35TH CONGRESS, 2d Session. | SENATE. | REP. COM. No. 368.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 3, 1859.—Ordered to lie on the table and be printed.

Mr. BAYARD submitted the following

REPORT.

The Committee on the Judiciary, to whom was referred the memorial of the State of Indiana, by her representatives and senators in general convention assembled, representing that it is her wish and desire that the honorable Henry S. Lane and the honorable William Monroe McCarty be admitted to seats in the Senate of the United States, as the only legally elected and constitutionally chosen senators of that State, submit the following report:

That the honorable Graham N. Fitch, on the 9th day of February, 1857, was admitted by the Senate, on the customary *prima facie* evidence of his election, as a senator from the State of Indiana, to serve as such until the 4th day of March, A. D. 1861; was qualified, and took his seat as a senator. On the same day resolutions of the senate of Indiana adverse to the legality of his election, and a protest of certain members of the house of representatives of the same State against the validity of the election, were presented to the Senate; and the credentials of Mr. Fitch, the resolutions of the senate of Indiana, and the protest of the members of the house of representatives against the validity of the election were referred to the Committee on the Judiciary.

The committee, on the 26th of February, reported a resolution authorizing testimony to be taken, both by the sitting members and the protestants in relation to all matters of fact contained in their respective allegations. This report was ordered to lie upon the table on the 2d of March, 1857; and no further action was had upon the subject during that session. At the called session of the Senate, the papers on file relating to the election of Mr. Fitch were, on the 9th of March, 1857, on motion of Mr. Trumbull, referred to the Committee on the Judiciary; and on the 14th of March the committee reported a resolution authorizing testimony to be taken—slightly variant from the resolution reported at the preceding session. The resolution was on the same day ordered to lie on the table. The credentials of the honorable Jesse D. Bright, elected a senator from the State of Indiana,

to serve as such until the 4th day of March, 1863, were presented to the Senate and read on the 2d day of March, 1857; and at the called session of the Senate, on the 4th day of March, A. D. 1857, Mr. Bright was qualified and took his seat. At the first session of the present Congress, on the 17th of December, 1858, on motion of Mr. Trumbull, the credentials of the sitting members from Indiana, together with all papers on file protesting against their right to seats, or relating to their election as senators in Congress by the legislature of Indiana, were referred by the Senate to the Committee on the Judiciary. On the 21st of January, 1858, the committee made a report, concluding with a resolution similar to the resolution which had previously been reported in relation to the case of Mr. Fitch, authorizing testimony to be taken; and on the 25th of the same month Mr. Trumbull submitted the views of the minority of the committee.

Both the report of the committee and the views of the minority were printed and are appended as part of this report, with a view to the illustration of the questions presented to the Senate, upon which its decision was subsequently made.

On the 16th of February, 1858, the consideration of the resolution reported by the committee was resumed, and after the rejection of some proposed amendments, and the adoption of others, the following resolution was passed by the Senate:

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

Testimony was subsequently taken by the protestants, which was, together with certain affidavits presented on behalf of the sitting members, and documentary evidence referred to the Committee on the Judiciary, and on the 24th of May, 1858, Mr. Pugh from that committee reported the following resolution:

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

This resolution and the accompanying documents were on the same day ordered to be printed.

The resolution was under consideration in the Senate, and fully debated at several subsequent times, and was finally, after the rejection of several proposed amendments, passed by the Senate without amendment or alteration. In the opinion of the committee, this resolution one motion having been made to reconsider it) finally disposed of all questions presented to the Senate, involving the respective rights of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright to their seats in the Senate, as senators from the State of Indiana for the terms stated in the resolution. It appears by the memorial that the legislature of Indiana, at its recent session in December last, assumed the power of revising the final decision thus made by the Senate of the United States under its unquestioned and undoubted constitutional authority, to "be the judge of the qualifications of its own members." Under this assumption, it also appears by the journals of the senate and house of representatives of the State of Indiana, the legislature of Indiana, treating the seats of the senators from that State as vacant, proceeded, subsequently, by a concurrent vote of the senate and house of representatives of the State, to elect the Hon. Henry S. Lane as a senator of the United States for the State of Indiana, to serve as such until the 4th of March, 1863, and the Hon. William Monroe M'Carty as a senator for the same State, to serve as such until the 4th of March, A. D. 1861. Under this action of the legislature of Indiana those gentlemen now claim their seats in the Senate of the United States.

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

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

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

There being, by the decision of the Senate, no vacancy from the State of Indiana, in the Senate of the United States, the election

held by the legislature of that State at its recent session is in the opinion of the committee, a nullity, and merely void, and confers no rights upon the persons it assumed to elect as senators of the United States. The committee ask to be discharged from the further consideration of the memorial of the legislature of Indiana.

IN THE SENATE OF THE UNITED STATES, *January* 21, 1858.

Mr. BAYARD made the following report.

The Committee on the Judiciary, to whom was referred the protest against the election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright, as senators in Congress from the State of Indiana, report:

The committee find that the protests against the election of the Hon. Graham N. Fitch as a senator in Congress from the State of Indiana were referred to the Committee on the Judiciary on the 10th of February, 1857, and on the 26th of the same month a resolution was reported by the committee authorizing testimony to be taken both by the protestants and sitting member. The resolution not being acted upon by the Senate at that session, from the pressure of other business, the protests were again referred to the committee on the 9th of March last, at the special session of the Senate, and the same resolution, with a slight amendment, reported by the committee on the 13th of the same month, which being taken up on the day it was reported, a debate ensued upon an amendment offered by the Hon. Mr. Trumbull, of Illinois, and the Senate having on the previous day resolved to adjourn "*sine die*" on the 14th of March, at 1 o'clock, the resolution reported by the committee was ordered to lie on the table.

The protests against the election of the Hon. Jesse D. Bright, as well as against the election of the Hon. Graham N. Fitch, having been referred at the present session, and the objections of the protestants and allegations of the sitting members being identical in both cases, the committee have adopted and recommend the passage of the resolution reported to the Senate by the committee at the special session on the 13th day of March last, with such variation as is requisite to make it apply to the cases of both the sitting members, as follows:

Resolved, That in the case of the contested election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright, senators returned and admitted to their seats from the State of Indiana, the sitting members, and all persons protesting against their election, or any of them, by themselves, or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting members touching all matters of fact therein contained, before any judge of the district court of the United States, or any judge of the

supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis.

IN THE SENATE OF THE UNITED STATES, *January* 25, 1858.

Mr. TRUMBULL submitted the following views of the minority of

The Committee on the Judiciary, to whom were referred the protests against the right of Graham N. Fitch and Jesse D. Bright to seats as senators from the State of Indiana.

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

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

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

Both houses being in session, the speaker notified them that he should proceed to open and publish the votes for governor and lieutenant governor, on Monday the 12th day of January, at 2½ o'clock p. m., in the hall of the house. Shortly before the hour arrived the president of the senate announced that he would proceed immediately to the hall of the house of representatives; and thereupon, together with such senators as chose to go, being a minority of the whole number thereof, he repaired to the hall of the house of representatives, and there, in their presence, and in the presence of the members of

the house, the votes for governor and lieutenant governor were duly counted and published by the speaker, and A. P. Willard, the then president of the senate, was declared duly elected governor, and A. A. Hammon lieutenant governor, of said State.

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

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

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

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

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

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

J. COLLAMER,
L. TRUMBULL.

35TH CONGRESS, 2d Session. | SENATE. | REP. COM. No. 368. PART 2.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 3, 1859.

Mr. COLLAMER submitted the following

VIEWS OF THE MINORITY.

The power of the Senate to judge of the election and qualification of its own members is unlimited and abiding. It is not exhausted in any particular case by once adjudicating the same, as the power of re-examination and the correction of error or mistake, incident to all judicial tribunals and proceedings, remains with the Senate in this respect, as well to do justice to itself as to the States represented, or to the persons claiming or holding seats. Such an abiding power must exist, to purge the body from intruders, otherwise any one might retain his seat who had once wrongly procured a decision of the Senate in his favor by fraud and falsehood, or even by papers forged or fabricated.

In what cases and at whose application a rehearing will at all times be granted is not now necessary to inquire; but when new parties, with apparently legal claim, apply, and especially when a sovereign State, by its legislature, makes respectful application to be represented by persons in the Senate legally elected, and insists that the sitting members from that State were never legally chosen, we consider that the subject should be fully re-examined, and that neither the State, the legislature, or the persons now claiming seats, can legally or justly be estopped, or even prejudiced, by any former proceedings of the Senate to which they were not parties.

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

allegation. The said Lane and McCarty present their certificates and claim their seats. We consider the matters stated in said memorial as true. The said Lane and McCarty have presented their brief sustaining their claim to seats, which is in the words following:

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

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

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

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

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

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

The constitution of Indiana only provides for a joint convention upon the contingency of a tie vote for governor and lieutenant-gov-

ernor. That contingency did not exist; therefore the convention did not. To say that a duty to form a joint convention creates it, is as absurd as to say that the subpœna of a witness works his presence, or the commands of the decalogue their observance.

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

The resolves of the senate are those of the whole body. The mutinous senators, who usurped the name and power of the senate in said pretended convention, were subject to arrest by order of that body for absence, and the attempt to nullify the will of the majority by attempting a business at a time, place, and in a manner vetoed by that body, by a resolve, then unvacated and unrescinded. Said convention, if it existed, expired with the duty that called it into life. The president of the senate, when inaugurated governor, his office as president of the senate expired, and with it that of his deputy president. The president not only usurped the power to appoint a clerk—an office not known to the law and void—who only authenticated this pretended election by interpolating it into the journal of the house. This president, whose power expired with that of his creator, arrogated that of adjourning it to a fixed day; in other words, commanding it to obey his arbitrary rescript; and, at a subsequent one, the more imperious mandate commanded them to proceed to elect senators, no agreement whatever having been had by the house therefor as to time, place, and manner.

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

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

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

To sustain the title of Messrs. Bright and Fitch, the constitution of Indiana, depositing her legislative power in two coordinate houses, must be broken down—that which requires two-thirds of the members to exercise any of her attributes of sovereignty, and that one house cannot coerce the other. Not only is this election in defiance

of these injunctions, but in the face of a positive dissent by one branch, armed by the people with an absolute veto. But a presiding officer, who is no part of the legislature, usurped the powers and prerogatives of the legislature; all the forms and guaranties with which the people hedged in their legislative servant were disregarded, and it is claimed that the act is as valid as if they had been observed.

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

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

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

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

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

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

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

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

The qualifications are continuing conditions of title.

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

We deny that sovereigns are estopped.

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

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

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

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

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

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

W. M. McCARTY,
H. S. LANE.

In the case of the State of Mississippi, in the House of Representatives in the 25th Congress, the power to re-examine a decision made on an election of members was fully considered and decided. Gohlston and Claiborne were, at a special election held on the proclamation of the governor, chosen representatives from that State, to a special session of Congress, called by the President. At that session exception was taken to them, but after some objection they were admitted to their seats. Their case and papers were referred to the Committee on Elections, who made report, and thereupon, on full and elaborate discussion, it was resolved that they were duly elected members of the 25th Congress, and entitled to their seats. This was in September. In November following an election was holden in said State and Prentiss and Ward were elected members of the 25th Congress, who, in December following, presented their credentials and claimed their seats. It was then insisted in that case, as it now is in this, that the decision so before made was conclusive of the right of Claiborne and Gohlston to their seats as members of the 25th Congress, and the whole matter was "*res adjudicata.*" But on full examination and after full discussion, the former resolution declaring said Claiborne and Gohlston as duly elected members of the 25th Congress was *rescinded.*

We are therefore of opinion that the memorial of the legislature of Indiana should be duly entertained and considered, and the said Lane and McCarty fully heard; and that if on full examination and hearing the Senate find that the present sitting members were not duly elected, the resolution declaring them elected should be reconsidered. And if the Senate find that the said Lane and McCarty were legally elected they should be admitted to their seats.

J. COLLAMER,
L. TRUMBULL.