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Chapter XIV.

THE OATH AS RELATED TO QUALIFICATIONS.

441. The Senate investigated the sanity of a Senator-elect before allowing him to take the oath.—April 30, 1844,[3] in the Senate, Mr. Spencer Jarnagan, of Tennessee, offered this resolution, just after the reading of the credentials to which it refers:

Resolved, That the credentials presented to the Senate of the election of John M. Niles to be Senator of the United States from the State of Connecticut be referred to a select committee, to consist of five, who shall be instructed to inquire into the election, returns, and qualifications of the said John M. Niles, and into his capacity at this time to take the oath prescribed by the Constitution of the United States.

After some discussion of the condition of Mr. Niles, during which it was stated by a Senator that of his own personal knowledge he could assure the Senate of the sanity of Mr. Niles, the resolution was agreed to. Messrs. Jarnagan; Thomas H. Benton, of Missouri; John M. Berrien, of Georgia; Silas Wright, of New York; and George McDuffie, of South Carolina, were appointed the committee.

On May 16 the committee reported, saying that after conversation with Mr. Niles they became satisfied of his capacity to take the oath. The report concludes:

The committee are satisfied that Mr. Niles is at this time laboring under mental and physical debility, but is not of unsound mind in the technical sense of that phrase; and the faculties of his mind are subject to the control of his will; and there is no sufficient reason why he be not qualified and permitted to take his seat as a member of the Senate; and they most cordially unite with Doctor Brigham (whose letter constitutes a part of the report of the committee) in the hope that such a course (that is, taking his rest in the Senate and participating at least two hours a day actively in its business) will be the means of usefulness and a resource against disease: Therefore,

Resolved, That the Hon. John M. Niles be permitted to take the oath of a Senator in the Congress of the United States, and to take his seat as a member of the Senate.

The resolution having been agreed to, Mr. Niles came forward, qualified, and took his seat.

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[1] See also Blakey *v.* Golladay (sec. 323 of this volume), Switzler *v.* Anderson (sec. 868 of Volume II), and case of Roberts (see. 478 of this volume).

[2] See cases of Sypher *v.* St. Martin (sec. 333 of this volume), Newsham *v.* Ryan (sec. 335 of this volume), and Charles H. Porter (sec. 387 of this volume).

Senate by special act modified oath of loyalty (sec. 391 of this volume).

[3] First session Twenty-eighth Congress, Journal of Senate, pp. 257, 283; Globe, pp. 592–594, 636.

442. The election case of Philip B. Key, of Maryland, in the Tenth Congress.

A Member having been a pensioner of a foreign government, the House considered his case and declared him entitled to his seat, but declined to affirm. that he was qualified.—On December 11, 1807,[1] William Findley, of Pennsylvania, from the Committee on Elections, submitted a report on the petition of certain electors in the Third Congressional district of Maryland, who prayed that the seat of Mr. Philip B. Key be vacated, alleging that he had not fulfilled the condition of a law of Maryland. This law, which imposed on Representatives in Congress from that State a qualification in addition to those prescribed by the Constitution, required a residence of twelve calendar months in the district before election, and it was alleged that Mr. Key did not fulfill this condition and that he was not an inhabitant of the State. The Committee on Elections found upon examination that the law had been repealed so far as Mr. Key's district was concerned, and therefore recommended this resolution: [2]

Resolved, That Philip B. Key, having the greatest number of votes and being qualified agreeably to the Constitution of the United States, is entitled to his seat in this House.

On January 21 and 22, 1808, this report was considered in the House, and at that time a statement was made that Mr. Key was, or had been, a pensioner of the British Government. Debate arising on this point, Mr. Barent Gardenier, of New York, contended that every person was eligible to a seat in the House unless expressly disqualified by the Constitution. There being nothing in the Constitution which disqualified a person from receiving a pension from a foreign government, this charge should not be considered in Mr. Key's case.

The House, however, decided that the report should be recommitted for further examination.

On February 24, 1808, the committee reported their findings of fact on the charge that Mr. Key was a British pensioner. In 1778 Mr. Key had accepted a commission in a provincial regiment of the British army. After the general peace of 1783 the corps he served in was disbanded, and he, with the other officers, was placed on half pay. In 1785 he returned to Maryland, being entitled to draw his half pay. In 1794 he sold his half pay to a brother-in-law, and shortly thereafter was elected to the Maryland legislature, where he served several years. Through the bankruptcy and death of the brother-in-law Mr. Key, in 1805, resumed the receipt of his half pay, but after taking six months' pay he ceased to draw it. In January, 1806, Mr. Key directed his agent in London to resign for him all right and claim to the half pay, and on October 28 or 29, 1807, sent a formal resignation of it to the British minister at Washington by the hands of a notary public.[3] The committee did not find that Mr. Key had ever taken the oath of allegiance to the King of Great Britain, but he had taken the oath required of the public servants

[1] First session Tenth Congress, Journal, pp. 16, 68, 71, 114, 139, 140, 192, 232, 235; Annals, pp. 1490–1495, 1945, 1848, 1849; House Reports Nos. 3 and 5, First session Tenth Congress.

[2] For question as to inhabitancy, see section 432 of this volume.

[3] It appears from the report that Mr. Key was elected October 6, 1806, and took the oath and his seat in the House on the day of organization of the Tenth Congress, October 26, 1807.

of the State of Maryland. The committee concluded that there was nothing in these facts to cause them to alter the conclusion which they had set forth in the former report.

On January 21, in Committee of the Whole, on motion of Mr. John Rhea, of Tennessee, the words "having the greatest number of votes, and being qualified agreeably to the Constitution of the United States," were stricken from the resolution. A little later question was raised as to Mr. Key's relation to the British Government, and the report was recommitted.

On March 17, after the committee had again reported, the question both of residence and half pay was discussed. Mr. John Rowan thought that, even were it true as to the alleged receipt of half pay by Mr. Key, neither the Constitution nor any law of the United States made it any disqualification. If Mr. Key had continued to receive the half pay after becoming a Member, that might be cause for discussion.

On March 18 the resolution was reported from the Committee of the Whole with the amendment adopted January 21. Mr. John Randolph, jr., of Virginia, demanded a division of the amendment, and accordingly the question was taken first upon the words "having the greatest number of votes." The House concurred in striking these out without division. The question then being taken on concurring in striking out the words "and being qualified agreeably to the Constitution of the United States," the yeas were 79 and the nays 28.

The question then recurred on the simple proposition declaring Mr. Key entitled to his seat, and it was agreed to—yeas 57, nays 52. The final debate seems to have been principally on the question of his residence.

443. In 1862, before the enactment of the test oath for loyalty, the Senate, after mature consideration, declined to exclude for alleged disloyalty Benjamin Stark, whose credentials were unimpeached.

In 1862 the Senate decided to administer the oath "without prejudice to any subsequent proceedings in the case" to a Senator-elect charged with disloyalty.

A Senate committee having, on the strength of ex parte affidavits, found Benjamin Stark disloyal, the Senate disagreed to a resolution for his expulsion.

In 1862 a Senator who challenged the right of a Senator-elect to be sworn substantiated his objection with ex parte affidavits.

An argument that a Senator-elect might be excluded for disqualifications other than the three specified by the Constitution.

On January 6, 1862,[1] the Senate, Mr. James W. Nesmith, of Oregon, presented the credentials of Benjamin Stark, appointed a Senator by the governor of Oregon to fill a vacancy occasioned by the death of Edward D. Baker.

Mr. William Pitt Fessenden, of Maine, moved that the oath[2] be not administered and that the credentials, with certain papers which he then offered, be referred to the Committee on the Judiciary. On January 6 and 10 this motion was debated at length. It was admitted by Mr. Fessenden that he considered

[1] Second session Thirty-seventh Congress, Globe, pp. 183, 265–269: Election Cases. Senate Document No. 11, special session Fifty-eighth Congress, p. 294.

[2] The so-called ironclad oath was not then in existence, having been approved July 2, 1862.

the motion unprecedented, but he considered it justified by the papers which he presented. These papers consisted of affidavits of persons in Oregon, who swore that they had heard Mr. Stark make disloyal speeches.

In the debate it appeared that persons presenting credentials as Senators had been denied their seats pending investigation; but that in such cases there had been involved questions of law only, raised by the wording of the credentials themselves or by the Senate taking judicial knowledge of a fact as to the session of a legislature. But in this case a fact as to qualification was raised, and loyalty was not one of the three enumerated qualifications. In support of the motion the cases of Kensey Johns, Ambrose H. Sevier, Lannian, and Dixon were cited.

An amendment striking the word "not" from Mr. Fessenden's motion was disagreed to—yeas 10, nays 29. Then Mr. Fessenden's motion was agreed to—yeas 29, nays 11.

On February 7, 1862,[1] Mr. Ira Harris, of New York, submitted the report of the Committee on the Judiciary, as follows:

The Committee on the Judiciary, to whom were referred the credentials of Benjamin Stark as a Senator from the State of Oregon, with the accompanying papers, have had the same under consideration, and, without expressing any opinion as to the effect of the papers before them upon any subsequent proceedings in the case, they report the following resolution:

Resolved, That Benjamin Stark, of Oregon, appointed a Senator of that State by the governor thereof, is entitled to take the constitutional oath of office.

Mr. Lyman Trumbull, of Illinois, dissented from the conclusions of the committee, and submitted the following views:

A preliminary question was raised in the Senate when this case was referred to the committee, whether it was competent for the Senate for any cause to refuse to allow a person to be sworn as a Member of the Senate whose credentials were in proper form, and who possessed all the qualifications as to age, citizenship, and inhabitancy prescribed by the Constitution, and whether the only remedy which the Senate had to protect itself against the presence of an infamous person, a convicted felon, or an avowed and open traitor, was not by expulsion by a two-thirds vote after he should have been sworn into office. The Senate decided, after debate, to refer the credentials of Mr. Stark, with the accompanying papers, consisting of written statements and affidavits impeaching his loyalty, to the committee without allowing him to be sworn. A majority of the committee now report the case back, with a resolution that Mr. Stark is entitled to take the constitutional oath, expressly stating that they do so "without expressing any opinion as to the effect of the papers before them upon any subsequent proceedings in the case."

This reservation of opinion on the evidence could only have become necessary on the supposition that some subsequent proceedings might be taken in the case, referring doubtless to a motion to expel the Senator after he should have been admitted a Member, for the reasons assigned in the accompanying papers, in effect establishing the principle that evidence of disloyalty, which might be sufficient to expel a Member when admitted, was not sufficient to prevent his qualifying as a Member. To this principle the undersigned can not agree. He believes it was the duty of the committee to examine and pass upon the evidence before it, and if found insufficient to prevent Mr. Stark from taking the constitutional oath, that it would also be insufficient to warrant his expulsion after he was admitted.

It is admitted that neither the Senate, Congress, nor a State can superadd other qualifications for a Senator to those prescribed by the Constitution, and yet either may prevent a person possessing all those qualifications, and duly elected, from taking his seat in the Senate. Does anyone question the right of a State to arrest for crime a person duly qualified for and appointed a Senator, hold him in confinement, and thereby prevent his appearing in the Senate to qualify? Suppose a Senator, after his appointment, and before qualifying, to commit the crime of murder. Would anyone question the

[1] Senate Report No. 11; Globe, p. 696.

right of the State authorities where the crime was committed to arrest, confine, and, if found guilty, execute the murderer, and thereby forever prevent his taking his seat? Or, if the punishment for the offense was imprisonment, would anyone question the right to hold the Senator in prison, and thereby prevent his appearing in the Senate?

Could the Senate in such a case expel him before he had been admitted to a seat? Or must he [be] brought from the felon's cell, be introduced into the Senate, and sworn as a Member before his seat could be declared vacant? If not, must the State go unrepresented till the time for which he was appointed has expired? Or would it be competent for the Senate in such a case, by a majority vote, to declaire the convict incompetent to hold a seat in the body, and thereby open the way for the appointment of a successor? It is manifest that the prescribing of the qualifications for a Senator in the Constitution was not intended to prevent his being held amenable for his crimes. The fact that the Constitution declares that Senators and Representatives "shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same," is conclusive that for those offenses they may be arrested. As a punishment for crime, then, it is clear that a Senator-elect, possessing all the constitutional qualifications of age, citizenship, and inhabitancy, may be prevented from taking the oath of office. Congress has repeatedly acted upon the presumption that it was entirely competent for it to prescribe, as a punishment for crime, an inability forever afterwards to hold any office of honor, profit, or trust under the United States.

By a statute passed in 1790, any person giving a reward to a United States judge as a bribe to procure from him any opinion or judgment, and the judge receiving such bribe, are both declared to be forever disqualified to hold any office of honor, trust, or profit under the United States. By an act passed in 1853, any Member of Congress after his election, and whether before or after he is qualified, who shall accept any reward given for the purpose of influencing his vote on any question which may come before him in his official capacity is declared incapable forever of holding any office of honor, trust, or profit under the United States. Similar laws, it is believed, exist in most of the States, prescribing as part of the punishment for particular offenses, such as dueling, bribery, and some others, a disqualification for holding any office under the State, and this notwithstanding the State constitutions may have prescribed the qualifications for members of their legislatures, of which the disqualification arising from the conviction for crime was not one. The power of Congress to prescribe the punishment for treason is expressly given by the Constitution, except that it can not be made to work corruption of blood or forfeiture beyond the life of the person attainted. Does anyone doubt the power of Congress under this clause of the Constitution to declare that a person convicted of treason should forever be incapable of holding any office under the United States? If this were done, would it be pretended that a convicted traitor was entitled to be sworn as a Senator? The clause of the Constitution prescribing the qualifications of Senators and Representatives could never have been intended to limit the power to make disqualification to hold those or any other offices a penalty for the commission of crime, especially treason. Its design, doubtless, was to produce uniformity of qualification in all the States, and to prevent any particular class of persons, such as ministers of the gospel, or others, from being excluded from these positions. If it be competent for Congress to make disqualification to hold office a punishment for an offense against the United States, then it is clearly competent for the Senate, which, by the Constitution, is made "the judge of the elections, returns, and qualifications of its own members," to do the same thing, so far as the right to take a seat in that body is concerned. Doubtless a law of Congress declaring that a person convicted of a particular offense should not hold office under the United States, and the decision of the courts sustaining such a law, would not preclude the Senate from admitting such a person to a seat, should it think proper, because the Senate is the exclusive judge of the elections, returns, and qualifications of its own Members; yet it is hardly conceivable that the Senate ever would admit such a person to be sworn; nor does the fact that Congress has not adopted such a punishment for disloyalty or treason prevent the Senate from refusing to allow to be sworn as a Member a person believed by the body to be guilty of those offenses or other infamous crimes.

That one avowed traitor, a convicted felon, or a person known to be disloyal to the Government has a constitutional right to be admitted into the body would imply that the Senate had no power of protecting itself—a power which, from the nature of things, must be inherent in every legislative body. Suppose a Member sent to the Senate, before being sworn, were to disturb the body and by violence interrupt its proceedings, would the Senate be compelled to allow such a person to be sworn as a Member

of the body before it could cast him out? Surely not, unless the Senate is unable to protect itself and preserve its own order. The Constitution declares that "each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member." The connection of the sentence in which the power of expulsion is given would indicate that it was intended to be exercised for some act done as a Member, and not for some cause existing before the Member was elected or took his seat. For any crime or infamous act done before that time the appropriate remedy would seem to be to refuse to allow him to qualify, which, in the judgment of the undersigned, the Senate may properly do; not by way of adding to the qualifications imposed by the Constitution, but as a punishment due to his crimes or the infamy of his character. Hence the undersigned, conceiving that it was the duty of the committee to have expressed its opinion on the evidence of disloyalty before it and to have reported in favor of or against the swearing in of the Senator as the evidence should warrant, and not allow him to be first sworn, and leave the question of his loyalty to be subsequently determined on a motion to expel, the undersigned forbears to review the evidence of disloyalty before the committee or to express any opinion upon it till the pending question of jurisdiction to consider it is determined.

The report was debated long and learnedly on February 18, 24, 26, and 27.[1]

Mr. Harris, in opening the debate,[2] gave the reasons for the conclusion which he had submitted from the committee.

The question submitted to the committee was, whether or not evidence of this description (certain ex parte affidavits alleging treasonable declarations) could be allowed to prevail against his prima facie right to take his seat as a Senator. The committee were of opinion that they could not. The Constitution declares what shall be the qualifications of a Senator. They are in respect to his age, in respect to his residence, in respect to his citizenship; and the committee were of opinion that the Senate were limited to the question, first, whether or not the person claiming the seat and presenting his credentials produced the requisite evidence of his election or appointment; and second, whether there was any question as to his constitutional qualifications. * * * I do not understand that it is competent for the Senate, and I think they step aside from their only jurisdiction when they attempt to punish a man for his crime or misbehavior antecedent to his election. If this were so, the Constitution ought to be amended so as to read that the legislature of a State or the governor of a State, in a certain contingency, shall elect or appoint a Senator, subject to the advice and consent of the Senate. The Senate would then be the ultimate judge whether or not the man ought to have a seat here, and it would be competent for the Senate upon any caprice or any view it might take of the capacity, moral, or intellectual, or political, of a man, to reject him and prevent his taking a seat. Sir, I do not so understand the Constitution. I understand the Senate is the judge of the election of a Senator, of the sufficiency and genuineness of the returns furnished, and the evidence of the election; and also of the constitutional qualifications of the individual to hold a seat in the Senate. Beyond that I apprehend the Senate have no power at all.

On the other hand, it was urged by Mr. Charles Sumner, of Massachusetts,[3] that the Constitution required the oath to support the Constitution, and that this was in effect another constitutional qualification as to loyalty.

This contention was combatted, especially by Messrs. Timothy O. Howe, of Wisconsin, and John Sherman, of Ohio[4] who contended that the clause of the Constitution requiring the oath did not, in effect, impose a fourth qualification.

It was urged by Mr. James R. Doolittle, of Wisconsin:[5]

The power given to a majority to pass upon his qualifications implies the power to pass upon his disqualifications also, and that they may refuse to admit to a seat one who is disqualified as an avowed traitor. I am more inclined to that opinion because, after the question of his right to a seat upon this

[1] Globe, pp. 861, 925, 963, 988–994.

[2] Globe, p. 961.

[3] Globe, pp. 869, 969.

[4] Globe, p. 927, 969.

[5] Globe, pp. 926.

ground is distinctly raised and passed upon by the Senate, it may become res adjudicata, which can not be reopened. While I think this power is in a majority, it is in its nature judicial; and in its exercise, whether by a majority or two-thirds, this body should proceed with the same deliberation and the same freedom from all party bias as if sitting as a court.

In opposition Mr. Howe argued,[1] after enumerating the qualifications of the Constitution:

What other qualifications the Senator should have are to be determined first by the constituent body when they elect; and from their decision there is, in my judgment, no appeal, except to two-thirds of the Senate upon a motion to expel.

It was further urged by Mr. Sherman[2] that the power to expel was unlimited, and he cited English cases to show that it might be applied to offenses committed before election.

On February 27[3] the question was taken first on the amendment proposed by Mr. Sumner to the resolution, viz:

Strike out the words "is entitled to take the constitutional oath of office" and in lieu thereof insert "and now charged with disloyalty by the affidavits of many citizens of Oregon, and also by a letter addressed to the Secretary of State and signed jointly by many citizens of Oregon, some of whom hold public trusts under the United States, is not entitled to take the constitutional oath of office without a previous investigation into the truth of the charge."

This amendment was disagreed to—yeas 18, nays 26.

Thereupon Mr. Doolittle moved that the resolution be amended by adding thereto the words—

without prejudice to any subsequent proceedings in the case.

It was explained that this was proposed so that the Senate might not be precluded from passing on the question of expulsion. In opposition it was urged that the Senate could not be so precluded, but the amendment was agreed to, there being, on division, ayes 24, noes 16.

On the question to agree to the resolution as amended, as follows:

Resolved, That Benjamin Stark, of Oregon, appointed a Senator of that State by the governor thereof, is entitled to take the constitutional oath of office without prejudice to any subsequent proceedings in the case.

It was determined in the affirmative—yeas 26, nays 19.[4]

Mr. Stark then took the oath.

On February 28[5] Mr. Stark offered this resolution:

Resolved, That the papers relating to the loyalty of Benjamin Stark, a Senator from Oregon, be withdrawn from the files of the Senate and referred to the Committee on the Judiciary, with instructions to investigate the charges preferred against said Stark on all evidence which has been or may be presented, and with power to send for persons and papers.

This resolution was debated at length on February 28 and March the 18,[6] discussion relating largely to the effect of the decision to admit Mr. Stark, and the propriety of further action in view of that vote. Some of those Senators who had voted to exclude argued that it was now rather late to propose to purge the Senate

[1] Globe, p. 927.

[2] Globe, p. 970.

[3] Globe, p. 993.

[4] Globe, p. 994.

[5] Globe, p. 1011.

[6] Globe, pp. 1011–1014, 1261–1266.

of an alleged unworthy Member, and that he should have been excluded at the outset.

Finally, after amending the resolution by substituting a select committee for the Judiciary Committee, the resolution was agreed to—yeas, 37; nays, 3.

On April 22, Mr. Daniel Clark, of New Hampshire, chairman of the select committee, submitted a report.[1] This report states that it was not thought practicable, because of the remoteness of Oregon, to take any further testimony, and says:

> The committee met on the 24th of March, and the Senator from Oregon attended the meeting in compliance with the invitation of the committee, and desired that the committee should examine the papers before them, and if they should come to the conclusion that grounds were furnished for the charge of disloyalty by the papers and testimony, that the committee should draw up specific charges, to which he would file his answer. This the committee declined to do, for the reason that they did not wish to become his prosecutors, and were charged by the Senate with investigation and not accusation.
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> Mr. Stark was informed that the committee did not propose to take any further testimony unless he desired it, but would investigate the charges as presented by the papers then before them. To which the committee understood Mr. Stark to reply that he did not wish to take any further testimony as the matter stood. It was then suggested by the committee to the Senator from Oregon that he should submit to the committee his answer in writing to the allegations and evidence then before the committee, with any further evidence he might wish to present, and that the committee would adjourn to afford him the necessary time for that purpose.

The report next quotes the letter of Mr. Stark, a portion of which is as follows:

> If the committee propose to confine their investigation exclusively to those statements and ex parte affidavits now before them, in connection with what I may submit for their consideration, it may not be inappropriate for me to express my opinions in regard to them, and I shall do so in the same spirit by which the committee appear to have been actuated in making the request.
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> As it could not be fairly supposed that I would permit myself to occupy the attitude of self-prosecutor or that I would assume the task of defending myself when no charge on prima facie evidence had been preferred against me, I trust that I may do so without derogating from the true position which my honor and self-respect demand that I should occupy.
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> With all due deference, therefore, I submit that as a Senator of the United States for the State of Oregon I am entitled to, and I claim, every presumption of honor, integrity, loyalty, and patriotism that can be claimed by any other Senator until such presumption is overborne by competent testimony. It certainly would be very extraordinary to put an honorable Senator upon trial for expulsion without charges and specifications made with reasonable (if not technical) precision, and supported by testimony subjected to all the tests which human wisdom and human experience have found to be essential for the ascertainment of truth. Should such a case ever arise it is reasonable to suppose that it would not be permitted long to interrupt the order or disturb the decorum of the American Senate. Unless the proceedings of your committee are to be regarded as a preliminary inquiry, whether or not charges for expulsion ought to be preferred against me, in what essential particular does this case differ from the one suggested?
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> The papers referred to you I have again examined with that earnest attention which a deep personal interest in the result of an inquiry must ever stimulate, and with the light reflected upon them by the communication which I had the honor to address to the Committee on the Judiciary under date of January 17 ultimo, I am unable to discover anything upon which a sufficient charge for expulsion can be predicated, or anything in the nature of evidence which an impartial tribunal could receive as sufficient to justify expulsion from the Senate. Accepting all the statements contained in the letters, affidavits, etc., to be true, and there is merely attributed to me opinions which in the field of politics might be regarded as heresies, and expressions charged upon me which might be characterized as idle, mischievous, and unwise. This suggestion, I need not remind the committee, is not made as palliative upon an admission by me of the truth of any part of these statements, but purely as argumentative and as properly

[1] Senate Report No. 38, second session Thirty-seventh Congress.

within the scope of my purpose in addressing to them this communication. Guided by this purpose, I have in these reflections excluded any denial or admission of anything contained in the papers before the committee, my chief design being accomplished if I shall have succeeded in showing the utter impossibility of making, or even entering upon, a defense of any specific charge or of proffering to rebut evidence when none is presented.

I can not conclude this brief statement without asserting, as in substance I did in my communication to the Judiciary Committee, that the declarations of my assailants are utterly false in many particulars which might be deemed important, especially the statements of Hull and Law; that the expressions attributed to me in others of the affidavits have been wickedly and maliciously perverted, and that in every respect their declarations are unjust to my real sentiments and at variance with the whole tenor of my life.

The committee, after giving Mr. Stark opportunity to present further testimony, and after he had failed to do so, reached conclusions which they state as follows:

The committee then proceeded to consider the allegations and charges contained in the papers which had been submitted to them by the Senate, in connection with his answer and statement, and upon mature deliberation do find the following conclusions from the facts proved, viz:

First. That for many months prior to the 21st of November, 1861, and up to that time, the said Stark was an ardent advocate of the cause of the rebellious States.

Second. That after the formation of the constitution of the Confederate States he openly declared his admiration for it and advocated the absorption of the loyal States of the Union into the Southern Confederacy under that constitution as the only means of peace, warmly avowing his sympathies with the South.

Third. That the Senator from Oregon is disloyal to the Government of the United States.

The report gives extracts from the evidence and argument to show the reasons for these conclusions. In support of the third conclusion they cited utterances of Mr. Stark's—

calculated to encourage the rebellion and discourage the efforts to suppress it.

The report was signed by the chairman and by Messrs. J. M. Howard, of Michigan, Joseph A. Wright, of Indiana, and John Sherman, of Ohio.

Mr. W. J. Willey, of Virginia, did not entirely concur:

Concurring in the first two conclusions of the majority of the committee, I am yet constrained, not without hesitation, to differ with them in their third and last conclusion. Distrusting all ex parte testimony, especially in regard to expressions uttered in the heat of high political excitement, seeing that the sentiments and opinions thus attributed to Mr. Stark are virtually denied and repudiated by him in his written statement before the committee; remembering that since it is alleged those conversations took place and those expressions were uttered Mr. Stark, in taking his seat as a Senator, has purged himself of these sinister allegations by taking the oath to support the Constitution of the United States, and especially fearing the danger of making mere difference of opinion, however wide and fundamental, a test of fidelity to the Government, I am not prepared to say that Mr. Stark is now disloyal.

On May 7 [1] Mr. Sumner submitted the following resolution for consideration:

Resolved, That Benjamin Stark, a Senator from Oregon, who has been found by a committee of this body to be disloyal to the Government of the United States, be, and the same is hereby, expelled from the Senate.

It was stated at this time by Mr. Sherman, who signed the report, that only a small portion of the session remained, and that the people of Oregon would very

[1] Globe, p. 1983.

soon have the opportunity of passing on the question of Mr. Stark's loyalty. Therefore he did not favor the presentation of a resolution of expulsion.

On June 5 and 6,[1] however, Mr. Sumner pressed the question to the attention of the Senate, and on the latter day, almost without debate, the question was taken on agreeing to the resolution, and it was disagreed to—yeas 16, nays 21.

444. A question being raised as to the loyalty of a Member-elect, the House has exercised its discretion about permitting him to take the oath at once.—On November 21, 1867,[2] the Members-elect from the State of Tennessee appeared to take the oath, when Mr. James Brooks, of New York, challenged Mr. William B. Stokes, alleging that he had been disloyal during the war, and presenting in support thereof a letter alleged to have been written by Mr. Stokes in 1861, announcing an intention to resist the Federal Government.

On the same day Mr. James Mullins was challenged on the charge of disloyalty, in support of which a letter written by an army officer, but not verified by oath, was read, charging Mr. Mullins with disloyal utterances in 1861.

In the debate it was argued that in these two cases the charge was not made on the responsibility of a Member, supported by affidavits, as in the Kentucky cases; that the gentlemen in question were known to have acted loyally during the war, and that the evidence shown against them was not sufficient to preclude their taking the test oath with the approval of their own consciences.

Resolution to refer the credentials and deny the oath to the two Members-elect were disagreed to by the House, and they were sworn.

445. On November 21, 1867,[3] the Members-elect from the State of Tennessee appeared to take the oath, the House being already organized. Thereupon Mr. James Brooks, of New York, challenged the right of Mr. R. R. Butler to be sworn on the ground that he had been disloyal to the Government, presenting in support of the charge the journal of the legislature of the State of Tennessee at the time of the secession acts.

After debate the House agreed to the following resolution:

Resolved, That the credentials of R. R. Butler, from the First district of Tennessee, be referred to the Committee of Elections, and that he be not sworn pending the investigation.

446. On January 31, 1870,[4] Mr. John A. Bingham, of Ohio, presented the following:

Resolved, That the Hon. Lewis McKenzie be now sworn in as Member of this House from the Seventh district of Virginia, he having the prima facie right thereto; but without prejudice to the claim of Charles Whittlesey, contestant to such seat, or to his right to prosecute his claim thereto.

It appeared from the debate that the credentials of Mr. McKenzie were in proper form, but that the Committee of Elections felt themselves bound by the resolution of the House directing them, whenever a contestant should allege that his opponent could not take the oath of loyalty to inquire into the prima facie right, and report

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[1] Globe, pp. 2569, 2571, 2572, 2596.

[2] First session Fortieth Congress, Journal, pp. 253, 254; Globe, pp. 768–778.

[3] First session Fortieth Congress, Journal, p. 253; Globe, p. 768. At this time the law providing for the test oath was in force.

[4] Second session Forty-first Congress, Journal, p. 239; Globe, p. 917.

their finding. Such an inquiry had been begun in this case, but the report would not be made up for some time. Under these circumstances, and because several Members vouched for the loyalty of Mr. McKenzie, the House decided to permit him to take the oath, agreeing to the resolution.

447. The House decided that the oath should be administered to a Member-elect, although a Member charged that he was personally disqualified.—On March 4, 1871,[1] while the Speaker was administering the oath to the Members-elect at the time of the organization of the House, the name of Mr. Alfred M. Waddell, of North Carolina, was called, whereupon Mr. Horace Maynard, upon his authority as a Member of the House, objected to the swearing in of Mr. Waddell, on the ground that he was personally disqualified.

Mr. Waddell stood aside; and after the organization of the House had been completed, Mr. Maynard stated that the disqualification which he charged existed under the third article of the fourteenth amendment of the Constitution. Before the war Mr. Waddell had held the office of clerk and master of chancery in North Carolina, an office which required him to take an oath to support the Constitution of the United States. After that he had served as an officer in the Confederate army. The supreme court of North Carolina had determined that the office of clerk and master of chancery was a judicial office.

Mr. William D. Kelley, of Pennsylvania, contended that the office in question was not judicial in character, and that the House was not bound by the decision of the North Carolina court, for they were the judges of the qualifications of their own Members. He then read the law of North Carolina defining the duties of the office to show to the House that they were not judicial in character.

Then, on motion of Mr. Kelley, the oath was administered to Mr. Waddell.

Then, on motion of Mr. Maynard, his credentials were referred to the Committee on Elections.

448. The election case of the Kentucky Members in the Fortieth Congress.

Before the adoption of the fourteenth amendment, and in a time of civil disorders, the House denied the oath to Members-elect who presented themselves with credentials in due form but whose loyalty was questioned; and the credentials were referred to a committee.

In 1867 it was held that no man duly elected should be excluded for disloyalty unless it could be clearly proven that he had been guilty of such open acts of disloyalty that he could not honestly and truly take the oath of July 2, 1862.

Before the adoption of the fourteenth amendment, and in a time of civil disorders, a committee reported and the House sustained the view that no person who had been disloyal should be sworn.

In 1867 the Elections Committee took the view that charges of the disloyalty of a constituency should not prevent a person holding a regular certificate from taking a seat on his prima facie right.

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[1] First session Forty-second Congress, Journal, pp. 9, 13; Globe, pp. 6, 11, 12.

In 1867 Members who challenged the right of a Member-elect to take the oath did so, one on his responsibility as a Member and the other on the strength of affidavits.

On July 3, 1867,[1] the Congress having assembled from a recess caused by a temporary adjournment, the Clerk called the names of 8 gentlemen returned as Members-elect from the State of Kentucky, with credentials in due form.

Thereupon Mr. Robert C. Schenck, of Ohio, challenged the right of one of them, Mr. John D. Young, to take the oath on the ground that he had given aid and comfort to the enemies of the Government. Mr. Schenck produced affidavits in support of this charge. Mr. John A. Logan, of Illinois, also presented affidavits charging Mr. L. S. Trimble, another of the Members-elect from Kentucky, with disloyalty. Mr. John F. Benjamin, of Missouri, on his responsibility as a Member, challenged the loyalty of a third, Mr. J. Proctor Knott. In the course of the debate the fact was developed that only one of the 8, Mr. George M. Adams. was free from the objections which were being urged.

After debate the House—yeas 67, noes 50—agreed to the following:

Whereas it is alleged that in the election recently held in the State of Kentucky for Representatives in the Fortieth Congress the legal and loyal voters in the several districts in said State have been overawed and prevented from a true expression of their will and choice at the polls by those who have sympathized with or actually participated in the late rebellion, and that such elections were carried by the votes of such disloyal and returned rebels; and whereas it is alleged that several of the Representatives-elect from that State are disloyal: Therefore be it

Resolved, That the credentials of L. S. Trimble, John Young Brown, J. Proctor Knott, A. P. Grover, Thomas L. Jones, James B. Beck, and John D. Young, Members-elect from the State of Kentucky, shall be referred to the Committee of Elections for report at as early a day as practicable.

On July 5[2] a proposition that the oath be administered to Messrs. Beck and Grover, against whom the charges of disloyalty were less specific, led to a discussion of the grounds for refusing the oath to a person presenting a certificate in due form, Members asserting that such action was justifiable in a case of alleged personal disqualification. The proposition was referred to the Committee of Elections.

On July 8[3] the Committee on Elections reported, through Mr. Henry L. Dawes, of Massachusetts, reciting the allegations that had been made, and concluding:

The committee are of opinion that no person who has been engaged in armed hostility to the Government of the United States, or who has given aid and comfort to its enemies during the late rebellion, ought to be permitted to be sworn as a Member of this House, and that any specific and apparently well-grounded charge of personal disloyalty made against a person claiming a seat as a Member of this House ought to be investigated and reported upon before such person is permitted to take the seat; but all charges touching the disloyalty of a constituency in a State in which loyal civil government was not overthrown during the late rebellion, or the illegality of an election, are matters which pertain to a contest in the ordinary way, and should not prevent a person holding a regular certificate from taking his seat.

In view of this report the House agreed to a resolution giving the committee

[1] First session Fortieth Congress, Journal, p. 161; Globe, pp. 468–479.

[2] Globe, pp. 501–503; Journal, p. 165.

[3] Journal, pp. 170, 171; Globe, pp. 513–515. Report No. 6; 2 Bartlett, p. 327; Rowell's Digest, p. 218.

the authority necessary to inquire whether any or either of the seven persons were disqualified

from sitting as Members of this House on account of their having been guilty of acts of disloyalty to the Government of the United States, or having given aid or comfort to its enemies.

On December 3, 1867,[1] Mr. Burton C. Cook, of Illinois, submitted the report.[2] After affirming again the principles set forth in the former report the committee say:

It is apparent that there must be power in this House to prevent this [seating of disloyal persons], the House being the judge of the qualifications of its Members, of which fidelity to the Constitution is one, and that this end can only be certainly accomplished by the investigation of any specific and apparently well-grounded charge of personal disloyalty made against a person claiming a seat as a Member of this House, before such person is permitted to take the seat. The House concurred in this view of the committee by adopting the resolution under which the committee is now acting. The principle upon which this preliminary investigation was ordered was adopted by Congress when the oath of office to be taken by Members of this House was prescribed by law, and the preliminary investigation of specific and apparently well-founded charges against a person claiming a seat in this House is only an additional mode of attaining the same result sought to be secured by requiring the oath to be taken by all persons who become Members of the House. * * *

Whether at some future time provisions should be made by law by which those persons who have been at one time guilty of acts of disloyalty, but have by their subsequent conduct given conclusive evidence of loyalty, attachment to the Government, and obedience to the Constitution and laws, should be permitted to take seats in this House, is a matter which addresses itself to the considerate judgment of Congress, but upon which the committee is not now called upon to express an opinion. But while the committee entertained no doubt that it is the right and duty of this House to turn back from its very threshold everyone seeking to enter who has been engaged in armed hostility to the Government of the United States, or has given aid and comfort to its enemies during the late rebellion, yet we believe that in our Government the right of representation is so sacred that no man who has been duly elected by the legal voters of his district should be refused his seat upon the ground of his personal disloyalty, unless it is proved that he has been guilty of such open acts of disloyalty that he can not honestly and truly take the oath prescribed by the act of July 2, 1862; and further, that the commission of such acts of disloyalty to the Government should not be suspected merely, but should be proved by clear and satisfactory testimony, and that while mere want of active support of the Government or a passive sympathy with the rebellion are not sufficient to exclude a person regularly elected from taking his seat in the House, yet whenever it is shown by proof that the claimant has by act or speech given aid or countenance to the rebellion, he should not be permitted to take the oath, and such acts or speech need not be such as to constitute treason technically, but must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion. In obedience to the resolution of this House of July 8, 1867, acting upon the views herein expressed, your committee sent a subcommittee to the State of Kentucky, and carefully examined all the evidence which they could procure upon the question referred to them, and upon an examination of the evidence they find that it is not proved that either James B. Beck, Thomas L. Jones, A. P. Grover, or J. Proctor Knott have been engaged in armed hostility to the Government of the United States, or have given aid and comfort to its enemies, during the late rebellion, and they therefore recommend that they be permitted to be sworn as Members of this House. In relation to the case of Lawrence S. Trimble, John D. Young, and John Young Brown, the committee reports that the seat of each of these gentlemen is contested, and that in each case the contestants have made the point that the person holding the certificate of election had been guilty of direct acts of disloyalty to the Government, and evidence has been taken both by the claimants and contestants, in addition to that taken by the committee, upon that question, which evidence the

[1] Second session Fortieth Congress, Report No. 2; 2 Bartlett, p. 368; Journal, p. 30; Globe, pp. 11, 13.

[2] It was announced in the House that Messrs. Michael C. Kerr, of Indiana, and Joseph W. McClurg, of Missouri, did not concur in the legal propositions laid down in the report.

committee has not yet had time to consider, and is not now prepared to report any conclusion in those cases. The committee believes that it will be able to report in those cases within a short time, as the cases are understood to be ready for a final hearing.

The committee recommends the adoption of the following resolution:

Resolved, That James B. Beck, Thomas L. Jones, A. P. Grover, and J. Proctor Knott are entitled to seats as Members of this House from the State of Kentucky.

The resolution was agreed to without division, and the four persons named were sworn in as Members.[1]

449. The Kentucky election case of Smith v. Brown in the Fortieth Congress.

In 1868 the House excluded a Member-elect who, by voluntarily giving aid and comfort to rebellion, had, in the opinion of the House, made it impossible for him to take the oath of office prescribed by law.

In 1868, a question of loyalty arising, the House in effect held that there might be established by law qualifications other than those required by the Constitution.

In 1868 it seems to have been assumed by the Committee on Elections, if not by the House itself, that the House alone might not add to the qualifications prescribed by the Constitution.

Form of oath prescribed by the act of July 2, 1862, known as the "Ironclad oath."

Discussion as to whether or not the law prescribing the oath of loyalty in 1862 was constitutional.

The House may by resolution modify the legal requirements for taking testimony in an election case.

On July 9, 1867,[2] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, presented this resolution, which was agreed to:

Resolved, That in each of the cases of contested election from Kentucky, the time for taking testimony is hereby extended to the 1st day of December next, in all things else conforming to existing law, except that such testimony may be taken before a notary public.

On January 21, 1868,[3] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, submitted the report of a majority of the committee[4] in one of the above-mentioned cases, Smith v. Brown. Mr. Brown had presented credentials in proper form, but had been excluded with other Kentucky Members.[5]

There was no doubt that he had received a large majority of the votes.

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[1] On December 18, 1863, in the Senate, Mr. Charles Sumner, of Massachusetts, proposed a rule requiring all Senators to take and subscribe in open Senate to the oath or affirmation provided for by the act of July 2, 1862. This gave rise to a lengthy and learned debate on the subject of the oath required and allowed by the Constitution, and upon the question of establishing qualifications outside of those provided by the Constitution. The debate was continued January 20, 21, and 25, 1864, and on the latter day the resolution was agreed to, yeas 28, nays 11. (First session Thirty-eighth Congress, Globe, pp. 48, 275, 290, 320–331, 341.)

[2] First session Fortieth Congress, Journal, p. 177; Globe, p. 546.

[3] Second session Fortieth Congress, House Report No. 11; 2 Bartlett, p. 395; Rowell's Digest, p. 220.

[4] Minority views filed by Messrs. M. C. Kerr, of Indiana, and John W. Chanler, of New York.

[5] See section 448 of this work.

This election case, the first of its kind since the formation of the Constitution, and recognized by the House as of the highest importance, was divided into two branches, which the House decided to debate and decide separately.

(1) The question as to whether or not John Young Brown was disqualified from sitting as a Member of the House on account of his having been guilty of acts of disloyalty to the Government of the United States or having given aid or comfort to its enemies. The majority of the committee, in their report, cite first the oath prescribed by the act of July 2, 1862: [1]

That hereafter every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation:

I, A. B., do solemnly swear (or affirm) that have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: so help me God.

The report then says:

The committee understands itself to be instructed to inquire whether the said Brown has committed any of the acts which he is required by said statute, before entering upon the duties of a Representative, to make oath that he has not done.

The evidence relied upon to support this charge of disloyalty against Mr. Brown is contained in the following letter, written by him at the time it bears date, to the editors of the Louisville Courier, and published in that paper on the 15th day of May following:

[From the Louisville Courier, May 15,1861.]

ELIZABETHTOWN, *April 18, 1861.*

Editors Louisville Courier:

My attention has been called to the following paragraph, which appeared in your paper of this date:

"JOHN YOUNG BROWN'S POSITION.—This gentleman, in reply to some searching interrogatories put to him by Governor Helm, said, in reference to the call of the President for four regiments of volunteers to march against the South—

"'I would not send one solitary man to aid that Government, and those who volunteer should be shot down in their tracks.'"

This ambiguous report of my remarks has, I find, been misunderstood by some who have read it, who construe my language to apply to the *government of the Confederate States!* What I did say was this:

"Not one man or one dollar will Kentucky furnish *Lincoln* to aid *him* in his *unholy war against the South.* If this *northern army* shall attempt to cross our borders, *we will resist it unto the death;* and if one man shall be found in our Commonwealth to volunteer to join them *he ought* and I believe will *be shot down before he leaves the State."*

This was not said in reply to any question propounded by ex-Governor Helm, as you have stated, and is no more than *I frequently uttered publicly and privately* prior to my debate with him.

Respectfully,

JOHN YOUNG BROWN.

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[1] 12 Stat. L., p. 502.

The majority and minority differed as to the purport and effect of these words. The minority contended that considering the circumstances at the time the letter was written it was not disloyal. The majority concluded that Mr. Brown having "voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the United States," he is not entitled to take the oath of office or to be admitted to this House as a Representative from the State of Kentucky.

Therefore the majority of the committee recommended the adoption of the following resolution:

Resolved, That John Young Brown, having voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the United States, is not entitled to take the oath of office as a Representative in this House from the Second Congressional district of Kentucky or to hold a seat therein as such Representative.

This portion of the report was debated fully on January 31 and February 1 and 3, 1868[1]. The question of fact as to whether the letter actually constituted such an act as the majority contended was considered, but the conflict was especially vigorous over the legality of the proposed action.

In opposition to the action recommended by the majority of the committee it was urged[2] that in the compact known as the Constitution it was agreed that no State should elect any person who should not have three specified qualifications, of age, citizenship, and inhabitancy. Either House might judge the elections, returns, and qualifications of its own Members and might expel. Subject to these limitations the right and power of the States over their Representatives was exclusive and complete. The attempt in the act of July 2, 1862, to impose another qualification was in direct conflict with the terms of the original pact. The imposition of additional limitations not being among the powers granted to the Congress, it must be unconstitutional and void. But even supposing the act of 1862 to be constitutional, it was not competent for the House to inquire whether a Member might take the oath. That was a question for him to determine by himself. It was further urged,[3] although not as vital, that even under the terms of the act of 1862 the oath might not be rightfully required, since there was a broad distinction between a Member of Congress and the officer referred to in that act. Further, the law of the oath was unconstitutional in that it was ex post facto and assumed to punish for alleged offenses committed before its enactment, and also to punish without legal trial and conviction. In the case of ex parte Garland the Supreme Court had held this oath unconstitutional when applied to lawyers. The oath was also unconstitutional, because the Constitution prescribed only an oath "to support this Constitution." Under the legal principle "expressio unius exclusio alterius' it was to be presumed that the Constitution meant what was written and nothing more. The same doctrine would indicate that in enumerating the three qualifications the Constitution intended that there should be no more. In support of this contention Justice Story was quoted. It was true that the House was the judge of the qualifications of its

[1] Globe, pp. 891, 899, 901, 916, 937.

[2] By Mr. James B. Beck, of Kentucky, Globe, p. 902.

[3] By Mr. J. Proctor Knott, of Kentucky, Globe, p. 912.

own Members, but this did not mean that it might create new qualifications. It must sit in a judicial and not a legislative capacity, and decide only whether the Member had the three enumerated qualifications. This argument as to the inability of the House to add qualifications by itself was admitted to be sound by the chairman of the Elections Committee,[1] who presented the report against Mr. Brown, but he of course held that the Congress might by the law of the oath establish the additional qualification of loyalty.

In support of the resolution of exclusion it was argued that the Government might go behind the qualifications enumerated in the Constitution. It was true that only three qualifications were specified, but did not this mean that no man should serve who had not at least these three qualifications?[2] It had been held that the States might not impose other qualifications, but it did not necessarily follow that the Congress, with the approval of the President, i.e., the Government, might not prescribe other qualifications. It was inherently implied in every constitutional provision under which the House had its existence that no man should be qualified to sit as a Member who had not the indispensable qualification of loyalty to the Government. The laws of human society authorized a government to resort to all means to preserve itself. In McCulloch *v.* Maryland, Chief Justice Marshall had set forth views sustaining the argument that Congress had full powers of preservation of itself. The Congress of 1862 had full power to adopt the form of oath in question in this case as a consequence. It was further urged[3] that if under the Constitution no qualifications except those enumerated could be required, then the great leaders of the recent rebellion might be elected to the House and seated. Even expulsion might not be a remedy, since if a man had a right to take a seat he had a right to hold it. By laws passed in 1793 and 1853, disqualifying persons guilty of certain acts from holding any office of honor, trust, or profit under the United States, Congress had asserted its right to prescribe additional qualifications. It could not be said that exclusion from the House in the pending case was an ex post facto punishment, for a disqualification from holding office was not an increase of penalty.

In rebuttal the minority argued that the case of McCulloch *v.* The State of Maryland had no application to the pending case. Also, the effect of the acts of 1793 and 1853 was denied on the ground that a Member of Congress was not an officer within the meaning of those laws.

On February 13[4] the question was taken on a motion of Mr. Michael C. Kerr, of Indiana, to substitute for the resolution proposed by the majority the following:

> That John Young Brown, not having voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility to the United States, and having received a majority of the votes cast in the Second district of Kentucky for Representative in this House, is entitled to admission and to take the oath of office as a Representative from said district.

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[1] Mr. Henry L. Dawes, of Massachusetts, Globe, p. 915. Mr. Dawes cited his report in this case, wherein he said that the House "can judge whether each Member has been elected according to the laws of his State and possesses the qualifications fixed by the Constitution. Here its power begins and ends."

[2] Speech of Mr. Dawes, Globe, p. 894.

[3] By Mr. Burton C. Cook, of Illinois, Globe, p. 909.

[4] Journal, pp. 342, 343; Globe, p. 1161.

This amendment was disagreed to, yeas 43, nays 38.

The resolution of the majority, excluding Mr. Brown, was then agreed to without division.

450. The Kentucky case of Smith v. Brown, continued.

In the Kentucky cases in 1868 a contest was presented and sustained against a person to whom the House had refused the oath on his prima facie showing.

The person receiving the majority of the votes in a district being excluded as disqualified, the House, after careful examination, declined to seat the one receiving the next highest number.

The Elections Committee, in a report sustained on the main issue, held as an incidental question that the English law as to seating a minority candidate, when a vacancy is caused by disqualification is not applicable under the Constitution.

(2) On the second branch of the case, relating to the right of the contestant to the seat, the committee were united. Mr. Young's majority over the contestant was 6,106 votes. The contestant rested his claim to the seat solely on the legal view that where a candidate known to be ineligible receives the highest number of votes, those votes are to be treated as void, and the candidate having the next highest number be seated. The report reviews the English authorities on which contestant mainly relied, showing that the rule rested entirely on the fact that the voters had knowledge of the ineligibility of the candidate before voting for him. The rule laid down by Heywood on County Elections was "that it is a willful obstinacy and misconduct in a voter to give his vote for a person laboring under a known incapacity." Parliament requires the notice of this incapacity to be exceedingly formal, and in almost every instance to be at the polls. The report says:

> Now, if it be admitted that this is the rule of law in this country as well as in Great Britain, the facts do not bring this case within it. No such notice as the British Parliament required was given to the electors at the polls in the twelve counties composing this district. Indeed, it does not appear that any notice at all of any alleged ineligibility was given at a single poll. The most that can be claimed, by way of notice, is the alleged notoriety of certain facts, viz, the publication of the letter, which, it is claimed, was evidence from which ineligibility could be inferred by the voter. But how notorious were even these facts? The letter was published in 1861—six years before the election; it was reproduced on the stump; but in how many of these counties, in the hearing of how many of the very men who afterwards, on election day, cast their votes for Mr. Brown, does not appear. It must also be remembered that what would be the legal result arising from these facts was never made certain before the votes. That result depended upon the purpose for which the letter was written, and its effect—all matters of proof and matters at all times in dispute before the voters, and about which even this committee itself, with a better opportunity than any voter ever had to investigate and examine all the evidence, are now, after a full hearing, as nearly equally divided as possible. How can it be said, then, that any voter, in casting his ballot for Mr. Brown, has been guilty of "willful misconduct and obstinacy" by casting a vote for one known to be ineligible? Mr. Heywood says that in England "it is not so in a doubtful case." (Southwark Elections, p. 259.) If, then, it be admitted that this English rule was a law binding on this House, still it would not avail Mr. Smith in this case, for the facts do not bring the case within the rule.
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> But the committee do not find any such law regulating elections in this country, in either branch of Congress, or in any State legislature, as far as they have been able to examine. Their attention has been called to no case, and it was not claimed before the committee that, as yet, this rule, by which one receiving only a minority of the votes actually cast had been adjudged elected, had ever been applied in this country.

On the other hand, there have been many cases of alleged ineligibility in both branches of Congress since the formation of the Government, in some of which seats have been declared vacant on that ground, and in which, had there existed in this country any such rule, it would certainly have been resorted to.

The report cites the cases of Ramsey *v.* Smith, Gallatin, Bailey, Shields, and the case of Mr. Brown himself (the excluded one), who was not allowed to take his seat in the Thirty-sixth Congress until he had arrived at the constitutional age. Cushing's Law of Legislative Assemblies was also discussed, and shown to be based on English, not American, precedents.

The report goes on to discuss the powers of Parliament, which are often called omnipotent, and which in theory proceed from the Sovereign and not from the people. In the matter of elections it had laid down many arbitrary laws besides the one in question. Comparing the English with the American system, the report says:

There certainly can be no need of argument to show that such law can find no place in our system, or occasion to contrast the limited powers of the House of Representatives with the "omnipotence of Parliament. As Congress, much less the House of Representatives, never conceded, never having the power to concede, to a voter his right to the ballot, neither can it take it away, modify, or limit it. Least of all can this body, the House alone, punish a voter for "obstinacy" or "perversity" in the exercise of his right. It can not touch a voter or prescribe how he shall vote, nor can it impose a penalty on him, much less disfranchise him or say what shall be the effect or the power of his ballot if it be cast in a particular way. The laws of the State determine this. It is unnecessary to discuss how far both Houses by a law can interfere under that clause of the Constitution which says that "the time, 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." It is enough to say that Congress never has touched those regulations, but has left them as made by the States. Both Houses have always absolutely conformed, in the effect to be given to the ballot, to the law of the State. To such extent has it been carried that the Senate has rejected a claimant to a seat who had 29 votes to 29 blanks, because there was a law of the State defining the power of each ballot by prescribing that, to be elected Senator, one must have not only a majority of all the votes cast, but also a majority of all the members elected to the legislature (2 Contested Elections, 608), and there happened to have been 60 members elected to that legislature; and this House has, in obedience to a law of the State of Delaware, rejected votes and given the seat to a contestant, because 4 votes had only the name of the sitting Member on them, when the law required each voter, though there was but one Representative to be elected, to put two names on his ballot of two persons residing in different counties of the State. (1 Contested Elections, 69.) Some States have required a majority of all votes cast for an election, some a plurality alone, some a plurality after one or more unsuccessful attempts. The statute books of the States are full of provisions touching elections, extending as well to the effect and power of each ballot as to the manner of depositing it, all of which are a rule for this House. Congress has not seen fit to enact any law concerning it if it had the power. It is not necessary to inquire whether Kentucky might not provide by law that votes cast for one known to be ineligible shall be thrown away, and one who has received a majority of the votes only shall be declared elected. It is enough to say that that State has not only never passed such a law, but it has enacted by statute that no one shall be declared elected who has not received a majority of the votes cast. As has been shown, Parliament did enact a law that votes cast for one ineligible shall be treated as if not cast, and one having a minority only of the votes be thus elected. But neither has Congress nor Kentucky enacted any such law; much less can this House alone, by a resolution, set it up, and that, too, after the fact, as a punishment for "willful obstinacy and misconduct." The right of representation is a sacred right, which can not be taken away from the majority. That majority, by perversely persisting in casting its vote for one ineligible, can lose representation, but never the right to representation while the Constitution and the State government shall endure. If it be inquired whether a loyal minority have not rights which are thus extinguished, the answer is obvious. If all

are legal voters the right of one is no greater than that of another; nor is it a valid objection that by this rule one district after another might be left without a Representative until representation itself might be destroyed. The Constitution has given into the hands of Congress power by law to make, alter, or amend all regulations as to the times, places, and manner of electing Representatives. If this is power enough to meet the exigency, it will be met when it arises. If there is not power enough then it can not be found in that instrument. When Congress has by law thus regulated elections, this House can, by resolution, conform its actions thereto, but not till then.

The committee are therefore of the opinion that the case does not come within the law of the British Parliament, for want of a sufficient notice to the electors at the polls of an ineligibility, known and fixed by law; that the law of the British Parliament in this particular has never been adopted in this country, and is wholly inapplicable to the system of government under which we live.

The will of the majority expressed in conformity with established law is the very basis on which rest the foundations of our institutions, and any attempt to substitute therefor the will of a minority is an attack upon the fundamental principles of the Government, and if successful will prove their overthrow.

Therefore the committee recommended the following resolutions:

Resolved, That Samuel E. Smith, not having received a majority of the votes cast for Representative in this House from the Second Congressional district of Kentucky, is not entitled to a seat therein as such Representative.

Resolved, That the Speaker be directed to notify the governor of Kentucky that a vacancy exists in the representation in this House from the Second Congressional district of Kentucky.

This branch of the report was debated at length on February 14 and 15.[1] This debate led to a review of precedents and to the citation of several American precedents which the report of the committee had overlooked and which were in harmony with the English rule. The earliest was an instance wherein about seventy years previous a sheriff had been declared elected in one of the counties of Maryland on the principle of the English precedents.[2] A later case was a decision of the Maine supreme court[3] (7 Maine reports), where certain scattering votes cast for an ineligible person had been disregarded, thus allowing an election which otherwise would have been defeated for lack of the required absolute majority. Another precedent was cited from the Maine legislature of 1865, where a candidate who was ineligible was excluded, although he had a majority of the votes, and the minority candidate was seated. The Indiana case of Gulick *v.* New was also cited in support of the same theory. Those who opposed the view of the committee also contended that the alleged disloyalty of Mr. Brown was well known in the district and constituted sufficient notice. In reply, it was argued that it had only recently been decided that such disloyalty was a disqualification and that Mr. Brown's status was a matter of controversy in the district.

Those supporting the report also denied the authority of the English rule and cited, in addition to the precedents referred to in the report, a decision by the supreme court of Georgia in 1852, wherein the English rule was denied and the contrary principle upheld.

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[1] Globe, pp. 1185, 1189–1200.

[2] Speech of Mr. Dawes, Globe, pp. 1185, 1186.

[3] Speech of Mr. John A. Peters, of Maine, Globe, p. 1197.

The question was taken [1] on a motion of Mr. John Coburn, of Indiana, to substitute for the resolution denying to contestant the seat the following:

That Samuel E. Smith, having received a majority of the votes cast in conformity with law, is entitled to take the oath of office as a Representative in this House from the Second Congressional district of Kentucky.

This motion was decided in the negative, yeas 30, nays 102.

Then the resolutions as reported by the committee were agreed to without division.

451. The Kentucky election case of McKee v. Young in the Fortieth Congress.

John D. Young, having, in the opinion of the House, voluntarily given aid and comfort to the enemy by words, although not by acts, was held incapable of taking the oath of July 2, 1862.

Argument that the act of July 2, 1862, prescribing a test oath, did in effect create an additional qualification.

In an exceptional case the House rejected votes cast by persons lately in armed resistance to the Government, although by the law of the State they were qualified voters.

Certain officers of election being held to be disqualified under State law, the House rejected the returns over which they had presided, declining to treat them as de facto officers.

A question as to whether or not the votes of persons deprived of citizenship by an act of Congress should be rejected in a case where the State law did not require a voter to be a citizen of the United States.

On March 23, 1868,[2] Mr. Joseph W. McClurg, of Missouri, from the Committee on Elections, submitted a report of the majority of the committee on the Kentucky election case of McKee *v.* Young. Mr. Young had presented himself at the preceding session with credentials in regular form, but with other Kentucky Members [3] had not been permitted to take the seat until his qualifications for loyalty had been investigated.

The questions arising in this case naturally divide themselves into two main branches:

1. The majority of the committee concluded, from a discussion of the evidence, that the contestant had sustained the allegation in his notice of contest that said Young "voluntarily gave aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the Government of the United States." The report says:

The committee find the allegations of the contestant so sustained by the proof that it is unnecessary to contend that a rule too liberal in favor of those who sympathized with the late avowed enemies of the Government was adopted when report No. 2 of this session was approved by this House in the cases from Kentucky of Beck, Jones, Grover, and Knott. This case is brought within the rule then laid

[1] Journal, pp. 350, 351.

[2] Second session Fortieth Congress, House Report No. 29; 2 Bartlett, p. 422; Rowell's Digest, p. 222.

[3] See section 448 of this work.

down, as it is proven, by clear and satisfactory testimony, that the said John D. Young "has been guilty of such acts of disloyalty that he can not honestly and truly take the oath prescribed by the act of July 2, 1862."

The testimony of witnesses both for and against Mr. Young shows that he was not regarded by any as a Union man, and that he was not merely in passive sympathy with those engaged in the rebellion but desired its success and so expressed himself.

Before quoting testimony on this point the committee would express the opinion that "aid and comfort" may be given to an enemy by words of encouragement, or the expression of an opinion, from one occupying an influential position. They said John D. Young occupied the official position of county judge, as shown in the testimony.

The majority of the committee make no argument on the right to exclude such a person, regarding that question as settled by the preceding cases.

The minority of the committee[1] deny that the evidence shows those results claimed by the majority, and argue again that the House may not exclude for such a reason. They say:

Upon the whole evidence, therefore, the undersigned maintain that it has not been made to appear by anything like "clear and satisfactory testimony" that John D. Young has been guilty of any such open acts of disloyalty that he can not truthfully take the oath prescribed by the act of July 2, 1862, and that he should be permitted to take his seat as the Representative of the Ninth Congressional district of Kentucky in the present Congress.

The undersigned can not, however, close this paper, lengthy as it has necessarily been made, without entering a most solemn and emphatic dissent from the doctrine assumed by the majority, that a person possessing the qualifications prescribed in the Constitution of the United States for a Member of the House of Representatives can be legally excluded from his seat as such, after having been duly elected thereto, simply because he may not be able truthfully to take the oath prescribed by the act of July 2, 1862. It is more than doubtful, in their opinion, whether the act can, by any proper rule of construction, be made to apply to Members of Congress at all; but, be that as it may, it seems to them to be a violation of the Constitution in more than one particular.

Congress, by an act passed January 24, 1865, extended the provisions of the act of July 2, 1862, so as to require the oath therein prescribed to be taken by lawyers practicing in the courts of the United States. That act was declared by the Supreme Court, upon solemn adjudication, after thorough argument, to be unconstitutional, not only because it was in conflict with the inhibition against the passage of bills of attainder, but because it was to all intents and purposes an ex post facto law, besides being in contravention of that clause in the Constitution vesting the pardoning power in the Executive. (Ex parte Garland, 4 Wall., p. 333.) But there is another and far weightier reason for holding the act of 1862 unconstitutional, when sought to be enforced as to Members of Congress, and that is, that it super adds qualifications, or, which amounts to the same thing, prescribes disqualifications for Representatives unknown to the Constitution, which, in the very nature of things, Congress has no power to do.

The Constitution, section 2, Article I, provides that "no person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not when elected be an inhabitant of the State in which he shall be chosen," the converse of which is that any person who is 25 years of age, has been a citizen of the United States for seven years, and is an inhabitant of the State in which he may be chosen, shall be a Representative if legally elected as such. If the person elected possess the qualifications presented by the Constitution, Congress has no power to inquire any further, or to demand anything more.

This principle was early recognized by Congress in the case of Barney *v.* McCreery, from Maryland, and reaffirmed in the cases of Fouke *v.* Trumbull, and Turney *v.* Marshall, from Illinois. In the latter case the distinguished chairman of the committee at that time, Mr. Bingham, says in his report:

"By the Constitution the people have the right to chose as their Representative any person having only the qualifications therein mentioned, without super adding thereto any additional qualification whatever. A power to add new qualifications is equivalent to a power to vary or change them."

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[1] Messrs. M. C. Kerr, of Indiana, and John W. Chanler, of New York.

Yet that this act does in effect prescribe an additional qualification is too plain to admit of an argument. It is self-evident truth. That additional qualification without the possession of which the majority would not permit him to take his seat, is his ability to truthfully take the test oath. If the majority think he can truthfully take it, he gets his seat; if they think otherwise, he is deprived of it. Will any man of ordinary self-respect deny, then, that this act prescribes an additional qualification? If this principle is correct, then there is no limit to the power of Congress in prescribing qualifications for its Members but the will and discretion of the dominant majority, and by prescribing test after test they may exclude everybody but a favored few, and the right of choosing their own Representatives may be taken from the people entirely, or the character of Congress molded to suit the views and interests of one particular section or party forever.

It is no answer to this to say that Congress should have the power to exclude persons who from imbecility or want of integrity might endanger the safety of the Government. The question is, Has it the power? It has only the power to exclude those who do not possess the qualifications prescribed in the Constitution. If the people see proper to elect an imbecile, a person holding opinions distasteful to the majority, or one who may once have held such opinions, to represent them, it is a matter that concerns themselves, and confers no new power on Congress, and suspends no provisions of the Constitution. The only remedy lies in amending the Constitution, in the manner prescribed in the fifth article. Until that is done, Congress can do no more than pass upon the qualifications already prescribed.

It is simply begging the question to claim that Congress has the power to prescribe this test oath to be taken by its Members, because "each House has the power to judge of the elections, returns, and qualifications of its own Members," for the question instantly recurs, "What are the qualifications of which each House may be the judge?" and the answer is, simply the qualifications prescribed by the Constitution. To admit any other rule would be to make each House entirely independent of the Constitution, as to who may or may not be its own Members.

The majority of the committee proposed the following resolution:

Resolved, That John D. Young, having voluntarily given aid, countenance, counsel, and encouragement to persons engaged. in armed hostility to the United States, is not entitled to take the oath of office as a Representative in this House from the Ninth Congressional district of Kentucky, or to hold a seat therein as such Representative.

The report was debated on June 20 and 22,[1] and on the latter day Mr. Kerr offered as a substitute a declaration that Mr. Young "was duly elected a Member of this House" and "should now be admitted to his seat herein upon taking the oath prescribed by law."

This substitute was decided in the negative—yeas 30, nays 96.

The resolution reported by the committee was then agreed to without division.

2. On the question as to the election of contestant a greater diversity of opinion arose in the committee. It was not contended that Mr. McKee should be seated simply because Mr. Young had been excluded for disqualification, the question involved in such a proceeding being regarded as settled in a former case. But a serious division of opinion arose on the question as to whether or not the contestant, Mr. McKee, had actually been elected. In the report presented March 23 all the committee, with one exception, agreed that contestant was not elected. But on June 2 the dissenting Member, Mr. Charles Upson, of Michigan, filed views contending that contestant had been elected.[2] On June 3, by unanimous consent, on motion of Mr. Henry L. Dawes, of Massachusetts, and without debate, the subject was recommitted.[3] On June 17 Mr. Burton C. Cook, of Illinois, presented from a

[1] Journal, pp. 912, 913.

[2] House Report No. 49; Bartlett, p. 452.

[3] Journal, p. 793; Globe, p. 2812.

majority of the committee [1] a report taking the ground that the contestant was elected, and recommending the adoption of the following resolutions:

Resolved, That J. D. Young was not legally elected a Member of the House of Representatives of the Fortieth Congress from the Ninth Congressional district of Kentucky.

Resolved, That Samuel McKee was duly elected a Member of the House of Representatives in the Fortieth Congress from the Ninth Congressional district of the State of Kentucky.

Mr. Young had been returned by an official majority of 1,479 votes. In their final report the majority of the committee find that "the 625 votes of rebel soldiers ought not to be counted," that 883 majority should be deducted from Mr. Young, because it was given in precincts where there were "rebel officers of election," and finally that the votes of eight deserters should be deducted. This would leave a majority of 41 for Mr. McKee, the contestant.

(*a*) As to the 625 votes of "rebel soldiers," the majority in their final report say:

It appears perfectly clear to the committee that persons who had been soldiers in the rebel army had no right to vote or to act as officers of election. They had surrendered to the Government of the United States upon the condition that each company or regimental officer should sign a parole for his men, and each man was allowed to return home, not to be disturbed by United States authority so long as he observed his parole and the laws in force where he resided. These men were especially excepted from the amnesty proclaimed by the President May 29, 1865, under the tenth exception, and there appears to have been no other act of amnesty up to the time of this election which could include them; they were paroled prisoners of war. No reason occurs to the committee why these men should be allowed to vote which would not apply with equal force to them while actually in the field against the Government; the only difference which appears is that they had now been captured; their object, aim, and intent, whether in fighting or voting, was manifestly to destroy the Government. It seems absurd to say that it was a patriotic duty to kill them while they were in arms against the Government to prevent the destruction of the Government by them, and at the same time wholly illegal to refuse to allow them to accomplish the same result by their votes. The whole plan of reconstruction by Congress, as also the plan of reconstruction proposed in the proclamations of the President, has proceeded upon the assumption that those who had renounced their allegiance to the Government and fought against it have forfeited their right to vote.

In debate Mr. Upson [2] elaborated this argument further:

I say that when a rebel throws down the cartridge box he can not take up the ballot box and immediately assume either to come into this House, or to send an agent here to represent him, without the consent of the sovereign power of the nation. * * * No republican government can exist on any such basis. Gentlemen say there is no precedent. Well, of course, in the very nature of things there can be no precedent. There is no precedent for such a rebellion * * * It is necessary for us to distinctly lay down and assert the principles that all political rights do not necessarily revert to all men who engage in rebellion when peace is first restored as they were before the rebellion unless by permission of the sovereign power of the people. * * * It is by virtue of the reconstruction acts of Congress, not by any inherent right of their own, that they have the right to vote in the Southern States.

Kentucky, of course, had not been the subject of reconstruction legislation, never having seceded.

In their first report the majority of the committee had said:

But the committee finding that there is no law of Kentucky disfranchising rebel soldiers, have not been able to see how those votes can be rejected.

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[1] House Report No. 59; 2 Bartlett, p. 458. Mr. Luke P. Poland, of Vermont, who had agreed to the first majority report, dissented from this (Globe, p. 3371).

[2] Globe, p. 3374.

The minority of the committee, Messrs. Kerr and Chanler, concurred, with this argument:

Each State has the exclusive right to determine who shall and who shall not be electors at her polls, The several States possessed that right before the adoption of the Constitution of the United States. They never surrendered it nor delegated to Congress or any other department of the Government the power to alter or interfere with it in any way. The Constitution of the United States, Article I, section 2, provides that "the electors for Representatives in Congress in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." The constitution of Kentucky, in force when this election was held, and still in force, prescribes that all white male citizens of the State, 21 years of age, who shall have resided in the State two years, or in the county, town, or city in which they offer to vote one year next preceding the election, shall be electors of the most numerous branch of the legislature of that State. (New constitution of Kentucky, Art, II, sec. 8.) It follows, therefore, that no vote cast for either Young or McKee can lawfully be rejected on account of the voter's participation in the rebellion, no matter to what extent that participation may have gone, and there is still less pretext for this claim of contestant's, because Congress has never assumed to declare who shall or shall not be voters in Kentucky, even granting that there are those who may be willing to go to the extent of admitting that they have that power. It is true that the legislature of Kentucky, by an act approved March 11, 1862, sought to deprive all who had participated in the rebellion of the right of suffrage, but this act was repealed by an act approved December 19, 1865, * * *.

So that long before the 4th of May, 1867, when this election was held, all who had in any way participated in the rebellion were restored to all their political rights and privileges, and had all the qualifications of an elector as fully as if they had never been in the rebellion at all. What difference, then, does it make in this case whether seven hundred or seven thousand of those who voted for Young had been in the rebel army? What difference whether eight or eight thousand of them had deserted from the Federal army? They were still, under the constitution and laws of Kentucky, qualified electors of the most numerous branch of the State legislature, and had as much right to vote for a Member of Congress under the Constitution of the United States as either of the candidates themselves.

(*b*) The law of Kentucky of February 11, 1858, provided that the judges of elections should be so appointed as to represent the two political parties, and a further law enacted March 15, 1862, provided:

SECTION 1. That in construing the act approved February 11, 1858, to which this is an amendment, those who have engaged in the rebellion for the overthrow of the Government, or who have in any way aided, counseled, or advised the separation of Kentucky from the Federal Union by force of arms, or adhered to those engaged in the effort to separate her from the Federal Union by force of arms, shall not be deemed one of the political parties in this Commonwealth within the provisions of the act to which this is an amendment.

In their second report the majority found that in each of ten precincts one or more returned rebels had acted as officers of election, and that in such precincts a total majority of 883 had been returned for Mr. Young. The report contends that this majority should be rejected.

By the law of Kentucky none but electors can be judges or officers of election. The law of Kentucky also provides that those who have engaged in the rebellion for the overthrow of the Government, or who have in any way aided, counseled, or advised the separation of Kentucky from the Federal Union by force of arms, or adhered to those engaged in the effort to separate her from the Federal Union by force of arms, should not be selected as judges of election. * * * It has long been held that if the officers of election are not capable of holding the office, the election has no more validity than would an election where no officers whatever were appointed; it is otherwise where persons capable of holding the office are appointed, although they may not have complied with the forms of the law. (Easton *v.* Scott, First Contested Election Cases, p. 272; Delano *v.* Morgan, decided the present session.)

Both in the report and in the debate, a state of intimidation in the district was referred to as a fact which showed the necessity of impartial election officers selected according to the law.

The partisan leanings of the election officers were shown from the poll books. As to this, and as to the law providing for representation of two parties, neither of which should include those who had aided the rebellion, Mr. Upson, in his minority views, had said:

It is submitted that such statutes can not be considered as directory merely, but as imperative, and it is insisted also that the condition of this portion of Kentucky, at the time when this election was held, made the rigid enforcement of this law a matter of vital interest to the loyal Union men of that district.

It is stated by the minority of the committee in their report heretofore referred to (p. 16) that all these election officers must, by the laws of Kentucky, have been appointed in June or July, nearly a year preceding this election, and hence they argue that the vote of these officers cast at this election is no evidence of their political status at the time of their alleged appointment the year previous, and they quote from the reasoning of the chairman of the committee in the case of Blakey *v.* Golloday (Report No. 1, of this session, p. 3) in support of this position.

Unfortunately, however, for their argument, they overlooked the fact that this Congressional election was held by virtue of an act of the legislature of Kentucky, passed February 18, 1867, which provided that the officers of election to be appointed by the county courts in March or April of that year, for the election of constables and justices of the peace, should be the officers of election for the election of Members of Congress, on the same 4th day of May, 1867, so that the appointment was only made a month or two, at the furthest, prior to the election, and the vote of the election officer would be a pretty sure criterion of his political party status at the time of his appointment, especially as the Representative in Congress was the most important officer to be chosen at said election.

But the case of Blakey *v.* Golloday was expressly decided on other grounds, and no decision was made as to the political construction to be given to this law of Kentucky.

In their first report the majority of the committee had refrained from taking a position on this feature of the case because from the view they took as to other features a decision on this question would not affect the case.

The minority, composed of Messrs. Kerr and Chanler, held:

It is a sufficient answer to all this to say that there is no law in Kentucky disqualifying a man from acting as am officer of an election, sheriff of a county, or in any other office in the State, on account of his having been in the rebel army; and, besides, if there were, these were, to say the least of it, all officers de facto, duly appointed and acting regularly under color of authority. No complaint is made that either of them acted unfairly, or that either candidate was benefited or injured by their official action, and, therefore, according to the principle above stated, their acts are as valid, so far as the public and the parties to this contest are concerned, as if they had been officers dehjure.

(*c*) In making the 41 majority for contestant, the majority of the committee in their second report rejected the votes of eight deserters from the Federal Army, which were shown to have been cast for Young. Mr. Upson, in his minority views, which seem to have largely influenced the second report, had said:

The act of Congress of March 3, 1865, decitizenizes, by their own voluntary act, all persons who have deserted the military or naval service of the United States who shall not return to said service, or report themselves to a provost-marshal, within sixty days after the issuing of the President's proclamation under the provisions of said act, and makes them forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof, and the act of Congress of July 19, 1867, recognizes expressly this loss of citizenship in consequence of desertion.

The statutes of Kentucky also recognize the right of expatriation on the part of the citizen, and

that naturalization can only be effected under the laws of the United States, so as to make the naturalized person a citizen of that State, and no person by her constitution can be a voter who is not a citizen. Citizenship of white persons in that State is derived by birth within that or some other State of the Union, or residence therein, or by naturalization under the laws of the United States and the like residence in said State. The few exceptional cases it is not necessary to notice. That deserters, by reason of this act of Congress, are not legal voters, has also been expressly held by the majority of the said committee in the recent case of Delano *v.* Morgan, from the Thirteenth Congressional district of Ohio. (Report No. 42 of this session, p. 3.)

In their first report the majority had said:

It is proven that eight deserters from the Federal Army voted for Mr. Young, but no law is found under which Kentucky excludes such a vote.

In the debate Mr. Poland pointed out[1] that in the case of Delano *v.* Morgan the law of Ohio required a voter to be a citizen of the United States, and it was for that reason that deserters who had lost their citizenship because of the law of Congress were rejected in Ohio. In Kentucky there was no State law like that of Ohio.

On June 20 and 22[2] the report was debated at length, and on the latter day the two resolutions reported by the majority were agreed to. On the second of the two, that declaring contestant elected, there were yeas 62, nays 43.

Mr. McKee then appeared and took the oath.

At the outset of this case a preliminary question had been settled as follows:

Before proceeding to state the grounds on which Mr. McKee bases his claim, the committee remark that the notice of contest is objected to by Mr. Young for the reason that the contestant does not "specify particularly the grounds upon which he relies in the contest." It is unnecessary to say whether or no this objection would have been sustained if made in time; for no objection appears in the answer of Mr. Young to the sufficiency of the notice. None appears to have been made during the time of taking testimony, and none in the progress of the argument before the committee by Mr. Young or his counsel. The objection first appears in Mr. Young's printed brief, after both parties had been fully heard in the whole case. In the opinion of the committee the objection as to particularity of specifications comes too late to require further attention.

452. The Kentucky election case of Symes v. Trimble, in the Fortieth Congress.

It not being proved by clear and satisfactory testimony that Lawrence S. Trimble had given aid and comfort to rebellion, the House declined to exclude him.

In the Kentucky cases in 1868 a contest was presented and sustained against a person to whom the House had refused the oath on his prima facie showing.

The House sometimes authorizes a contestant to serve an amended or supplemental notice of contest after the expiration of the time fixed by law for the serving of the notice.

Contestants have sometimes served amended or supplemental notices of contest, trusting to the House to authorize the action later.

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[1] Globe, p. 3372.

[2] Globe, pp. 3328, 3331, 3336, 3368–3375; Journal, pp. 912–914.

On July 11, 1867,[1] Mr. Halbert E. Paine, of Wisconsin, from the Committee on Elections, reported the following:

Resolved, That G. G. Symes, contestant of the claim of L. S. Trimble, to a seat in this House as a Representative of the First district of Kentucky, be permitted to serve an amended or supplementary notice of contest within ten days after the passage of this resolution, and that L. S. Trimble be permitted to serve his answer thereto within thirty days after the service thereof.

Mr. Paine explained that when the House was not in session an amended notice was often served after expiration of the legal time, the contestant trusting to the House to authorize the action when it should meet and consider the case. But it happened that the House was in session at this time, and it seemed better to ask the authority at first. It was objected that as the time allowed by law for filing notice had expired this proceeding was unusual, but the resolution was agreed to, ayes 64, noes 26.

As appears in the case relating to the Kentucky Members generally,[2] Mr. Trimble had received an undoubted majority of the votes cast, and had presented credentials in regular form, but had not been permitted to take the oath because of charges that he was disqualified because of alleged disloyalty.

The Committee on Elections reported on January, 7, 1868,[3] Mr. Charles Upson, of Michigan, presenting the report:

By a resolution of this House, passed July 8, 1867, your committee, was, among other things, instructed to inquire and report whether the said Lawrence S. Trimble was "disqualified from sitting as a Member of this House on account of having been guilty of acts of disloyalty to the Government of the United States, or having given aid and comfort to its enemies;" and in pursuance of said resolution testimony was taken in this case, as well as other cases therein embraced, which evidence, on the 3d of December, 1867, was reported to this House.

The right of the said Trimble to his seat was also contested by G. G. Symes, who likewise claimed to have been elected thereto as the Representative from said district; and one of the points made by the contestant in his allegations was that the said Trimble was "guilty of overt acts of disloyalty and treason to the Government of the United States during the late rebellion, and gave aid and comfort to the rebels by supplying them with medicine, commissary, and quartermasters' stores, to enable them to prosecute the war, and yourself entered their lines and countenanced, aided, and abetted their rebellion." As the whole investigation and contest depends chiefly, if not wholly, on this charge of direct acts of disloyalty as disqualifying Mr. Trimble from sitting as a Member of this House, and as the evidence taken under the aforesaid resolution of the House, and under the notice of contest, relates chiefly to this charge, the committee thought proper to consider the evidence taken under the resolution and under the notice of contest together, and to embody its conclusions in one final report.

Adhering to the rule laid down by the committee in its report made to this House December 3, 1867, in the cases from Kentucky of Beck, Jones, Grover, and Knott (Report No. 2 of this session), which was subsequently approved by the House, the committee, having considered the whole testimony, does not find that it has been "proved by clear and satisfactory testimony" that the said Lawrence S. Trimble "has been guilty of such open acts of disloyalty that he can not honestly and truly take the oath prescribed by the act of July 2, 1862," nor does it find the allegations of contestant sustained by the proof.

The committee found the charge that Mr. Trimble had been concerned in contraband trade with the enemies of the Government too vague and uncertain to be relied on. The report says:

It is also in evidence that subsequent to these alleged illegal transactions, in September, 1861, and after some charges had been made against Mr. Trimble in relation thereto, an investigation was had

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

[2] See section 448 of this work.

[3] Second session Fortieth Congress, House Report No. 6; 2 Bartlett, p. 370; Rowell's Digest, p. 218.

under the supervision of the Treasury Department, and he was exonerated therefrom, and thereupon he was appointed by the Treasury Department one of the Board of Trade at Paducah, and acted in that capacity, so far as appears, to the satisfaction of the Department.

From the evidence in regard to speeches made by Mr. Trimble, it appears that in 1861 he was the Union candidate for Congress against Burnett, and made Union speeches in that canvass throughout the district. After the emancipation proclamation of President Lincoln was issued, he, in common with many of the originally professed Union men of Kentucky, opposed Mr. Lincoln's Administration and the policy of the war, charging that it was waged as an abolition war, and asserting that he was opposed to voting any more men or money to aid in carrying it on; but it is evident from the whole testimony that his opposition was expressed in language similar to that made use of by the opponents of the Administration about that time on the floor of Congress, the propriety or tendency of which, under the circumstances, it is perhaps unnecessary to discuss here.

Kentucky having had many of her citizens engaged in the rebellion, and others strongly sympathizing with them who remained at home, and having since the surrender of the rebel armies permitted, by law, all returned rebels to vote who are in other respects qualified, it is evident that avowed sympathy with the rebellion does not at present detract from the popularity of a candidate for official position in that State, but rather conduces to his success, and this fact may have somewhat stimulated some candidates in their efforts and intensified their expressions before their constituents. In this case, however, Mr. Trimble having been the outspoken Union candidate for Congress in 1861 against secession, having by authority of the Treasury Department, in September of the same year, served as one of the Board of Trade at Paducah, and having also been elected and having served as a Representative from his district in the Thirty-ninth Congress, his seat uncontested and his loyalty unquestioned, your committee, taking into consideration all the testimony, finds no case made out under the charges against him disqualifying him from taking his seat or disproving his election as a Representative to this Congress from his district.

The committee recommends the adoption of the following resolutions:

Resolved, That G. G. Symes is not entitled to a seat in this House as a Representative from the First Congressional district in Kentucky.

Resolved, That the oath of office be now administered to Lawrence S. Trimble, and that he be admitted to a seat in this House as a Representative from the First Congressional district in Kentucky.

The resolutions were debated in the House on July 10[1] and were agreed to without division.

The oath was thereupon administered to Mr. Trimble.

453. A Senator-elect whose loyalty satisfactorily withstood inquiry, but who seemed unable truthfully to take the oath of July 2, 1862, was finally permitted to take the oath.

In 1866 a Senator having stated in his place that the loyalty of a Senator-elect was doubtful, the credentials were referred to a committee before the oath was taken.

In 1866[2] a question arose in the Senate as to the qualifications of David T. Patterson, a Senator-elect from Tennessee. Mr. Patterson's credentials were presented on July 26, 1866,[3] and after debate were referred to the Committee on the Judiciary, with instructions to inquire into Mr. Patterson's qualifications.

The motion to refer was made by Mr. Charles Sumner, of Massachusetts, and in support of the motion he cited the case of Senator Stark. It was pointed out that in that case affidavits were presented charging disloyalty. In this case a Senator merely stated in his place that there was reason to suspect the loyalty of

[1] Journal, p. 167; Globe, pp. 447–452.

[2] Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 329.

[3] First session Thirty-ninth Congress, Globe, pp. 4162–4169.

Mr. Patterson. The debate proceeded to a discussion of the propriety of refusing the oath to a person presenting prima facie evidence of his election, and a distinction was drawn between the Senate, which was a continuing body, and a body like the House, where it was necessary for purposes of organization to give credit to the credentials at the outset. The fact that the House had declined to give full effect to the credentials of the Tennessee Member and had referred them to the committee, in the meantime refusing to allow the bearer to qualify, was cited. The dangers of excluding persons bearing credentials in due form was dwelt on, but the motion of Mr. Sumner was agreed to—yeas 26, nays 14.

On July 27 [1] Mr. Luke P. Poland, of Vermont, presented the report of the committee:

The only question in relation to the qualifications of Mr. Patterson, or his right to hold his seat in the Senate, arises from the fact of his having held the office of circuit judge in the State of Tennessee after that State had passed an ordinance of secession and become a member of the Confederacy.

Circuit judges in Tennessee are elected by the people of the several circuits, and hold their offices for the term of eight years.

Judge Patterson was elected judge in one of the circuits in eastern Tennessee in May, 1854, and his term of office had not expired when the State passed the ordinance of secession. The constitution of the State of Tennessee remained the same after the secession of the State as before, and there was no change made in the form of the State government or in their judicial system. A large majority of the people of East Tennessee were ardently devoted to the Union and deemed it very important for their interest and that of the Union cause that the civil officers in that section of the state should be filled with Union men.

Judge Patterson was a firm, avowed, and influential Union man, and he was urgently pressed by the Union men of that circuit to run as a candidate for reelection as circuit judge, and he finally, though reluctantly, consented to do so. The opposing candidate was an avowed secessionist, and the issue in the election was between Union and secession. The election was held in May, 1862, and Judge Patterson was elected over his rebel competitor by a large majority. At the same election most of the local offices in that section were filled by the election of Union men. At that time it was believed by the Union men of East Tennessee that they would soon be relieved from rebel military rule by the arrival of Union forces; and they desired also to retain the civil power in their own hands. In this expectation they were disappointed, and soon rebel bands were scattered through that region, and the Union people were subjected to great hardships and cruel oppression. When Judge Patterson was thus reelected judge, he did not suppose he would be commissioned by the governor of the State, who was a secessionist; but, after some considerable delay, a commission was sent to him with peremptory orders to take the oath. On the receipt of his commission and order to take the oath, Judge Patterson delayed and hesitated, and consulted other leading Union men as to the proper course for him to take. They advised and urged him to take the oath; that he could thereby afford protection to some extent to Union men against acts of lawless violence on the part of the rebels, and that if he did not accept the office and take the oath the office would be filled by a rebel, and they would then be oppressed by the civil as well as the military power of the rebels. Judge Patterson yielded to their urgency and arguments, and went before a magistrate and took the oath which the Tennessee legislature had prescribed, which, in substance, was that he would support the constitution of Tennessee and the constitution of the Confederate States. Judge Patterson declared at the time to the magistrate that he owed no allegiance to the Confederate government, and that he did not consider that part of the oath as binding him at all. At this time there were rebel troops in the neighborhood, and Judge Patterson had good reason to believe that his refusal to take the oath would subject him to arrest and imprisonment, if not worse treatment; but we do not find that he was actuated at all by personal considerations, but acted solely upon the motive that he could thereby afford some aid and protection to the Union people and also prevent the office from falling into hands that would use it to oppress them.

[1] Senate Report No. 139.

East Tennessee at this time was in a very disturbed and distracted condition. The country was full of bands of armed rebels, and lawless violence held sway. Business was nearly suspended, and no civil business was done in the courts. Judge Patterson held a few terms of court in counties where he could organize grand juries of Union men, and in this way did something toward preserving peace and order in the community. No other business was done by him as judge after his election in 1862.

During all this time Judge Patterson was an open, avowed, and devoted adherent to the Union. He was in constant communication with the officers of the Federal troops nearest that vicinity, and obtained and furnished to them information as to the movements of the rebels. He aided in concealing Union men, and in facilitating their escape to the Union lines, when they generally entered the Union service. He aided the Union people and the Union cause in every way open to him, and too numerous for detail. By these means he became amenable to the hostility of the secessionists, and was subjected to great difficulty and danger. He was several times arrested and held for some time in custody. At times he was obliged to conceal himself for safety, and spent nights in outbuildings and in the woods to avoid their vengeance.

In September, 1863, the Federal troops reached Knoxville, and Judge Patterson succeeded in escaping with his family to that place, and did not return to his home until after the close of the rebellion.

As before stated, the constitution and election laws and judicial system of Tennessee remained the same after the secession of the State as before, and Judge Patterson was elected judge the last time under the same State constitution and laws as existed at his first election, and no laws were enforced by him as judge except such as were in force before the secession of the State.

The committee are all satisfied that during the entire rebellion Judge Patterson was an earnest, firm, and devoted Union man, and suffered severely in support of his principles. In accepting the office of judge, and taking the official oath, he did not intend any hostility to the authority or Government of the United States, nor did he intend to acknowledge any allegiance to, or any friendship for, the confederate government, but acted throughout with a sincere desire to benefit and preserve the Union and the Government of the United States. He always denied the authority of the confederate government over him, and feels an entire willingness and ability to take the oath required upon his admission to a seat in the Senate. The committee recommend the following resolution:

Resolved, That the Hon. David T. Patterson is duly qualified and entitled to hold a seat in the Senate of the United States as a Senator from the State of Tennessee.

On July 27 [1] the resolution was debated and Mr. Lyman Trumbull, of Illinois, objected that on the state of facts Mr. Patterson could not take the oath, since the oath would cause him to swear that he had never taken or exercised the functions of the office, while he undoubtedly had done both. It was suggested that Congress had already proposed a constitutional amendment providing for the removal of political disabilities, and while this amendment bad not been finally ratified, yet Congress might carry out its spirit by passing a joint resolution applying to his case. So a joint resolution was introduced in the Senate that Mr. Patterson be admitted upon his taking so much of the oath prescribed by the act of July 2, 1862, as is not included in the words, "that I have neither sought, nor accepted, nor attempted to exercise, the functions of any office whatever, under any authority or pretended authority in hostility to the United States." This joint resolution passed the Senate, but was laid on the table in the House the same day.

There was considerable debate [2] as to the dilemma resulting from this situation, it being, maintained strenuously that Mr. Patterson could not and should not take the oath, but finally the Senate agreed to this resolution:

Resoved, That the Hon. David T. Patterson, upon taking the oaths required by the Constitution and laws, be admitted to a seat in the Senate of the United States.

On July 28 [3] Mr. Patterson took the oath.

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[1] Globe, pp. 4213–4216.

[2] Globe, pp. 4242–4245.

[3] Globe, p. 4293.

454. By the fourteenth amendment one who, having previously taken an oath as an officer of Government to support the Constitution, has engaged in rebellion, is disqualified as a Member until the disability be removed.—Section 3 of Article XIV [1] of the Constitution provides:

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and VicePresident, 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 legislature, 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 or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[2]

455. The Tennessee election case of Roderick R. Butler in the Fortieth Congress.

A Member-elect who was about to be sworn was challenged for disloyalty, whereupon the House denied him the oath and referred the credentials.

A Member-elect who had not been disloyal, but who could not truthfully take the oath of July 2, 1862, was not sworn until he had been relieved of his disabilities by law.

An objection to a Member-elect's qualifications being sustained neither by affidavit nor on the personal responsibility of the Member objecting, the House declined to entertain it.

A bill removing the disabilities of a Member-elect and modifying the test oath for his benefit was passed by a two-thirds vote.

For persons whose disabilities had been removed the oath of July 2, 1862, was modified by the act of July 11, 1868.

On November 21, 1867,[3] at a period after the organization of the House, the Members-elect from the State of Tennessee presented themselves with credentials in regular form.

Thereupon Mr. Charles A. Eldridge, of Wisconsin, objected to the administration of the oath to one of them, Mr. William B. Stokes, presenting a letter tending to show disloyalty on the part of Mr. Stokes. Mr. Eldridge at the same time presented a resolution that Mr. Stokes's credentials be referred to the Committee of Elections and that he be not sworn pending the investigation.

Mr. James Brooks, of New York, then challenged Messrs. Butler, Mullins, and Arnell, alleging disloyalty in their past records. He also challenged the whole delegation on the ground that a republican form of government did not exist in Tennessee. He thereupon moved to amend the pending resolution by adding resolutions that all the certificates of the gentlemen from Tennessee be referred to the

[1] The fourteenth article was proclaimed as ratified on July 28, 1868.

[2] By the act of May 22, 1872 (17 Stat. L., p. 142), the disabilities imposed by this article were removed from all persons whomsoever, except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States; and by act of June 6, 1898, all existing disabilities were removed (30 Stat. L., p. 432).

[3] First session Fortieth Congress, Journal, pp. 253, 254; Globe, pp. 768–778.

Committee of Elections, and that Messrs. Butler, Mullins, and Arnell's credentials be referred previous to their being sworn.

After debate, which disclosed more serious evidence in the shape of a legislative journal of Tennessee against Mr. Butler than against the remaining Members, Mr. Henry L. Dawes, of Massachusetts, proposed the following substitute:

That the credentials of R. R. Butler, from the First district of Tennessee, be referred to the Committee of Elections, and that he be not sworn pending the investigation.

Mr. Brooks's amendment having been disagreed to, the substitute proposed by Mr. Dawes was agreed to, and then the resolution as amended was agreed to yeas 117, nays 28.

Thereupon Messrs. Eldridge and Brooks offered separate resolutions that the oath be not administered to Messrs. Stokes and Mullins until their cases had been investigated. Neither Mr. Eldridge nor Mr. Brooks presented affidavits or asserted on their responsibility as Members that the two persons in question had been disloyal, but left it to be inferred from a copy of a letter in the case of one and an extract from a speech in the case of another.

After debate, in the course of which it was recalled that affidavits were produced in the Kentucky cases, while in this case a Member did not even make the charges on his own responsibility, the House decided the resolutions in the negative.

Thereupon the oath was administered to all the Tennessee Members except Mr. Butler.

On February 25, 1868,[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, submitted a report in the case of Mr. Butler. This report states that the only objection raised against Mr. Butler, who had a large majority of the votes in the district, was disloyalty. It appeared that on December 14, 1861, as a member of the secession legislature of Tennessee, he had voted for resolutions pledging the State to the Southern confederacy. Mr. Butler admitted this, but claimed that nevertheless he then was a Union man and continued to be afterwards. There was also evidence tending to show that he remained in the legislature to be of service to Union men, and that his votes were understood not to express his views. There was no doubt that after returning from the legislature he served actively as a Union man. The committee conclude:

The evidence is very full on these points, and leaves no doubt on the mind of the committee of the sincere loyalty of Mr. Butler, and that the several acts and votes in the legislature laid to his charge as evidence of his disloyalty are capable of the explanation here given.

But the oath of office which the law requires Mr. Butler to take before he can be admitted to a seat as a Representative is in the following words:

"I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my I knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

[1] Second session Fortieth Congress, House Report No. 18; 2 Bartlett, p. 461; Rowell's Digest, p. 224.

that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

It will be observed that he is required to make oath that he has "neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the 'United States." In the opinion of the committee be can not truthfully so swear. Whatever may have been his motives, the fact still stares him in the face that he took and accepted the office which he will be compelled to swear that he has not taken and accepted. But, for the reasons heretofore given, the committee recommends that, by a joint resolution, so much of the oath as thus stands in the way of admission to a seat in this House of one truly loyal throughout the war may be omitted in administering the oath of office to Mr. Butler.

It accordingly recommends the passage of the accompanying joint resolution.

This joint resolution came up for debate on March 4, 1868.[1] It provided that Mr. Butler be admitted to his seat upon taking the usual oath to support the Constitution of the United States, and upon taking all of the "test oath" excepting the words: "That I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States."

After this joint resolution was reported it appeared that Mr. Butler had before the war taken an oath to support the Constitution of the United States, and therefore that his case came within the third section of the fourteenth amendment to the Constitution of the United States. There was some question as to whether this amendment was yet in force. After debate[2] on March 5,[3] the House voted to recommit the joint resolution with instructions to the committee to report a bill for the relief of Mr. Butler, and also a general bill for such persons as might have their disabilities removed by a two-thirds vote in accordance with section 3 of the fourteenth amendment to the Constitution. On March 6[4] two bills were introduced in accordance with these instructions. They were debated at length[5] in both House and Senate, the question of Mr. Butler's loyalty and of the desirability of modifying the requirements of the test oath being especially considered. The bill relating to Mr. Butler passed both the House and Senate by two-thirds votes, and it was understood at the time that a two-thirds vote was necessary.[6]

The law as finally perfected in Mr. Butler's case provided:[7]

That all legal and political disabilities imposed by the United States upon Roderick R. Butler, of Tennessee, in consequence of participation in the recent rebellion, be, and the same are hereby, removed. And the said Butler, on entering upon the discharge of the duties of any office to which he has been or may be elected or appointed, instead of the oath prescribed by the act of July 2, 1862, shall take and subscribe the following oath. [Here followed an oath to support the Constitution.]

This act was approved June 19, 1868, and on June 26 Mr. Butler appeared and took the oath."[8]

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[1] Globe, p. 1662.

[2] Globe, pp. 1662, 1682–1693.

[3] Journal, p. 477; Globe, p. 1693.

[4] Journal, p. 482.

[5] Globe, pp. 1707, 1977, 2192, 2218, 2267, 2559, 3058, 3197, 3733, 3761.

[6] See remarks of Mr. Dawes, Globe, p. 3197.

[7] 15 Stat. L., p. 360.

[8] Journal, p. 935.

The general law approved July 11, 1868,[1] provided the same oath for persons generally whose disabilities should be removed by a two-thirds vote of the two Houses.

456. The North Carolina election case of Boyden v. Shober in the Forty-first Congress.

A Member-elect, enrolled by the Clerk on his regular credentials, did not vote until his disqualifications had been removed and he had been permitted by the House to take the oath.

A State law requiring two ballot boxes to be kept at each polling place was construed by the House as directory only; and in the absence of fraud a neglect of the provision did not nullify the election.

On March 4, 1869,[2] at the organization of the House, the name of Mr. Francis E. Shober, of North Carolina, appears on the Clerk's list of Members-elect. On the yeas and nays on a motion to proceed to the election of Speaker his name appears among those not voting. On the vote for Speaker he did not vote. The Journal does not show affirmatively that he was not sworn in, but on a yea-and-nay vote taken on March 5, after the Members had been sworn in, his name does not appear at all, indicating that he had not been sworn in and that his name had been stricken from the roll of Members.

On April 12, 1870,[3] the President approved an act "to remove political disabilities from Francis E. Shober, of North Carolina." This act removed his disabilities and prescribed the form of oath to be taken by him on being sworn into any office.

On April 13, 1870,[4] Mr. George W. McCrary, of Iowa, presented the following resolution, which was agreed to:

Resolved, That Francis E. Shober be sworn as a Member of this House from the Sixth district of North Carolina and that upon taking the oath prescribed by the act passed at the present session of Congress for his relief he shall be entitled to a seat in this House without prejudice to the right of Nathaniel Boyden to contest the right thereto.

Mr. McCrary stated that Mr. Shober's credentials had been examined by the Committee on Elections and found regular.

On January 16, 1871,[5] Mr. McCrary submitted the report of the Committee on Elections in the contest of Boyden *v.* Shober. This report states that the sitting Member admitted his inability to take the test oath, and did not offer to qualify until after Congress had passed an act to relieve him from disability. Of course the passage of the relieving act disposed of the contestant's allegations of disability. After disposing of some considerations as to charges not sustained by the evidence, the report says:

We are left, therefore, to the consideration of the first ground of contest, viz, that the election was wholly void by reason of a failure to comply with the statutory provisions concerning the manner of conducting the election.

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[1] 15 Stat. L., p. 85; Revised Statutes, sec. 1757.

[2] First session Forty-first Congress, Journal, pp. 5, 8, 10.

[3] 16 Stat. L., p. 634.

[4] Second session Forty-first Congress, Journal, p. 610; Globe, p. 2648.

[5] Third session Forty-first Congress.

It is said that the law of North Carolina, rightly construed, required that two ballot boxes should have been kept at each poll, and that all ballots for Member of Congress should have been deposited in one, and all ballots for electors for President and Vice-President in the other.

There seems to be some doubt as to the true construction of the statute of North Carolina, but assuming that the construction contended for by contestant is correct, we are of opinion that the statute is directory only, and that the failure to provide two ballot boxes, and the deposit of all the ballots in one box, did not render the election void in the absence of fraud. If the ballots were freely cast, if they were honestly and fairly counted, and correctly returned, we should be unwilling to hold that a mere mistake of the election officers, as to whether the ballots should go into one box or two, should be allowed to defeat the will of the majority.

It is claimed that the certificate of election was not issued to contestee by competent authority; that, it should have been issued by the sheriffs of the several counties comprising the district and not by the governor. The law upon this subject is not cited in the record, and the point is not pressed. Indeed, it has been rendered immaterial by the action of the House in accepting the credentials of contestee and ordering him to be sworn into office thereon. We may remark, however, that the failure or refusal of the proper officer to issue a certificate of election would only render it necessary for the House to go back to the returns and poll books and ascertain, if possible, from these, or from any competent and sufficient evidence, who was actually elected, and award the seat accordingly.

We are of opinion, therefore, that the contestant has failed to sustain the points made by him in his notice of contest, with the exception of the fifth point, which was sustained by the proof but which was rendered immaterial by the act of Congress relieving contestee from his disability.

Your committee are of opinion that the contestant has prosecuted this contest in good faith and with reasonable cause, and that under the practice of the House in similar cases he is entitled to compensation for the expenses incurred by him.

We therefore recommend the adoption of the accompanying resolutions:

Resolved, That Nathaniel Boyden is not entitled to a seat in this House as a Representative from the Sixth district of North Carolina.

Resolved, That Francis E. Shober is entitled to retain his seat in this House as a Representative from said district.

On January 24, 1871,[1] the two resolutions were agreed to without debate or division.

457. In 1867 the Senate, having in view the test oath and the spirit of the fourteenth amendment, excluded Philip F. Thomas for disloyalty.

In 1867 the Senate, upon the statement by a Member that there were rumors affecting the loyalty of a Member-elect, referred the credentials before permitting the oath to be taken.

The right to add other qualifications to the three prescribed by the Constitution was discussed fully in the Senate in 1867.

Discussion of the question as to whether or not the test oath of July 2, 1862, actually prescribed a new qualification for the Member.

On March 18, 1867,[2] the credentials of Philip F. Thomas, Senator-elect from Maryland, were presented in the Senate. Mr. Jacob M. Howard, of Michigan, objected that there were rumors affecting the loyalty of Mr. Thomas and moved that the credentials be referred to the Committee on the Judiciary. In the debate attention was called to the fact that in the cases of Messrs. Stark and Patterson the allegations were more specific; but finally, on March 19, the credentials were referred without division.

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[1] Journal, p. 207; Globe, p. 698.

[2] Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 333; first session Fortieth Congress, Globe, pp. 171–180, 200.

On December 18 Mr. Reverdy Johnson, of Maryland, from the Committee on the Judiciary, reported:

That they have taken the evidence submitted herewith, and that they find nothing sufficient, in the opinion of the committee, to debar said Thomas from taking his seat, unless it be found in the fact of the son of said Thomas having entered the military service of the confederacy, and in the circumstances connected with that fact or relating to it, and without the expression of an opinion in regard to this point, they report the whole evidence to the Senate.

Mr. Johnson submitted the following resolution for consideration:

Resolved, That the Hon. Philip F. Thomas, Senator-elect from Maryland, be admitted to his seat on his taking the oaths prescribed by the Constitution and laws of the United States.

458. On January 6, 1868,[1] the report was taken up, and the debate began as to whether or not the act of Mr. Thomas in assisting his son was an act giving aid and comfort to the enemies of the Government. The test oath was also discussed and its bearing on the question of qualifications, Mr. George F. Edmunds, of Vermont, contending[2] that the Constitution did not definitely prescribe all the qualifications, but that there existed the authority to impose other qualifications, citing this passage:

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office of public trust under the United States.

A question was also raised as to whether or not the amendment to the Constitution specifying the disability on account of treason, and providing for its removal by a two-thirds vote of each House, had been ratified.

The report was debated at length on January 20–22, February 12–14, and 17–19.[3] Speaking on January 22, Mr. William Pitt Fessenden, of Maine, said[4] that it might at times be necessary for the Senate to protect itself by refusing admission, but, he continued:

We are exercising in any such case an extra-constitutional power. I think it exists as other powers which we have asserted during the war exist; but, as I said before, they can only be exercised in very extraordinary cases. As we stand now, it would be, in my judgment, dangerous in the extreme for Congress to assume the power of excluding a man who was sent here with the proper credentials on mere presumptions or mere suppositions or mere ideas of what the man is. The ordinary question presented to the Senate in such a case is with regard to his qualifications as prescribed by the Constitution itself; and it is only within a very recent period that it has become necessary to go further, as we have gone further and as we unquestionably had a right to do, and prescribe another qualification, if you choose so to call it; that is to say, prescribe a rule of admission by designating an oath to be taken which has reference to the qualifications, or rather to the disqualifications, of the individual. I voted for that. I think we had a right to pass it. * * * The question, however, as presented to us now, is beyond that. It is whether we shall assume the responsibility of refusing to permit this gentleman to take the oath. He professes himself willing to take it. We are called upon by many gentlemen who have spoken here to say that he shall not be permitted to do it, because it is one of those cases where we are called upon, outside of any constitutional provision and outside of any legal provision, to exclude this man on the doctrine of self-protection, for no other, I think, can be adduced to support the proposition.

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[1] Second session Fortieth Congress, Globe, pp. 320–330.

[2] Globe, p. 327.

[3] Globe, pp. 632–635, 653–662, 678–686, 1144–1156, 1165–1177, 1205–1210, 1232–1243.

[4] Globe, pp. 684, 685.

* * * The power which we have under the Constitution to judge of the qualifications of Members of the body is not a mere arbitrary power to be exerted according to the will of the individuals who may vote upon the subject. It ought to be a power subject to certain rules and founded upon certain principles. So it was up to a very late period, until the rebellion. The rule simply was, if a man came here and presented proper credentials from his State, to allow him to take the ordinary oath which we all took, to support the Constitution, and be admitted, and if there was any objection to him to try that question afterwards.

Speaking on February 13, Mr. Charles Sumner said: [1]

I do not stop to argue the question, if that amendment is now a part of the Constitution; for I would not unnecessarily occupy your time, nor direct attention from the case which you are to decide. For the present I content myself with two remarks: First, the amendment ha's already been adopted by three-fourths of the States that took part in proposing it, and this is enough, for the spirit of the Constitution is thus satisfied; and, secondly, it has already been adopted by "the legislatures of three-fourths of the several States" which have legislatures, thus complying with the letter of the Constitution. Therefore by the spirit of the Constitution, and also by its letter, this amendment is now a part of the Constitution, binding on all of us. As such I invoke its application to this case. In face of this positive peremptory requirement it is impossible to see how loyalty can be other than a "qualification." In denying it you practically set aside this amendment.

But even without this amendment, I can not doubt that the original text is sufficiently clear and explicit. It is nowhere said in the Constitution that certain specified requirements and none others shall be "qualifications" of Senators. The word "qualifications," which plays such a part in this case, occurs in another connection, where it is provided that "each House shall be the judge of the elections, returns, and qualifications of its own members." What these "qualifications" may be is to be found elsewhere. Searching the Constitution from beginning to end we find three "qualifications," which come under the head of form, being (1) age, (2) citizenship, and (3) inhabitancy in the State. But behind and above these is another "qualification," which is of substance, in contradiction to form only. So supreme is this that it is placed under the safeguard of an oath. This is loyalty. It is easy to see how infinitely more important is this than either of the others—than age, than citizenship, or than inhabitancy in the State. A Senator failing in either of these would be incompetent by the letter of the Constitution; but the Republic might not suffer from his presence. On the other hand, a Senator failing in loyalty is a public enemy, whose presence in this council Chamber would be a certain peril to the Republic.

It is vain to say that loyalty is not declared to be a "qualification." I deny it. Loyalty is made a "qualification" in the amendment to the Constitution; and then again in the original text, when in the most solemn way possible it is distinguished and guarded by an oath. Men are familiarly said to "qualify" when they take the oath of office, and thus the language of common life furnishes an authentic interpretation to the Constitution.

But no man can be allowed to take the oath as Senator when, on the evidence before the Senate, he is not competent. If it appear that he is not of sufficient age, or of the required citizenship or inhabitancy, he can not be allowed to go to that desk. Especially if it appear that he fails in the all-important "qualification" of loyalty, he cannot be allowed to go to that desk. A false oath, taken with our knowledge, would compromise the Senate. We who consent will become parties to the falsehood. We shall be parties in the offense. It is futile to say that the oath is one of purgation only, and that it is for him who takes it to determine on his conscience if he can take it. The Senate can not forget the evidence; nor can its responsibility in the case be swallowed up in any process of individual purgation. On the evidence we must act and judge accordingly. The "open sesame" of this Chamber must be something more than the oath of a suspected applicant.

According to Lord Coke, "an infidel can not be sworn" as a witness. This was an early rule which has since been softened in our courts. But under the Constitution of the United States and existing statutes a "political infidel can not be sworn" as a Senator. Whatever may be his inclination or motive he must not be allowed to approach your desk. The country has a right to expect that all who enter here shall have a sure and well-founded loyalty, above all question or "suspicion." And such I insist is the rule of the Constitution and of Congress.

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[1] Globe, p. 1145.

As if to place the question beyond all doubt, Congress by positive enactment requires that every Senator, before admission to his seat, shall swear that he has "voluntarily given no aid, countenance, counsel, or encouragement, to persons engaged in armed hostility" to the United States. Here is little more than an interpretation of the Constitution. The conclusion is plain. No person who has voluntarily given even "countenance" or "encouragement" to another engaged in the rebellion can be allowed to take that oath.

Speaking on the same day, Mr. George F. Edmunds, of Vermont, said,[1] after quoting the passage of the Constitution in relation to qualifications:

Senators will observe that there are negative statements. They are exclusive, every one of them. It is not declaring who shall be admitted into the Senate of the United States. It is declaring who shall not be eligible to election to this body; that is all. It is the same as to the House of Representatives and as to other officers, always in the negative, always exclusive, instead of in the affirmative and inclusive. And upon what principle was this Constitution founded? Will lawyers here deny that we have a right to look to the course of constitutional and parliamentary jurisprudence in that country from which we derive our origin and most of our laws to illustrate our own Constitution and to enlighten us in this investigation? By no means. And what was that? The House of Commons in Parliament, using the very language that in another section of the Constitution is used here, were the exclusive judges of the elections, returns, and qualifications of their own members. What was their constitutional power under that rule? It was that they were the sole and exclusive judges, not only of the citizenship and of the property qualification of persons who should be elected, but of everything that entered into the personnel of the man who presented himself at the doors of the House of Commons with a certificate of election for admission. And what were those rules? One was that an idiot could not be a representative in the Commons; another was that an insane man could not be, and a variety of other disqualifications, of which the Commons themselves alone were the sole and exclusive judges.

We declared in our Constitution that a certain class of persons should never, under any circumstances, whatever their other qualifications might be, be Senators of the United States; no alien should be a Senator. Did it therefore follow that every citizen, male or female, black or white, rich or poor, sane or insane, innocent or criminal, should be a Senator? Not by any means, I take it. We declared then that no person should be a Senator who was not a citizen, who had not a certain qualification of residence and of age, and there we stopped the rule of disqualification, leaving the common law exactly where it stood before. And that common law, in the very language of its immemorial time, was inserted in another section of the instrument, which declared that this body should be the judges of the elections, returns, and qualifications of its members. And that very word "qualifications," by the known history of jurisprudence, had the scope and signification that I have named; and that was, that it was the duty of the body to apply it to the candidate, to keep itself pure from association with criminals and incompetent persons.

Speaking on February 18,[2] Mr. Reverdy Johnson, of Maryland, said:

The only qualifications required by the Constitution are that the party to be chosen shall be at least 30 years of age, etc. * * * Subject to these limitations, the legislature of the State has the unrestricted right of choice. No department of this Government of the United States has any jurisdiction over it. The Constitution, whether we regard its terms or its evident scope, as manifested by its nature, creates a government of delegated powers, and that government has consequently no authority to interfere. * * *

Mr. Johnson went on to substantiate this argument by reference to the clause relating to expulsion. He also expressed the opinion that Congress had no authority to pass the test oath.

In the course of the debate Mr. Sumner had proposed this as a substitute:

That Philip F. Thomas, Senator-elect from Maryland, can not be admitted to take the oath of office required by the Constitution and laws, inasmuch as he allowed his minor son to leave the paternal house to serve as a rebel soldier, and gave him at the time $100 in money, all of which was "aid,"

[1] Globe, p. 1149.

[2] Globe, p. 1237.

"countenance," or "encouragement" to the rebellion, which he was forbidden to give; and further, inasmuch as in forbearing to disclose and make known the treason of his son to the President, or other proper authorities, according to the requirement of the statute in such cases, he was guilty of misprision of treason as defined by existing law.

Mr. Sumner withdrew this, however, it being urged that Mr. Thomas's conduct as a Cabinet officer in 1860 afforded more certain grounds for action.

Mr. Roscoe Conkling, of New York, proposed the following substitute:

That, in the judgment of the Senate, Philip F. Thomas, Senator-elect from Maryland, can not with truth take the oath prescribed by the act of Congress approved July 2, 1862, and that therefore he be not allowed to take said oath,

but withdrew it, after commenting on the variance of opinion as to whether the test oath actually prescribed a new qualification or not.[1]

The question being then taken on the resolution originally proposed by Mr. Johnson, it was disagreed to—yeas 21, nays 28.[2]

Then, by a vote of yeas 27, nays 20, the Senate agreed to the following, offered by Mr. Charles D. Drake, of Missouri:

Resolved, That Philip F. Thomas, having voluntarily given aid, countenance, and encouragement to persons engaged in armed hostility to the United States, is not entitled to take the oath of office as a Senator of the United States from the State of Maryland, or to hold a seat in this body as such Senator; and that the President pro tempore of the Senate inform the governor of the State of Maryland of the action of the Senate in the premises.

459. The Georgia case of Wimpy and Christy in the Fortieth Congress.

In 1868 the House denied the oath to two persons who appeared with conflicting credentials which cast doubt on the right of either to the seat.

A question as to whether a State law may give to the minority candidate the seat for which the majority candidate is disqualified.

On December 7, 1868,[3] the Speaker laid before the House credentials from the governor of Georgia, certifying John A. Wimpy as entitled to a seat in the House. These credentials showed that John H. Christy had received the highest number of votes in the Sixth district, but, it appearing to the satisfaction of the governor that said Christy was ineligible under the fourteenth amendment to the Constitution, and the said Wimpy having received the next highest number of votes, the governor had commissioned Wimpy, relying on a law of Georgia providing that when the person receiving the highest number of votes for any office should be ineligible the person receiving the next highest number, and being eligible, should be commissioned.

At the same time Mr. James A. Brooks, of New York, presented credentials signed by Major-General Meade, commander of the military district including Georgia,[4] certifying the election of Mr. Christy. Mr. Brooks stated that this cer-

[1] Globe, pp. 1263, 1264.

[2] Globe, p. 1271.

[3] Third session Fortieth Congress, Journal, p. 8; Globe, p. 7.

[4] The reconstruction act provided for the military districts and the political reconstruction of the States under military supervision. 14 Stat. L., p. 428; 15 Stat. L., p. 73.

tificate was similar to that on which other Members from Georgia had been seated. Mr. Brooks charged that Mr. Wimpy had been a Confederate soldier.

Both certificates were referred to the Committee on Elections, and neither claimant was sworn in.

On January 15[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, submitted a report. They found that the commission of Mr. Christy was signed by General Meade, under whose order the election had been held. That of Mr. Wimpy was signed by Governor Bullock, who was at the same election chosen governor and assumed the duties of the office on relinquishment of command by General Meade.

The committee found that Mr. Christy, by his own admission, had given "aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the Govermment," and in accordance with the precedent in the case of John Y. Brown was not qualified to hold a seat as Representative from the State of Georgia. This appeared independently of any question as to ineligibility under the fourteenth amendment.

Examining the case of Mr. Wimpy, the committee conclude:

> The committee was of opinion that at the time of this election Mr. Wimpy, like Mr. Christy, could not take the oath of office because he had "voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the Government of the United States." If, therefore, the provision in the statute of Georgia included Members of Congress and also this cause of ineligibility, still Mr. Wimpy could not avail himself of it because of his own ineligibility at the time of the election. Nor would a subsequent removal of disabilities by act of Congress give Mr. Wimpy the benefit of this act, because the act refers to the eligibility at the time of the election; and if such an act could bring Mr. Wimpy within its provisions, such an act could likewise take Mr. Christy out of its provisions, and upon its passage he would, with a majority of the votes, be instantly entitled to the seat.
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> This conclusion, arrived at unanimously by the committee, renders it unnecessary to determine other questions raised in this case which would otherwise render it at least very doubtful whether under any circumstances, Mr. Wimpy, with a majority of 100 votes against him, could, by force of the law of Georgia already cited, become entitled to the seat. The committee therefore does not find it necessary to express an opinion whether the statute was intended to affect other than State officers, or could, if intended, include Representatives in Congress, or whether aiding the late rebellion was one of the causes of ineligibility embraced in the "foregoing rules" specified in the one hundred and twenty-sixth section of the act, which was itself enacted long before the rebellion broke out; but, for the reasons already specified, reports adversely on the claim of Mr. Wimpy to the seat. It therefore recommends the adoption of the accompanying resolutions:
>
> *Resolved,* That J. H. Christy, having voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the United States, is not entitled to take the oath of office as a Representative in this House from the Sixth Congressional district of Georgia or to hold a seat therein as such Representative.
>
> *Resolved,* That John A. Wimpy, not having received a majority of the votes cast for Representative in this House from the Sixth Congressional district of Georgia, is not entitled to a seat therein as such Representative.
>
> *Resolved*, That the Committee of Elections be discharged from the further consideration of the question of removing political disabilities from John H. Christy, and that the same be referred to the tommittee on Reconstruction.

On January 28,[2] the report was debated in the House, rather in reference to

[1] House Report No. 8; 2 Bartlett, p. 464; Rowell's Digest, p. 225.

[2] Globe, pp. 675, 677.

its relation to the question of reconstruction than on the merits of the respective claimants, and on that day was postponed until the third Tuesday of February. It was not taken up on that day, or again. So neither claimant was admitted.

460. The Kentucky election case of Zeigler v. Rice in the Forty-first Congress.

In 1869 John M. Rice, challenged on account of alleged disloyalty, was permitted by the House to take the oath pending examination of the charges.

In 1869 the Elections Committee proposed to exclude for disloyalty one who had already been sworn in; and although the committee were reversed on the facts, the propriety of the proceeding was not questioned.

In a case somewhat inconclusive it was held that notice of disqualification given seasonably to the electors did not modify the rule against seating a minority candidate.

On March 4, 1869,[1] at the organization of the House, the name of Mr. John M. Rice, of Kentucky, was on the roll presented by the Clerk. When the Members-elect were taking the oath objection on ground of disloyalty was made to Mr. Rice, and he stood aside. On the next day the House agreed to this resolution:

Resolved, That Boyd Winchester and John M. Rice, Representatives-elect from the State of Kentucky, be now sworn in, and the papers filed against their admission be referred to the Committee of Elections, when appointed, with directions to report as soon as practicable.

Accordingly Messrs. Winchester and Rice were sworn in and took their seats.

On June 30, 1870,[2] Mr. R. R. Butler, of Tennessee, from the Committee an Elections, submitted the report of the committee on the case of Zeigler *v.* Rice. The contestant alleged that sitting Member was ineligible under section 3 of the fourteenth amendment to the Constitution.

A question of law and a question of fact were involved:

(*a*) The question of law arose from the following specification in contestant's notice of contest:

That notice of this disqualification on your part was given publicly to the voters of the district prior to the said election held on the 3d day of November, 1868, and during the time you stood as a candidate before the people; that this disqualification existed at that time; and that by reason thereof all votes cast for you were and are illegal and void; wherefore I was duly elected by the legal vote of said district on said 3d day of November last, and am lawfully entitled to and claim the seat in the Forty-first Congress of the United States as Representative for said Ninth district of Kentucky.

The majority in their report say they are convinced that sitting Member is ineligible, "but do not agree with contestant that as contestee was ineligible the candidate who was eligible is entitled to the seat."

The views of the minority, presented by Mr. Albert G. Burr, of Illinois, say:

The undersigned concurs with the majority of the committee in the opinion that in no possible aspect of this case can it be pretended that the contestant Zeigler is entitled to the seat as the Representative of the Ninth Congressional district of Kentucky. There is no dispute on that point. The contestant himself does not claim that he received a majority of the votes cast, and no just man can dissent from the conclusion of the committee that he has no shadow of title whatever to the seat.

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[1] First session Forty-first Congress, Journal, pp. 9, 13; Globe, pp. 6, 13.

[2] Second session Forty-first Congress, House Report No. 107; 2 Bartlett, p. 871.

(*b*) The question of the qualification of Mr. Rice was a question of fact. The majority of the committee, from the testimony presented, concluded that he had been disloyal and had given aid and comfort to the enemy. Therefore they proposed the following:

Resolved, That the Hon. John M. Rice is disqualified by the third section of the fourteenth amendment to the Constitution of the United States from holding a seat in Congress, and that the seat now occupied by him as a Representative from the Ninth district of Kentucky, in the Forty-first Congress, is hereby declared vacant, and that the Speaker of the House of Representatives notify the governor of the Commonwealth of Kentucky that such vacancy exists.

The minority construed the evidence as entirely failing to show Mr. Rice disqualified, and recommended the following:

Resolved, That Hon. John M. Rice is justly entitled to his seat as Representative in the Forty-first Congress from the Ninth district of the State of Kentucky.

The report was debated on July 11,[1] the debate being confined entirely to the question of fact, and the proposition to exclude a Member who had already taken the oath and his seat was not discussed. As to the question of fact, Members who bad known sitting Member at the time of the alleged disloyalty raised a question as to the conclusions which the majority had drawn from the testimony.

Finally the question recurred on the substitute proposed by the minority, and it was agreed to without division. Then the resolution as amended was agreed to.

So the report of the majority of the committee was overruled, and Mr. Rice retained the seat.

461. The Virginia election case of Tucker v. Booker, in the Forty-first Congress.

In 1870 no one of the Members-elect from Virginia was seated until the credentials were reported on by a committee and the House had acted.

A Member-elect whose loyalty was impeached was permitted to take the oath; and after that the House was reluctant to take action in his case.

A question as to whether or not a Member who is disqualified, but has been permitted to take the oath, may be excluded by majority vote.

A question relating to a Member's right to his seat being laid on the table, the Member continues in his functions.

At the beginning of the second session of the Forty-first Congress the credentials of all the Members-elect from the State of Virginia were referred to the Committee on Elections, and the claimants were not sworn in until the committee reported. Against Mr. George W. Booker charges of disloyalty were made, but the committee on February 1, 1870[2] reported a recommendation that the oath be administered to him in accordance with the precedent made by the House in the case of Mr. McKenzie. There was much discussion over this motion. The committee had not examined the question of loyalty, and strong allegations of dis-

[1] Journal, pp. 1199, 1200, 1213; Globe, pp. 5442–5447.

[2] Second session Forty-first Congress, Journal, p. 244; Globe, pp. 947–950.

loyalty were made against Mr. Booker. Finally, by a vote of yeas 89, nays 72, it was determined that the oath should be administered, and Mr. Booker was accordingly sworn in.

On March 22, 1870,[1] Mr. George M. Brooks, of Massachusetts, from the Special Committee of Elections, presented the report in the case of Tucker v. Booker. The returns showed Mr. Booker elected by a plurality of 3,533 over contestant. The grounds of contest related entirely to the loyalty of sitting Member, it being charged that he was disqualified because of section 3 of the fourteenth amendment to the Constitution, and also that he was unable to take the oath of July 2, 1862.

The committee found from the testimony of one witness that Mr. Booker had admitted that he voted for the Virginia ordinance of secession.

The remaining testimony was of a documentary character, setting forth facts such as are included in this portion of the report:

From the evidence it appears that on July 14, 1856, said Booker, having been elected a justice of the peace for the county of Henry and State of Virginia for the term of four years from the 1st day of August then next, took the oaths of office prescribed by law, and the oath to support the Constitution of the United States; that acting under this commission, he performed the duties of justice of the peace, and on July 9, 1860, having been again elected a justice of the peace for the term of four years from the 1st day of August then next, he took the several oaths required by law, and on the 10th day of September, 1860, he was elected presiding justice of the court, and that he continued to exercise the duties of such magistrate during the rebellion.

The particular acts of disloyalty that are relied upon by the contestant, and which appear to be proved and are not denied by the the contestee, are as follows: That at a county court held for Henry County, at the court-house, on May 13, 1861, said Booker met with other justices and voted to accept the provisions of an act of the general assembly passed January 19, 1861, authorizing the county courts to arm the militia of their respective counties, and to provide means therefor, pursuant to a resolution of the convention of Virginia "recommending the county courts to levy or raise, by issuing bonds, a sufficient amount of money to equip and arm such volunteers as may be raised within the limits of their respective counties" it was also at said court "ordered that ten thousand dollars be raised by levy on all the lands and all other subjects liable to tax and levies in said county."

That at a county court held July 8,1861, said Booker being present as presiding justice, William Martin was appointed by said court as an agent on the part of Henry County, "to visit the volunteer companies in the service and report to the next court the wants and general condition of said companies, with a view to making provision by the court for the relief of their necessities." At a court held September 9, 1861, Samuel H. Haviston was appointed an agent for the county to purchase full winter equipments for the four volunteer companies in the service.

At a court held October 15, 1861, said Booker was appointed an agent for the county "to repair to the encampments of the several companies from said county and ascertain the wants of each member in clothing, and report thereof to the next court." And at a court held November 12, 1861, said Booker made a report in writing, which is annexed hereto and marked "A"

The sitting Member did not deny the facts presented against him, but claimed that he was from the outset opposed to secession; that he was always a Union man, and that he held the offices he did in order to protect other Union men and save himself from conscription. The testimony of other witnesses convinced the committee of this, and they say:

Although technically said Booker may have seemed to have "given aid and comfort to the enemies 11 of the United States by performing the duties of his office, yet the committee is convinced that he was during the whole rebellion, and to the present time has been, a sincere Union man, and that the acts

[1] House report No. 41; 2 Bartlett, p. 772.

by him performed to which objection is taken are in contravention of the letter but not the spirit of the third article of the fourteenth amendment to the Constitution of the United States. The committee therefore holds that said Booker is not ineligible under the same.

The committee is, however, of the opinion that if no action had been taken by the House upon the claim of said Booker for a seat, it would have reported that having accepted and exercised the functions of an office under the Confederate government, he could not take so much of the oath prescribed by the act of July 2, 1862, as declares that he has "neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States," without being relieved from the disabilities imposed by said act, and that it should have recommended that so much of said oath above recited should be omitted in administering the oath of office to said Booker.

But the House, on the Ist day of February last, upon representation being made that said Booker was loyal, voted that he was entitled to his seat, and he took the oath prescribed by the act of July 2, 1862, and is now a sitting Member of this House. The committee is of the opinion that this vote was an indication of the sense of the House that the fact of his loyalty was the question to be settled, and this being determined in his favor, he was entitled to his seat. The committee also believes that said Booker, conscious of his loyalty, did not consider that he was debarred from taking said oath, holding the office under the circumstances and for the purposes he did so hold it; that he did not deem it was the spirit, intent, or meaning of the same to apply to one who was truly loyal and a Union man through the rebellion, and has been so to the present time.

The committee therefore, believing said Booker to have taken said oath honestly, considering that he was right in so doing, and being desirous of carrying out the will of a large plurality of the voters in his district, and the declared wish of the House as expressed by their vote of February 1, hereby recommends the passage of the following resolution:

Resolved, That the Ron. George W. Booker is entitled to retain his seat as a Member of this Congress from the Fourth district of the State of Virginia.

The report was offered in the House on March 22,[1] and thereupon Mr. Luke P. Poland, of Vermont, proposed a preamble reciting the facts as to sitting Member's acts, and a resolution "That George W. Booker is disqualified from holding a seat as a Member of this House."

On July 5[2] the report was debated in the House. Mr. Henry L. Dawes, of Massachusetts, raised a question as to how Mr. Booker could be excluded, since he had already been admitted to a seat and taken the oath. Mr. Dawes did not see how he could be removed except by expulsion. Mr. Poland seemed to regard the taking of the oath under the circumstances as temporary, and intimated that a majority vote, in his opinion, might exclude the sitting Member.

The remainder of the debate referred largely to the record of Mr. Booker and the question of duress as an excuse for his acts.

Finally Mr. Dawes moved to lay the whole subject on the table.

A question being raised as to the effect of such a motion, if carried, the Speaker pro tempore said:

It is hardly a parliamentary question for the Chair to decide. The Chair is under the impression, however, that it would leave the case just where it was before it was referred to the Committee on Elections.

The motion to lay on the table was then agreed to—ayes 99, noes 24.

On July 6[3] Mr. Booker is recorded as voting, and thereafter to the end of the session.

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[1] Globe, p. 2135.

[2] Journal, p. 1149; Globe, pp. 5195–5199.

[3] Journal, p. 1155.

462. The Virginia election case of Whittlesey v. McKenzie in the Forty-first Congress.

In 1870 the House voted to administer the oath to a Member-elect on his correct prima facie showing, although a question as to his qualifications was pending before the Elections Committee.

In 1870, after a Member-elect had been permitted to take the oath, the House took up and decided a contest based on his alleged disloyalty, deciding that the evidence did not show his disqualification.

An instance wherein the House decided on its own initiative an election case pending before the Committee on Elections.

At the opening of the second session of the Forty-first Congress the credentials of all the claimants to seats from Virginia were referred to the Committee on Elections for examination, pending the administration of the oath. On January 31, 1870,[1] Mr. John A. Bingham, of Ohio, not a member of the Elections Committee, offered the following resolution:

Resolved, That Hon. Lewis McKenzie be now sworn in as a Member of this House from the Seventh district of Virginia, he having the prima facie right thereto; but without prejudice to the claim of Charles Whittlesey, contestant to such seat, or to his right to prosecute his claim thereto.

Mr. Halbert E. Paine, of Wisconsin, chairman of the Committee on Elections, stated that Mr. McKenzie's credentials were in the same form as those of the other Virginia claimants, who had already been allowed to take the oath. But there was a resolution of the House providing that whenever either contestant should allege that the other claimant was unable to take the oath, the Committee on Elections should inquire into the charge and report before the oath should be administered. The charge had been made in this case, and an investigation had been made. The testimony was now in the hands of the printer, and until it was printed and examined the committee could not arrive at a conclusion as to whether or not Mr. McKenzie was entitled to take the oath. Mr. Paine admitted, however, that the House, having all control over the subject, might permit Mr. McKenzie to take the oath, although the order of the House precluded the Committee on Elections from recommending it at this stage.

After debate as to Mr. McKenzie's loyalty, the resolution was agreed to without division.

Mr. McKenzie was accordingly sworn in.

On May 24, 1870,[2] Mr. John C. Churchill, of New York, from the Subcommittee on Elections, submitted a report in the case of Whittlesey v. McKenzie. Contestant raised no question as to the validity of the election or the correctness of the count, but claimed that sitting Member was guilty of acts in the early part of the year 1861 which made him ineligible under the third section of the fourteenth article of amendments to the Constitution, and also made it impossible that he should truthfully take the oath of July 2, 1862.

The contestant gave facts in support of his contention:

1. On the 21st day of January, 1861, the house of delegates of Virginia, of which the sitting Member was then a member, adopted, by a unanimous vote, 108 delegates voting, the following resolution:

"Resolved by the general assembly of Virginia, That if all efforts to reconcile the unhappy difference

[1] Second session Forty-first Congress, Journal, p. 239; Globe, pp. 917–918.

[2] House Report No. 75; 2 Bartlett, p. 746.

existing between the two sections of the country shall prove to be abortive, that, in the opinion of the general assembly, every consideration of honor and interest demand that Virginia shall unite her destiny with the slaveholding States of the South."

The sitting Member, Mr. McKenzie, was present and voted for this resolution.

2. On the 14th day of March, 1861, the senate of Virginia passed, with an amendment, and returned to the house of delegates for their concurrence, "An act to authorize the issue of treasury notes." A motion was made to lay the bill and amendment on the table. For this motion the sitting Member voted, and in support of it made a speech, of which the following is a report which appeared in the Daily Richmond Whig of March 15, 1861, and the substantial correctness of which is not disputed:

"During the debate, Mr. McKenzie said the House had been in session sixty-six days, and, until a few days ago, he had supposed the bill had become the law of the land. He had voted for this bill the time he did because he had believed it was important to the public safety. We had just voted that, so far as Virginia was concerned, we would not permit the coercion on the part of the Federal Government of any of the Southern States. Having come to this conclusion, he, for one, was ready to vote means to arm the State, if need be.

"Does anybody presume that 170,000 voters of Virginia, a commonwealth extending from the Potomac to the Ohio River, a better armed State than any five States in the Union, are acting from any fear of the North? Virginia is not afraid. When the convention comes to a decision, and whatever they do, and it is ratified by the people, she will take her position, and, if necessary, fight. I think the opportunity ought to be given to amend, if necessary; and I shall, therefore, vote to lay it on the table."

The motion to lay on the table was defeated by a large majority, and the amendment of the Senate was then concurred in and the bill passed by a unanimous vote. The sitting Member voting in the affirmative.

3. On the 2d of May, 1861, the sitting Member, being then a member of the common council of the city of Alexandria, voted in favor of an appropriation of $200 each to the Emmet Guards and to the Irish volunteers, to aid in equipping these companies, which soon after entered the Confederate service.

4. On April 30 and May 6, 1861, a quantity of oats belonging to sitting Member were taken by the military authorities of Virginia and were charged to the State.

The committee, examining these charges at length, found that the only government to which Mr. McKenzie yielded support at the times in question was that of the State of Virginia, but that Virginia did not ratify the ordinance of secession until May 23, 1861. Since then Mr. McKenzie had been an outspoken Union man. It could not be pretended that he had yielded support to any government hostile to the United States.

Therefore the only question was as to whether or not he had given "aid or comfort" to the enemies of the United States. The committee found from an examination of the testimony and facts, in relation to all the circumstances, that the charges of the contestant were not sustained. They also found:

A good deal of evidence in this case was taken to show that the sitting Member before, during, and after the occurrence of the acts charged as making him ineligible was known and accepted generally by all, both the loyal and the disloyal people of his acquaintance in Alexandria and vicinity, as a friend of the Union cause. It is well argued by the contestant that this can not be received as a defense for two reasons: First, that the sitting Member has served no answer in this case, as required by the laws, and therefore can not set up in the evidence any matter by way of defense to the charges of the contestant except such as may tend to negative the charges; and, second, that if the acts make him ineligible, neither prior, subsequent, nor contemporaneous loyalty could make him eligible or do more than furnish a ground for him to ask to be relieved from his disabilities. But this evidence, though not receivable as a defense, is properly to be received, as enabling us the better to understand the acts themselves and to determine their true character.

Therefore:

We conclude that nothing shown in the evidence in this case makes the sitting Member ineligible under the fourteenth article of amendments to the Constitution of the United States or debars him

from taking the oath prescribed by law, and this makes it unnecessary for us to consider the question very ably presented by the contestant in his argument as to the effect of such ineligibility, if shown, upon votes cast for the sitting Member; and we conclude with recommending to the House the adoption of the following resolutions:

Resolved, That Charles Whittlesey is not entitled to a seat as a Member of the Forty-first Congress from the Seventh Congressional district of Virginia.

Resolved, That Lewis McKenzie is entitled to a seat as a Member of the Forty-first Congress from the Seventh Congressional district of Virginia.

On June 17 [1] the resolutions were agreed to by the House without debate or division.

463. The Senate election case of Joseph C. Abbott in the Forty-eighth Congress.

A Senator-elect being disqualified, the Senate, after elaborate examination, decided that the person receiving the next highest number of votes was not entitled to the seat.

On March 7, 1871,[2] a memorial was presented in the Senate from Joseph C. Abbott, who claimed to have been legally elected a Senator from North Carolina. This memorial was referred to the Committee on Privileges and Elections, and on February 28, 1872, Mr. John A. Logan, of Illinois, submitted from that committee the following report: [3]

The Committee on Privileges and Elections, to whom was referred the memorial of Joseph C. Abbott, claiming to be entitled to a seat in this body as a Senator from North Carolina, for the term commencing on the 4th day of March, A. D. 1871, respectfully submit the following report:

Article I, section 5, of the Constitution of the United States provides that—

"Each House shall be the judge of the elections, returns, and qualifications of its own members."

The duty which devolves upon the Senate in deciding cases that arise under this clause of the Constitution is in the nature of a judicial proceeding, and the cases must be decided upon the evidence presented and in accordance with legal principles as established by former parliamentary and judicial precedents and decisions.

Examining the facts, the committee found as to the election by the legislature:

That the number of members present at the time and so voting constituted a quorum of each house of the legislature, the constitution of North Carolina providing that "neither house shall proceed upon public business unless a majority of all the members are actually present," the numbers so present amounting to a majority of all the members.

On the following day the two houses, in the usual form, declared that Vance had received a majority of the votes cast in both houses and that he was duly elected as such Senator for said term of six years commencing on the 4th day of March, 1871.

It is also further in evidence that said Vance was not on said second Tuesday of November, 1870, and at no time since has been, qualified to serve as such Senator, owing to disability imposed by the fourteenth article of amendment of the Constitution.

It is averred that the members of the legislature of North Carolina so voting for Vance, at the time their votes were cast, had notice of the ineligibility of Vance, but no evidence on this point has been presented to the committee, the memorialist relying upon the assumption that this was a matter of public notoriety.

It appears, therefore, that Abbott rests his claim to the seat solely upon what he assumes to be the legal result of the conceded ineligibility of Vance, who, although receiving a majority of the votes, is not entitled to take the oath of office or hold the seat. He assumes that it is a conclusion of law that if the

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[1] Journal, p. 1026; Globe, p. 4519.

[2] Election Cases, Senate Document No. 11, special session, Fifty-eighth Congress, p. 396.

[3] Second session Forty-eighth Congress, Senate Report No. 58.

candidate who has received the highest number of votes is ineligible and that ineligibility was known to those who voted for him before casting their votes, that the votes so cast for him are void, and should be considered as nullities and as though they never had been cast; and consequently the candidate receiving the next highest number of votes is elected.

In support of this view of the case the memorialist has called the attention of the committee to a large number of English authorities bearing on this question. While the committee make no question as to the general tenor of the decisions to which attention has been called, yet it is evident that these are based upon a very different rule from that adopted in our country. To show that this rule is different, the committee would refer to the following authorities, which are cited in the very able report of Mr. Dawes from the Committee on Elections, in the case of Smith *v.* J. Y. Brown (Report of Committees, No. 11 second session Fortieth Congress.) * * *

After citing the authorities in favor of seating a minority candidate, when an election had been made after due notice of disabilities, the report continues:

But is such a principle applicable in a government based upon the theory that the power emanates from the people? In the British Government the case is exactly the reverse, as there the theory is that the power originates with the monarch, and the privileges allowed the people to select representatives are, under that theory, considered as conceded and not as inherent rights. But this Government rests upon an entirely different basis. Here the power originates with the people, and that which the Government is authorized to exercise is conceded by the people. The right to designate who shall exercise this power has never been delegated. The method by which this choice shall be made known consistent with this theory can never be otherwise than by giving the majority or plurality the right to decide. Any attempt to restrict the right of the voter is an attempt to invade that right; therefore the theory that casting a vote knowingly for an ineligible candidate is in the nature of a crime which may be punished by ignoring the act of the majority and recognizing the act of the minority is in direct conflict with that most sacred right which the people of this Government have always guarded with jealous care. Such a rule is consistent with the theory of the British Government, as it affords one means of preventing the power from passing into the hands of the people; but it is directly at variance with the theory of our Government, as it affords one means by which that right which the people have of selecting their representatives may be abridged.

While, therefore, the general tenor of the English authorities to which he refers us is admitted to be as claimed by the memorialist, yet we do not conceive such a rule to be applicable to and consistent with the political institutions of the United States, where the right of the majority to govern and the Government is based upon the consent of the governed is one of the first political lessons to be learned.

There is also another very strong reason why the English authorities relied upon by the memorialist are not applicable in the present case, even if the spirit and fundamental idea of our institutions were insufficient to show this.

The third section of the fourteenth amendment of the Constitution, which imposes the disabilities in question, also contemplates and provides for the removal thereof by Congress. There is no such feature in the English law. The English cases are, therefore, based upon a very different state of facts from those that exist in this country, and are not precedents for this case.

It is difficult to conceive how the Constitution could grant authority to Congress to remove the disabilities under which an individual who has been elected is laboring, and allow him to take his seat as a Member, and yet at the same time embrace the idea that such an election is wholly void and the votes cast for him nullities. Yet Congress by its action in numerous instances has given the first construction to this clause of the Constitution, and if the memorialist in this case shall be admitted to his seat the Senate will have to give the second construction.

After citing at length the judicial decisions and legislative cases against the English theory, the report continues:

But suppose that it is admitted that the English rule is applicable here, do the facts in this case bring it within that rule? Were the votes for Vance cast in willful obstinacy for a candidate the voters knew, or had good reason to believe, would not be entitled to take his seat? The memorialist avers that the fact that Vance was known to be ineligible is not controverted. That his ineligibility was a

matter of public notoriety in North Carolina is doubtless true, and that it was known to most if not all of the members of the legislature is quite probable; yet no evidence has been presented to the committee proving this fact, or that notice of his disqualification was given at the time the vote was taken.

Let us even go one step further, and suppose that the evidence on this point was clear and explicit; are we not justified in believing that those who voted for Vance did so in good faith, believing that his disabilities would be removed after the election by the action of Congress, basing this presumption on the precedents which had recently been set in similar cases? Nor is this by any means an improbable hypothesis, but accords much better with the facts presented to the committee than the hypothesis that the votes given for Vance were cast in "willful obstinacy" for a candidate they knew would not be admitted to his seat. If they were given under the impression that these disabilities would be removed, then, although unavailing, they can not be rejected from the count. And the committee would again refer to the report of the committee in the case of Yulee *v.* Mallory, of Florida, 1852.

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Under the English rule it is the fact that the voters knowingly and purposely throw away their votes that lays the foundation for saying they assent to the election of the minority man. But no such purpose can be predicated of the legislature of North Carolina. They did not know that their votes for Vance would be thrown away. They did not purposely throw them away, because Congress had in numerous cases previously removed disabilities of a similar character from those elected and allowed them to hold their offices. Nearly all of the officers elected in this State in 1868 had their disabilities removed by the act of June, 1868, and were allowed by virtue thereof to enter upon and discharge the functions of their respective offices.

The same act removed the disabilities of a large number of persons elected in Alabama in February, 1868, and at the close of the section contains this sweeping clause:

"And also all officers-elect at the election commenced the 4th day of February, 1868, in said State of Alabama, and who have not publicly declined to accept the offices to which they were elected." (15 Stat. L., 366, 2.)

These were certainly sufficient to raise in the minds of the members of the legislature of North Carolina who voted for Vance the belief that his disabilities would be removed and that he would be allowed to take his seat. In fact, they had good right to believe that this was the rule, and the opposite the exception, especially where the persons so elected were known to favor the restoration of order and obedience to law.

Again, it may be fairly argued that the fourteenth amendment to the Constitution did not disqualify Vance to be elected, but only to hold the office of Senator in case his disability should not be removed. Upon this interpretation his election was voidable only, and not void, and, as a consequence, Abbott was not elected. But even if this interpretation is erroneous, it is one the legislature of North Carolina might (and as nothing to the contrary is shown, we are to presume did) honestly entertain (especially in view of the action of Congress above referred to), and if they elected Vance under a mistake in law, his election was not void, but only voidable.

Although the committee have referred to the decisions of the courts and legislative bodies of this country bearing upon this case, the tenor of which is believed to be decidedly adverse to the claim of the memorialist, yet this appears unnecessary, as a careful examination of the act of Congress of July 25, 1866 (which has already been alluded to on one point), when applied to the facts in this case, would seem to be an effectual bar to the claim of the memorialist.

The report then cites this act, which in terms requires the election of a Senator by majority vote, and concludes:

It is, moreover, evident from the very wording of this act that Congress did not even contemplate the possibility of an election by a minority under any circumstances, but by this act imply the opposite.

As to another question the report holds:

It has been suggested that there is a distinction in respect to the operation of the rule insisted on by the memorialist between a popular election, under our liberal system of suffrage, for a Member to the House of Representatives by ballot and an election of a Senator by viva voce vote of the members of a legislature.

Your committee are inclined to think this is correct, but that the distinction bears against the claim of the memorialist instead of in favor of it.

The number of persons entitled to vote at a popular election is not fixed and definite, and hence it is impossible to have a quorum or anything answering thereto. There is no power to compel attendance. This is, and necessarily must be, wholly voluntary; therefore it is necessary that those attending should have the right to elect where the election is free, and are prevented from attending by force, intimidation, or fraud. If a candidate receiving the majority is disqualified, and the votes cut for him are declared nullities (as claimed by the memorialist), the remaining votes are as effectual to elect as if every voter of the district had been present; and if those who voted for the candidate receiving the majority had not been present at all, the election nevertheless would have been valid. But the rule is wholly different in legislative bodies. The number is fixed and definite, a quorum can be and is required to act, and the presence of a less number is not effectual. Had but the 32 who voted for Abbott been present in the house at the time the vote was cut, we do not suppose anyone would contend that he had even a shadow to base his claim upon; yet this number would be sufficient to elect in a district of 1,000 voters if no others voted. We therefore coincide in the view that there is a difference, and that, even if the English rule was applicable in the case of an election of a Member to the House of Representatives, it would by no means follow that it was applicable to the election of a Senator where the number voting, of the votes counted, is less than a quorum.

Your committee, therefore, after a full hearing of the case and examination of the authorities, come to the conclusion that the Hon. Joseph C. Abbott, of North Carolina, is not entitled to a seat in the United States Senate, and recommend the adoption of the following resolution:

Resolved, That Joseph C. Abbott, not having received a majority of the votes cast by the North Carolina legislature on the second Tuesday in November, 1870, for the office of Senator of the United States, is not entitled to a seat in said United States Senate as such Senator.

Mr. Matt H. Carpenter, of Wisconsin, on behalf of himself and Mr. B.F. Rice, of Arkansas, submitted minority views, in which they say:

Had Vance been qualified to serve, there would be no question as to his right. But he was disqualified by the fourteenth amendment to the Constitution of the United States, for the reason that he had been a Member of the Congress prior to the rebellion, and, as such Member, had taken an oath to support the Constitution of the United States, and during the rebellion he had acted as colonel in the rebel army, and taken an oath of allegiance to the so-called Confederate States of America; and he had acted as governor of the rebel State of North Carolina from August, 1862, to April, 1865; and this disqualification was notorious—known to all the members of the legislature at the time of his election, and to all the people of that State. The fact that Vance was known to the members of the legislature who voted for him for Senator to be disqualified is not controverted. On the contrary, General Ransom, who claims to have been subsequently elected, upon the resignation of Vance, was heard before your committee, and frankly admitted that the fact that Vance was disqualified was well known to all the members of both houses of the legislature at the time of his pretended election.

It is admitted on all hands that the election which was held, as before stated, conferred no right upon Vance to a seat in this body; but Abbott, who was qualified, and who received the next highest number of votes cast, and a majority of all the votes cast for qualified candidates in both houses, insists that he was elected at said election, and is now entitled to the seat; and this is the question to be determined.

The minority views then go on to cite the statute governing the election of a Senator by the legislature, and continues:

It will be perceived that this act does not attempt to determine what shall be a quorum of each house, but leaves that question to be determined by the constitution and laws of the State. By the constitution of North Carolina it is provided:

"Neither house shall proceed upon public business unless a majority of all the members are actually present."

It is not necessary that all the members should participate in the transaction of public business by either house, but merely that a majority of all the members should actually be present in each house. But in providing for an election by the joint assembly of the two houses the act of Congress does provide that in such election—

"The person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected."

The difference in these two provisions is not one of phraseology merely, but of substance. In the election by the two houses separately in North Carolina, if a majority of the members elected to each house are actually present, the person who shall receive the highest number of votes cast, though that may be less than half of a constitutional quorum, is to be declared elected; but in the election by the joint assembly it is not enough that a candidate should receive a majority of all the votes cast, but he must receive a majority of "all the votes of the said joint assembly—a majority of all the members elected to both houses being present and voting." These provisions are so materially different that the variation can not be regarded as accidental, and the reason for the distinction is, no doubt, that the act intended to leave the matters of a quorum and the proceedings of the houses acting separately to be regulated by the constitution and laws of the State, but the act intended to provide what should be necessary to constitute a quorum and make an election in the joint assembly—a body created by the act, and whose proceedings might not be regulated by the constitution of the State.

It is only necessary in this case to consider the effect of the proceedings in the two houses on the first day, because it is upon those proceedings Mr. Abbott founds his claim. If he was legally elected on that day the subsequent proceedings by the joint assembly could not affect his right, nor can such claim be affected by any subsequent proceedings of the legislature. His claim depends upon the legal effect of what took place in the two houses on the first day of the election.

It is insisted that the provisions of the act in relation to election by the two houses and by the joint assembly are substantially the same, because it is provided by the act that—

"Each house shall openly, by a viva voice vote of each member present, name one person for Senator, etc., and the name of the person so voted for who shall have a majority of the whole number of votes cast in each house shall be entered on the journal," etc.

And hence it results that to be elected on the first day the person must have a majority of all the members present. But this construction, which is equivalent to saying that, to make an election, every member must vote, would put it in the power of a single member of the legislature to defeat an election on that day. This could not have been intended, and that clause must be regarded as relating merely to the manner of voting; and if a number of votes are cast for a qualified candidate, and the other members refuse to vote at all, then the person "who shall have a majority of the whole number of votes cast" must be deemed elected.

The provision concerning the joint assembly is materially different. There it is provided:

"The joint assembly shall then proceed to choose, by a viva voice vote of each member present, a person for the purpose aforesaid, and a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected."

The clause "a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting," undoubtedly requires that to make an election a candidate must receive a number of votes greater than half of the majority of both houses. The difference between the two provisions is this: If a majority or quorum of each house are actually present when each house proceeds to the election on the first day, the person receiving the highest number of votes cast is elected, though receiving less than half of a majority. But in the joint assembly it is necessary to an election that a candidate should receive the votes of more than half of a majority of both houses.

It is a well-established rule for construing statutes that every clause, phrase, and word must be deemed to have been added to the statute for the purpose of accomplishing some end that would not be accomplished without it.

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Applying this familiar precept to the statute before us, it must be held that the provision in regard to an election by the joint assembly requiring a person to receive "a majority of all the votes of the said joint assembly," which is not found in the act in relation to an election by the two houses acting

separately, was added for the purpose of requiring in one case what was not necessary in the other. It may be said that the same thing ought to be required in the one case as in the other, and that the act of Congress ought not to be so construed as to permit an election by the minority in one case and to forbid it in the other. But the answer to this is obvious. Before the passage of this act the States elected Senators by various methods; some by a joint assembly of both houses and some by the action of the two houses separately. In those States which elected by the latter method the houses might sometimes disagree, and thus defeat an election. It was the manifest intention of the act of Congress to afford to a legislature the opportunity of electing a Senator by the separate action of the houses, and in doing so to leave the whole detail of the election to be regulated by the parliamentary usage of the State. But in providing for an election by the joint assembly, a method not in use in some of the States, it was necessary to provide what should be a quorum, and what should be necessary to an election.

As the act of Congress does not affect the question under consideration. resort must be had to the precedents and authorities, English and American.

It is admitted that when the electors vote for a disqualified candidate, in ignorance of his disqualification, the election is void, and must be remitted to the elective body. But it is insisted that where, as in this case, the electors (the members of the two houses) had full knowledge of the disqualification, votes cast for such person are considered as thrown away, and the qualified candidate receiving the next highest number of votes, and a majority of all votes cast for qualified candidates, is elected. If this proposition is well grounded, Mr. Abbott is entitled to a seat; and this is the precise question upon which we are to consult the authorities.

Mr. Abbott furnished to your committee a printed brief containing references to and quotations from the decisions upon this question from the earliest times, which quotations are embodied in this report. * * *

After citing many decisions referred to in the brief, especially the case of Yulee, the views of the minority proceed:

It was strongly contended before your committee that the case under consideration falls fairly within this equitable principle, because it was said that all the State officers and judges of North Carolina had been elected while under disability imposed by the fourteenth amendment, and Congress had subsequent to their election removed their disabilities and enabled them to hold their offices; and your committee were referred to the act of June 25, 1868 (15 Stat. L., p. 366), by which "all officers elected at the election commencing the 4th day of February, 1868, in the State of Alabama," and who had not publicly declined to accept the offices to which they were elected, were relieved of their disabilities. From these facts it was contended that the members of the legislature who voted for Vance might well believe, and it was said that in fact they did believe, that Congress would relieve Vance of his disability and that he would be admitted to his seat in the Senate.

This suggestion has some force, but a slight examination will show that it is rather plausible than round. In the first place, the case bears no resemblance to that supposed in the report in Yulee's case, because here there was no misapprehension as to any fact then existing. If the electors had supposed that Vance was not disqualified, though in fact he was, or had they believed that an act had already passed Congress relieving him from his disability, though such was not the case, then the electors would have acted under a misapprehension and honestly entertained the belief that Vance was eligible. But such is not the case. Every elector who voted for Vance knew that he was disqualified by the fourteenth amendment and that his disability had not been removed. Every elector therefore knew when he gave his vote for Vance that, as the case then stood, such vote was thrown away. As well might a man claim exemption from the penalty imposed by a statute upon the ground that although he knew he was violating its provisions he expected the legislature would repeal it. It was the duty of that legislature to elect a Senator who, in virtue of that election and without the aid of any other government, would be authorized to demand his seat as a Senator. To elect a disqualified candidate and then refer it to Congress to remove his disqualifications or not is to transfer the election from the legislature to Congress. In such case the legislature would in effect be nominating a Senator and submitting it to Congress to determine whether or not he should be a Senator. Put the case in the strongest possible light for Vance, still it must be admitted that the electors who voted for him knew that as the case then stood their votes were being thrown away; that without the action of Congress, which might or might not be interposed, the election was in violation of the Constitution; and up to the time when

Abbott claimed his seat in this body, and up to the present hour, the votes given for Vance remain wholly inoperative, void, blanks in the law, thrown away for every legal purpose. Mistakes which equity may relieve against are mistakes in regard to existing facts not over sanguine and unfounded hopes looking to the future for realization and accomplishment.

In the second place, the legislation of Congress in regard to the organization of the reconstructed governments of the Southern States furnishes no precedent to bind the Senate in determining the election of its own Members. Those State governments could not be organized without relieving the disabilities of those who had been elected. Congress was therefore compelled to do so or abandon those States to anarchy or remit them to military rule. To quote the language of a great statesman on another subject, "A doubtful precedent should not be followed beyond its necessity." No such necessity exists in regard to the Senate of the United States, and therefore the electors had no right to assume that Congress would do in this case, where there was no necessity for it, what it had been compelled to do in the other cases referred to. And in no case has a Senator elected under disabilities imposed by the fourteenth amendment been relieved of such disability and permitted to take his seat.

Several decisions of the House of Representatives have been referred to which are supposed to be inconsistent with the principle here asserted. But it is believed that in none of those cases was it established that the electors knew of the disqualification of the candidate voted for; and in the very able report of Mr. Dawes, from the Committee on Elections (Report of Committees, 11, second session Fortieth Congress), which is much relied upon, it is expressly stated that this point was not involved, because it did Dot appear that the electors bad such notice.

But there are many reasons for declining a critical examination of the decisions of the other House in regard to the election of its Members. By the Constitution each House is made the judge of the elections, returns, and qualifications of its Members. It would therefore be improper for the Senate—certainly indelicate for a committee of the Senate—to criticise the actions or decisions of the House; and it would be subversive of the Constitution, because it would practically make the House of Representatives not only the judge of the election, returns, and qualifications of its own Members, but also of the Members of this House, if the Senate were to follow as precedents the decisions of the House in conflict with its own opinions.

Again, there is much force and reason in the distinction made by the court, in Commonwealth v. Cluley (56 Penn. St., p. 274), between a popular election, under our system of almost universal suffrage, for a Member of the House of Representatives, by ballot, and an election of a Senator by a viva voce vote of the members of a legislature. And it might well be that the House of Representatives should establish one rule appropriate to the election of its Members and the Senate a different rule in regard to the election of its Members. The difference between the two cases would justify different rules.

In a popular election, by ballot, for a Member of the House of Representatives, where the voters are numerous and scattered over a considerable territory, it would be impossible to ascertain whether or not the electors, or enough of them to change the result, had knowledge of the disqualification of the candidate. Besides, voting by ballot includes the right of the elector to conceal the fact for which candidate he voted. This is his secret, which can not be wrested from him even in a court of justice. And they who voted against the successful candidate, yet failed to defeat him at the polls, might attempt to accomplish the same end by pretending to have voted for him with knowledge of his incapacity. Even perjury in such case, should a voter voluntarily swear falsely in regard to it, could never be detected and punished. Such a principle applied to such elections would be unsatisfactory, often incapable of application, and always a temptation to frauds and perjuries, which might be committed with impunity. And it may be conceded that, in determining who has been elected at such popular election by ballot, no candidate not receiving a majority of all votes cast, counting blanks and ballots for disqualified candidates, ought to be declared elected; and that the decisions of the House of Representatives, as applied to the election of its own Members, ought to proceed upon a different principle than the one here contended for.

But the circumstances which may well induce the House of Representatives to depart from the ancient rule and practice in determining the election of its Members do not exist in relation to the election of Senators. Senators are elected by a small number of persons, the number fixed by law, who are compelled to vote viva voice. Their votes are matters of record, and the record discloses who voted for and who voted against the disqualified candidate. Whether these electors had notice or not of the ineligibility of a candidate is easily, and may be definitely and certainly, ascertained. There

is no inconvenience, no opportunity for fraud, no temptation to perjury, in the application of the principle here contended for to such an election. Every reason that can be given for excluding the application of this principle to popular elections by ballot sustains its application to the election of a Senator by the viva voice vote of the members of the legislature; and it is worthy of remark that the rule of parliamentary and common law, which is established by an unbroken current of decisions in England, had reference to elections, not by ballot, but viva voice. That method of election gave rise to the rule, and no reason has been given, none suggests itself, for departing from it now in regard to such elections. And it should also be observed that in every case in the American courts of law where the judges have, obiter dictum, declared that the minority candidate was not elected, not only was the element of knowledge of the disqualification wanting, but the election was by ballot and not viva voice. Not a dictum of any American court or American law writer of established reputation has been cited to your committee, and it is believed that none exist, which disapproves of the principle as applicable to elections viva voice.

In the report of the majority it is said that this principle belongs to a government where, as in England, the right to vote has been granted or conceded as a boon or franchise by the monarch to his subject; and hence to vote for a candidate known to be disqualified is a crime. But that in this country voting is the inherent right of every citizen; and Roe on Elections, page 256, is cited as sustaining this assertion in relation to elections in England. The author referred to, so far from sustaining such a distinction, does not allude to it. And it is believed, for many reasons, that no such distinction can be maintained.

1. The great charter in England was not a concession in the sense of a grant of rights. It was an admission that certain rights belonged to Englishmen, and always had belonged to them. The rights there admitted to exist were the inherent rights of Englishmen. Blackstone says:

"The great charter" contained very few new grants, but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England."

The great Bill of Rights delivered by the Lords and Commons to the Prince and Princess of Orange February 13, 1688, and afterwards enacted in Parliament, after enumerating the privileges of the people, concludes in the following strain of ancient, manly eloquence:

"And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties."

And the act of Parliament recognizes—

"All and singular the rights and liberties asserted and claimed in the said declaration to be true, ancient, and indubitable rights of the people of this Kingdom."

2. The right of voting in this country is not an inherent right of the citizen. If it were, women as well as men could vote; because women as well as men are citizens and always have been under our Constitution; and every inherent right of the citizen is possessed as fully and may be exercised as freely by the female as the male citizen. Our popular elections are participated in by those who have a constitutional right to vote. Their right to vote does not spring merely from citizenship; it is a right secured, limited, and regulated by the Constitution and laws. A citizen has no more inherent right to be a voter than to be a Senator. The citizen may vote if the Constitution and laws permit, not otherwise; so every citizen may be a Senator if duly elected and qualified, not otherwise.

3. But if such distinction were conceded to exist, it would strengthen the conclusion here arrived at. To test this let us concede that the Englishman in voting is exercising not an inherent right, but a franchise delegated to him by the Crown; therefore it is a crime for him to vote for a disqualified candidate, and for that reason his vote is considered as thrown away and the next highest qualified candidate is to be considered as elected. And let us also concede that at a popular election in this country the voter exercises an inherent right of citizenship; and hence, if he votes for a candidate known to be disqualified his vote is not thrown away. From these admissions what results? Simply this: That in our popular elections, by ballot, for a Member of the House of Representatives the principle here contended for does not apply. Very well. It does not apply upon this hypothesis, because the voter is exercising an inherent right and not a delegated power when he casts his ballot. Now, if this distinction be well taken does not everyone perceive that the principle here contended for must apply to an election of Senators by the members of a legislature who in that election are exercising a delegated power and not an inherent right? The members of the legislature in electing a Senator are exercising a power that is delegated in a double sense. The power to elect a Senator is delegated by this Government—that is,

by the Constitution of the United States—to the legislature of the State; and the people elect members of that legislature who are among other things to exercise this power of electing a Senator. It will not be pretended that a member of the legislature in voting for a Senator is exercising an inherent right of a citizen, and all must admit that he is exercising a delegated power; so that the very argument which exempts the election of Members of the House of Representatives from the operation of the principle under consideration subjects the election of Senators to its full operation.

It has also been urged before your committee that bills passed by Congress to relieve disabilities of Members elected to the House of Representatives rest upon principles inconsistent with the conclusions of this report. To this two answers may be made: (1) The proceedings of Congress in relation to cases of election while reconstruction of the late rebel States was in progress can hardly be relied upon as settling principles by which either House of Congress ought to be bound in times of peace. The circumstances under which such legislation was had were exceptional and the legislation itself ought not to stand as a precedent. (2) The bills which have passed were bills originating in the House of Representatives concerning Members elected to that House, and although the Senate has concurred in the enactment of such laws it ought not to be regarded as settling principles by which the Senate must be bound in determining the election of its own Members. Whenever the House of Representatives manifests its desire to seat a Member, although it may require the enactment of a law by both Houses to accomplish the purpose, still the Senate in concurring in such enactment may be regarded as extending a courtesy to the House of Representatives rather than settling principles which will bind the Senate in relation to the election of its own members. * * *

Therefore it is submitted that upon reason and authority the votes cast for Mr. Vance, with full knowledge on the part of the members of both houses of the legislature that he was disqualified by the Constitution to serve in this body, ought to be considered as thrown away; and that, inasmuch as a majority of all the members elected to each house were "actually present," the election was legal, and that the qualified candidate receiving the highest number of votes, and a majority of all votes cast for qualified candidates, was duly elected. It is conceded that majorities have a constitutional right to govern in this country; but it is not conceded that even the majority of the legislature of a State may morally or constitutionally defeat government by refusing to elect Senators to serve in the Senate of the United States. In this case the majority had a right to elect a qualified person to the Senate; but having waived their right by voting for a person known to be disqualified, as much as though they had refused to vote at all or had voted for a man known to be dead, the minority who complied with the Constitution by voting for a qualified candidate may well be held to have expressed the will of the legislature. If the majority, being. called upon, will not vote they can not complain that the election was decided by those who did vote, though a minority of the elective body. And voting for a person known to be disqualified is not voting. Such votes are void—no votes; and the highest number of votes cast, a quorum being present, must effect an election.

Therefore, in view of the premises, the minority of your committee recommend the adoption of the following resolution:

"Resolved, That Joseph C. Abbott has been duly elected Senator from the State of North Carolina for the term of six years, commencing on the 4th day of March, 1871, and that he is entitled to a seat in the Senate as such Senator."

The reports were debated at length in the Senate on April 11, 12, 15, 22, and 23, 1872,[1] and on the latter day the motion to substitute the minority resolution for that of the majority was disagreed to—yeas 10, nays 42. Then the resolution reported by the majority was agreed to.

[1] Globe, pp. 2387–2390, 2431–2434, 2676; Appendix, pp. 219–229, 245–257, 234–245, 272–279, 328–334.