedings of the general assembly of the State of Rhode Island hereto appended, and marked "A," that the senate and house of representatives of said State, then sitting in the city of Providence, met in grand committee in conformity to the usage of the legislature in such cases, for the purpose of choosing a Senator to represent said State in the Congress of the United States; and that, on counting the ballots, it appeared that Mr. Robbins was elected by a majority of four votes, who was thereupon declared to be duly elected a Senator to represent said State in the Congress of the United States for six years from and after the 4th day of March then next following; that, having performed the duty for which the two houses had met, the grand committee was dissolved, and the members of each house repaired to their respective chambers. It further appears to your committee that on the 28th day of the same month of January His Excellency Lemuel H. Arnold, governor of the State of Rhode Island, by commission in due form, bearing his signature, under the great seal of the State, did proclaim and make known the election of the said Asher Robbins as aforesaid, and caused the said commission, signed and sealed as aforesaid, to be delivered to the said Asher Robbins, which was presented to the Senate of the United States in open session on the 4th day of February, 1833, and on motion read and entered on the journals of the Senate. By virtue of the force and effect of the aforesaid commission, the said Asher Robbins, Senator-elect from the State of Rhode Island, appeared in the Senate Chamber on the 2d day of December, 1833, was duly sworn to support the Constitution of the United States, and took his seat as a member of the Senate.

It further appears to your committee that at a subsequent session of the general assembly of Rhode Island, begun and held at the town of South Kingston in said State, on the last Monday of October, 1833, certain proceedings were had relative to the election of the said Asher Robbins as above mentioned, which resulted in the adoption of a declaration or act of the said general assembly, by which the election of Mr. Robbins is declared to be "null and void and of no effect," and the office vacated. Whereupon, at the same session of the general assembly the two houses met in grand committee on the 1st day of November, 1833, and proceeded to elect a Senator to represent the State of Rhode Island in the Congress of the United States for the term of six years, commencing on the 4th day of March preceding, to supply the vacancy created, or supposed to be created, by the act declaring the election of Mr. Robbins null and void; and the majority appearing to be in favor of Elisha R. Potter, the said Potter was thereupon declared to be duly elected a Senator in Congress from the said State for the term aforesaid, when the grand committee was dissolved and the members repaired to their respective chambers. That on the 5th day of the same month of November His Excellency John Brown Francis, governor of the State of Rhode Island, by commission in due form, bearing his signature, under the great seal of the State, did proclaim and make known the election of the said Elisha R. Potter as aforesaid, and cause the said commission, signed and sealed as aforesaid, to be delivered to the said Elisha R. Potter, which was presented to the Senate on the 2d day of December last, and on the 5th day of the same month referred to this committee.

The case was considered fully on its merits, and after an examination of the status of the legislatures of Rhode Island, the Senate, by a vote of yeas 27, nays 16, agreed to the following:

Resolved, That Asher Robbins, being duly and constitutionally chosen a Senator in Congress from the State of Rhode Island, is entitled to his seat in the Senate."¹

628. The Senate election case of Corbin v. Butler, from South Carolina, in the Forty-fifth Congress.

Before its committee had reported on conflicting credentials, the Senate took one set of credentials from the committee and seated a claimant whose prima facie and final right and personal conduct were assailed.

On February 13, 1877,² in the Senate, Mr. John J. Patterson, of South Carolina, presented the credentials of David T. Corbin as Senator from South Carolina for the term of six years commencing March 4, 1877. On March 2³ Mr. Matt W. Ransom, of North Carolina, presented the credentials of M. C. Butler, certified by Wade Hampton, as governor of South Carolina, to have been elected for the term commencing March 4, 1877.

On March 7, 1877,⁴ on motion of Mr. Patterson, the credentials of Messrs. Corbin and Butler were referred to the Committee on Privileges and Elections.

On November 20,⁵ at the regular session, Mr. Allen G. Thurman, of Ohio, submitted for consideration:

Resolved, That the Committee on Privileges and Elections be discharged from the further consideration of the credentials of M. C. Butler, of South Carolina.

This resolution was debated at length on November 21, 22, and 26. Most of this debate was as to the expediency of discharging the committee, and as to the

¹ Senate Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress.

² Second session Forty-fourth Congress, Record, p. 1507.

³ Record, p. 2069.

⁴ Special session of the Senate, Forty-fifth Congress, Record, pp. 23, 24.

⁵ First session Forty-fifth Congress, Record, p. 556.

reasons why a report had not been made on this case. It appeared that the Louisiana case was before the committee and was receiving prior consideration. It was urged¹ on behalf of the committee that there was in this case a question which of two rival South Carolina legislatures was entitled to recognition, and that time must be given the committee to make the proper examination. On the other hand, it was argued² that the briefs of the contestants substantially furnished all the facts needed by the Senate to decide the case without action by the committee.

On November 26,³ Mr. George F. Edmunds, of Vermont, called attention to a charge that the Senator from South Carolina, Mr. Patterson, had been coerced by threats that he would be confined in the penitentiary of South Carolina, to cooperate with those desiring to seat Mr. Butler. Mr. Edmunds thereupon proposed this amendment:

By striking out all after the word "resolved" and in lieu thereof inserting:

"That the Committee on Privileges and Elections be, and hereby is, instructed to inquire forthwith, and report as soon as may be, whether any threats, promises, or arrangements respecting existing or contemplated accusations or criminal prosecutions against any Senator, or any other corrupt or otherwise unlawful means or influences have been in any manner used or put in operation, directly or indirectly, by M. C. Butler, one of the claimants to a seat in the Senate from the State of South Carolina, or by any other Senator or other person, for the purpose of influencing the vote of any Senator on the question of discharging said committee from the consideration of said M. C. Butler's credentials or on the other question at the present session of the Senate; and that said committee have power to send for persons and papers, and to sit during the sittings of the Senate."

After debate, this resolution was decided in the negative, yeas 27, nays 30.

On this day also there was debate as to the merits of the case, and the facts relied on by the two contestants were put quite fully before the Senate, especially as to the alleged intimidation of voters in two counties, which had resulted in the exclusion of the representatives of those counties from one of the rival legislatures.

Mr. Samuel J. R. McMillan, of Minnesota, urged⁴ that the Senate did not know at this time whether or not there were any issues of fact not settled between the parties to the contest. Therefore he moved to strike out of the pending resolution all after the word "resolved" and insert—

That the Committee on Privileges and Elections be instructed to examine and report what questions of fact, if any, in the Corbin-Butler case are not settled by the admissions of the claimants to the seat now vacant from the State of South Carolina.

This amendment was debated somewhat, and while it was pending the brief of Mr. Corbin, giving a view of the issues in the case, was read. The amendment was disagreed to, yeas 24, nays, 28.

Next there was debate which involved the so-called "Hamburgh massacre," and certain testimony was read tending to show the active participation of one of the contestants (Mr. Butler) in that affair, and it was claimed that the so-called "massacre" was one of the means by which Mr. Butler secured the title to the seat which he now presented to the attention of the Senate. It was urged in behalf of Mr. Butler that the testimony relied on to prove Mr. Butler's participation in the Hamburgh affair was *ex parte* and unreliable, and that its presentation in this case was

¹ Record, p. 572.

² Record, p. 576.

³ Record, pp. 645-648.

⁴ Record, pp. 653-662.

unjust. It was argued, on the other hand, by Mr. Roscoe Conkling, of New York, that this testimony tending to raise a question as to whether Mr. Butler had not actually participated in bringing about the alleged terrorism by which his election was apparently secured, and showed that a committee ought to pass on this question of fact before the Senate should act.

The debate¹ on this point was interspersed with dilatory proceedings incident to a session which lasted all night and consumed twenty-eight consecutive hours. The resolution to discharge the committee was finally agreed to,² yeas 29, nays 27.

The credentials of Mr. Butler were then before the Senate, which adjourned at this point.

On November 28³ the Senate proceeded to the consideration of a resolution to seat William P. Kellogg as Senator from Louisiana.

Mr. Thurman moved to substitute therefor:

That M. C. Butler be now sworn in as a Senator from the State of South Carolina.

This amendment was rejected, yeas 30, nays 31.

On November 30,⁴ after the Senate had determined to admit to a seat Mr. William Pitt Kellogg, of Louisiana, Mr. Thurman moved that M. C. Butler, of South Carolina, be sworn in as a Senator from that State. This motion was agreed to, yeas 29, nays 28.

Thereupon the oath was administered to both Mr. Kellogg and Mr. Butler. The votes on the two cases were taken after an agreement by unanimous consent that the one should follow the other.

629. The case of Corbin v. Butler, continued.

Instance of a contest inaugurated in the Senate by petition, and form of petition.

The majority of the Senate committee contended that the doctrine of res adjudicata did not apply to a decision incident to the credentials and made without full and formal examination of the merits.

At the next session of Congress, on December 13, 1877;⁵ Mr. Angus Cameron, of Wisconsin, presented the following petition, which later was referred to the Committee on Privileges and Elections:

To the honorable Senate of the United States:

Your petitioner, David T. Corbin, of the State of South Carolina, shows to your honorable body that he was, on the 12th day of December, A. D. 1876, duly and lawfully elected by the legislature of the State of South Carolina to the office of United States Senator from that State for the term of six years commencing the 4th day of March, A. D. 1877.

That in said election all the provisions of the Constitution and laws of the United States were complied with, and your petitioner was regularly and duly declared elected by the legislature of said State, and duly commissioned accordingly by the governor of said State.

And your petitioner further shows that his credentials were presented to your honorable body before the close of the last regular session, and at the commencement of the extra session in March last said credentials, together with the credentials of M. C. Butler (who claimed to have been elected also Senator from South Carolina), were referred to the Committee on Privileges and Elections of your honorable body.

¹ Record, pp. 663–712.

² Record, p. 712.

³ Record, p. 730.

⁴ Record, pp. 797, 798.

⁵ Second session Forty-fifth Congress, Record, p. 166.

And your petitioner shows, on information and belief, that his said credentials have, since said reference of them to said committee, remained in the possession of said committee, and that no action has been taken thereon, either by said committee or the Senate.

And your petitioner now prays that your honorable body will, in justice to your petitioner, and in justice to the legislature of the State of South Carolina that elected and the governor that commissioned him, inquire into, hear, and determine on their merits the claim and right of your petitioner to a seat in your honorable body as Senator from the State of South Carolina.

All of which is respectfully submitted.

DAVID T. CORBIN.

On February 4, 1879,¹ Mr. Cameron presented the report of the committee, which was concurred in by Messrs. Bainbridge Wadleigh, of New Hampshire; John H. Mitchell, of Oregon; S. J. R. McMillan, of Minnesota; George F. Hoar, of Massachusetts, and John J. Ingalls, of Kansas.

Several questions are discussed in this report.

(1) As to the doctrine of *res adjudicata* as applied to the case, the report says:

On the 26th day of March, 1878, this petition was referred to this committee. At the very outset of the committee's examination of Mr. Corbin's claim they were met with a plea to their jurisdiction, submitted by the counsel of Mr. M. C. Butler, as follows:

"The sitting Member respectfully submits that the Committee on Privileges and Elections can not entertain jurisdiction of the contestant's claim to the seat of a Senator from the State of South Carolina in the Congress of the United States. He bases his denial of the right of the committee to take jurisdiction of the case upon the following grounds:

"1. In the adjudication of a contested election case, under that clause of the Constitution which makes each House 'the judge of the elections, returns, and qualifications of its own Members,' the Senate act as a judicial tribunal. And the general principle that every question in issue settled by the final judgment of a judicial tribunal becomes *res adjudicata* as between the parties thereto applies to judgments of the Senate in contested election cases.

"2. The contestant's petition, referred to the committee March 26, 1878, suggests no question which was not adjudicated by the Senate in the determination of this cause at the first session of the Forty-fifth Congress; nor was any question involved in the contestant's case as presented to the committee or to the Senate at that session which was not adjudicated in that determination.

"3. Inasmuch as the Senate has no set forms for its judicial decisions, the nature and scope of an adjudication will be determined, not by the mere form of the judgment, but by the whole record of the case.

"4. When the Senate adjudicates a contested election case upon its merits the jurisdiction of the committee over the case *ipso facto* terminates, whatever formalities may or may not attend the termination of such jurisdiction.

"5. Judicial tribunals of last resort will not rehear a cause after final judgment, on the application of a party, but only on a motion to reconsider made by a member of the tribunal who concurred in the decision; nor even in such a case after the expiration of the term at which the judgment is rendered. And this principle applies to decisions made by the Senate in contested election cases."

An elaborate discussion of the proposition stated in this plea to the jurisdiction is not necessary, as while expressing no opinion on their general soundness, the committee overruled the plea on the ground that the same is not supported by the facts in the case. The claim or right of Mr. Corbin to a seat in the Senate as Senator from the State of South Carolina is not *res adjudicata*, because in point of fact it has not been passed upon and adjudicated by the Senate.

To ascertain what has and what has not been determined in any given case, reference must be had to the record of the proceedings taken therein.

If the record shows the controversy between the parties determined upon a consideration of the merits, then that determination binds the parties and their privies, and precludes further inquiry.

¹Senate Report No. 707.

The facts above stated, from the records of the Senate in regard to Mr. Corbin's case, show that his credentials were referred to this committee of the Senate, and that no action of the Senate has been had to withdraw them from the committee. And the fact is that the credentials have been with the committee to the present time by the direct action of the Senate. No case has in any form been made up between Mr. Corbin and Mr. Butler and submitted to the Senate to be passed upon, and no case, as between them, has been passed upon by the Senate.

Mr. Thurman's resolution, that the Committee on Privileges and Elections be discharged from the further consideration of the credentials of M. C. Butler, of South Carolina, meant precisely what it said. Its language is too clear to be misunderstood. It indicates a mere purpose on the part of the mover to dispense with the further service of the Committee on Privileges and Elections in the consideration of Mr. Butler's credentials.

After reviewing the circumstances of the discharge of the committee the report proceeds:

But whatever individual Senators said in the course of the discussion, the action of the Senate is to be looked to finally to ascertain what was determined. When the resolution was adopted its effect was simply to bring before the Senate the credentials of M. C. Butler. It did not bring before the Senate the credentials of D. T. Corbin.

After Mr. Butler's credentials were thus brought before the Senate a motion was made that he be sworn in as Senator from South Carolina, and without debate the vote was taken and the motion adopted. Mr. Butler was then sworn in. Swearing in a Senator on his credentials has always been regarded as admitting him to his seat on the prima facie case made by those credentials. There is no instance in the history of the Senate where a member has been so sworn in and allowed to take his seat as Senator that such admission has been held to preclude investigation into the merits of his title. On the other hand, the precedents are exactly the reverse. The cases of James Shields, of Illinois; James Harlan, of Iowa; Bright and Fitch, of Indiana, and of Mallory, of Florida, reported in Bartlett's Contested Election Cases in Congress, at pages 606, 621, 629, and 608, are examples of this rule.

But the principle of *res adjudicata* can only apply where parties to the controversy have been before the court or body having jurisdiction thereof and have been heard upon the merits of their respective claims and a decision has been rendered thereon.

In the present case Mr. Corbin has never been a party before the Senate to any controversy with Mr. Butler respecting his rights to a seat as Senator. The Senate, by its action, has not permitted him to be a party to any such controversy, and the merits of his case have never been passed upon by the Senate. Therefore, the doctrine of *res adjudicata* has no application to the case.

The minority views, signed by Messrs. A. S. Merrimon, of North Carolina, Eli Saulsbury, of Delaware, and Benj. H. Hill, of Georgia, lay stress on the theory that the case should be adjudged *res adjudicata*:

In considering this petition the facts which have been presented to this committee are precisely the same which were presented on the former consideration of this case. Not a new fact has been presented, nor offered to be presented, and not an old fact has been withdrawn or modified, nor offered to be withdrawn or modified. The arguments now made have been made from the same statements and briefs filed on the former hearing, and not a new question of law has been presented, except the issue of *res adjudicata*. No charge of fraud has been made against the former decision. No allegation that testimony was before excluded which ought to have been admitted, or that testimony was admitted which ought to have been excluded; no request by either party to produce testimony has been denied, and no pretense that testimony then offered and excluded can now be produced. The jurisdiction is the same; the parties are the same; the subject-matter of contest is the same; the facts are the same, and the questions of law are the same. The petition now before us is a mere, sheer, naked proposition that the Senate at a subsequent session shall revote on the identical questions, facts, and issues on which the Senate voted and decided at a former session.

Without going into a tedious and unnecessary review of the authorities and cases to be found in the books, we deem it sufficient to say that no demand like that contained in the petition of Mr. Corbin was ever granted by this Senate, nor, as we believe, by any legislative body.

In the case of Bright and Fitch, in the Thirty-fifth Congress, the parties to the rehearing asked were new and different, and had not before been heard, and the rehearing itself was asked in a memorial from the legislature of the State of Indiana. But because "all the facts and questions of law involved were as fully known and presented to the Senate" on the former hearing as they were then presented in the memorial of the legislature asking a rehearing, it was held that the judgment first rendered by the Senate "was final, and precluded further inquiry into the subject."

If, on the former hearing, Mr. Corbin had been denied the privilege of introducing material facts which he offered to produce; if he presented material facts now which were then unknown; if all the facts and questions of law now known and presented were not then as fully known and presented, the undersigned will not undertake to say his petition for a rehearing ought not in justice and right to be gravely heard and considered on the merits. But as Mr. Corbin himself has suggested no new facts or questions of law, and as we well know that all the facts and questions of law now known and presented were then quite as well known and presented both to the committee and the Senate, we can not regard his petition for another vote as entitled to further consideration.

630. The case of Corbin v. Butler, continued.

Elaborate discussion by Senate committee of effect of the constitutional provision that "a majority of each House shall constitute a quorum."

Discussion by a Senate committee of the effect in an election case of a decision of a State court construing a provision of the State constitution.

(2) As to the merits of the case, the main question involved was as to what constituted a quorum of the State house of representatives. The majority report thus reviews the case:

A general election was held in that State November 7, 1876, for State and county officers, and for members of the house of representatives of the State legislature, and for a part of the members of the State senate.

The returns of this election were made, first, by the several boards of precinct managers—each board consisting of three members—to the commissioners of election for their respective counties, called in this connection boards of "county canvassers;" second, by the several boards of county canvassers to the board of State canvassers at Columbia, the capital of the State; and, third, by the board of State canvassers, who finally acted upon the returns and determined and declared the results.

The board of State canvassers, on November 22, 1876, completed their canvass of this election and returned as duly elected 16 State senators and 116 members of the house of representatives.

Subsequently, and previous to November 28, 1876, the day of the meeting of the legislature, the secretary of state delivered the official certificate of his election to each person declared elected by the board of State canvassers.

On the 28th day of November, 1876, the newly elected senators, with those holding over from the former election, met and organized as the senate, in the senate chamber in the statehouse. The legality of the senate as a legislative body and the regularity of its organization are not now and never have been questioned.

On the same day 59 of the persons declared elected by the board of State canvassers met in the hall of the house of representatives in the statehouse and organized as the house of representatives, the other 57 members, holding certificates of election from the board of State canvassers, refusing to meet with them. These 57 members met in a private hall in the city of Columbia, and pretended to organize as a house of representatives by the election of William H. Wallace as speaker. The 59 members at the statehouse elected E. W. M. Mackey speaker.

The two bodies organized at the statehouse recognized each other, respectively, as the senate and house of representatives of the State by the interchange of official communications pertaining to legislative business. They also officially recognized Governor Chamberlain as the governor of the State, and were officially recognized by him as the senate and house of representatives, together constituting the legislature of the State.

On November 29, 1876, 5 persons who contested the election of the persons declared elected by the

board of State canvassers as representatives of Barnwell County were declared by this house of representatives at the statehouse to be entitled to seats, and were admitted and sworn in as members.

On December 2, 1876, 5 persons who in like manner contested the election of the persons declared elected by the board of State canvassers as representatives of Abbeville County were declared by this house to be entitled to seats, and were admitted and sworn in as members.

On December 5, 1876, 4 other persons, contestants for seats from Aiken County, were in like manner admitted and sworn in as members.

The members thus admitted, with the original membership of 59, make the whole number of members of this house of representatives (commonly known as the Mackey house) 73.

On December 2, 1876, this house of representatives considered the matter of the election for members of the house of representatives in Edgefield and Laurens counties, and declared that no valid election was held in those counties on the 7th of November, 1876.

On the 12th day of December, 1876, being the second Tuesday after the said 28th day of November, 1876, the two bodies above described proceeded, in the manner prescribed by the statutes of the United States (U.S. Rev. Stat., Tit. II, ch. 1, p. 3), to elect a Senator in Congress.

D. T. Corbin received a majority of all the votes cast in both bodies on December 12, 1876.

On the following day, December 13, 1876, the two bodies convened in joint assembly at 12 o'clock meridian, the journal of each house was read, and, it appearing that D. T. Corbin had received a majority of all the votes in each house, he was declared duly elected Senator.

Mr. Corbin's credentials were signed on December 13, 1876, by Governor Chamberlain, who was, until December 14, 1876, the unquestioned governor of the State, General Hampton not claiming to hold the office until after his inauguration on December 14, 1876.

Upon this general statement of facts arises the question, Was the election of Mr. Corbin valid, and is he now entitled to a seat in this body as a Senator from the State of South Carolina?

It has already been stated that no question has ever been made as to the complete validity, as a legislative body and a constituent house of the general assembly, of the senate which sat in the statehouse and cooperated with the house of representatives, in which Mr. Corbin received a majority of votes. No other body claimed to be the senate.

This senate never in any manner recognized the existence, as a legislative body, of the other assemblage which assumed to be the house of representatives (commonly known as the Wallace house), and which met in a private hall in Columbia.

The action of this senate, therefore, so far as it enters into the title of Mr. Corbin, need not be further discussed. It was valid.

The part performed by the house of representatives which sat in the statehouse in the election of Mr. Corbin presents the most important question which arises in this case.

The validity of this body is called in question. It is claimed, in denial of Mr. Corbin's title, that this body was never a valid legislative body under the constitution and laws of South Carolina; that it never had a quorum of lawfully elected members; that its acts were null and void.

The facts upon which this question must be decided are these:

The constitution of the State, Article II, section 4, provides as follows:

"The house of representatives shall consist of 124 members, to be apportioned among the several counties according to the number of inhabitants in each."

Article II, section 14, is as follows:

"Each house shall judge of the election returns and qualifications of its own members; and a majority of each house shall constitute a quorum to do business."

At the election of November 7, 1876, 124 persons were to be voted for as members of the house of representatives. Of this number, constituting a full house, the board of State canvassers declared that only 116 were duly elected, and the secretary of state issued certificates of election to only 116, the canvassers at the same time placing upon the records a declaration of their inability, by reason of unlawful influences and practices in the election, to determine that any persons had been duly elected as representatives for the counties of Edgefield and Laurens.

Of the 116 persons thus declared elected by the board of State canvassers, and holding certificates of election from the secretary of state, 59 took part in the organization of the house of representatives in the statehouse on November 28, 1876, being a majority of all the members declared elected by the board of State canvassers and holding certificates of election from the secretary of state.

Was the body thus composed and organized the legal house of representatives of the State?

Attention has been called to the fact that after the organization of the house of representatives which elected Mr. Corbin certain of those who took part in that organization withdrew and acted with another assemblage calling itself the house of representatives, thereby reducing the number of canvassing board members sitting in the Mackey house from 59 to 53, of whom only 44 voted for Mr. Corbin.

There is no force in these suggestions, because the fact is that the number of members who acted with the Mackey house was never reduced below 59. It is true that a few of those who formed part of the original 59 canvassing board members of the Mackey house left their seats in the statehouse and joined the Wallace house; but before a single such person had left the Mackey house had, upon contests duly made, admitted other members in number more than equal to those who afterward left.

If, therefore, the original house of 59 members was a lawful house on the day of its organization, it was a lawful house at all times thereafter till its final adjournment December 22, 1876. If it was a lawful house for any purpose it was a lawful house for the purpose of deciding contested elections of its own members and for admitting those whom it might adjudge to be lawfully elected.

The statement that out of the original 59 who organized the Mackey house only 44 voted for Mr. Corbin has no significance. At the time of his election the inquiry was not how many canvassing board members voted for Mr. Corbin, but how many lawful members voted for him. If the house was lawfully organized on November 28, then the members admitted on the 29th, and subsequently, were lawful members, entitled to all the rights and powers belonging to any members.

But to the point of the legality of the Mackey house.

The constitutional provisions which regulate the matter of a legislative quorum in South Carolina are (1) that "the house shall consist of 124 members" and (2) that "a majority of each house shall constitute a quorum to do business."

Stated in its most condensed form, the inquiry here is, what is the meaning of the phrase "a majority of each house?" Does it mean a majority of 124 or a majority of the members duly elected or qualified?

As an original question it would seem that there are strong reasons why the latter view should be adopted.

If the former view be adopted a contingency may easily occur in which it will be absolutely impossible to organize a lawful house. If under any circumstances there should be a failure to elect a majority of the whole possible representation, the government would be brought at once to a dead stop; nor would there be any power anywhere to remove the obstruction.

In opposition to this view it is said that if it be held that a number less than a majority of the whole possible representation constitute a quorum, then under some circumstances it will be in the power of a small fraction of the whole representation to hold and exercise the powers of the house. This is admitted; but such a danger will not menace the life itself of the State. The government will be able to go on without recourse to extra legal remedies.

All governments aim at self-perpetuation. No element of self-destruction is intentionally admitted into the framework or fundamental law of a State. All constitutional provisions should therefore receive a construction, if possible, which shall be in harmony with this idea of the perpetuity of the government, of its unbroken life and efficiency. If the rule were adopted that a quorum of the house of representatives of South Carolina must consist of at least 63 members, then if from any cause 63 members should not be elected, it would be impossible by any constitutional methods to obtain a house of representatives at least until the next general election.

No speaker could be chosen; no writs of election could be issued. Did the 59 members composing the body at the statehouse constitute a quorum of the house of representatives?

The most controlling decisions upon this question are those of the two Houses of Congress.

The Constitution of the United States and the constitution of South Carolina may be said to contain identical provisions upon this point. The Constitution of the United States provides as follows:

"The Senate of the United States shall be composed of 2 Senators from each State, chosen by the legislature thereof for six years." (Art. I, sec. 3.)

"The number of Representatives shall not exceed 1 for every 30,000, but each State shall have at least 1 Representative." (Art. I, sec. 2.)

The only respect in which these provisions differ from the corresponding provisions of the constitution of South Carolina is that here the numerical aggregate of Senators and Representatives is no

stated. The rule of representation is laid down, and under that rule there is always at any specified point of time a fixed number of Senators and Representatives in Congress, precisely as much so as in South Carolina.

In principle these two constitutional provisions are identical, and it is idle to insist that the mere verbal difference is of the least importance.

The provisions respecting a quorum in the Constitution of the United States and that of South Carolina are identical in terms, namely:

“A majority of each house shall constitute a quorum to do business.”

It will be found that in the Senate of the United States prior to 1862 it was held as a matter of parliamentary practice in some instances that a quorum consisted of a majority of the whole possible representation, and in other instances of a majority of Senators elected and qualified.

The question does not appear to have been discussed by the Senate, or to have been maturely considered, until after April 11, 1862. On that day Mr. Sherman, of Ohio, offered a resolution, which was referred to the Committee on the Judiciary, in these words:

“Resolved, That a majority of the Senators duly elected and entitled to seats in this body is a constitutional quorum.” (Congressional Globe, April 11, 1862.)

On July 9, 1862, this resolution was debated in the Senate and laid upon the table by a vote of 19 to 18.

On March 7, 1864, Mr. Sherman offered a resolution, which was referred to the Committee on the Judiciary, in these words:

“Resolved, That a quorum of the Senate consists of a majority of the Senators duly chosen or qualified.”

On May 3, 1864, the Committee on the Judiciary having been discharged from the further consideration of the resolution, it was taken up and debated. On this and the following day the subject was elaborately discussed, especially by Senators Carlisle and Davis against the resolution, and by Senators Johnson and Sherman in its favor. The words “or qualified” having been struck out, the resolution was adopted by a vote of 26 to 11, May 4, 1864, in these words:

“Resolved, That a quorum of the Senate consists of a majority of the Senators duly chosen.” (Congressional Globe, March 7, May 3 and 4, 1864.)

The precedents in the House of Representatives prior to 1861 had been varying, but here, as in the Senate, the subject does not appear to have been maturely considered until 1861. During the first session of the Thirty-seventh Congress, in the House of Representatives, Speaker Grow finally decided that a quorum of the House consisted of a majority of the members chosen, and he was sustained by the House in this decision. (House Journal, first session Thirty-seventh Congress.)

The effort has sometimes been made to disparage this precedent by stating that it was made under the stress of a necessity to secure an organization of the House. This is a mistake. The decision was made fifteen days after the organization of the House, and upon a question which did not involve the question of the validity of the organization.

The resolution adopted by the Senate in 1864 has since been adopted by the Senate as a permanent rule, and now appears in Rule 1.

If, in opposition to these precedents, it is urged that they were made because of special circumstances then existing, or upon certain constitutional theories regarding the status of the States then in rebellion, the answer is that there is no doubt that the peril of an opposite construction did lead to the final reversal of former precedents. And justly so. One of the truest canons of constitutional construction is that which adopts the construction which best effectuates the purpose of the instrument or provision to be construed. A construction which leads directly to the practical paralysis of the legislative power of a State can never be admitted.

Professor Farrar, in his Manual of the Constitution of the United States, page 166, says in relation to the constitutional provision respecting a quorum that “this has been held to be a majority of the Members actually sworn in and entitled to seats at the time, and not a majority of a full delegation from all the States.”

Another precedent arose in the Senate of the United States on March 2, 1861, when a proposition to amend the Constitution was on its passage. The Constitution, upon this point, provides that “Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution,” etc.

When the vote was taken in the Senate, March 2, 1861, Mr. Trumbull raised the point of order that this provision required two-thirds of all the Senators which all the States were entitled to elect. The Presiding Officer overruled the point of order, and upon appeal the ruling was sustained by a vote of 33 to 1.

Another precedent of considerable force is found in connection with the ratification of the fifteenth amendment to the Constitution. The constitution of Indiana provided that two-thirds of each house should constitute a quorum. In 1867 certain members of the legislature resigned in order to defeat a vote upon the ratification of the amendment. The remaining members thereupon decided that two-thirds of the actual membership constituted a quorum, and proceeded to ratify the amendment. This action was certified in forwarding the vote of the legislature on the ratification of the amendment. No question was raised by Congress in regard to the legality of the vote, and the vote of Indiana, as thus cast, was accepted and counted.

The case of *State v. Huggins* (1 McCord, 139), decided in the court of appeals in South Carolina, is in point. Eighteen managers of election were appointed by the legislature for the district of Georgetown. Two had refused to qualify, one was dead, and one was disqualified, reducing the number to fourteen. It was held by the court that a majority of fourteen properly formed the board of managers for the district to determine the validity of the election of a sheriff, a majority of those qualified to serve, and not a majority of the whole number appointed, being a lawful quorum.

Under the provision of the Constitution of the United States that "each House shall be judge of the elections, returns, and qualifications of its own Members," the Senate is the sole judge of this matter. The action, opinion, or decision of any other body is, therefore, entitled to such weight or respect only as may be due to the reasons which support it.

It is proper to consider the connection of the supreme court of the State of South Carolina with this case. And it may be remarked that this presents the most remarkable and, perhaps, unfortunate feature of the controversy. That court may be said, without injustice, to have taken part in the purely political contests of the State. Instead of leaving such contests to be settled by other departments of the government, where they properly belong, the court engaged in those contests.

The action of that court was taken under these circumstances: After the Mackey house and the Wallace house were each organized, the former with 59 and the latter with 57 members declared elected by the canvassing board, a petition was presented to the supreme court by Mr. Wallace, as speaker of the Wallace house, asking a mandamus to compel the secretary of state and the speaker of the Mackey house to deliver to him the returns of the election for governor and lieutenant-governor.

By Article III, section 4, of the constitution of the State these returns are required to be sent by the managers of the election to the secretary of state, who is required to return them to the speaker of the house of representatives.

By the return of the secretary of state to the rule to show cause, issued by the supreme court upon the petition above stated, it appeared that that officer had delivered the returns to the speaker of the Mackey house.

The return of the speaker of the Mackey house showed that he had received the returns from the secretary of state, and held them by virtue of his office as speaker, and he denied the power and jurisdiction of the court in the matter.

The court thereupon reserved the question as to the secretary of state for further argument and dismissed the petition as to Speaker Mackey.

In coming to this conclusion the court said that "63 members were in their seats when Mr. Wallace was elected. * * * That the house of representatives consisted of 124 members, and 63 were necessary for a quorum to do business. * * * That all the members had certificates from the secretary of state except 8, and the qualification of these 8 was established by the proceedings in this court. * * * That, no matter what was the character of the certificates, they had, the return of the board of State canvassers to the court, showing that they had received the greatest number of votes in their particular counties, entitled them to access to the floor for the purpose of organization."

In taking cognizance of this matter and rendering a decision therein the court plainly transgressed the limits of its judicial powers, and its decision is void and binding on no one.

The constitution of the State, in section 26 of Article I, provides that "in the government of this Commonwealth the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other."

That the due organization of the house of representatives is a legislative power or function, and not a judicial one, seems too clear for argument. Two bodies were claiming each to be the lawful house of representatives. This was a purely political question. It was a question between two sections or parts of one legislative body, each claiming to represent that body. No other questions were involved.

Whether Mackey or Wallace was entitled to have the election returns was a question which directly involved the action of the members of the legislative body, not in its effects upon citizens generally, but in relation to the due organization of that body under powers granted to it alone by the constitution.

The interposition of the court was not only without authority but was also absolutely unnecessary. There was ample power in the lawful house of representatives to afford the necessary remedy in the matter, if any remedy was needed.

The judgment of the court itself shows for another reason its want of jurisdiction over the case. It held that Mackey, not being an official person, could not be reached by mandamus and dismissed the petition. It could grant no relief, accomplish no result, and yet it proceeded to express an opinion. This was extrajudicial. The court must have recognized this dilemma at the outset, namely, if Mackey is speaker, he is the lawful custodian of the returns; if he is not speaker, he is not such an official person as can be reached by mandamus. Hence, in either event, no writ could have been issued, and nothing remained but to dismiss the petition.

Under these circumstances the expression of an opinion that Wallace was the speaker and that 63 members are necessary to form a quorum was utterly uncalled for, a mere empty obiter dictum.

When, therefore, it is claimed that the supreme court of the State is empowered to construe the constitution, and hence to decide upon the question of a quorum, the answer is that this is true only when the court has a proper case before it requiring the decision of such a question.

But, further, it is to be noted that the court in giving this opinion assumed the fact, now denied, that 124 members of the house, instead of 116, had been in fact chosen.

The supreme court gave no reason for the opinion that 63 members were necessary to form a quorum. It was their unsupported opinion, a dictum in every sense, not expressed in the course of reasoning or discussion leading to a judgment, and wholly unsupported by argument.

In *Carroll v. Lessee of Carroll* (16 How., 28) Judge Curtis said: "This court, and other courts organized under the common law, has never held itself bound by any part of an opinion which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens v. Virginia* (6 Wheat., 399) this court was much pressed with some portion of its opinion in the case of *Marbury v. Madison*. And Mr. Chief Justice Marshall said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of *ex parte Christy* (3 How., 292) and *Jenness v. Peck* (7 How., 612) are an illustration of the rule that any opinion given here or elsewhere can not be relied on as a binding authority unless the case called for its expression. Its weight of reason must depend on what it contains."

The conclusion on this point is that the construction of that provision of the Constitution of the United States relative to a quorum given by both Houses of Congress is applicable to a like provision in the constitution of the State of South Carolina.

It is a construction dictated by sound reason and public policy. And if it is a safe and sound construction of the Constitution of the United States, it is equally a safe and sound construction of the constitution of the State of South Carolina.

A quorum, therefore, of either house of the legislature of South Carolina must be held to be a majority of the members chosen.

The minority views hold:

The only real question is whether the house of representatives of the legislature which it is claimed elected Mr. Corbin was a legal house or a legal quorum of a house under the constitution and laws of South Carolina.

By section 4, Article II, of the constitution it is provided that "the house of representatives shall consist of 124 members."

By section 14, Article II, it is provided that "a majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day and may compel the attendance of absent members in such manner and under such penalties as may be provided by law."

It is difficult to see how language could more plainly define what should be a house, or what should be a quorum of a house, or what only a less number than a quorum had power to do. Nor is there anything in law, morals, or party exigency which can justify a resort to construction or sophistry to confuse such plain language. The number of members who assembled in what is called the Mackey house, which pretended to elect Corbin, was 59. Clearly this was neither a house nor the quorum of a house, as plainly defined by the constitution of the State, and this number had no power except to adjourn from day to day and compel the attendance of absent members. But this number proceeded to organize as 9, legal quorum to do business.

The pretext for this extraordinary assumption of power by 59 members was that the board of State canvassers had only issued certificates of election to 116 members, and the claim is that 59 is a majority of 116. But this very statement admits that a quorum of the house was certified as elected. The 59, then, are left without excuse for failing to exercise their only power under the constitution—"to compel the attendance of absent members." But the facts show that the people in fact elected 124 members, a full house. The precinct commissioners and the county commissioners of election, in all the counties, respectively, made out and forwarded the statements required by law showing the votes cast at the election. The board of State canvassers refused to cast up the votes in the counties of Edgefield and Laurens, under the shallow pretext that they were unable to determine whether the elections in those counties were legal. They refused to discharge their plain ministerial duty of casting up the votes and thereby "determine and declare what persons had been by the greatest number of votes duly elected," but excused themselves from this duty by pretending they were not able to determine whether there had been legal elections in those counties. This was a question which, under the constitution, each house alone had authority to determine, and which the board of State canvassers, by plain language of the act creating it, is forbidden to determine.

In due time, also, the house of representatives did determine that there had been elections held in the counties of Edgefield and Laurens, and the returns very plainly showed who had been elected, and, in fact, the full house of 124 members were elected. Both in fact and law, therefore, 59 was not a quorum of the house to do business, and Mr. Corbin was not elected by a legal legislature.

(3) The majority discuss at length the action of the State canvassers in refusing credentials to the persons claiming election from the two disturbed counties, finding that action legal and proper. The minority do not discuss the subject at length, saying merely that their action was "mere trickery" and should not receive the approbation of the Senate.

631. The case of Corbin v. Butler, continued.

A Senate committee's discussion of the functions of credentials in the organization of a legislature.

By a letter presented and read to the Senate a contestant withdrew his claim to a seat after the committee had reported in his favor.

(4) A question as to the organization of the State house of representatives is thus discussed by the majority:

Passing now from questions affecting the legality of the action of the board of canvassers, we come to questions concerning the mode of organizing the Mackey house, and especially the exclusion therefrom of all persons not declared elected by the canvassing board.

The legal and parliamentary principles on which the Mackey house was organized may be stated as follows:

First. That no persons except those declared elected and duly returned by the board of State canvassers and holding certificates of the secretary of state were entitled by law or usage to be placed upon the roll. (Cushing, secs. 229 and 240.)

Second. That the organization of the house must be effected by those persons only whose election had thus been declared by the board of State canvassers and certified by the secretary of state in accordance with the law of the State.

Third. That all other persons claiming to be entitled to seats in the house of representatives must submit their claims to the house after its organization by the members whose seats were undisputed. (Cushing, secs. 229 and 240.)

“It is to be observed in the outset that when a number of persons come together, each claiming to be a member of a legislative body, those persons who hold the usual credentials of membership are alone entitled to participate in the organization.” (McCrary’s Law of Elections, 377.)

“It is apparent that the case of *Sykes v. Spencer* is not in conflict with the rule that in the organization of legislative bodies persons holding the usual credentials are alone authorized to act.” (McCrary’s Law of Elections, 392.)

In the well-known case of *Kerr v. Trego* (47 Pa. S. R. —), cited in *Brightly’s Leading Cues on Elections* (p. 632), Chief Justice Lowrie, of the supreme court of Pennsylvania, laid down the following principle:

“On the division of a body that ought to be a unit, the test of which represents the legitimate social succession, is, which of them has maintained the regular forms of organization according to the law and usages of the body, or, in the absence of these, according to the laws, customs, and usages of similar bodies in like cases, or in analogy to them. This is the uniform rule in such cases.”

And in the same case, speaking of the custom of the clerk of the former organization taking charge of the organization of the new body, he says (p. 638):

“It has the sanction of the common usage of every public body into which only a portion of new members is annually elected. It is the periodical form of reorganizing the select council and the senate of the State, and also the form of organizing the Senate of the United States on the meeting of a new Congress, when the Vice-President does not appear and the last President pro tempore does; and we understand this custom to be uniform throughout the United States, though this is not very important. And when there is a president whose term as a member has expired, then the functions of the clerks continue, and they in all cases act as the organs of reorganizing the body, and continue to hold office until their successors are chosen and qualified. Our State and Federal Houses of Representatives are illustration enough of this. So universal is this mode of organizing all sorts of legislative and municipal bodies that, all departures from it can be justified only as founded on special and peculiar usages or on positive legislation. Whenever this form is adhered to, a schism of the body becomes impossible, though the process of organization may be very tardy.

“It is objected that a rule that attributes so much power to the officers of the previous year gives them an advantage which they may use arbitrarily and fraudulently against the new members, so as to secure to themselves an illegitimate majority. No doubt this may be so, but no law can guard against such frauds so as to entirely prevent them, just as it can not entirely prevent stealing and perjury and bribery; the people are liable to such frauds at every step in the processes of an election or organization. But so much more the need for order and law in this part of the process; the law can dictate that, though it can not furnish honesty and sound judgment to the actors in it. That the law and order that we have announced have existed so long and so generally is proof, at least, that they are better than no law at all.”

In *Wilson’s Digest of Parliamentary Law*, section 1603, page 221, this author says:

“At the commencement of every regular session the Clerk of the House opens the session by calling the names of Members by States and Territories, if in Congress, and by counties if in State legislative assemblies. If a quorum answer to their names, he will put the following question: ‘Is it the pleasure of the House to proceed to the election of a Speaker?’ If decided in the affirmative, tellers are generally appointed to conduct the vote.”

This seems to be the universal custom in the organization of legislative bodies, and such custom not only prevails in South Carolina, but is specially established by the rules of the house of representatives of this State.

Rule 80 of the rules of the house of representatives of this State is as follows:

“In all cases not determined by these rules, or by the laws, or by the constitution of this State, as ratified on the 14th, 15th, and 16th days of April, 1868, this house shall conform to the parliamentary law which governs the House of Representatives of the United States Congress.”

Rule 81 is as follows:

“These rules shall be the rules of the house of representatives of the present and succeeding general assemblies until otherwise ordered.”

Turning now to Barclay’s Digest (pp. 44 et seq., and 126), we find that the law governing the House of Representatives of the United States Congress requires the Clerk of the last House to make up the roll of the Members of the new House by placing thereon the names of such persons only whose credentials show “that they were regularly elected;” that having ascertained, by a call of this roll, that a quorum is present, the Clerk then proceeds to call the names of the Members for the choice of a Speaker; the Speaker, being chosen, assumes the duties of presiding officer, and, after swearing in the Members, the oath of office being first administered to him, proceeds to complete the organization. Pending the election of a Speaker, the Clerk preserves order and decorum.

Upon the question of the right of the claimants from Edgefield and Laurens counties to be placed upon the roll and to participate in the organization, the following citation from Cushing’s Law and Practice of Legislative Assemblies, section 229, page 87, is in point:

“The right to assume the functions of a member, in the first instance, and to participate in the preliminary proceedings and organization, depends wholly and exclusively upon the return or certificate of election, those persons who have been declared elected and are duly returned being considered as members until their election is investigated and set aside and those who are not so returned being excluded from exercising the function of members, even though duly elected, until their election is investigated and their right admitted.”

To the same effect is section 141 (p. 52) of the same work, which has already been cited in connection with the action of the Supreme Court.

In section 238 (p. 91) of the same work, in discussing the principles of parliamentary law governing the assembly and organization of legislative bodies, Cushing says:

“Hence it has occurred more than once that struggles for political power have begun among the members of our legislative assemblies, even before their organization; and it has happened, on the one hand, that persons whose rights of membership were in dispute, and who had not the legal and regular evidence of election, have taken upon themselves the functions of members, and, on the other, that persons having the legal evidence of membership have been excluded from participating in the proceedings.”

In order to avoid such difficulties, this distinguished writer lays down the following principles in section 240, which are applicable to the question now under consideration:

“That no person who is not duly returned is a member, even though legally elected, until his election is established.

“That those members who are duly returned, and they alone (the members whose rights are to be determined being excluded), constitute a judicial tribunal for the decision of all questions of this nature.”

In *Kerr v. Trego* (Brightly’s Election Cases, p. 636), already cited, the chief justice said:

“In all bodies that are under law, the law is that where there has been an authorized election for the office in controversy the certificate of election which is sanctioned by law or usage is a prima facie written title to the office, and can be set aside only by a contest in the form prescribed by law. This is not now disputed. No doubt this gives great power to dishonest election officers, but we know no remedy for this but by the choice of honest men.”

It is proper here in this connection to again refer to the language already quoted from the same authority (p. 638):

“It is objected that a rule that attributes so much power to the officers of the previous year gives them an advantage which they may use arbitrarily and fraudulently against the new members, so as to secure to themselves an illegitimate majority. No doubt this may be so; but no law can guard against such frauds so as to entirely prevent them, just as it can not entirely prevent stealing and perjury and bribery; the people are liable to such frauds at every step in the processes of an election or organization. But so much the more need for order and law in this part of the process; the law can dictate that, though it can not furnish honesty and sound judgment to the actors in it. That the law and order which we have announced have existed so long and so generally is proof, at least, that they are better than no law at all.”

Applying the law as now stated to the facts in the present instance, it is clear, first, that there were no representatives from Edgefield and Laurens counties having certificates of election according to the law and usage of this State, and, second, that under the law, without such certificates, the clerk had no right to place the names of any persons upon the roll of the house as representatives from these counties.

It follows that 59 members of the house of representatives who met in the statehouse at Columbia and organized by the election of E. W. M. Mackey as speaker were lawfully convened, were lawfully organized, and, under the constitution of South Carolina, constituted the lawful house of representatives of that State. Though less than a majority of all the possible members of that body (124), there was a "quorum to do business," which consisted of a "majority of the members chosen"—a majority of all those holding lawful certificates of election.

This house of representatives, in connection with the unquestioned senate, constituting together, as they did, the legislature of the State of South Carolina, proceeded on the 12th day of December, 1876, to the election of a Senator to represent that State in the Senate of the United States for the term of six years, to commence on the 4th of March, 1877. The election was duly held, duly determined and declared, and D. T. Corbin was duly and formally declared elected Senator, and subsequently he was duly commissioned as such by the governor of the State. He is, therefore, entitled, on the merits of his case, to a seat in the Senate as a Senator from South Carolina for the term of six years, commencing on the 4th of March, A. D. 1877.

Finally, after reviewing the circumstances of the election of Mr. Butler by a legislature consisting of one house only, the majority recommended this resolution:

Resolved, That David T. Corbin was, on the 12th day of December, A. D. 1876, duly elected by the legislature of the State of South Carolina a Senator from that State in the Congress of the United States for the term of six years, commencing on the 4th day of March, A. D. 1877, and that, as such, he is entitled to have the oath of office administered to him.

On February 25, 1879,¹ near the end of the Congress, Mr. Cameron moved that the Senate proceed to the consideration of the resolution. This motion was disagreed to—yeas 25, nays 36.

On February 28² the Vice-President laid before the Senate a letter from David T. Corbin withdrawing his claim to the seat. He stated that he did not by so doing concede that his claim was not legal, but he believed that it would not be acted on, and a further prosecution in the next Congress would be unavailing.

The letter was laid on the table.

632. The Senate election case of Lucas v. Faulkner, from West Virginia, in the Fiftieth Congress.

There being conflicting credentials arising from a question as to the legality of election, and an allegation of disqualification, the Senate determined final right before either claimant was seated.

In electing a Senator the State legislature acts under authority of the Federal Constitution, and a State constitution and laws conflicting therewith are void.

No State may prescribe qualifications for a United States Senator in addition to those prescribed by the Federal Constitution.

On December 5, 1887,³ in the Senate, the President pro tempore presented the certificate of the appointment, by the governor of West Virginia, of Daniel B. Lucas as Senator from that State, to hold the office "until the next meeting of the legislature of said State having authority to fill" the vacancy occasioned by the expiration of the term of Johnson N. Camden on March 3, 1887.

¹ Record, p. 1882.

² Record, p. 2028.

³ First session Fiftieth Congress, Record, pp. 1-4.

Then the President pro tempore laid before the Senate the credentials of Charles J. Faulkner, chosen by the legislature of West Virginia a Senator for the term beginning March 4, 1887. These credentials,¹ signed by the governor and attested by the secretary of state under the seal of the State, not only certified the election in the usual form, but contain a recitation at length of the constitutional conditions under which the legislature acted and of the proceedings of the legislature properly attested.

The President pro tempore also laid before the Senate the protest of Daniel B. Lucas, wherein it was urged that the legislature had no constitutional power to elect at the time it chose Mr. Faulkner, and, further, that Mr. Faulkner was disqualified.

During the swearing in of the Senators-elect Mr. George F. Hoar objected to the administration of the oath to Mr. Faulkner, and the latter stood aside, as it seemed proper that a committee should examine the case before the administration of the oath.

On December 12,² on motion of Mr. Hoar, the papers in the case were referred to the Committee on Privileges and Elections.

On December 14³ Mr. Hoar submitted the report of the committee. This report gave the following statement of facts:

The Constitution of the United States, Article 1, section 3, provides:

“The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; * * * if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

“SEC. 4. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators.”

The Revised Statutes of the United States, Title II, section 14, provide:

“The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.”

Section 15 prescribes the manner of such election. Section 16 is as follows:

“Whenever, on the meeting of the legislature of any State, a vacancy exists in the representation of such State in the Senate, the legislature shall proceed, on the second Tuesday after the meeting and organization, to elect a person to fill such vacancy, in the manner prescribed in the preceding section for the election of a Senator for a full term.”

The Constitution further provides, Article I, section 5:

“Each house shall be the judge of the elections, returns, and qualifications of its own members.”

Of course the opinion of any other tribunal can have no weight as an authority in determining any question as to the validity of the election of a Senator. But it may be proper to note that the constitutional authority of Congress to prescribe the time and manner of electing Senators, although it may not exhaust the whole subject, but still leaves in force the regulations of a State, in regard to the same subject, not in conflict with its own, is expressly affirmed by the Supreme Court of the United States in *ex parte Seibold* (100 U. S., 371).

The constitution of West Virginia provides that—

“The legislature shall assemble at the seat of government biennially, and not oftener, unless convened by the governor. The first session of the legislature, after the adoption of this constitution, shall

¹ For copy of credentials see Record, pp. 1–3.

² Record, p. 36.

³ Record, pp. 53, 54; Senate Report No. 1.

commence on the third Tuesday of November, 1872; and the regular biennial session of the legislature shall commence on the second Wednesday of January, 1875, and every two years thereafter on the same day. (Art. VI, sec. 7.)”

Article VII, section 7, is as follows:

“The governor may, on extraordinary occasions, convene, at his own instance, the legislature; but, when so convened, it shall enter upon no business except that stated in the proclamation by which it was called together.”

The term of Mr. Camden as a Senator from West Virginia expired on the 4th day of March, 1887. The regular biennial session of the legislature began on the second Wednesday of January in pursuance of the provisions of the constitution cited.

At that session the legislature proceeded to ballot for a successor to Mr. Camden, but no person obtained a majority of the ballots and it adjourned without making a choice. Thereafter, on the 5th day of March, the governor appointed Mr. Lucas, in the recess of the legislature, and issued to him a certificate declaring his appointment as Senator in the Senate of the United States “until the next meeting of the legislature having authority to fill such vacancy.” Mr. Lucas accepted the appointment.

On the same 5th day of March the governor issued the following proclamation:

The report gives this proclamation in full. It summoned the legislature to convene for eight specified objects, no one of which referred to the election of a Senator.

Having set forth the facts the report discusses two questions arising in the case.

(1) As to the action of the legislature:

The legislature met in special session, pursuant to said call, and duly elected Mr. Faulkner to fill the existing vacancy in the Senate of the United States, if it had authority so to do.

The Constitution of the United States is the supreme authority, and all provisions of the constitution or statutes of any State are void and of no effect unless they can be so construed as not to conflict with its provisions.

The Constitution of the United States expressly provides that the vacancy which happens during the recess of the legislature of any State shall be filled by the legislature at its next meeting. The statute of the United States merely prescribes the time and manner in which, at such meeting, the constitutional mandate shall be obeyed. The only question, therefore, which can possibly arise is whether the body which sat in pursuance of the call of the governor was a legislature in the constitutional sense.

It is claimed by Mr. Lucas that, as this body was not permitted to enter upon any legislative business except such as related to the eight matters set forth in the call, it was not a legislature, but was a body deriving its power from the will of the executive, and so was exerting a certain executive or quasi executive function, something like that which is exercised by the Senate in giving its assent to the nominations of public officers.

But it seems to us that this view can not be supported. In the first place, the body is expressly declared by the constitution of West Virginia itself to be a legislature. In the next place, the function which it exercised in making enactments upon the eight great subjects mentioned in the call of the governor is clearly a legislative function. Among them, under Articles I and II, is the making appropriations of public money; under Article III, the regulating of procedure in criminal cases; under Articles V, VI, and VII, would exist the power to declare certain high crimes and misdemeanors; and under Article VIII, to give the assent of the State to the establishment and confirmation of its boundary lines.

It is difficult to conceive of any definition of the word “legislature” which would not include a body capable of passing and actually passing such enactments as these. They can be binding on the people of the Commonwealth only as legislation. They would be subject to be construed and enforced by the courts of that State only in their character as laws.

But it seems to the committee that the construction of the State constitution of West Virginia, upon which the above argument is based, is one which will not bear examination. When that constitution provided that the legislature so convened in extraordinary occasions “should enter upon no business except that stated in the proclamation by which it was called together,” the people must be presumed

to have had in mind business to be transacted under authority of the State constitution, and not to have intended to prohibit the performance of duties imposed upon it by the supreme authority of the Constitution of the United States.

If the argument be sound that a legislative body which is prohibited from entering upon certain classes of business, or which is confined to certain classes of business clearly legislative in their character, is no legislature in the constitutional sense, its logic would require us to declare that the legislature of every State whose bill of rights excludes it from large domains of legislation is no legislative body. If, under the same provision of the Constitution of the United States, the act of Congress had fixed a day for holding elections for Representatives to Congress, and the State constitution or laws should prohibit the assembling of the people for such elections on the day so fixed, it would, we suppose, be held clear that the act of the State would be void and the authority of the act of Congress would prevail.

We can not see any difference between such prohibition of a State constitution applicable to the constitutional electors of Senators, who are members of the State legislature, and the constitutional electors of representatives, who are a body of electors authorized to vote for members of the most numerous branch of the State legislature.

We are therefore clearly of opinion that the election of Mr. Faulkner at the special session of the legislature of West Virginia was valid.

(2) As to the qualifications of Mr. Faulkner, the report holds:

It is insisted that Mr. Faulkner was ineligible to the office of Senator by reason of the provision of the constitution of West Virginia:

“No judge during his term of office shall practice the profession of law or hold any other office, appointment, or public trust, under this or any other government, and the acceptance thereof shall vacate his judicial office. Nor shall he, during his continuance therein, be eligible to any political office.” (Art. VIII, sec. 16.)

But we are of opinion that no State can prescribe any qualification to the office of United States Senator in addition to those declared in the Constitution of the United States. (See the debates on the case of Mr. Trumbull, *supra*, p. 148.)

This provision, according to the settled rule of construction, must be so construed as to attribute to it a meaning not inconsistent with the constitution of West Virginia. This can well and properly be done by holding it to mean “eligible to office under the constitution of West Virginia.”

Therefore the committee concluded:

We therefore find that Mr. Faulkner has been constitutionally elected to the seat in the Senate made vacant by the expiration of the term of Mr. Camden and that he is entitled to take the oath.

We report the following resolutions:

Resolved, That Daniel B. Lucas is not entitled to a seat in the Senate from the State of West Virginia.

Resolved, That Charles J. Faulkner has been duly elected Senator from the State of West Virginia for the term of six years, commencing on the 4th day of March, 1887, and that he is entitled to a seat in the Senate as such Senator.

The resolutions were agreed to without division.

Thereupon Mr. Faulkner appeared and took the oath.

633. The Senate election case of Addicks v. Kenney, from Delaware, in the Fifty-fourth Congress.

The Senate gave immediate prima facie effect to credentials regular in form, although a contestant presented irregular credentials.

On January 21, 1897,¹ in the Senate, Mr. William E. Chandler, of New Hamp-

¹Second session Fifty-fourth Congress, Record, p. 1004.

shire, presented the following paper, which was referred to the Committee on Privileges and Elections:

DELAWARE, *ss*:

Be it known that the legislature of the State of Delaware did, on the 20th day of January, in the year of our Lord 1897, at an election in due manner held according to the form of the act of the general assembly of said State in such case made and provided, choose John Edward Addicks to be a Senator from said State in the Senate of the United States for the constitutional term from the 3d day of March, in the year of our Lord 1895.

Given under our hands in obedience to the said act of the general assembly the day and year aforesaid.

ROBERT J. HANBY,
Speaker of the Senate.

THOMAS C. MOORE,
Speaker of the House of Representatives.

GEO. W. ROGERS,
Clerk of the Senate.

CHAS. R. HASTINGS,
Clerk of the House of Representatives.

On February 5¹ Mr. George Gray, of Delaware, presented the credentials of Richard W. Kenney as a Senator from the State of Delaware. The credentials were read, as follows:

STATE OF DELAWARE, EXECUTIVE DEPARTMENT.

To the President of the Senate of the United States:

This is to certify that on the 19th day of January, in the year of our Lord 1897, Richard R. Kenney was duly elected by the legislature, of Delaware a Senator to represent said State in the Senate of the "United States, to fill a vacancy existing in the representation of said State for the term ending the 3d day of March, A. D. 1901.

Witness his excellency, our governor, Ebe W. Tunnell, and our seal hereunto affixed, at Dover, this 21st day of January, in the year of our Lord 1897, and of the Independence of the United States of America the one hundred and twenty-first.

EBE W. TUNNELL.

By the governor:

WM. H. BRYCE, *Secretary of State.*

Mr. Kenney being present, and the oath prescribed by law having been administered to him, he took his seat in the Senate.

Mr. George F. Hoar, of Massachusetts, chairman of the Committee on Privileges and Elections, after referring to the fact that the Senate had declared Henry A. Du Pont not entitled to the seat, and that the Committee on Privileges and Elections had reported against reopening Mr. Du Pont's case, said:

If it be true that Mr. Du Pont was not legally elected, or if it be true that that question has been settled by a judgment of the Senate, it follows that there is a vacancy, and that there was a vacancy at the time of the alleged election of Mr. Kenney, in the office of Senator from the State of Delaware; and there being a vacancy under the Constitution and statute of the United States, the credential in due form, signed by the executive of that State, gives the gentleman who now applies for the seat a prima facie title to the seat, subject, as has been suggested by my honorable friend from New Hampshire, to reexamination on the merits hereafter, if that reexamination shall be desired. I therefore assent to the request of the Senator from Delaware that the oath be administered.

¹Record, pp. 1559, 1560.

On March 19¹ Mr. Julius C. Burrows, of Michigan, presented the petition of John Edward Addicks, a citizen of the State of Delaware, setting forth that on the 20th day of January, 1897, by a majority of the duly elected and qualified members of the senate and house of representatives of the State of Delaware, he was duly elected a United States Senator to fill the vacancy in the United States Senate occasioned by the expiration of the term of Anthony Higgins, and that he was denied the usual and formal certificate of election to which he was entitled.

The memorial was referred.

¹Record, p. 66.