

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 18, 1896.—Ordered to be printed.

Mr. MITCHELL, of Oregon, from the Committee on Privileges and Elections, submitted the following

REPORT:

[To accompany S. Res. 133.]

The Committee on Privileges and Elections, to whom was referred the petition of Henry A. Du Pont, of the State of Delaware, claiming a seat in the Senate from that State in virtue of an election by the legislature thereof on May 9, 1895, having had the same under consideration, beg leave to submit the following report:

STATEMENT OF FACTS.

There is in this case no material contention as to the facts. It is conceded the petitioner, Henry A. Du Pont, was, at the date of his alleged election, a citizen of the United States and an inhabitant of the State of Delaware, over 30 years of age, and in all respects qualified to become a Senator.

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

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

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

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

Mr. Alrichs, of the senate, voted for .....	H. A. DuPont.
Mr. Fenimore .....	Ed. Ridgley.
Mr. Hanby .....	J. Edward Addicks.
Mr. Harrington .....	Ed. Ridgley.
Mr. Moore .....	H. A. DuPont.
Mr. Pierce .....	H. A. DuPont.
Mr. Pyle .....	Ed. Ridgley.
Mr. Records .....	Ed. Ridgley.
Mr. Speaker .....	Ed. Ridgley.
Mr. Ball, of the house, voted for .....	J. Edward Addicks.
Mr. Brown .....	H. A. DuPont.
Mr. Burton .....	H. A. DuPont.
Mr. Daly .....	Ed. Ridgley.
Mr. Davis .....	Ed. Ridgley.
Mr. Fleming .....	H. A. DuPont.
Mr. Jolls .....	H. A. DuPont.
Mr. Killen .....	Ed. Ridgley.

Mr. Money .....	H. A. DuPont.
Mr. Moore .....	John Edward Addicks.
Mr. Morgan .....	H. A. DuPont.
Mr. Mustard .....	Ebe W. Tunnell.
Mr. Pyle .....	H. A. DuPont.
Mr. Reybold .....	H. A. DuPont.
Mr. Robbins .....	J. Edward Addicks.
Mr. Sypherd .....	Edward Ridgley.
Mr. Townsend .....	H. A. DuPont.
Mr. Walker .....	H. A. DuPont.
Mr. Watson .....	Ed. Ridgley.
Mr. Wilson .....	H. A. DuPont.
Mr. Speaker .....	H. A. DuPont.

The vote as above ascertained having been announced, as follows:

	Votes.
H. A. DuPont had .....	15
Ed. Ridgley had .....	10
J. Edward Addicks had .....	4
Ebe W. Tunnell had .....	1

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

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

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

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

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

The ground upon which it is claimed upon the part of Mr. DuPont that Mr. Watson was ineligible to a seat in such joint assembly, and should not have been counted therein in making up the number constituting the same, is based on the fact that, although he had been duly elected a senator from the county of Kent, and from the commencement of the session in January, 1895, until April 9, of that year, had held and occupied a seat in the senate, and had been elected speaker thereof, and served in that capacity, he had, on the 9th day of April, 1895, the

governor of the State of Delaware, Joshua H. Marvil, having died the day previous, succeeded to the governorship of the State in virtue of a provision of the constitution of that State, and from that date until the 9th day of May following had continued to exercise the functions and duties of executive of the State, and has ever since and still continues to exercise the office of governor of said State, and that, therefore, on that date, May 9, 1895, he, then holding the office of and being the governor of the State of Delaware, was ineligible to a seat in said joint assembly, and had no right whatever, under the provisions of the constitution of the State and of the laws of the land, to be present, either to participate by his vote or otherwise, or to be counted therein.

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

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

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

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

#### PROCEEDINGS OF THE LEGISLATURE.

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

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

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

speaker of the senate, took the official oaths prescribed for the governor of the State of Delaware, and forthwith entered upon the exercise of that office.

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

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

And, further, it is clear to your committee from the record and other evidence submitted that from the hour of his inauguration as governor, by taking the constitutional oaths required of a governor, his name was dropped from the roll call of the senate and was never once called, either as of speaker or as of a senator, on any roll call had on any bill, resolution, or motion until the final adjournment of the senate. Senator Alrichs, in his affidavit of date January 28, 1896 (Doc. 9, part 6, p. 1), shows this conclusively, and it is not contradicted by any affidavit filed in the case. The following is Senator Alrichs's affidavit in full:

AFFIDAVIT OF SAMUEL ALRICHS.

STATE OF DELAWARE,

*Newcastle County, ss:*

On this 28th day of January, A. D. 1896, before me, Edward G. Cook, a notary public for the State of Delaware in and for Newcastle County, personally comes Samuel Alrichs, who, being by me first duly sworn according to law, deposes and says:

That he is a member of the senate of the State of Delaware, as stated by him in a previous affidavit made in the above matter; that he took his seat in said senate on the 1st day of January, A. D. 1895, for a term of four years; that, *after William T. Watson took the oath of office as governor of the State of Delaware upon the death of Governor Marvil, to wit, on the 9th day of April, A. D. 1895, to the expiration of the last session of the senate on the 9th day of May of said year, the clerk of the senate did not call the name of William T. Watson as a member of the senate. He was neither on the call of the roll at the assembling of any session, nor upon the taking of any roll call upon bill, resolution, or other motion. He was not reported by the clerk as either present or absent; neither was his name called or recorded upon the taking of any yea or nay vote as being present or absent. William T. Watson's name was thus dropped from the rolls after he became governor by reason of no special order, or action, or motion, or otherwise, taken in respect thereto by the senate. It must have been done by the order of the speaker pro tempore. It was, however, in accordance with the general understanding of the members of the senate that William T. Watson was no longer a member of that body.*

SAMUEL ALRICHS.

Sworn to and subscribed before me the day and year first above written, as witness my hand and official seal.

[SEAL.]

EDWARD J. COOK, *Notary Public.*

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

	Votes.
Henry A. DuPont .....	15
Ed. Ridgely.....	10
J. E. Addicks.....	4
E. W. Tunnell.....	1

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

#### THE VITAL QUESTION.

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

#### PROPOSITIONS INVOLVED.

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

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

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

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

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

In discussing these several propositions, therefore, it becomes, in the view taken by your committee, wholly unnecessary, in reaching a correct conclusion as to the merits of the present controversy, to determine the question as to whether the offices of senator and speaker of the senate became *absolutely vacant* upon the accession of the speaker of

the senate to the office of governor, so as to entitle the electors of Kent County to fill such vacancy by election, or so as to prevent his resuming his place as senator and speaker at the termination of his term of office, and of his right to exercise the office of governor, as it is clear, if the right of Watson, while holding the office of governor and exercising that office, to exercise the functions of a senator, whether for the reason that his office as such senator had *ipso facto* become vacant, or for any other reason, based on a fair construction of the various provisions of the constitution of the State of Delaware, and the well-known rule of law relating to incompatible offices, *was suspended*, then in *either* of such events the presence of Governor Watson in the joint assembly May 9, 1895, and his voting for a United States Senator therein while holding and exercising the office of governor, were *wholly illegal*, and in such event his vote in such joint assembly *should not be counted*.

WHETHER THE OFFICES HELD BY MR. WATSON AS SENATOR AND SPEAKER OF THE SENATE DID OR DID NOT BECOME ABSOLUTELY VACANT ON HIS BECOMING GOVERNOR, IT IS CLEAR THAT WHILE HOLDING AND EXERCISING SUCH EXECUTIVE OFFICE HIS RIGHT TO EXERCISE ANY OF THE FUNCTIONS, EITHER OF THE OFFICE OF SENATOR OR SPEAKER OF THE SENATE, WAS ABSOLUTELY SUSPENDED.

Whether the offices held by Mr. Watson as senator and speaker of the senate did or did not become absolutely vacant on his becoming governor, it is clear that while holding and exercising such executive office his right to exercise any of the functions, either of the office of senator or speaker of the senate, was absolutely suspended.

This conclusion is based on what seems to your committee to be—

First. The only reasonable and fair construction of various provisions of the constitution of the State of Delaware;

Second. Because it is sustained and supported by the well-recognized rule of the common law which inhibits either the holding or exercising simultaneously by the same person two incompatible offices, and also by the principles of our American system that legislative and executive offices are incompatible; and,

Third. Because the uniform unbroken usage observed in Delaware by its governors, legislators, and people for more than one hundred years is to this effect, that is to say, that the right to exercise the offices of senator and speaker of the senate is suspended and held in abeyance during the time he is exercising the office of governor, and that both offices can not by such person be exercised simultaneously, and in perfect harmony with the constitutional provisions of the State which, in our judgment, *expressly* forbid the simultaneous exercise by the same person of the offices of governor and State senator.

#### LEGAL PROPOSITIONS.

Before proceeding to analyze these various constitutional provisions in their application to the present controversy, your committee respectfully submit the following propositions, the soundness of which it will endeavor to maintain:

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

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

Third. There is no *express* or *implied* authority in the Delaware constitution for the simultaneous exercise by the same person of the offices of governor and senator; on the contrary, the constitution *expressly interdicts* such exercise of those two offices, and therefore at the time when Mr. DuPont received 15 votes in the joint assembly, Mr. Watson, being then governor of the State, holding and exercising that executive office, was incapable of exercising the office of senator.

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

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

Sixth. That Governor Watson's exercise of the office of senator in the joint assembly and of the office of president of the joint assembly was illegal and his vote for United States senator a *nullity*.

Seventh. The journal entries of the proceedings of the Delaware senate on May 9, 1895, are conclusive as to the number and names of senators present, the motions submitted, the votes cast, and of all the proceedings had, and can not be contradicted by *ex parte* affidavits.

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

This latter proposition will receive first consideration at the hands of your committee.

#### PROVISIONS OF THE DELAWARE CONSTITUTION.

The following are the several more important provisions of the constitution of the State of Delaware which have, as it is believed, any bearing upon this controversy. They are all, for convenience of the Senate, inserted here and will be considered and construed in *pari materia*. Certain other clauses will be cited and commented on later in this report:

ART. 2. SEC. 1. The legislative power of this State shall be vested in a general assembly, which shall consist of a senate and house of representatives.

ART. 3. SEC. 1. The supreme executive powers of the State shall be vested in a governor.

ART. 6. SEC. 1. The judicial power of this State shall be vested in a court of errors and appeals, a superior court, a court of chancery, an orphan's court, a court of oyer and terminer, a court of general sessions of the peace and jail delivery, a register's court, justices of the peace, and such other courts as the general assembly, with the concurrence of two-thirds of all the members of both houses, shall, from time to time, establish.

Section 14, of Article III, is as follows:

SEC. 14. Upon any vacancy happening in the office of governor, by his death, removal, resignation, or inability, the speaker of the senate shall exercise the office *until a governor elected by the people shall be duly qualified*. If there be no speaker of the senate, or upon a further vacancy happening in the office, by his death, removal, resignation, or inability, the speaker of the house of representatives shall exercise the office *until a governor elected by the people shall be duly qualified*. If the person elected governor shall die, or become disqualified before the commencement of his term of office, or shall refuse to take the same, the person *holding the office* shall continue to exercise it *until a governor shall be elected and duly qualified*. If, upon a vacancy happening in the office of governor, there be no other person who can exercise said office within the provisions of the constitution, the secretary of state shall exercise the same until the next meeting of the general assembly, who shall immediately proceed to elect, by joint ballot of both houses, a person to exercise the office *until a governor elected by the people shall be duly qualified*. If a vacancy occur in the office of governor, or if the governor-elect die or become disqualified before the commencement of his term, or refuse to take the office, an election for governor shall be held at the next general election, unless the vacancy happen within six days next preceding the election, exclusive of the day of the happening of the vacancy and the day of the election; in that case, if an election for governor would not have been held at said election without the happening of such vacancy, no election for governor shall be held at said election in consequence of such vacancy. If the trial of a contested election shall continue longer than until the third Tuesday of January next ensuing the election of a governor, the governor of the last year, or the speaker of the senate or of the house of representatives, who may then be in the exercise of the executive authority, shall continue therein until a determination of such contested election. The governor shall not be removed from his office for inability but with the concurrence of two-thirds of all the members of each branch of the legislature.

Section 12, Article II, provides as follows:

SEC. 12. \* \* \* No person concerned in any army or navy contracts, nor Member of Congress, nor any person *holding any office under this State or the United States*, except the Attorney-General, officers usually appointed by the courts of justice respectively, attorneys at law, and officers in the militia holding no disqualifying office shall, during his continuance in Congress or in office, *be a Senator or Representative*.

Section 5 of Article III:

SEC. 5. No Member of Congress, nor person holding any office under the United States, or this State, shall exercise the office of governor.

The following is the oath of office taken by each of the governors of the State of Delaware upon his accession to office. It is prescribed by Article VIII of the Constitution.

Members of the general assembly and all officers, executive and judicial, shall be bound by oath or affirmation to support the constitution of this State and to perform the duties of their respective offices with fidelity.

The following are the journal entries of the Delaware senate of proceedings therein on April 9, 1895:

The Hon. James L. Wolcott then administered, in the presence of the members of the senate, to Hon. William Tharp Watson, speaker of the senate, the following oaths of office as governor, to wit: "I, William T. Watson, do solemnly swear, on the holy evangels of Almighty God, that I will support the Constitution of the United States of America. So help me God."

"I, William T. Watson, do solemnly swear, on the holy evangels of Almighty God, that I will support the constitution of the State of Delaware. So help me God."

"I, William T. Watson, do solemnly swear, on the holy evangels of Almighty God, that I will perform the duties of the office of governor of the State of Delaware with fidelity. So help me God."



Thereupon the speaker called Mr. Pyle to the chair and retired from the senate chamber.

Section 1, Article VI, of the constitution is as follows:

SEC. 1. The judicial power of this State shall be vested in a court of errors and appeals, a superior court, a court of chancery, an orphans' court, a court of oyer and terminer, a court of general sessions of the peace and gaol delivery, a register's court, justices of the peace, and such other courts as the general assembly, with the concurrence of two-thirds of all the members of both houses, shall from time to time establish.

It is provided in Article III, section 3, that—

The governor shall hold his office during four years from the third Tuesday in January next ensuing his election, and shall not be eligible a second time to said office.

And in Article III, section 4, that—

SEC. 4. He shall be at least thirty years of age, and have been a citizen and inhabitant of the United States twelve years next before the first meeting of the legislature after his election, and the last six of that term an inhabitant of this State, unless he shall have been absent on the public business of the United States, or of this State.

Article III, section 11, provides as follows:

He shall, from time to time, give to the general assembly information of affairs concerning the State, and recommend to their consideration such measures as he shall judge expedient.

It is further provided in section 9 of Article III of the constitution, as follows:

SEC. 9. He shall have power to remit fines and forfeitures and to grant reprieves and pardons, except in cases of impeachment. He shall set forth in writing, fully, the grounds of all reprieves, pardons, and remissions, to be entered in the register of his official acts and laid before the general assembly at their next session.

The following are the provisions of the constitution of the State of Delaware bearing upon the election of senators and the constitution of the senate of that State:

ART. 2. SEC. 3. The senators shall be chosen for four years by the citizens residing in the several counties. \* \* \*

There shall be three senators chosen in each county. When a greater number of senators shall by the general assembly be judged necessary, two-thirds of each branch concurring, they may by law make provision for increasing their number; but the number of senators shall never be greater than one-half nor less than one-third of the number of representatives.

SEC. 2. The representatives shall be chosen for two years by the citizens residing in the several counties. \* \* \*

There shall be seven representatives chosen in each county, until a greater number of representatives shall by the general assembly be judged necessary; and then, two-thirds of each branch of the legislature concurring, they may by law make provision for increasing their number.

The qualifications of a senator of the legislature of the State of Delaware are prescribed by section 3 of Article II of the constitution of that State, as follows:

No person shall be a senator who shall not have attained to the age of twenty-seven years, and have, in the county in which he shall be chosen, a freehold estate in two hundred acres of land, or an estate in real or personal property, or in either, of the value of one thousand pounds at least, and have been a citizen and inhabitant of the State three years next preceding the first meeting of the legislature after his election, and the last year of that term an inhabitant of the county in which he shall be chosen, unless he shall have been absent on the public business of the United States or of this State.

While the qualifications of a representative in the legislature of the State of Delaware are set forth in section 2 of Article II, as follows:

No person shall be a representative who shall not have attained the age of twenty-four years, and have been a citizen and inhabitant of the State three years next

preceding the first meeting of the legislature after his election, and the last year of that term an inhabitant of the county in which he shall be chosen, unless he shall have been absent on the public business of the United States, or of this State.

While section 1 of Article IV provides that—

All elections for governor, senators, representatives, sheriffs, and coroners shall be held on the Tuesday next after the first Monday in the month of November of the year in which they are to be held, and be by ballot.

Section 2 of Article II provides that—

The representatives shall be chosen for two years by the citizens residing in the several counties.

Section 3 of Article II provides that—

The senators shall be chosen for four years by the citizens residing in the several counties.

Section 4 of Article II provides that—

The general assembly shall meet on the first Tuesday of January, biennially, unless sooner convened by the governor. The first meeting of the general assembly under this amended constitution shall be on the first Tuesday of January, in the year of our Lord one thousand eight hundred and thirty-three, which shall be the commencement of biennial sessions.

It is provided in Article II, section 6, that—

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

While Article V, sections 1 and 2, are as follows:

#### ARTICLE V.

SECTION 1. The house of representatives shall have the sole power of impeaching; but two-thirds of all the members must concur in an impeachment. All impeachments shall be tried by the senate; and when sitting for that purpose the senators shall be upon oath or affirmation to do justice according to the evidence. No person shall be convicted without the concurrence of two-thirds of all the senators.

SEC. 2. The governor, and all other civil officers under this State, shall be liable to impeachment for treason, bribery, or any high crime or misdemeanor in office. Judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of honor, trust, or profit under this State; but the party convicted shall nevertheless be subject to indictment, trial, judgment, and punishment according to law.

It is provided in Article III, section 14, as follows:

The governor shall not be removed from his office for inability but with the concurrence of two-thirds of all the members of each branch of the legislature.

Article II, section 5, provides that—

Each house shall choose its speaker and other officers; and also each house, whose speaker shall exercise the office of governor, may choose a speaker *pro tempore*.

Article II, section 7, provides that—

Each house may, \* \* \* with the concurrence of two-thirds, expel a member, etc.

Article VII, section 3, provides that—

The legislature, two-thirds of each branch concurring, may vest the appointment of sheriffs and coroners in the governor.

Article III, section 14, is as follows:

If upon a vacancy happening in the office of governor there be no other person who can exercise said office within the provisions of the constitution, the secretary of state shall exercise the same until the next meeting of the general assembly, who shall immediately proceed to elect, by joint ballot of both houses, a person to exercise the office until a governor elected by the people shall be duly qualified.

**A PRELIMINARY QUESTION.—THE SENATE OF THE UNITED STATES MAY INQUIRE INTO THE RIGHT OF GOVERNOR WATSON TO A SEAT IN THE JOINT ASSEMBLY AND TO VOTE FOR A UNITED STATES SENATOR THEREIN.**

At the threshold in this investigation we are confronted with the question, Has the Senate of the United States the constitutional power to inquire into the question as to the right of Watson, then governor of the State, to a seat in the State senate, and to be present in the joint assembly, and to vote for a United States Senator?

Those opposing the claim of Mr. DuPont insist no such power exists, and the reason advanced in support of this contention is that the senate of Delaware passed judgment upon Watson's qualifications as a member of that body, and that such decision is conclusive.

Counsel, in opposition to the claim of Mr. DuPont, cite section 6, Article II, of the constitution of the State of Delaware, as follows:

Each house shall judge of the elections, returns, and *qualifications* of its own members.

Then, conceding that in order to conclude the United States Senate, the State senate must have either *actually* or *constructively* acted, and *rendered judgment* upon the question of his right to a seat therein, it is by the opposition assumed, and the declaration is made, that such action was had, such *judgment* in this case *was rendered*, and hence the Senate of the United States is concluded.

Your committee deny this contention. They deny that the Delaware senate ever at any time after Watson became Governor, either *actually* or *constructively*, passed upon his qualifications to a seat in that body. And it is upon this branch of the case there is any controversy whatever as to the facts.

It is conceded by your committee that Governor Watson, after having studiously refrained from attempting to exercise any of the functions of senator or speaker of the senate from the date of his inauguration as governor, April 9, 1895, until May 9, 1895, a fact also conceded by those opposing the claim of Mr. DuPont, did on this latter date, May 9, 1895, the legislature being about to adjourn *sine die*, enter the senate chamber a few minutes before the hour of 12 o'clock meridian, at which time the senate was to proceed to the hall of the house of representatives to meet the members of the house in joint assembly for the purpose of electing a United States Senator, and after conversing with two or more members until a few moments before 12 o'clock meridian, did then, the president *pro tempore* leaving the chair, take the chair of speaker of the senate, all the business of the senate having been concluded, and immediately made this announcement:

The hour of 12 having arrived, the senate will proceed to take part in the joint assembly.

That, while occupying the chair as speaker of the senate, Governor Watson took no part whatever in any of the legislative functions of the senate, other than what related to proceeding to the hall of the house of representatives by the senate for the purpose of attending the joint assembly to elect a United States Senator. These are the facts and *all the facts* in reference to this matter, as found by your committee.

THE SENATE JOURNAL ENTRIES ARE CONCLUSIVE AS AGAINST *EX PARTE* AFFIDAVITS AS TO WHAT OCCURRED IN THE SENATE MAY 9, 1895.

This brings us to a consideration of the seventh proposition hereinbefore stated, namely: That the journal entries of the proceedings of the Delaware senate on May 9, 1895, are conclusive as to the number and names of senators present, the motions submitted, the votes cast, and of *all the proceedings had*, and can not be contradicted by *ex parte* affidavits.

The law is well settled by more than 120 adjudicated cases in the courts of last resort in more than twenty of the States in the American Union, as also by the Supreme Court of the United States, that where a State constitution prescribes such formalities in the enactment of laws as require a record of the yeas and nays on the legislative journals, those journals are conclusive as against, not only a printed statute published by authority of law, but also against a duly enrolled act. The principle now contended for falls far short of going to this extent.

The question involved in the case under consideration is not whether the legislative journals are conclusive against a printed statute or an enrolled act, but whether they are conclusive as against *ex parte* affidavits by which such journals are sought to be contradicted.

Your committee, without indulging in argument upon this point, beg to attract attention to the following authorities, national and State, which hold to the doctrine that legislative journals are conclusive as against a duly enrolled act. Surely, if this be so, it can not be otherwise than they are conclusive against *ex parte* affidavits, the reason for this application of the rule being infinitely stronger than for the other.

The following is a list of the authorities, 124 in number, relied on. It is believed few Federal or State authorities can be found to conflict with these. Decisions can be found, as, for instance, in *Field v. Clark* (143 U. S., 649-678), to the effect that where the constitution contains no provision requiring entries on the journal of particular matters, such, for example, as calls of the yeas and nays on a measure in question, the enrolled acts can not in such case be impeached by the journals. That, however, is a very different proposition from the one involved here.

The authorities are as follows:

- Alabama*.—28 Ala., 466; 43 id., 721; 48 id., 115; 54 id., 599; 57 id., 49; 58 id., 546; 60 id., 361; 77 id., 597; 77 id., 608; 78 id., 411; 78 id., 517; 82 id., 562.  
*Arkansas*.—19 Ark., 250; 27 id., 266; 28 id., 317; 31 id., 701; 32 id., 496; 33 id., 17; 35 id., 237; 40 id., 200; 41 id., 471; 44 id., 536; 48 id., 370; 49 id., 325; 51 id., 559.  
*California*.—8 Sawyer, 238; 54 Cal., 111; 69 id., 479; 80 id., 211.  
*Colorado*.—5 Colo., 525; 11 id., 489.  
*Florida*.—20 Fla., 407; 24 id., 293.  
*Illinois*.—14 Ill., 297; 17 id., 151; 19 id., 283; 19 id., 324; 25 id., 181; 35 id., 121; 38 id., 174; 43 id., 77; 44 id., 91; 45 id., 119; 62 id., 253; 63 id., 157; 68 id., 160; 70 id., 166; 70 id., 659; 74 id., 361; 77 id., 11; 81 id., 288; 93 id., 191; 98 id., 156; 120 id., 332; 122 id., 420; 94 U. S., 260; 103 U. S., 683; 103 U. S., 697; 105 U. S., 667.  
*Kansas*.—12 Kans., 384; 15 id., 194; 17 id., 162; 24 id., 700; 26 id., 724; 28 id., 243; 35 id., 545; 41 id., 200.  
*Maryland*.—41 Md., 446; 42 id., 203; 48 id., 292.  
*Michigan*.—2 Gibbs, 287; 1 Douglass, 351; 2 id., 191; 13 Mich., 481; 16 id., 254; 22 id., 104; 47 id., 520; 55 id., 94; 59 id., 610; 64 id., 385; 72 id., 446; 79 id., 59; 79 id., 595; 80 id., 598; 83 id., 13; 84 id., 408.  
*Minnesota*.—2 Minn., 330; 24 id., 78; 31 id., 472; 38 id., 143; 45 id., 451.  
*Missouri*.—60 Mo., 33; 71 id., 266.  
*Nebraska*.—4 Nebr., 503; 9 id., 125; 9 id., 462; 17 id., 389; 18 id., 236; 20 id., 96; 21 id., 647; 24 id., 586.  
*Ohio*.—5 Ohio, 358; 3 Ohio State, 475; 20 id., 1; 44 id., 348; 45 id., 254.

Oregon.—11 Oreg., 67, 71; 14 id., 365.

South Carolina.—2 S. C., 150; 11 id., 262; 12 id., 200; 13 id., 46.

Tennessee.—3 Lea, 332; 4 id., 608; 6 id., 549; 86 Tenn., 732; 87 id., 163.

United States.—94 U. S., 260; 103 id., 683; 103 id., 697; 105 id., 667.

Virginia.—79 Va., 269.

West Virginia.—5 W. Va., 85.

Wisconsin.—20 Wis., 501; 45 id., 543; 64 id., 323.

Wyoming.—1 Wyo., 85; 1 id., 96.

The constitution of Michigan contained the following clause:

No public act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same is passed, unless the legislature shall otherwise direct, by a two-thirds vote of the members elected to each house.

In *People v. Mahany* (13 Mich., 481, 492) Mr. Justice Cooley, delivering the opinion of the court, said:

As the court are bound judicially to take notice of what the law is, we have no doubt it is our right, as well as our duty, to take notice not only of the printed statute books, but also of the journals of the two houses, to enable us to determine whether all the constitutional requisites to the validity of a statute have been complied with. The printed statute is not even *prima facie* valid, when other records, of which the court must equally take notice, show that some constitutional formality is wanting.

The constitution of California contained the following provision:

No bill shall become a law without the concurrence of a majority of the members elected to each house.

In the *Railroad Tax Case* (8 Sawyer, 238, 293) Judge Sawyer, with the concurrence of Mr. Justice Field, said:

On March 4, the house considered the senate amendment, and, upon a call of the yeas and nays, as required by the constitution *thirty-nine* members voted for the amendment, and *thirty-two* against it, their being four paired and not voting; thus the votes, in favor of the amendment, were two less than a majority of members elected to the house, and the bill failed. \* All this appears upon the journal. \* The bill, therefore, was never constitutionally passed, and never became a law. Under the decisions of the courts, upon constitutional provisions in all respects similar to that in the present constitution of California, it is settled that the court, to inform itself, will look to the journals of the legislature.

In *Spangler v. Jacoby* (14 Ill., 297, 300) the court said:

The act in question was signed by the speakers of the two houses, and it received the assent of the executive. *Prima facie*, therefore, it became a law. But the journal of the house of representatives fails wholly to show that it was ever put upon its final passage in that house; in other words, it does not appear that it passed with the concurrence of a majority of the members elect of that body. The act did not become a law in pursuance of the provisions of the constitution, and it is therefore null and void. The judgment is reversed.

In *Berry v. R. R. Co.* (41 Md., 446, 463, 465), Judge Alvey, delivering the opinion of the court said:

The question has repeatedly arisen, in several of the State courts of the highest authority, and in all cases, with but few exceptions, it has been held that neither the printed statute book nor the ordinary authentication of the statute after its passage, would preclude the inquiry into the fact whether the statute, as published, had in truth passed the legislature; and, as evidence upon the question, the legislative journals and the bills as acted upon by the legislative assemblies have been consulted.\* We can have no doubt whatever that the third section of the act in question, as that act was sealed and approved by the governor, is materially different from the third section of the act as it passed the two houses of the legislature, and we must therefore declare that particular section of the act to be null and void.

The constitution of the State of Delaware, Article II, section 17, contains the following clause:

No act of incorporation, except for the renewal of existing corporations, shall be hereafter enacted without the concurrence by two-thirds of each branch of the legislature.

This provision requires the yeas and nays to be recorded in the journals on the passage of every new act of incorporation.

THE DELAWARE SENATE DID NOT, EITHER ACTUALLY OR CONSTRUCTIVELY, JUDGE OF THE QUALIFICATIONS OF GOVERNOR WATSON TO A SEAT IN THE SENATE AT ANY TIME SUBSEQUENT TO HIS BECOMING GOVERNOR OF THE STATE.

As bearing upon the question as to what occurred either of a legislative or quasi-judicial character in the Delaware senate on May 9, 1895, Mr. DuPont presents a certified copy of the senate journal entries of the proceedings of the senate of that date (Doc. 9, Part II, pp. 431), and insists such journal entries are conclusive upon that question. Mr. DuPont, however, as is his right, presents also the *ex parte* affidavits of certain State senators and others, not for the purpose, however, of contradicting, but *confirming* such journal entries; while those opposing Mr. DuPont present certain *ex parte* affidavits tending strongly to *impeach* and *contradict* such journal entries in certain respects.

Should these affidavits tending to impeach the journal entries be considered as competent evidence, then there is a slight conflict of testimony in respect to the exact time and manner in which Governor Watson attempted to resume and did resume his seat as speaker of the senate on said 9th day of May, 1895.

Your committee, however, while protesting such *ex parte* affidavits can not be considered in *so far as they tend to impeach the journal entries*, regard this conflict as immaterial and as not in any manner materially affecting the merits of the case, whatever view may be taken of the testimony.

Upon the part of those opposing Mr. DuPont and denying his right to a seat in the senate it is contended, which contention it is sought to maintain by these *ex parte* affidavits contradictory of the senate journal entries, and which is, in the judgment of your committee, not sustained, but, on the contrary, clearly contradicted by the senate journal entries and other evidence submitted, except so far as hereinbefore conceded, that Governor Watson entered the senate chamber on said 9th day of May "between the hours of 11 and 12 o'clock"—just how long before 12, whether fifty-nine minutes or five seconds before, is not stated in any of the affidavits filed—the senate being in session, and took the chair as speaker of the senate; that he presided over the senate until 12 o'clock m., the hour for the two houses to convene in joint assembly; how long he so presided, whether fifty-nine minutes or *one minute or one second*, is not stated in any of the affidavits filed, nor is it disclosed by the record; that while he presided over the senate, it is claimed in one, or more of these affidavits, he "voted in the affirmative upon at least one corporation bill," and declared that such bill had passed the senate, it having received the required constitutional majority. What corporation bill it was which it is alleged he so voted on is not disclosed, either by the affidavit of Governor Watson himself, which is filed in the case, or by any other testimony.

It is further claimed he, while presiding in the senate, "put motions made by senators," but what motion or motions he so put is not stated either in briefs of counsel or in any of the evidence submitted. In so far as these several affidavits filed in opposition to Mr. DuPont relate to the exact time when Governor Watson assumed the speaker's chair in the senate they are not contradictory of the affidavits filed by Mr. DuPont. The latter say it was after all the legislative business was ended and just as the senate was about to proceed to the hall of the house of representatives to take part in the joint assembly (which all agree was 12 m.), while the former are to the effect that he entered the

senate chamber *between the hours of 11 and 12 o'clock*—how many moments before 12 m. is not stated—and that he, of course, subsequently took the chair.

That precisely what Governor Watson says on this subject may be readily seen, your committee present herewith his affidavit in full:

AFFIDAVIT OF WILLIAM T. WATSON, SPEAKER OF THE SENATE OF THE STATE OF DELAWARE.

STATE OF DELAWARE, *Kent County, ss:*

Be it remembered that on this 28th day of January, A. D. 1896, personally came before me, William E. Riggs, jr., a notary public of the State of Delaware, resident in Kent County, William T. Watson, who, being by me duly sworn according to law, did depose and say that he was elected speaker of the senate on the 1st day of January, A. D. 1895, and on the 9th day of April of the same year, after the death of Joshua Marvil, the duly elected and qualified governor of the State of Delaware, assumed the exercise of the office of governor; that on the 9th day of May, A. D. 1895, *between the hours of 11 and 12 o'clock m.*, this affiant entered the senate chamber, whereupon William T. Records, speaker pro tempore, vacated the chair, and he, this affiant, took the same and presided over the senate until the hour for the two houses to assemble in joint meeting arrived, and then announced the same and proceeded at the head of the senators into the hall of the house of representatives, where he presided over the joint assembly from the beginning to the end thereof and voted upon all questions which arose during the session, no objection having been made to his so presiding or voting until at or about the time the last ballot was taken, when *Senator Alrichs read a written protest against his right to so vote and preside*; that while he presided over the senate on that day in its chamber he *voted upon one bill at least and announced its passage by the senate*; that he received and put motions made by senators and was addressed as speaker of that body, and that no objection from any quarter was made to his acting as presiding officer of the senate and otherwise participating in the proceedings thereof while in session during the hour aforesaid.

WILLIAM T. WATSON.

Sworn to and subscribed before me the day and year aforesaid.

[SEAL.]

WILLIAM E. RIGGS, Jr., *Notary Public.*

It will be seen Governor Watson admits in this affidavit his right to vote and preside in said joint assembly was challenged in writing.

#### SENATE JOURNAL ENTRIES AND EX PARTE AFFIDAVITS.

As bearing upon this question of fact, Mr. DuPont has presented the following testimony:

(1) A copy of the journal entries of the proceedings of the senate of that date. (See Senate Document No. 9, part 2, first session Fifty-fourth Congress.) And also, in corroboration of and support of senate journal entries, the following:

(2) The affidavit of John M. C. Moore, a State senator of the Delaware senate from Sussex County. (See Doc. id., 31.)

(3) The affidavit of George F. Pierce, a State senator of the Delaware senate from Sussex County. (Doc. id., 33.)

(4) The affidavit of Samuel Alrichs, a State senator of the senate of Delaware from Newcastle County. (Doc. id., 34.)

(5) The affidavit of Edgar T. Hastings, clerk of the house of representatives of the State of Delaware. (Doc. id., 35.)

(6) The affidavit of John S. Prettyman, jr. (Doc. id., 36.)

(7) The affidavit of Frank Reedy. (Doc. id., 37.)

(8) The affidavit of George L. Townsend. (Doc. id., 38.)

(9) The affidavit of William Michael Byrne. (Senate Doc. 9, Fifty-fourth Congress, first session, part 4, pp. 1-3.)

(10) Second affidavit of State Senator Samuel Alrichs. (Doc. 9, part 6, p. 1.)

While in opposition to these journal entries, and *contradictory thereof* and of these several affidavits, those opposed to the claim of Mr. DuPont have presented the following:

(1) The affidavit of Robert J. Hanby, State senator in the senate of Delaware from the county of Newcastle. (Doc. 9, part 3, p. 1.)

(2) The affidavit of William T. Records, State senator from Sussex County and speaker pro tempore of the Delaware senate. (Doc. 9, part 3, p. 2.)

(3) The affidavit of Charles A. Hastings, clerk of the senate of the State of Delaware.

(4) The affidavit of John B. Pennington (Doc. 9, part 3, p. 2.)

(5) The affidavit of Edward D. Hearne, assistant to Charles A. Hastings, the clerk of the senate (Doc. 9, part 3, p. 4).

(6) The affidavit of William T. Watson, claiming to be speaker of the senate of the State of Delaware (Doc. 9, part 5, p. 1).

(7) The affidavit of Cyrus Cort, chaplain of the senate of the State of Delaware for the session of 1895 (Doc. 9, part 5, p. 2).

For the convenience of the Senate this copy of the senate journal entries of the proceedings of the senate of the State of Delaware on May 9, 1895, also these affidavits, also the certificate of the election of Mr. DuPont, signed by the speaker of the Delaware house of representatives and attested by the clerk of the house (see Doc. 9, pp. 1-5), together with the affidavits of Edgar T. Hastings, clerk of the Delaware house of representatives, Henry McMullen, speaker of said house, and Samuel Alrichs, a State senator, attached thereto (Doc. 9, pp. 3-8), are printed together in an appendix hereto attached, marked A, and made a part of the report of your committee.

It will be observed from an inspection of the journal entries of the proceedings of the Delaware senate of May 9, 1895, that at the convening of the senate at 11 o'clock a. m., Thursday, May 9, 1895, but 8 senators were present, including "Mr. Speaker *pro tempore*." No mention is made of the presence of Senator Watson or Speaker Watson (Doc. 9, part 2, p. 4), while the names making up the 8 senators alleged to be present are all given, as follows: Messrs. Alrichs, Fenimore, Hanby, Harrington, Moore, Pierce, Pyle, Mr. Speaker *pro tempore*.

It will be noticed, furthermore, that the yeas and nays were taken that date on but six different measures, as follows:

(1) On house bill entitled "An act to amend sections 5 and 10 of the act entitled 'An act to incorporate the town of Frederica.'"

On this question there were, yeas, 8; nays, 0.

(2) On house bill entitled "An act to incorporate the Acetyline Light Company."

On the passage of this bill the vote was, yeas, 8; nays, 0.

(3) On house bill entitled "An act to incorporate the Silverbrook Cemetery Company," on the passage of which the vote was, yeas, 8; nays, 0.

(4) On substitute for house bill entitled "An Act to incorporate the Masonic Hall Company of Lewes."

On the passage of this bill the vote was, yeas, 7; nays, 0—Senator Hanby being either absent or not voting. The 7 voting for the bill did not include the name of Watson.

(5) On house bill entitled "An act relating to certain lands of the Wellman Iron and Steel Company, in Newcastle County."

On the passage of this bill the vote was, yeas, 8; nays, 0.

(6) On house bill entitled "An act to incorporate the Calhoun-Jones Company, of Georgetown, Sussex County."



On the passage of this bill the vote was, yeas, 8; nays, 0.

The foregoing were the *only* bills placed upon passage in the senate on May 9, 1895, on which the yeas and nays were taken and entered on the journal, and in each instance, except one, there were but 8 votes cast in all, including the speaker *pro tempore*, so called, and entered on the journal; and Watson was not present, either as senator or speaker of the senate, nor is his name anywhere mentioned, nor is his vote recorded on any of these bills, nor is he named as putting any motion to the senate or transacting any other business whatever.

In the one case above mentioned—that is, on the passage of the house measure entitled “An act to incorporate the Masonic Hall Company of Lewes,” there were but 7 votes cast, including the speaker *pro tempore*, Senator Hanby not voting. Watson was not present or voting.

The only other proceedings had in the senate on that date, May 9, 1895, subsequent to the vote on the last house bill, on which the yeas and nays were called as above—that is, on the house bill entitled “An act to incorporate the Calhoun-Jones Company, of Georgetown, Sussex County” (Doc. 9, part 2, p. 7), are best stated by quoting in *hæc verba* the whole of the subsequent journal entries of the proceedings of that day, as follows:

*Ordered*, That the house be informed thereof, and the bill returned to that body.

Mr. Hastings, clerk of the house, being admitted, informed the senate that the house had passed and requested the concurrence of the senate in the following house bill entitled “An act to divorce Benjamin O. Jacobs from his wife, Victoria W. Jacobs.”

Mr. Hastings, clerk of the house, being admitted, presented for the signature of the speaker of the senate the following duly and correctly enrolled house bills, the same having been signed by the speaker of the house:

An act to incorporate the Silverbrook Cemetery Company.

An act relative to bonds, undertakings, and other obligations with surety or sureties, to the acceptance as surety or guarantor thereupon of companies qualified to act as such and to provide a uniform system of procedure by and standard of qualifications for such companies.

Mr. Hastings, the clerk of the house, being admitted, returned to the senate the following duly and correctly enrolled senate bill, the same having been signed by the speakers of both houses:

An act to divorce Ellen Tatem Pusey from her husband, Joshua B. Pusey.

Mr. Hastings, clerk of the house, being admitted, informed the senate that the house had passed the following senate bills:

An act relating to certain lands of the Wellman Iron and Steel Company, in Newcastle County.

An act to incorporate Calhoun-Jones Company, of Georgetown.

An act to incorporate the North American Construction Company.

An act to divorce Elzey D. Richardson from his wife, Jennie A. Richardson.

And returned the same to the senate.

From the above record it will be observed no further measures were placed upon their passage, either by a call for the yeas and nays or otherwise. It was simply ordered that the house be advised of the passage of the above-named house bills.

The clerk of the house informed the senate—

(1) That the house had passed a bill to divorce Benjamin O. Jacobs from his wife, Victoria W. Jacobs.

(2) He presented for the signature of the speaker two bills.

(3) He announced that two certain bills had been signed by the speakers of both houses.

(4) He informed the senate that the house had passed four senate bills, and he returned the same to the senate.

From the beginning, therefore, until the end of the journal entries of the proceedings of the Delaware senate on May 9, 1895, there is not only no mention of the fact that Governor Watson was present and

voted on any corporation or any other bill, either in the affirmative or negative, or that he put any motion or announced any result, but, on the contrary, the record discloses the fact that he was not present, or at least did not vote on any roll call, during that entire day.

The only other bills placed on their passage in the senate May 9, 1895, other than those above mentioned, on which the yeas and nays were taken and not one of which was a corporation bill, and all of which were acted upon *prior* to the action upon any one of the bills above named, on which the yeas and nays were called, were the following:

- (1) An act relating to the salary of the attorney-general. (Doc 9, part 2, p. 4.)
- (2) An act for the relief of Robert Cook, deceased. (Id.)
- (3) Joint resolutions in relation to paying William T. Smithers, and John D. Hawkins, secretary of state. (Id.)
- (4) An act to prevent bogus sales within the State of Delaware, etc. (Doc. id.)

Your committee, therefore, in response to the contention of those opposing Mr. DuPont, to the effect that the Delaware senate, as a matter of fact, *acted upon* and *passed judgment* May 9, 1895, on the *qualifications* of Governor Watson to a seat in the senate, say:

First. This is a question which can alone be determined by an inspection of the record of the journal entries of the senate, which record can not be contradicted by *ex parte* affidavits; and that such record is not merely silent on the subject, but affirmatively shows that Governor Watson took no part whatever, either as senator or speaker of the senate, in any of the proceedings of the senate on May 9, 1895, and furthermore that no question as to his qualifications to a seat in the senate was submitted or acted upon, either *directly* or *constructively*; and

Second. Were it proper to admit *ex parte* affidavits in opposition to the record, a proposition denied by your committee, even then, giving to such affidavits every consideration and weight which should be accorded to them as competent testimony in the case, and taking into consideration all the evidence presented on both sides, the preponderance of such evidence is clearly to the effect that, as a matter of fact and law, the Delaware senate did *not*, on May 9, 1895, in any manner act or pass judgment, either *actually* or *constructively*, upon the qualifications of Governor Watson to a seat in the senate, and hence, for this reason, the Senate of the United States is not concluded from determining, in its own right, as to his qualifications to such seat.

**THE JOINT ASSEMBLY HAD NO POWER TO ADJUDICATE UPON THE QUALIFICATIONS OF THE GOVERNOR TO A SEAT IN THE STATE SENATE, DID NOT ATTEMPT TO DO SO, BUT PROTESTED AGAINST HIS RIGHT.**

The joint assembly for the purpose of electing a Senator had no power to judge of the right of the governor to a seat in the State senate; no power whatever resided in that body to judge of his qualifications, and his presence there and voting and presiding could not possibly have conferred any rights, even if there had been acquiescence on the part of the joint assembly. But there was no acquiescence, but, on the contrary, a *vigorous protest*.

The record shows (see affidavit of Senator Alrichs, *supra*) that he, on behalf of himself and fourteen other members of the joint assembly

who had voted for Mr. DuPont, presented in said joint assembly the following protest:

After the last ballot had been taken in said final joint assembly and before the two houses separated I, on behalf of myself and the fourteen other senators voting for the said Henry A. DuPont, arose and presented the following challenge, protest, and demand:

"I very respectfully challenge the correctness of the announcement of this vote and divers preceding votes, and do now most respectfully insist and demand that Henry A. DuPont be now declared elected Senator for the unexpired term of six years commencing on the fourth day of March, A. D. 1895, inasmuch as it is now respectfully insisted that this joint assembly consists of twenty-nine members, the honorable gentleman now undertaking to preside and participate therein being governor of the State, and not now a senator."

After the presentation of the foregoing challenge, protest, and demand, and without taking any further ballot, the joint assembly finally separated, with a declaration from William T. Watson that no person had been elected Senator in Congress for said term.

SAMUEL ALRICHES.

Sworn and subscribed before me this twenty-fifth day of November, A. D. 1895. And witness my hand and official seal.

[SEAL.]

JOHN H. FRAZER, *Notary Public.*

Even had Watson been senator and speaker of the senate on May 9, 1895, both *de facto* and *de jure*, he would not from these circumstances have had any *preference right* over that of any other member of the joint assembly to preside over that body. He would have been there simply as a senator, without any authority whatever in virtue of any law to preside, except by the consent of his associates. This consent was not given, but protested against.

THE SENATE OF THE UNITED STATES IS NOT CONCLUDED BY ANY CONSTRUCTION PLACED UPON THE CONSTITUTION OF THE STATE OF DELAWARE CONCERNING THE QUESTION AS TO WHETHER A CERTAIN SEAT IN THE SENATE IS, UNDER THE CONSTITUTION OF THAT STATE, OPEN TO OCCUPATION, AND THE RESULTANT RIGHT OF THE GOVERNOR TO OCCUPY SUCH SEAT.

But your committee respectfully insist that any judgment, either *actual* or *constructive*, of the Delaware senate as to the right of a person to a seat in such senate to be conclusive on the Senate of the United States, must relate to a seat in the senate *subject to occupation*.

The senate of the State of Delaware, while possessing the exclusive right to determine as to the *qualifications of its members* to all seats *open to be filled*, does not include the right or power upon the part of such senate to judge as to the *number* of seats in that body, or as to what shall constitute a *constitutional vacancy*, or a *constitutional suspension* of the right of a particular seat to be filled by anyone, either temporarily or permanently.

The authority given the senate in virtue of the constitutional provision is to judge of the qualifications of members *who apply for admission to seats*, which seats are provided for *by the constitution*, and *not by the judgment of the senate*.

If, therefore, the senate undertakes to determine either that there is a *tenth* place in the senate open to occupation by a member, and proceeds to fill that *tenth* place with a member, when the constitution declares that the senate shall consist of but *nine* members, or if it undertakes to declare that one of the nine seats is open to occupation, and proceeds to fill that seat, when the constitution declares that, *by reason of*

the senator who occupied that seat having under the constitution become governor, *such seat is not open to occupation, and can not be held or its functions exercised by such governor while he continues to hold and exercise the office of governor*, then, in either of such cases, it is respectfully submitted, the judgment of the senate of the State of Delaware, however formal and solemn such a judgment may have been, does *not* conclude the Senate of the United States.

#### THE DISTINCTIONS BETWEEN THE DUPONT CASE AND THE TURPIE CASE.

The question for consideration here is widely different from that presented to this committee in the Turpie case, in the first session of the Fiftieth Congress.

In that case there was no statutory, much less constitutional, question involved as to the *number* of seats in the Indiana senate *open to occupation*. The rights of two sets of claimants to two different seats confessedly open to occupation were in issue. There was no question, constitutional, statutory, or otherwise, as to their right to be filled, or as to the duty upon the part of the senate to fill them, provided persons having the requisite qualifications were legally elected and returned. It was not only the right, but the duty of the Indiana senate, under the constitutional provisions in that State, to judge as to which set of claimants was legally elected and returned, and whether these had the proper qualifications. In the performance of this duty the Indiana senate held the two sitting members were *not* entitled to their seats and that the two persons claiming the same *were*, and the sitting members were ousted and the claimants seated. And this committee and the Senate very properly held that in such case the action of the State senate was conclusive.

Here the question rises to one of infinitely greater importance, involving an inquiry not only as to the *qualifications* of a person *claiming a seat*, but the question as to whether, under the constitution of the State of Delaware, *there was any seat to be occupied*. Argument to show the distinction between the two cases is unnecessary. The mere statement of the difference in the cases carries with it all the argument required.

But still further. In the Indiana case it was not questioned that the senate of Indiana had *actually* passed upon the question and judged *actually* of the right of the two claimants who were admitted to the seats to which they were admitted, while here it is clear there was no judgment of the senate of the State of Delaware, either *actual* or *constructive*, upon the right of the governor of the State of Delaware to hold or exercise the duties of senator.

THE SEAT FILLED BY GOVERNOR WATSON IN THE STATE SENATE OF DELAWARE, MAY 9, 1895, WAS NOT, IN ANY CORRECT INTERPRETATION OF THE DELAWARE CONSTITUTION, OPEN TO OCCUPATION ON THAT DATE.

It is clear, if under the constitution of the State of Delaware, as your Committee believe it is, that one of two things is true: Either that the office of senator held by Mr. Watson became absolutely vacant on his accession to the office of governor, or otherwise, that his right to exercise the functions of senator was *held in abeyance and absolutely suspended for and during the time he should continue to exercise the functions*

of governor; then in the former case there was a vacancy in the office of senator which could only be filled by election, and the right of the governor to fill it was one not open to the consideration or determination of the senate, because that matter is already determined by the constitution, while in the latter case there is by the provisions of the constitution *no seat open to occupation*. It can not in such case be filled by *anyone*, much less by *the governor*, and if the senate undertakes to fill it, either with the governor or anyone else, it is a judgment that is *ultra vires* and does not conclude the Senate of the United States.

In this connection it may be conceded that instances might occur where the judgment of a State senate as to the qualifications of one of its members may be binding on the Senate of the United States, although confessedly the effect of such judgment may be to admit a person to a seat who is lacking in an essential qualification. But it proceeds upon the theory that when certain facts are found to exist, although such finding may be erroneous, the judgment is binding. As, for instance, the constitution of the State of Delaware prescribes as a qualification for State senator that he shall be 27 years of age. Suppose the senate admit a person to a seat in the senate who, as a matter of fact, is but 20 years of age, but there is nothing in the record, nothing in the judgment of the senate passing upon his qualifications that discloses the fact that he was but 20 years of age; in such case, it is believed, the judgment of the senate would conclude the United States Senate. But in such case suppose the record, the judgment of the senate upon the question of qualification, found as a *fact* that the applicant was but 20 years of age, and then on such finding admitted him to a seat; is it not entirely clear that such a judgment would *not* be conclusive upon this body?

But three other States, namely, Pennsylvania, Maine, and Colorado, have ever had constitutions embracing in corresponding provisions the same qualifying words of the Delaware constitution, namely, "*during his continuance in office.*" Therefore it is that in those States only can we look for judicial decisions or authorities on the question whether Governor Watson can exercise the office of senator during his incumbency of the office of governor.

On the 14th of January, 1830, Joshua Hall was chosen president of the Maine senate. Soon thereafter the governor died, and he became the governor. Sixteen senators, including Mr. Hall, had been admitted and sworn. On the 26th of January the senate decided that there were four vacancies. Under the constitution these vacancies were to be filled by a joint assembly of the two houses of the legislature. On February — the house of representatives sent a message to the senate requesting that body to meet the house in joint assembly for the election of senators to fill the vacancies. On the 2d of February, the senate being in session, a senator moved an adjournment to enable the senate to meet the representatives in joint assembly. Mr. Hall, who was then exercising the office of governor, appeared in the senate and claimed the right to act as president. The vote was taken by yeas and nays. Hall voted in the negative. His vote being counted the result was, yeas 8, nays 8, and the motion was lost. On the 13th of February Mr. Jonathan G. Hunton, having been in the meantime elected governor, submitted certain questions to the supreme court, in pursuance of the Maine constitution. One of these questions was the following:

2d. Has the president of the senate, when the office of governor is vacant, and when he ought to be acting as governor, a right to *preside* and *vote* at the senate board?

The answer to this question was given by the chief justice, with the concurrence of the other justices, in the following words:

As to the second question my opinion is that, while the president of the senate, in virtue of his office as such, is clothed with the power of exercising the office of governor, he has *no* right to *preside* over the senate or to *vote as a member of that body*. (Opinion of the justices, 7 Greenleaf, 483.)

The provision of the Maine constitution, it will be seen, is in substance and effect, in fact almost literally, similar to that of the Delaware constitution.

It is as follows:

ART. IV, SEC. 14. Whenever the office of governor shall become vacant by death, resignation, removal from office, or otherwise, the president of the senate shall exercise the office of governor until another governor shall be qualified.

There is a provision of the Maine constitution which to some extent impairs, but by no means destroys, the value of the decision of the Maine court, *supra*, as an authority in the case now under consideration. It is to the effect that while the president of the senate exercises the office of governor his *duties* as *president of the senate* shall be suspended and a president *pro tempore* elected. The provision is not that his *powers and duties* as president of the senate shall be suspended, but merely that his *duties* as such shall be suspended. It is very clear, of course, that if a man's power to perform certain acts is suspended his obligation to perform them must also be suspended. He can not be charged with the *obligation* while stripped of the *power* to perform them. But it is not so clear that the suspension of the *obligation* is also the suspension of his *power* to perform the acts. He may have the power without being *required to exercise it, except at his discretion or convenience*. It is not clear that the suspension of the obligation to act as president of the Maine senate did not leave it in the power of the officer to perform or not perform, at his discretion or convenience, the duties not of *senator* but of *president of the senate*.

But if this peculiar provision of the Maine constitution does, in truth, suspend the acting governor's *power and duty* to preside over the senate, it certainly does not suspend or purport to suspend his *power*, or his *duty*, to *vote* as senator. If his power or duty to *vote* as senator is suspended, it must be suspended by some other provision of the State constitution. That other provision is to be found in a clause, which is common to both the Maine and the Delaware constitutions, to the effect that "no person holding any office, under the State, shall, during his continuance in office, *be a senator or representative*." And this gives great value and weight to the Maine decision as an authority in the case under consideration, for it makes the Maine case and the Delaware case, so far as this point is concerned, closely analogous. The prohibition against *voting as senator* is the same in both constitutions.

The following is the provision of the Maine constitution, which suspends the duty of the governor to *preside* over the senate:

ART. 4, SEC. 14. Whenever the office of governor shall become vacant by death, resignation, removal from office, or otherwise, the president of the senate shall exercise the office of governor until another governor shall be duly qualified; and, in case of the death, resignation, removal from office, or other disqualification of the president of the senate so exercising the office of governor, the speaker of the house of representatives shall exercise the office until a president of the senate shall have been chosen; and when the office of governor, president of the senate, and speaker of the house shall become vacant, in the recess of the senate, the person acting as secretary of state for the time being shall, by proclamation, convene the senate, that a president may be chosen to exercise the office of governor. And

whenever either the president of the senate or speaker of the house shall so exercise said office, he shall receive only the compensation of governor; but his *duties* as president or speaker shall be suspended; and the senate or house shall fill the vacancy until his duties as governor shall cease.

THE CONSTITUTIONAL STATUS OF THE OFFICE OF A DELAWARE SENATOR WHO HAS SUCCEEDED TO THE OFFICE OF GOVERNOR IS ESSENTIALLY THE SAME AS THAT OF THE OFFICE OF A SENATOR OR REPRESENTATIVE IN CONGRESS DURING THE INTERVAL BETWEEN THE 4TH OF MARCH, THE COMMENCEMENT OF HIS TERM, AND THE DATE OF HIS RESIGNATION OF ANOTHER FEDERAL OFFICE HELD BY HIM AT THE COMMENCEMENT OF HIS TERM.

The constitutional status of the office of a Delaware senator who has succeeded to the office of governor would seem to be essentially the same as that of the office of a Senator or Representative in Congress during the interval between the 4th of March, the commencement of his term, and the date of his resignation of another Federal office held by him at the commencement of his term. In each case the office is in *abeyance* whether it be characterized as a *temporary vacancy* or as a *suspension*. If in one case the office of State senator remains in *abeyance* during the State senator's continuance in the office of governor, so in the other case does the office of Federal Senator or Representative remain in *abeyance* during the Federal Senator's or Representative's continuance in the prior Federal office.

It is true that in one case the prior office has been actually exercised while in the other it has not. But this difference would not seem to affect the principle involved, for the following reasons:

First. The constitutions of Delaware and the United States are, on this point, substantially identical. The words of the Delaware constitution are—

No \* \* \* person holding any office under \* \* \* this State shall, during his continuance \* \* \* in office, be a senator or representative.

The following is the corresponding clause of the Federal Constitution:

No person holding any office under the United States shall be a member of either House during his continuance in office.

Second, the seat in the Delaware senate which had been occupied by the governor must, during his incumbency of the latter office, be either (1) *subject to occupation*, or (2) *absolutely vacant*, or (3) *in abeyance*. There is no other possible status of the senatorial office from which the speaker of the senate is transferred to the office of governor. So also the seat of the Federal Senator or Representative must, during the interval between the 4th of March and his resignation of his other office, be either (1) *subject to occupation*, or (2) *absolutely vacant*, or (3) *in abeyance*. If the office of the State senator is *subject to occupation* by the governor, while he is governor, so also is the office of Senator or Representative in Congress *subject to occupation* by the holder of another Federal office while he holds such office. If the office of Federal Senator or Representative becomes *absolutely and permanently vacant*, so also does the office of State senator become *absolutely vacant*. If the office of the Federal Senator or Representative is in *abeyance*, and the right to exercise it *suspended*, so also is the office of the State senator in *abeyance* and the right to exercise it *suspended*.

The law provides for the payment of the salaries of the Federal Representatives from the commencement of their terms on the 4th of March. This means that they hold their office from that date, provided they

hold no other Federal offices. But they are not sworn and do not exercise their office until Congress meets after the lapse of eight months. If they hold other Federal offices on or after March 4, their office of Representative is not absolutely vacated, but is only placed *in abeyance*. It is then in abeyance for precisely the same reason for which the office of State senator is in abeyance when he exercises the office of governor. In each case the office is in abeyance because of the temporary exercise of another office. The Federal Representative may not be sworn until the expiration of eight months after his term begins. But the oath does not confer the office. It is not a prerequisite to the tenure of the office. It is only a prerequisite to the exercise of the office.

The decisions of the Senate and House of Representatives of the United States, fixing the status of the office of Senator or Representative during the interval between the 4th of March and the resignation of another Federal office held on that day, will therefore be valuable authorities for the case now under consideration.

James H. Lane was chosen United States Senator by the Kansas legislature in April, 1861. On the 20th of June, 1861, he was appointed brigadier-general of volunteers by the President, and he accepted the office. On the 4th of July, 1861, he took his seat in the Senate, having previously resigned the office of brigadier-general. On the 8th of July, 1861, the governor of Kansas, assuming that Mr. Lane's acceptance of the office of brigadier-general had vacated his office of Senator, appointed Frederic P. Stanton to fill the vacancy. Mr. Stanton presented his credentials and claimed the seat, but the Senate awarded the seat to Mr. Lane. Numerous cases in the National House of Representatives are to the same effect and recognize the same principle.

NO QUESTION OF FACT IN THIS CASE UPON WHICH THE DELAWARE  
SENATE WAS CALLED UPON TO ACT.

In the case under consideration there is no question of fact upon which the Delaware senate could act or did act, and which action, although erroneous, would conclude the Senate of the United States; upon the contrary, the senate, assuming for the present it passed judgment on the qualifications of Watson, and taking the facts as they were and are, open, notorious, conceded by all, and disclosed as well by the journals of the senate, and in reference to which there can be no dispute, namely, that Senator and Speaker Watson was then governor, essayed to place him in a seat in the senate which the constitution on these conceded facts declares to be *not subject to occupation*, any more than would be a *tenth* seat in the senate when the constitution declares the senate shall consist of but *nine* members. Hence this is such a judgment, it is believed, as is *not* binding on the United States Senate. The Senate is not concluded by such a judgment any more than it would be concluded by a judgment which on its face disclosed the fact that the senate of the State of Delaware had on the 9th day of May, 1895, instead of admitting Governor Watson to a seat, had admitted President Cleveland or a *tenth* member to that body.

While it is the exclusive right of the senate of Delaware to determine, or, in the language of the Constitution, *judge*, as to the *qualifications* of a Senator, this does not include the right or power on the part of such senate to declare the *kind* or *number* of qualifications a person must have to entitle him to a seat in the Senate. These are *determined by the Constitution itself*. The senate can neither add to nor detract from them, can neither increase, reduce, nor modify their *number* or



*character.* What the senate can do, what it has a *constitutional right* to do, is to *judge* whether a *particular person* is possessed of the *qualifications* which the *Constitution and the statutes have prescribed.* Hence it is if the Constitution declare that a certain person for any reason is ineligible to a seat in the Senate, and the judgment of the senate discloses on its face this fact of constitutional ineligibility, and the senate thus admits to a seat a person whom the Constitution declares is debarred, then such judgment, however formal or solemn, it is submitted, does *not* conclude the Senate of the United States.

As bearing upon and in support of this view, your committee attract attention to the following authorities:

#### AUTHORITIES.

In *Prouty v. Stover* (11 Kans., 235) the validity of the election of a State printer by a joint assembly of the Kansas legislature was assailed. The question arose whether the action of the State senate, admitting and retaining certain senators, was made conclusive of their right to sit in the senate and vote in the joint assembly by the constitutional provision which made each house "the judge of the elections, returns, and qualifications of its own members." This action of the senate practically construed the law of Kansas to recognize certain seats in the senate as subject to occupation. It was claimed that this was conclusive on the courts. But the court held that the power of the senate to judge of the elections, returns, and qualifications of its own members did not include the power to conclusively construe the law to recognize the seats as subject to occupation, or to admit or retain the occupants of those seats. Judge Brewer, now an associate justice of the Supreme Court of the United States, delivering the opinion of the court, said:

Defendants claim that this court can not look beyond the action of the house to inquire whether persons, admitted as members, were legally entitled to seats. Article 2, section 8, declares that each house "shall be judge of the elections, returns, and qualifications of its own members." Its determination is not the subject of repeal or review. It is final and concludes everyone. But what is included in this power? Does the power to judge of the qualifications of its members include the power to increase such membership? Can it enlarge its members without limit? Is it like an academy of science, or a lodge of Odd Fellows, capable of indefinite expansion? If the law fixed the number of senators at twenty-five, could those twenty-five admit twenty-five more, on pretense of judging "of the elections and qualifications of its own members," and thus create a senate of fifty members? If this power exists, how easily could a partisan majority secure to itself a two-thirds vote, by simply admitting new members. To create a representative or senatorial district requires a law—the consent of both houses. Neither house, by itself, can create a district and then admit someone to represent it. The district must exist before it can be represented.

In *State v. Francis* (26 Kans., 724) it was contended that a certain act of the legislature had failed to receive a constitutional majority of votes, and was, therefore, void.

The question was whether four of the representatives whose votes were decisive in favor of this act, in the house, were lawful members of that body. The *house of representatives*, by its action admitting and retaining these four members, had construed the law and constitution to recognize their seats as subject to occupation at the time. The court overruled this construction, held that there were no seats in the house for these four representatives, and declared the act in question to be void. The court said:

Therefore, whenever the house of representatives consists of more than one hundred and twenty-five members some of such members must be there illegally. Such was the case in 1879. The house of representatives, at that time, consisted of one

hundred and twenty-nine members. Four of these members, to wit, the four from Rooks, Rush, Harper, and Kingman counties, who were not provided for by law, and who were the last members admitted to seats, were not entitled to their seats. And the act in controversy was passed only by the assistance of their votes. Except for their votes, or at least three of their votes, the act would not have received a constitutional majority of the votes of the members of the house; and, not counting their votes, the act did not receive a constitutional majority. Now, we do not think that their votes should be counted; and, therefore, we think the act in controversy must be held as not having passed the house of representatives, and as void.

In *Yard v. Meeser* (44 Penn. St., 341) the common council of Philadelphia, which was invested with the power to judge of the elections, returns, and qualifications of its members, had construed the law to recognize two seats as subject to occupation by representatives of the Fifth Ward, and had admitted a second member from that ward. The court, in an action to restrain the payment of the salary of the second councilman from this ward, overruled the construction given to the law by the common council, held that the law did not recognize the second seat, and declared that its occupant was not a lawful member of the common council. The court said:

This court has no authority to judge whether the election was regularly conducted or not, for that duty is assigned by law to the councils. Our duty must be confined to the decision of the question whether there was an office or vacancy to be filled.

Judge Cooley, in his *Constitutional Limitations*, pages 52-55, says:

It follows, therefore, that every Department of the Government, and every official of every Department, may, at any time when a duty is to be performed, be required to pass upon a question of constitutional construction. Sometimes the case will be such that the decision, when made, must, from the very nature of things, be conclusive and subject to no repeal or review, however erroneous it may be, in the opinion of other Departments or of other officers; but, in other cases, the same question may be required to be passed upon again, before the duty is completely performed. The first of these classes is where, by the Constitution, a particular question is plainly addressed to the discretion of some one Department or officer, so that the interference of any other Department or officer, with a view to the substitution of its own discretion or judgment, in the place of that to which the Constitution has confided the decision, would be impertinent and intrusive. \* \* \* *But there are cases in which the question of construction is equally addressed to two or more Departments of the Government;* and it then becomes important to know whether the decision by one is binding upon the others, or whether each is to act upon its own judgment. \* \* \* But setting aside now those cases to which we have referred, when from the nature of things, and perhaps from explicit terms of the Constitution, the judgment of the Department or officer acting must be final, we shall find *the general rule to be that, whenever action is taken which may become the subject of a suit or proceeding in court, any question of constitutional power or right that was involved in such action will be open for consideration in such suit or proceeding, and, as the court must finally settle the particular controversy, so also will they finally determine the question of constitutional law.*

This is a case, therefore, if there can be said to be any question open to construction, in which, in the language of Judge Cooley, "the question of construction is *equally addressed to two or more departments of the Government.*" It is in all respects similar in principle to that class of cases referred to by this eminent jurist wherein action is taken which may become the *subject of a suit or proceeding in court.* Any question of constitutional power or right that was involved in such action will be open for consideration in such suit or proceeding, and the court must finally settle the particular controversy; so also will they determine the question of constitutional law. Here the Senate of the United States, being called to *act judicially* under the constitutional grant authorizing it to judge of the elections and qualifications of its members—and this necessarily involves a construction of the Delaware constitution—hence, it is *not* bound, it is respectfully submitted, by any judgment of the Delaware senate on that subject.

If, as a matter of constitutional law, the office of senator and speaker of the senate held by Watson became absolutely vacant when he succeeded to the executive office, any judgment of the State senate seeking to clothe him with power to hold or exercise the office of State senator would be a mere *brutum fulmen*, an act in all respects *ultra vires*, for the plain reason it would be a judgment assigning him a seat in the senate which, under the constitution, is not assignable or subject to occupation. Such an act upon the part of the Delaware senate would be something infinitely *more in scope and effect* than simply to judge of the *qualifications* of a person to a seat in the senate. It would be to declare a seat *subject to occupation* which the constitution declares shall *not* be occupied.

And this view is equally applicable to this case whether the office of senator becomes absolutely vacant on the speaker of the senate becoming governor, or whether the right to exercise the office of senator while exercising the office of governor is merely *held in abeyance and suspended*. And any such judgment, it is respectfully submitted, is not binding on the Senate of the United States, and can not deprive that body under its power to judge of the qualifications of its members, of determining whether under the constitution of the State of Delaware the governor of that State can be permitted to hold or exercise the office of senator at the same time he holds and exercises the office of governor.

AT COMMON LAW THE SAME PERSON SHALL NOT HOLD OR EXERCISE SIMULTANEOUSLY INCOMPATIBLE OFFICES.

In support of our first proposition that it is a well-settled rule of the common law that the same person shall not exercise simultaneously incompatible offices, and, further, that the acceptance of an office incompatible with the one held is *ipso facto* a resignation of the other, we attract attention to the following authorities:

In the case of *Milward v. Thatcher* (2 T. R., 81) it was held that accepting the office of town clerk vacated the office of jurat of the corporation of Hastings, although the office of clerk was inferior to that of jurat, the jurats sitting as judges of a court of record; and the court, Mr. Justice Bulwer, in announcing the opinion said:

Now, if the offices be incompatible, his being a jurat before is no objection to his election; and if they be incompatible, the election to the latter office is good, because the acceptance of the second vacates the first office. \* \* \* The case of the *King v. Sir W. Trelawney*, so far as the question was entered into, is an authority. There the court did not distinguish between a superior and inferior office; but Lord Mansfield expressly said that "if the two offices were incompatible, the acceptance of the latter would imply a surrender of the former."

Mr. Justice Bulwer further, in the opinion in that case, said:

If two offices can not be held by the same person at the same time, the acceptance of the latter office vacates the former.

In the *King v. Pateman* (2 Durnf. and East, 777), Lord Chief Justice Kenyon said:

If an alderman be also a magistrate, and the town clerk act ministerially under him, then, indeed, these two offices can not be held by the same person. Now, here is a question whether the town clerk's accounts are not allowed by the alderman; if they are, I think the two offices are incompatible, and this information should be for the purpose of trying that fact.

In *The King v. Tizzard* (9 B. and C., 418), Mr. Justice Bailey gives the following as one definition of incompatible offices:

The two offices are incompatible when the holder can not *in every instance* discharge the duties of each.

And further says Mr. Justice Bailey:

The acceptance of the second office therefore vacates the first. So a man shall lose his office if he accepts another office incompatible.

Can it be said that any man can *in every instance* discharge the duties of both governor and state senator, much less those of governor, senator, and speaker of the senate.

Chief Justice Appleton, in *Stubbs v. Lee* (64 Me., 195), decided in 1874, in discussing what constituted incompatible offices, and also the effect of the acceptance of an office incompatible with one already held, referred to the common law doctrine, and citing the foregoing English authorities, says:

"The offices in question must be regarded as incompatible. I think," remarks Bailey, J., in *The King v. Tizzard* (9 B and C, 418), "that the two offices are incompatible *when the holder can not in every instance discharge the duties of each.*" \* \* \* The acceptance of the second office therefore vacates the first. \* \* \* So a man shall lose his office if he accepts another office incompatible; as if one be under the control of the other; as if the remembrancer of the exchequer be made a baron of the exchequer." (5 Com. Dig., tit. "Officer" (K. 5.) The appointment of a person to a second office incompatible with the first is not absolutely void, but on his subsequently accepting the appointment and qualifying, the first office is *ipso facto* vacated. (*The People v. Carrique*, 2 Hill, 93.)

A vacancy may arise in an office from an *implied resignation*, as by the incumbent's accepting an incompatible office (*Van Orsdale v. Hazard*, 3 Hill, 243). The acceptance of the office of constable of a town by a person holding at the time the office of justice of the peace is *of itself a surrender of the latter office* (*Magie v. Stoddard*, 25 Conn., 565).

Mr. Justice Appleton, in further discussing this question in case *supra*, says:

Where one has two incompatible offices, both can not be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance or to the uncertain and fluctuating whim of the officeholder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former is one certain and reliable as well as one indispensable for the protection of the public.

The defendant having been appointed and sworn as a deputy sheriff must be regarded as having accepted that office. By that acceptance he surrendered the office of trial justice, a judicial office incompatible with that of a deputy sheriff. His judicial authority, therefore, as a trial justice was at an end.

Justice Cowen in discussing the question as to the effect of the acceptance of one office upon the other, in *The People v. Carrique* (2 Hill, 97), says:

This is an absolute determination of the original office, and leaves no shadow of title to the possessor, so that neither quo warranto nor a motion is necessary before any other may be elected (*vide* Millecock on Municipal Corporations, 240, pl. 617; to the same point Lord Mansfield, in *Rex v. Trelawney*, 3 Burr., 1616; Butler, J., in *Milward v. Thatcher*, 2 T. R. 87).

Also in *Van Orsdall v. Hazard* (3 Hill, 248), the court said:

A vacancy sometimes arises from a mere *implied resignation* by accepting an office incompatible with that which is claimed to be vacated.

**THE AMERICAN RULE IS THAT LEGISLATIVE AND EXECUTIVE OFFICES ARE INCOMPATIBLE.**

Your committee recognize the doctrine as enunciated in the foregoing authorities as being the well-settled common law and American rule upon the subject of incompatible offices, both as to what constitutes incompatibility and as to the effect of the acceptance of an incompatible office in operating *ipso facto* a resignation of the former. A vacancy in such case is at once created, and it is not necessary there should be any legislative or judicial declaration to that effect. It is

such a vacancy as may be filled at once by the proper appointing power. And your committee further hold that the American rule is that legislative and executive offices are incompatible; that this general rule, so far from being weakened, is strengthened and confirmed by the fact that in a number of instances, for *special reasons*, the same person, and sometimes the same legislative body, is, by specific constitutional or legislative provision, clothed partially with both legislative and executive powers.

John M. Clayton, a leading and influential member, as stated by counsel in their brief in opposition to Mr. DuPont, of the constitutional convention of the State of Delaware of 1831, recognized and strongly urged recognition of this doctrine by that convention. He said:

I have a high opinion of the senators as men; but I object to the principle of conferring on them executive powers. It is highly important to keep as distinct as possible the legislative and executive departments. This principle is recognized in all our bills of rights. But here we should be blending legislative and executive powers.

THERE IS NO EXPRESS OR IMPLIED AUTHORITY IN THE DELAWARE CONSTITUTION FOR THE SIMULTANEOUS EXERCISE BY THE SAME PERSON OF THE OFFICES OF GOVERNOR AND STATE SENATOR.

There is no *express* or *implied* authority in the Delaware constitution for the simultaneous exercise by the same person of the offices of governor and senator. On the contrary, the constitution *expressly* inhibits such exercise of those two offices, and therefore, at the time Mr. DuPont received 15 votes in the joint convention, Mr. Watson being then governor of the State, holding and exercising that executive office, was incapable of exercising the office of senator.

Section 12 of Article II of the Delaware constitution, among other things, provides as follows:

SEC. 12. \* \* \* No person concerned in any army or navy contracts, nor Member of Congress, nor any person holding any office under this State or the United States, except the attorney-general, officers usually appointed by the courts of justice, respectively, attorneys at law, and officers in the militia holding no disqualifying office, shall, during his continuance in Congress, or in office, *be* a senator or representative.

Your committee regard this provision as *absolutely disqualifying the governor of the State of Delaware*, whether elected by the people or having succeeded to the office to fill a vacancy caused by the death of the governor, from *being* a senator, or from *exercising any of the functions of a senator*. The provision is clear and specific, open to no ambiguity in its declaration that no person *holding* any office under the State, or of the United States, with certain exceptions, which are stated, shall "during his continuance in such office *be* a senator or representative."

Mr. Watson was, on the 9th day of May, 1895, confessedly the governor of the State of Delaware. He was therefore on that date *holding* an office *under the State of Delaware*. As the governor is not named in the exceptions, namely, "the attorney-general, officers usually appointed by the courts of justice, respectively, attorneys at law, and officers in the militia holding no disqualifying office," he was therefore disqualified from *being a senator* in the senate of the State on that date. In other words, there was a place made vacant in the senate, either *absolutely*, or for and *during the time the speaker of the senate should continue to exercise the office of governor*, which, by *express constitutional provision*, he, the governor of the State, *was prohibited from*

*filling*—a vacancy such as was open only to occupation, if at all, by a person elected by the qualified electors of Kent County.

But not only so. It is further provided, in section 5 of Article III of the Delaware constitution, as follows:

SEC. 5. No Member of Congress nor person holding office under the United States or this State shall exercise the office of governor.

What is the effect of this provision? Is it not clear, unambiguous, specific, to the effect, among other things, that no person holding any office under the State of Delaware shall exercise the office of governor; or, in other words, no senator (because a senator holds an office *under the State*) shall *be* governor or shall *exercise the office of governor*?

A senator under the constitution of Delaware may be and is by specific provision *eligible* to the office of governor, but once the office of governor is *accepted*, its *duties entered upon* by such senator, he unquestionably, in virtue of section 12 of Article II of the Delaware constitution, *ceases to be a senator*, either *absolutely* or by *suspension*.

He ceases to be a senator for two reasons:

(1) Because section 12, Article II, of the constitution declares that no person holding office under that State (and the governor holds office under the State) shall *be* a senator; and

(2) Because the moment he becomes governor he necessarily—the two offices being incompatible—ceases to be senator. Otherwise, moreover, under section 5 of Article III of the constitution, he can not, if he is a senator, *exercise the office of governor*.

There is no conflict or repugnance between these two clauses of the constitution of the State of Delaware, unless an unreasonable construction should be given to them. Should they be construed as to make one, a declaration that the senator who happens to be speaker of the senate when the governor dies shall thereupon become governor, and the other a declaration that no senator *shall ever become governor*, then there would be a repugnance and a gross incongruity. Such a construction therefore should not be given if they are susceptible of another construction more reasonable and which would harmonize the two provisions.

In the judgment of your committee the two clauses taken together mean simply this:

In the event of a vacancy in the office of governor, the speaker of the senate is *eligible* to become governor. He is not empowered to exercise the office of governor *ex officio*, but he is *eligible* to fill the office of governor. If he takes the oath and enters upon the duties of the office of governor, then he ceases to be senator, if not *absolutely*, by *suspension for such time as he shall exercise the office of governor*, because the constitution declares, in substance and effect, that inasmuch as he then holds the office of governor, that being an office under the State, he can no longer, at least not so long as he continues to exercise the office of governor, *be a senator*.

The constitution of Delaware, taken as a whole, maintains with great distinctness the lines of separation between the three great branches of government—legislative, executive, and judicial—and this upon the well-recognized principle in America that legislative, executive, and judicial offices are incompatible with each other, and are not to be *exercised* simultaneously by the same person. While in a few instances there is slight encroachment in one sphere of these branches upon another, there is no instance in which the constitution authorizes the same individual to exercise the power of governor and that of either judge or legislator simultaneously.

This general rule and requirement of the constitution of that State as keeping distinct and separate the three branches of government are but emphasized and strengthened by the exceptions provided for in the constitution, as, for instance, it is provided that in case of a tie vote in the election of a governor by the people the two houses of the legislature are by joint ballot to choose one of the candidates to be governor.

Again, contested elections of governor are to be determined by a joint committee of one-third of all the members of each branch of the legislature.

Again, each house of the legislature is made the judge of the elections, returns, and qualifications of its own members.

And still further, all impeachments are to be tried by the senate.

But still further, section 14 of Article III of the Delaware constitution provides, as we have seen, that—

Upon any vacancy happening in the office of governor by his death, etc., \* \* \* the speaker of the senate shall exercise the office *until a governor elected by the people shall be duly qualified.*

There is nothing in this clause or any other clause of the constitution which declares affirmatively or by fair inference that the person thus exercising the office of governor shall continue to exercise the office of speaker or of senator.

SOME ADDITIONAL CITATIONS FROM THE DELAWARE CONSTITUTION SHOWING THE INCOMPATIBILITY OF THE OFFICES OF GOVERNOR AND STATE SENATOR.

For instance, Article VI, section 14, provides that—

The governor may, for any reasonable cause, in his discretion, remove any of them (judges) on the address of two-thirds of all the members of each branch of the general assembly.

If the governor can be governor and senator at the same time, exercising *both offices simultaneously*, then he may be one of the senators making up the two-thirds of all the members of each branch of the general assembly to *address the governor*, in virtue of *which address alone* he as governor acquires jurisdiction to remove a judge.

Again, Article III, section 11, provides that the governor—

Shall, from time to time, give to the general assembly information of affairs concerning the State, and recommend to their consideration such measures as he shall judge expedient.

It would be rather an anomaly in our American system of government to permit a governor to vote in favor of measures in the senate which he as governor deemed expedient and had recommended to the senate.

But still further, Article III, section 12, provides that the governor may—

In case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not exceeding three months.

Hence it is, if the governor can also be senator at the same time, and exercise both offices simultaneously, he is clothed with power to create a disagreement between the two houses by his vote in the senate, *which fact alone* would give him jurisdiction as governor to adjourn the general assembly to such time as he should think proper.

Article III, section 1, provides as follows:

The supreme executive powers of the State shall be vested in a governor.

While, therefore, the constitution designates the speaker of the senate as an *eligible person* to fill the office of governor, and as *the person* to fill it in the event of a vacancy, it is clear he can not and does not fill the office *as senator*, or because of the fact that he is *speaker of the senate*, for the reason that the supreme executive powers of the State are by the constitution vested in a *governor* and *not in the speaker of the senate*.

Again, it is provided in Article V, section 1, that—

All impeachments shall be tried by the senate; and when sitting for that purpose the senators shall be upon oath or affirmation to do justice according to the evidence. No person shall be convicted without the concurrence of two-thirds of all the senators.

The governor, moreover, is, in virtue of this same article, *subject to impeachment* by the house of representatives. If Watson was governor on May 9, 1895, and is yet, *and this is conceded*, then he was and is liable to impeachment, and under the theory that he is still senator, and eligible as such to *exercise the functions of senator*, he would *sit in judgment on himself*, and by his vote might defeat a two-thirds vote in the senate and thus render a verdict of not guilty as impeached. Can such incompatibility in office receive the sanction of the Senate?

Article II, section 7, provides:

Each house may \* \* \* with the concurrence of two-thirds, expel a member.

While Article III, section 14, provides that—

The governor shall not be removed from his office for inability, but with the concurrence of two-thirds of all the members of each branch of the legislature.

Here again, if permitted to exercise the office of senator while exercising the office of governor, he may by his vote in the senate defeat a two-thirds vote necessary to remove him as governor for disability.

It is also provided, in Article II, section 16, of the Delaware constitution, that—

In case of vacancy in the office of State treasurer in the recess of the general assembly, either *through omission of the general assembly* to appoint, or by the death, removal out of the State, resignation, or inability of the State treasurer, \* \* \* the governor shall fill the vacancy by appointment to continue until the next meeting of the general assembly.

It is obviously obnoxious to all sense of governmental propriety to permit a governor in such case to act as a legislator, and thus by his vote, and, what is infinitely more potent, by his *executive influence* in the senate, defeat the election of the head of the exchequer in the State, and thus enable him to appoint a man of his *sole choice* to the office.

Again, Article VII, section 1, provides that—

Certain officers \* \* \* may be removed \* \* \* *on the address of both houses* of the legislature;

While Article VI, section 14, provides that—

The governor may for any reasonable cause in his discretion remove any of the judges *on the address of two-thirds of all the members* of each branch of the general assembly.

Here again the gross impropriety is made clearly apparent in recognizing a construction that will enable the governor of the State to exercise his vote and his influence as governor of the State in the State senate *in making up the two-thirds vote* that will enable him as governor to remove or appoint judges and a number of other officers of the State.



WHAT HAS BEEN THE USAGE, AND WHAT ARE THE PRECEDENTS.

While in the judgment of your committee there is no such uncertainty or ambiguity in the different provisions of the constitution as to require resort to usage or precedents in giving construction, it is well to consider just what the precedents and usage have been.

Since 1792 nine speakers of the senate and one speaker of the house of representatives have succeeded to the office of governor, pursuant to the provisions of section 14 of Article III of the Delaware constitutions of 1792 and 1831. Four of these were under the constitution of 1792 and six under the constitution of 1831—the present constitution.

In *not one of these ten cases cited* has any person who has succeeded to the governorship in the last one hundred and four years in virtue of this section 14, which, so far as this question is concerned, is substantially similar in the constitutions of 1792 and 1831, whether speaker of the senate or speaker of the house of representatives, *taken any part whatever during his continuance in the governor's office in the proceedings of the senate or of the house of representatives, with the single exception of the present governor of Delaware, Mr. Watson,* and whose act in thus breaking over the precedents of one hundred years standing, has involved the people and the legislature of the State of Delaware, and the Senate of the United States in this controversy. During all this time the ten persons, including Governor Watson, thus exercising the office of governor have during such time drawn the governor's salary and have not drawn the salary of senator or member.

THE FACT THAT THE DELAWARE CONSTITUTION PROVIDES FOR THE ELECTION OF A SPEAKER *pro tempore* OF THE SENATE WHEN THE SPEAKER SUCCEEDS TO THE GOVERNORSHIP DOES NOT IMPLY THAT THE LATTER CONTINUES TO BE SPEAKER OF THE SENATE.

Counsel in opposition to the claim of Mr. DuPont contend that the use of the words, "speaker *pro tempore*," in the clause of the Delaware constitution which provides "That either house whose speaker shall exercise the office of governor may choose a speaker *pro tempore*," carries with it the implication of the contemporaneous official existence of another speaker, and it is also contended that the use of the words, "may choose," in the latter part of such clause implies simply a *discretion in*, and not a *duty upon*, the part of the senate to elect a speaker *pro tempore* in such a case.

Your committee can not concede either of these propositions as the result of a proper legal construction of such provision, even if the provision stood alone, and still much more difficult would it be to consent to such a construction when considered, as the clause must be, in connection with other clauses of the constitution. And as bearing upon the latter proposition it may be properly said that inasmuch as the *public interests* are involved, it being unquestionably for the *public interest* that the senate should at all times have a presiding officer, and as it is plain to all that the governor of a State, if he would properly discharge the duties of executive, could not possibly, in the very nature of things, for *any part of the time*, much less at all times, be present and preside over the senate, it follows, under the well-settled rule of law, that the word "may" as used in that clause should be construed as "*shall*."

"The rule is," said the court in *Rex v. Inhabitants of Derby* (Skinner, 370), and in *Rex et Regina v. Barlow* (2 Salkeld, 609), "where a

constitution or a statute directs the doing of a thing for the sake of justice or *the public good* the word 'may' is the same as the word 'shall.'

This rule has been followed both in England and the United States without any respectable dissent.

A statute of Illinois reads as follows: "The board of supervisors *may*, if *deemed advisable*, levy a special tax," etc., and the Supreme Court of the United States, in construing this statute in the case of *Supervisors v. The United States* (4 Wall., 435), opinion by Mr. Justice Swayne, said:

The conclusion to be deduced from the authorities is that where power is given to public officers in the language of the act before us, or in equivalent language, where the *public interest* or *individual rights* call for its exercise, the language though *permissive in form* is in fact *peremptory*.

In *Steines v. Franklin Co.* (48 Mo., 167), the court held that when a statute provides that the county court "*may*" submit the question to the voters, before incurring certain expenses, it must do so. In *Mitchell v. Duncan* (7 Flor., 13), it is held that "*may*" is to be construed "*shall*," where a statute directs the doing of a thing *necessary to the ends of justice*.

In *People v. Brooklyn* (22 Barb., 404), it is held that "*may*" will be construed "*shall*," where *the good sense of the entire enactment* requires it. In *Mayor v. New York* (3 Hill, 612), the Supreme Court said:

Where a public body, or officer, has been clothed, by statute, with power to do an act which concerns *the public interest*, or the rights of third persons, the execution of the power may be insisted on as a *duty*, though the phraseology of the statute be *permissive* merely.

The theory that provision in a statute or constitution for the election of a speaker *pro tempore*, implies the existence at the same time of *another* speaker, is wholly dissipated by the precedents of the innumerable American instances of the election of a speaker *pro tempore* when there is no regular speaker. A speaker *pro tempore* is simply a speaker for the occasion—for the time being. There may or may not be another speaker in existence at the same time. A speaker *pro tempore* may be, and frequently is, chosen, and so designated and called when there is no other speaker. There is, therefore, no argument in opposition to the theory of this report to be drawn from the use in the provision quoted, either of the words "*may choose*" or *pro tempore*.

To hold the same person could exercise and discharge the duties and functions of governor and State senator and speaker of the senate simultaneously would be to strike down ruthlessly the line that separates the executive and legislative branches of the Government and to declare an union of these two branches in the same person. This could not be so under the well-recognized American rule, even in the absence of express prohibitory clauses; but in this case such prohibitory clauses exist, as we have shown.

The constitutional provision is not that no person holding any office under the State of Delaware shall be *elected* governor by the people, but that no person holding such office shall "*exercise the office of governor*."

It is quite immaterial how he comes to be governor, whether by *election by the people* or by virtue of the *constitutional provision making the speaker of the senate eligible* in a certain contingency; in either case it is conceded he is *the governor of the State*, in every conceivable sense of the term, and hence it is clear he can not, while exercising such office of governor, hold any other office under the State of Delaware. He therefore can not be a senator; he can not *exercise senatorial functions*, while *exercising executive functions*.

## THE DELAWARE COURT OF APPEALS.

The court of errors and appeals of the State of Delaware in the case of *Rice v. Foster* (4 Harrington, 485-487), drew with clearness and distinctness the line of separation between the three branches of the government established by the constitution of the State of Delaware, and among other things said:

If we consider the peculiar situation of the United States, and go to the sources of that diversity of sentiment which pervades its inhabitants, we shall find great danger to fear that the same causes shall terminate here in the same fatal effects which they produced in those republics. To guard against these dangers and the evil tendencies of a democracy, our republican Government was instituted by the consent of the people. The characteristic which distinguishes it from the miscalled republics of ancient and modern times is that none of the powers of sovereignty are exercised by the people, but all of them by separate, coordinate branches of government in whom those powers are vested by the constitution. These coordinate branches are intended to operate as balances, checks, and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy, and misguided zeal, and to protect the minority against the injustice of the majority. \* \* \*

The legislative, executive, and judicial powers compose the sovereign power of a State. The people of the State of Delaware have vested the legislative power in a general assembly, consisting of a senate and house of representatives; the supreme executive powers of the State in a governor; and the judicial power in the several courts mentioned in the sixth article. The sovereign power, therefore, of this State resides with the legislative, executive, and judicial departments. Having thus transferred the sovereign power, the people can not resume or exercise any portion of it. To do so would be an infraction of the constitution, and a dissolution of the government. Nor can they interfere with the exercise of any part of the sovereign power, except by petition, remonstrance, or address. They have the power to change or alter the constitution; but this can be done only in the mode prescribed by the instrument itself. The attempt to do so in any other mode is revolutionary. And although the people have the power, in conformity with its provisions, to alter the constitution, under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy, or any other than a republican form of government. It is equally clear, that neither the legislative, executive, nor judicial department, separately, nor all combined, can devolve on the people the exercise of any part of the sovereign power with which each is invested. The assumption of a power to do so would be usurpation. The department arrogating it would elevate itself above the constitution, overturn the foundation on which its own foundation rests, demolish the whole frame and texture of our republican form of government, and prostrate everything to the worst species of tyranny and despotism, the ever-varying will of an irresponsible multitude.

IT IS CONCEDED WATSON WAS GOVERNOR OF THE STATE OF DELAWARE  
MAY 9, 1895, AND HAD BEEN SINCE APRIL 9, 1895, IN THE FULL  
SENSE OF THAT TERM.

It is not denied but *conceded by counsel*, in opposition to the claim of Mr. DuPont, that William T. Watson was, on the 9th day of May, 1895, and had been since April 9, 1895, *governor of the State*. In their able and elaborate brief filed in the case (p. 30), in a reference to certain statements in the brief of counsel for Mr. DuPont, we find the following:

Thus counsel devote thirty pages of their brief (pp. 34-63) to a demonstration of the fact that the speaker of the senate, in case of a vacancy in the office of governor, becomes governor of the State. The matter counsel present on this head attests their industry and may interest the curious, *but it supports a proposition which we do not contest.*

It is conceded, therefore, by those opposing the claim of Mr. DuPont, that Mr. Watson, on his inauguration as governor, *became the governor of the State*. He was not merely to exercise the office of governor *ex*

*officio*. Not merely to *act as governor* in the manner the President *pro tempore* of the United States Senate would have acted in the case of vacancies in the offices of President and Vice-President under the act of 1792. The distinction is this: If an office be *appendant*, as the expression is in 1 Leon, 321, to another office, the determination of the first office will determine the second. This is where a person holding any office is *ex officio* entitled to perform the functions of some other office, as was the case perhaps of President *pro tempore* of the United States Senate under the act of 1792. In such case the right to exercise the functions of the second office ceases upon the determination of the office held in virtue of which he exercises such *ex officio* functions of the second office.

If, however, the nomination or appointment to an office, as it is in the case under consideration by *descriptio personam*, of one who holds another office by the title of which he is described, and who, on a contingency, is to enter and fill another office, he answering the description at the time the contingency arises, designates him as the person who is to fill the office, and when, as thus designated, he enters into the office, he holds it in his *natural* and not in his *official* capacity. And hence in this case of Watson, even in the absence of any affirmative constitutional declaration, he would continue to hold the office of governor—if the term continued—*after his term of senator had expired*, his office of governor not being *appendant to that of senator*. But in this case the Delaware constitution, recognizing this principle, declares, in section 14, Article III, not that he shall exercise the office of governor *so long as his term of senator shall continue*, but “*until a governor elected by the people shall be duly qualified.*” (*Chadwick v. Earhart*, 11 Oregon, 394.)

GOVERNOR WATSON DID NOT RESUME THE CHAIR OF SPEAKER OF THE SENATE ABOUT 12 M., MAY 9, 1895, AFTER A CONTINUED ABSENCE OF A MONTH FROM DATE OF HIS INAUGURATION AS GOVERNOR, ON APRIL 9, 1895, AS THE RESULT OF A *sense of public duty* OR *believing he had any right to do so*, BUT AS AN *AFTERTHOUGHT* AND AS *the result of pressure from political associates and of a partisan conspiracy*, AND FOR THE *sole* PURPOSE OF DEFEATING THE ELECTION OF A REPUBLICAN UNITED STATES SENATOR.

Senator John M. C. Moore, in his affidavit of January 14, 1896 (see appendix), states that Governor Watson said to him in the senate chamber on May 9, 1895, shortly before he resumed the speaker's chair:

“Mr. Moore, I want to talk with you. I believe you will tell me just as it is. Is Mr. Massey out of this thing?” (Mr. Massey was one of the Republican candidates being voted for for United States Senator.) Senator Moore states he said to him in reply: “Governor, we are not going to cast another ballot for Mr. Massey nor no other who has been balloted for except Henry A. Du Pont. He will be elected on first ballot in the joint session,” to which the governor replied to me: “If that be the case, I shall take my seat.” Against this I remonstrated, and said to him: “Governor, I hope you will not do it; I think too much of you as a man for you to do it.” That was the last of our conversation. He made no reply to my remonstrance. He arose and went over to the desk of George Fisher Pierce, a senator and one of my colleagues from Sussex County, where I saw him take a seat near Senator Pierce.”

Senator George Fisher Pierce in his affidavit filed herein, of date January 13, 1896 (see appendix), says:

About ten minutes before the hour of noon, May 9, 1895, William

T. Watson, governor of the State of Delaware, being in the chamber (the senate being presided over by William T. Records, its speaker), came and took a seat alongside of this deponent and said to him: "I am going into the joint assembly and vote for a Senator." This deponent said: "*You are going to do what?*" He answered: "I am going to preside over the joint assembly to-day and vote for a United States Senator." This deponent then said: "Do you think that is right?" Governor Watson answered: "*No, I do not, but my party has overruled me.*" This deponent answered: "Then, I suppose, there is nothing I can say now that would change your mind;" to which Watson replied, "No, my mind is fully made up."

J. S. Prettyman, jr., in his affidavit filed herein, dated January 14, 1896 (see appendix), after reciting that he met and walked with Governor Watson from the railroad station at Milford, Del., into the center of the town, a distance of about one-quarter of a mile, about 6.45 o'clock p. m., May 9, 1895, the day the Delaware legislature adjourned, says: "During this walk Governor Watson said to me that when he went to Dover on the morning of that day *he did not expect to preside as speaker of the senate, believing that he did not have a legal right to act as governor and senator. After reaching Dover, in response to the influence of party leaders, he reversed this decision and consented to enter the senate and claim his rights as speaker. In doing this he said he put aside his own judgment, and acted upon the judgment of those whom he regarded as well qualified to advise.*" This witness further states in this affidavit that on the Friday following the above conversation he had another conversation with Governor Watson, when the latter, becoming somewhat excited, drew from his pocket a paper, and handed it to witness, saying, "Read this!" Deponent says: "I took the paper and read the writing through. It was an agreement between Robert J. Hanby, Newall Ball, Charles Moore, and John Robbins, members of the Delaware legislature, signed with their names, and to the effect that they would vote for J. Edward Addicks for United States Senator, and that they would *not* vote for anyone else, *even though no Senator should be elected.* As I passed the paper back to the governor, he said: "Wouldn't you have acted as I did, under such circumstances?" I evaded his question by saying, "Are the signatures genuine?" and he replied, "Of course they are; look again;" and he passed the paper to me for the second time. I read it through again, and examined the signatures, remarking that I was not familiar with the autographs of these men, but that the names were in different handwritings. He said he was not familiar with the autographs of the men, but that he was sure the names were genuine. The governor also said *that this agreement was brought to him to induce him to take part in the last joint assembly of the legislature, and, influenced by it, through the advice of others, he consented to preside as speaker of that body, and did so preside on the day mentioned.*

He further said the Republicans had every opportunity to elect a Senator, and had failed to do so, and of course he preferred that the Democratic party should have a representative in the United States Senate from Delaware, rather than the Republican party."

Frank Reedy, in his affidavit of date January 23, 1896, filed herein (see appendix), states he had a similar conversation with Governor Watson on May 10, 1895, in which he showed him the same or a similar paper.

From the foregoing *uncontradicted* testimony it is clearly evident Governor Watson did not reenter the speaker's chair and the joint

assembly May 9, 1895, *from any sense of public duty*, or in the *belief that he had any legal right to do so*, but rather in pursuance of a *partisan conspiracy* and for the *sole purpose* of defeating the election of a Republican to the United States Senate.

IT IS CONCEDED A CERTIFICATE OF DUPONT'S ELECTION FROM THE GOVERNOR OF DELAWARE IS NOT AN ESSENTIAL REQUISITE.

Mr. DuPont's election is not certified by William T. Watson, then holding the office of governor of the State of Delaware, but is certified to by Henry H. McMullen, speaker of the house of representatives, and attested by Edgar T. Hastings, clerk of the house of representatives. (See Senate Ex. Doc. No. 9, first session Fifty-fourth Congress.)

It is conceded, however, and, in fact, in view of the precedents, could not well be contested by those opposing the claim of Mr. DuPont to a seat in the Senate, that his title to such seat is not impaired by the fact that he fails to present a certificate of election from Mr. Watson, the then governor of the State, as evidence of his election, provided he received a majority of the legal votes cast in the joint assembly. (See argument in opposition to Mr. DuPont's claim, p. 5.)

THE UNION OF EXECUTIVE AND LEGISLATIVE FUNCTIONS IS *absolutism* OR *despotism* ON THE ONE HAND, AND *slavery* ON THE OTHER, WHETHER UNITED IN ONE MAN OR THE MANY.

Dr. Lieber, in his work on Civil Liberty and Self-Government, says:

A principal and guaranty of liberty, so acknowledged and common with the Anglican people that few think of its magnitude, yet of really organic and fundamental importance, is the division of government into the three distinct functions, or rather the keeping of these functions clearly apart.

It is, as has been mentioned, one of the greatest political blessings of England that from a very early period her courts of justice were not occupied with "administrative business," for instance, the collection of taxes, and that her Parliament became the exclusive legislature, while the Parliaments of France united a judicial, legislative, and administrative character. The union of these functions is absolutism or despotism on the one hand and slavery on the other, no matter in whom they are united, whether in one despot or in many, or in the multitude, as in Athens after the time of Cleon the tanner. The English political philosophers have pointed out long ago the necessity of keeping the three powers separate in a "constitutional" government. Those, however, who have no other definition of liberty than that it is equality, discard this division, except, indeed, so far as the mere convenience of transacting business would require (pp. 154, 155).

MR. WEBSTER'S VIEWS ON MAINTAINING CONSTITUTIONAL RESTRAINTS AND JUST DIVISIONS OF POLITICAL POWER.

Counsel for Mr. DuPont, in their brief, quote the following statement from a speech of Mr. Webster in the Senate of the United States, May 7, 1834, on the "Presidential protest," which your committee deem worthy of consideration in connection with the questions involved in this case:

The first object of a free people is the preservation of their liberty; and liberty is only to be preserved by maintaining constitutional restraints and just divisions of political power. Nothing is more deceptive or more dangerous than the pretense of a desire to simplify government. The simplest governments are despotisms; the next simplest, limited monarchies; but all republics, all governments of law, must impose numerous limitations and qualifications of authority, and give many positive and many qualified rights. In other words, they must be subject to rule and regulation. This is the very essence of free political institutions.

The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cautious, sagacious, discriminating, far-seeing intelligence;

it is jealous of encroachment, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it intrenches itself behind strong defenses, and fortifies itself with all possible care against the assaults of ambition and passion. It does not trust the amiable weaknesses of human nature, and therefore it will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it. Neither does it satisfy itself with flashy and temporary resistance to illegal authority. Far otherwise. It seeks for duration and permanence. It looks before and after; and, building on the experience of ages that are past, it labors diligently for the benefit of ages to come. This is the nature of constitutional liberty; and this is *our* liberty, if we will rightly understand and preserve it. Every free government is necessarily complicated, because all governments establish restraints as well on the power of government itself as on that of individuals. If we will abolish the distinction of branches and have but one branch; if we will abolish jury trials and leave all to the judge; if we will then ordain that the legislator himself shall be that judge, and if we will place the executive power in the same hands, we may readily simplify government. We may easily bring it to the simplest of all forms—a pure despotism. *But a separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions; and doubtless the continuance of regulated liberty depends on maintaining these boundaries.* (Works of Daniel Webster, Vol. IV, p. 122.)

And still further—

Mr. President, the contest for ages has been to rescue liberty from the grasp of executive power. Whoever has engaged in her sacred cause, from the days of the downfall of those great aristocracies which had stood between the king and the people to the time of our own independence, has struggled for the accomplishment of that single object. On the long list of the champions of human freedom there is not one name dimmed by the reproach of advocating the extension of executive authority; on the contrary, the uniform and steady purpose of all such champions has been to limit and restrain it. To this end the spirit of liberty, growing more and more enlightened and more and more vigorous from age to age, has been battering for centuries against the solid buttments of the feudal system. To this end all that could be gained from the imprudence, snatched from the weakness or wrung from the necessities of crowned heads, has been carefully gathered up, secured, and hoarded as the rich treasures, the very jewels of liberty.

To this end popular and representative right has kept up its warfare against prerogative with various success; sometimes writing the history of a whole age in blood, sometimes witnessing the martyrdom of Sidneys and Russells, often baffled and repulsed, but still gaining on the whole, and holding what it gained with a grasp which nothing but the complete extinction of its own being could compel it to relinquish. At length the great conquest over executive power in the leading western states of Europe has been accomplished. The feudal system, like other stupendous fabrics of past ages, is known only by the rubbish which it has left behind it. Crowned heads have been compelled to submit to the restraints of law, and the *people*, with that intelligence and that spirit which make their voice resistless, have been able to say to prerogative: "Thus far shalt thou come, and no farther." I need hardly say, sir, that into the full enjoyment of all which Europe has reached only through such slow and painful steps, we sprang at once by the Declaration of Independence and by the establishment of free representative governments; governments borrowing more or less from the models of other free states, but strengthened, secured, improved in their symmetry and deepened in their foundation by those great men of our own country, whose names will be as familiar to future times as if they were written on the arch of the sky.

Through all this history of the contest for liberty executive power has been regarded as a lion which must be caged. So far from being the object of enlightened popular trust, so far from being considered the natural protector of popular right, it has been dreaded, uniformly always dreaded, as the great source of its danger.

And now, sir, who is he, so ignorant of the history of liberty at home and abroad; who is he, yet dwelling in his contemplations among the principles and dogmas of the Middle Ages; who is he, from whose bosom all original infusion of American spirit has become so entirely evaporated and exhaled that he shall put into the mouth of the President of the United States the doctrine that the defense of liberty *naturally results* to executive power and is its peculiar duty? Who is he that, generous and confiding toward power where it is most dangerous and jealous only of those who can restrain it; who is he that, reversing the order of the state and upheaving the base, would poise the pyramid of the political system upon its apex? Who is he that, overlooking with contempt the guardianship of the representatives of the people and with equal contempt the higher guardianship of the people themselves; who is he that declares to us, through the President's lips, that the security for free-

dom rests in executive authority? Who is he that belies the blood and libels the fame of his own ancestors by declaring that *they*, with solemnity of form and force of manner, have invoked the executive power to come to the protection of liberty? Who is he that thus charges them with the insanity or the recklessness of putting the lamb beneath the lion's paw? No, sir. No, sir. Our security is in our watchfulness of executive power. It was the constitution of this department which was infinitely the most difficult part in the great work of creating our present Government. To give to the executive department such power as should make it useful and yet not such as should render it dangerous; to make it efficient, independent, and strong, and yet to prevent it from sweeping away everything by its union of military and civil authority; by the influence of patronage, and office, and favor; this, indeed, was difficult. They who had the work to do saw the difficulty, and we see it; and if we would maintain our system we shall act wisely to that end by preserving every restraint and every guard which the Constitution has provided. And when we and those who come after us have done all that we can do and all that they can do, it will be well for us and for them if some popular executive, by the power of patronage and party, and the power, too, of that very popularity shall not hereafter prove an overmatch for all other branches of the Government. (Works of Daniel Webster, Vol. IV, pp. 133, 134, 135).

Montesquieu in his "Spirit of Laws," volume 1, page 152, says:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything were the same man or the same body, whether of the nobles or of the people, to exercise those three powers—that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

#### CONCLUSIONS OF LAW AND FACT.

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

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

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

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

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



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

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

(7) In determining the question as to whether the Delaware senate on May 9, 1895, acted upon or *judged*, either *actually* or *constructively*, the qualifications of Governor Watson to a seat in the senate, the *journal entries* of the proceedings of the Delaware senate of that date are *conclusive* as to the number and names of senators present, the motions submitted, the votes cast, and of *all the proceedings had*, and *can not* be contradicted by *ex parte* affidavits.

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

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

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

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

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

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