engineer of St. Louis, Mr. Truman J. Homer, an engineer of the very highest promise in his profession, who has given great attention to this whole subject; who is fully equal, as I believe, to carry out into construction this great enterprise, as projected by him in the printed pamphlet I hold in my hand. I assume, therefore, that the data on which this bill is based, and the practicability of the undertaking, giant-like as it is in character, are entirely reliable.

I also have before me the measurement of several of the steamers plying on different parts of the river, the lower waters, the upper waters, the Illinois river, and the Missouri river, showing that a space of fifty feet will clear the structures of almost all of these boats as at present constructed, even if the river were at the high point of the city directrix. In ordinary cases, at least three hundred and sixty days out of the year, all the time in fact with the exception of ten or fifteen days in a quarter of a century, there will be a good deal more space than that, so that on the point of interference the amendment covers all that can be asked with any reason in the premises. I now offer the amendment, and ask that it be read.

The Secretary read the amendment, which was to strike out section two of the substitute, and in lieu thereof to insert the following:

SEC. 2. *And be it further enacted*, That the bridge built under authority of this act shall not be a suspension bridge or draw bridge, with pivot or other form of draw, but shall be constructed with continuous or unbroken spans, and subject to these conditions: First, that the lowest part of the bridge or bottom chord shall not be less than fifty feet above the city directrix at its greatest span. Second, that it shall have at least one span six hundred feet in the clear, or two spans of four hundred and fifty feet in the clear of abutments. If the two latter spans be used, the one over the main steamboat channel shall be fifty feet above the city directrix, measured to the lowest part of the bridge at the center of the span. Third, no span over the water at low-water mark shall be less than two hundred feet in the clear of abutments.

The amendment to the amendment was agreed to.

Mr. HENDERSON. I will ask my colleague if this amendment is substantially in accordance with the recommendations of the Chamber of Commerce of St. Louis? I received a paper some time since from the Chamber of Commerce in reference to the height of the bridge and the spans.

Mr. BROWN. It is exactly in accordance with that, with this simple provision, that it substitutes the fixed point of the city directrix for the questionable one of extreme high-water mark.

Mr. JOHNSON. What is the elevation?

Mr. BROWN. Fifty feet.

Mr. HENDERSON. I was of the impression that the water more generally rose above the city directrix, but of course my colleague knows.

Mr. BROWN. No; I have here the water lines for the last twenty-five years.

Mr. HENDERSON. I have examined that draught.

Mr. BROWN. I think this amendment will cover all the objections.

The amendment to the amendment was agreed to.

Mr. BROWN. I will move to amend the amendment of the committee in section one, line fourteen, by inserting after the word "Illinois" the words "and across any channel, slough, or bayou of the Mississippi river that may separate the islands opposite St. Louis from the main Illinois shore;" so that it will read:

A bridge across the Mississippi river, between the city of St. Louis in the State of Missouri, and the city of East St. Louis, in the State of Illinois, and across any channel, slough, or bayou of the Mississippi river that may separate the islands opposite St. Louis from the main Illinois shore, subject to all the conditions contained in said act, &c.

Mr. TRUMBULL. I have a little doubt about the propriety of that amendment. The main channel of the river opposite St. Louis is separted from the Illinois shore by an island, and there are various sloughs there. A creek comes down there. I do not suppose the Congress of the United States can authorize the construction of a bridge across private property.

Mr. BROWN. The navigable channel is not private property.

Mr. TRUMBULL. The slough on the east side of the channel is not a navigable channel at all. It is a turnpike now. We have a traveled road from the main Illinois shore on to the island, and Bloody Island is a tract of land embracing several thousand acres at the present time, and owned by private individuals. I am not prepared to say at this moment what the effect of authorizing a bridge over private property might be. I see by the provisions of this bill that the State of Illinois has passed an act which in conjunction with an act passed by the State of Missouri authorizes the construction of this bridge. I have not seen the Illinois act; I do not know what its provisions are; but I presume that act will make the necessary provision for the construction of any part of the bridge that is not over the waters of the Mississippi.

Mr. BROWN. It is not important, and if the Senator objects to it, I will withdraw the amendment.

The PRESIDENT *pro tempore*. The proposed amendment to the amendment is withdrawn, and the question is on the amendment of the committee as amended.

The amendment as amended was agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in.

Mr. DOOLITTLE. I should like to ask the Senator from Missouri whether the height of this bridge is sufficient so as not in any respect to interrupt navigation.

Mr. BROWN. Yes, sir; there is now no objection to it on that score.

Mr. DOOLITTLE. How high is it to be above high-water mark?

Mr. BROWN. Fifty feet above the directrix.

Mr. DOOLITTLE. Is that sufficiently high for steamboats?

Mr. BROWN. It is ample for all purposes.

Mr. GRIMES. Provided they lower their chimneys.

Mr. BROWN. They will have telescopic chimneys. It does not interfere with the pilot-houses or anything of that sort.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

SENATOR FROM NEW JERSEY.

Mr. TRUMBULL. I now ask the Senate to proceed with the consideration of the case of Hon. Mr. STOCKTON.

The motion was agreed to.

Mr. TRUMBULL. I will ask the Clerk to read the report of the committee.

The PRESIDENT *pro tempore*. It will be read if there be no objection.

The Secretary read the following report submitted by Mr. TRUMBULL on the 30th of January:

The Committee on the Judiciary, to whom were referred the credentials of John P. Stockton, claiming to have been elected a Senator from the State of New Jersey for six years from the 4th day of March, 1865, together with the protest of certain members of the Legislature of said State against the validity of his election, submit the following report:

The only question involved in the decision of Mr. Stockton's right to a seat is whether an election, by a plurality of votes of the members of the Legislature of New Jersey, in joint meeting assembled, in pursuance of a rule adopted by the joint meeting itself, is valid. The protestants insist that it is not, and they deny Mr. Stockton's right to a seat, because, as they say, he was not appointed by a majority of the votes of the joint meeting of the Legislature.

The legislative power of the State of New Jersey is vested by the State constitution in a Senate and General Assembly, which are required, for legislative purposes, to meet separately; but which, for the appointment of various officers, are required to assemble in joint meeting, and when so assembled are, by the constitution itself, styled the "Legislature in joint meeting."

The constitution of New Jersey does not prescribe the manner of choosing United States Senators, as, indeed, it could not, the Constitution of the United States having vested that power, in the absence of any law of Congress, exclusively in the Legislature; but it does constitute the two Houses one body for the purpose of appointing certain State officers. The statute of New Jersey declares that "United States Senators on the part of that State shall be appointed by the Senate and General Assembly in joint meeting assembled;" but it does not prescribe any rules for the government of the joint meeting, nor declare the manner of election.

The practice in New Jersey has been for the joint meeting to prescribe the rules for its own government.

In 1794 fifteen rules were adopted, the first two of which are as follows:

"1. That the election of State officers during the present session be *viva voce*, unless when otherwise ordered; and that all officers be put in nomination at least one day before their election.

"2. That the chairman shall not be entitled to vote except in case of a tie, and then to have a casting vote."

The other thirteen rules related chiefly to the method of conducting the proceedings. Each joint meeting which has since assembled has adopted its own rules, usually those of the preceding joint meeting, sometimes, however, with additions or exceptions.

In 1851 the following additional rule was adopted:

"*Resolved*, That no person shall be elected to any office, at any joint meeting during the present session, unless there be a majority of all the members elected personally present, and agreeing thereto."

In 1855 the joint meeting, after adopting the fifteen rules of the preceding joint meeting, added the following:

"That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared duly elected."

The joint meeting of 1861 adopted the rules of the preceding joint meeting for its own government, among which were the following:

"1. That the election of State officers during the present session be *viva voce*, unless when otherwise ordered."

"15. That in all questions the chairman of the joint meeting be called upon to vote in his turn, as one of the representatives in the Senate or Assembly, but that he have no casting vote as chairman.

"16. That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared to be duly elected."

The same rules were adopted by each joint meeting from 1861 to 1865.

The joint meeting which assembled February 15, 1865, and at an adjourned session of which Mr. Stockton was appointed Senator, adopted, at its first meeting, the rules of the preceding joint meeting, except the sixteenth rule, in lieu of which the following was adopted:

"*Resolved*, That no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both Houses of the Legislature."

After having appointed various officers under the rules which had been adopted at the assembling of the joint meeting, the following rule was adopted:

"*Resolved*, That the vote for county judges and commissioners of deeds be taken by acclamation, and that the counties in which vacancies exist be called in alphabetical order."

Acting under this rule, quite a number of officers were appointed by acclamation. Not completing its business, the joint meeting adjourned from time to time till March 15, when the following rule was adopted:

"*Resolved*, That the resolution that no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both Houses of the Legislature be rescinded, and that any candidate receiving a plurality of votes of the members present shall be declared duly elected."

Every member of both Houses, eighty-one in all, was present and voting when the above resolution was passed, and it was carried by a vote of 41 in the affirmative, of whom eleven were senators and thirty representatives, to 40 in the negative, of whom ten were senators and thirty representatives. The joint meeting then proceeded to the election of a United States Senator, with the following result:

Hon. John P. Stockton 40 votes; Hon. J. C. Ten Eyck 37 votes; J. W. Wall 1 vote; P. D. Vroom 1 vote; F. T. Frelinghuysen 1 vote; H. S. Little 1 vote.

Whereupon John P. Stockton, having received a plurality of all the votes cast, was declared duly elected. The joint meeting then proceeded to the election of various other officers, having completed which it rose.

The credentials of Mr. Stockton are under the great seal of State, signed by the Governor and in due form. No objection appears to have been made at the time to the election. Its validity is now called in question by a protest, dated March 20, 1865, and signed by eight senators and thirty members of the General Assembly. The Constitution of the United States declares that the Senate of the United States "shall be composed of two Senators from each State, chosen by the Legislature thereof," and that "the times, places, and manner of holding election for Senators and Representatives shall be prescribed in each State by the Legislature thereof," but Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The right to choose United States Senators in a joint meeting of the two Houses which compose the Legislature of a State has been too long and too frequently exercised to be now brought in question. This has been the manner of election in some States from the beginning, and is now the manner in most of them.

For the purpose of choosing United States Senators the joint meeting of the two Houses is regarded as the Legislature, and especially would this be so in New Jersey, where the joint meeting is by the constitution of the State denominated a Legislature. It has uniformly been held that when the two branches

of a Legislature meet in joint convention to elect a United States Senator they are merged into one, and act as one body, so that an election may be effected against the entire vote of the members of one House if the person voted for receive the requisite number of votes from the members of the other. It being, then, settled that the two Houses of a Legislature in joint meeting assembled constitute the Legislature, vested by the Constitution of the United States with authority, acting as one body, to elect a Senator, the question is, did the joint meeting of the Senate and General Assembly of New Jersey, duly convened, in pursuance of a resolution previously concurred in by each House separately, choose John P. Stockton United States Senator?

That it was competent for a plurality to elect, if a law to that effect had been prescribed by competent authority, will hardly be questioned. This is the rule very generally, if not universally, adopted in the election of members of the House of Representatives, who are "chosen every second year by the people of the several States," and no one questions the validity of the election of a Representative by a plurality vote when the law authorizes a plurality to elect. It is, however, insisted, and truly, that no law of New Jersey authorizes a plurality to elect. The laws of New Jersey are silent on this subject, but they do authorize a joint meeting of the two Houses of the Legislature to appoint a Senator, and it has been the uniform practice of this joint meeting since the foundation of the government to prescribe the rules for its own government. These rules as to the number of votes necessary to effect an election have varied at different times, sometimes requiring a majority of all the members elected to both Houses of the Legislature, sometimes a majority only of those present, and in the case under consideration only a plurality.

Suppose, under the rule first stated, but 79 members had been present in the joint meeting, and 40 had voted for the same person, would he have been elected? And if not, why not? Seventy-nine out of 81 would have constituted a quorum, and 40 would have been a majority of those present. The only reason why such a vote would not have made an election, would be the existence of the rule adopted by the joint meeting, declaring that "no candidate should be elected unless receiving a majority of the votes of all the members elected to both Houses of the Legislature." While that rule was in force, no presiding officer would have thought of declaring a candidate elected, nor would any candidate have supposed himself elected, because he received a majority of the votes cast, unless such majority was a majority of all the members elected to the Legislature. Under the other rule, "that a person receiving a majority of the votes of those present should be declared elected," who would doubt the validity of an election by 31 out of 60 votes, if only so many had been cast? If the joint meeting had the right to prescribe, at one time, that it should require a majority of all elected to the Legislature to elect, at another time that a majority of those present might elect, and at still another time that elections might be had by acclamation, it had the right to prescribe that a plurality should elect; and when any candidate received a plurality he thereupon became elected, not simply by the will of those who voted for him, but by the will of the joint meeting, which had previously, by a majority vote, resolved that such plurality should elect.

It might be urged in this case, with much plausibility, that inasmuch as the constitution of New Jersey recognizes the two Houses in joint meeting as a Legislature, that such joint meeting was the very body on whom the Constitution of the United States had conferred the power to prescribe "the times, places, and manner of holding elections for Senators;" but your committee prefer placing the authority of the joint meeting to prescribe the plurality rule on the broader ground, that in the absence of any law either of Congress or the State on the subject, a joint meeting of the two Houses of a Legislature, duly assembled and vested with authority to elect a United States Senator, has a right to prescribe that a plurality may elect, on the principle that the adoption of such a rule by a majority vote in the first instance makes the act subsequently done in pursuance of such majority vote its own.

The committee recommend for adoption the following resolution:

Resolved, That John P. Stockton was duly elected, and is entitled to his seat, as a Senator from the State of New Jersey, for the term of six years from the 4th day of March, 1865.

Mr. CLARK. I ask that the memorial of members of the Senate and House of Assembly of the State of New Jersey protesting against the admission of Hon. John P. Stockton to a seat in the United States Senate as a Senator from that State may be read, if there be no objection.

The Secretary read it, as follows:

TRENTON, NEW JERSEY, *March* 20, 1865.

To the Senate of the United States:

The subscribers, members of the Senate and House of Assembly of the State of New Jersey, respectfully represent:

That they protest against the admission to the Senate of the United States, as Senator from New Jersey, of Hon. John P. Stockton, on the ground that he was not appointed thereto by a majority of the votes of the joint meeting of the Legislature.

He was declared elected after the following vote: For John P. Stockton 40 votes; John C. Ten Eyck 37 votes; James W. Wall 1 vote; Peter D. Vroom 1 vote; F. T. Frelinghuysen 1 vote; Henry S. Little 1 vote.

So that only 40 votes were cast in his favor, while 41 votes were given against his election.

Immediately previous to the election the joint meeting, by a majority of one vote, rescinded a resolution previously adopted, declaring that a majority of all the members of the Legislature were required to elect any officer, and passed a resolution that only a plurality should be necessary to a choice. Hence, Mr. Stockton, on the vote above given, was declared elected Senator. That resolution, it is respectfully submitted, was unlawful.

The Constitution of the United States, the laws of New Jersey, and usage hitherto uninterrupted, require that no one shall represent a State in the United States Senate unless he be "chosen by its Legislature," which means, we submit, at least a majority of what constituted the Legislature as convened at the moment of the election.

These words, contained in the Constitution of the United States, article one, section three, really control the whole matter. Should a Legislature make a different rule, it would be inoperative; much more, if such rule were no State law, but a simple resolution.

This being so, we submit that, in order that any particular person may be rightly spoken of as "chosen" Senator, his name should have been designated as such by *all* the members of the Legislature present in joint meeting, or by a majority of them. It is so in reference to all bodies of individuals, public or private. Partnerships rule by majority; so do boards of trustees, common councilmen, the Legislature itself, in passing laws. The rule is universal whenever the creating power does not otherwise specify.

There can be no reason for a different rule in relation to this matter than that of the law as to corporations aggregate. The will of such corporations is that of all of the members or of a majority of them. The rule is founded on the law of nature, and it is settled that in such corporations where the principle of election is not specified in the charter, it requires a majority of the corporators; in elections of civil officers, it is sometimes otherwise; but that is in consequence of positive law, made by reason of the difficulties attending the requisition of a full majority upon a popular vote. And the same law of nature which decides that a majority of a collective body shall express its will, decides, likewise, that half or less than half shall not.

That a majority agree that a minority may choose the Senator is nothing. The act required is the concurrence of the mind of the body in the choice, *i. e.*, the designation of a particular individual as Senator. The concurrence of a minority leaves the majority non-concurrent whether they formally dissent or not, and the man named is not the choice of the majority, which the Constitution says he shall be when it declares that he shall be "chosen by the Legislature."

While this is the law, even should the Legislature make a contrary one, the next point we urge is that the Legislature have by law required the same thing.

The Constitution of the United States provides (article one, section four) that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof." Under this authority the Legislature of New Jersey have passed laws in relation to the Senators and Representatives.

In the case of Representatives, they have provided that the person having the greatest number of votes shall be elected. In the case of Senators, that they "shall be appointed by the Senate and General Assembly of this State in joint meeting assembled."

They do not here declare that the person having the greatest number of votes simply shall be sent. They used words which imply the concurrence of the body, created from the Senate and Assembly, in the designation, a concurrence which can only be through unanimity or the vote of a majority. This difference is not unintentional. And the word appointed is one used in the ancient constitution of New Jersey, when it regulated the joint meeting. That instrument was adopted July 2, 1776. It provided that the Council and Assembly jointly, at their first meeting yearly, should elect by a majority of votes a Governor, and that the justices of the supreme court and other officers "should be severally appointed by the Council and Assembly in manner aforesaid." The law already quoted was passed under the old constitution, and all appointments of State officers by joint meeting and of Senators were made by a majority of all the members of joint meeting present. It has from time to time been reënacted; but what has occurred to change its meaning? Under the old constitution it meant *election* by a majority of all votes. We submit that such is its meaning now.

The constitution of 1846 does not, in terms, require that appointments shall be "by a majority of votes;" it directs that specified officers shall be "appointed by the Senate and General Assembly in joint meeting;" but no change has ever before taken place, or been suggested as lawful, in the method of electing. The uniform usage has been to require a majority of all the members of a joint meeting to concur before there is any appointment. Severe contests have heretofore occurred in joint meetings, numerous ballots have been had, and candidates have owed their election to the absence of opponents reducing the number necessary to a majority. It cannot be said that because the joint meeting is composed of the Legislature, they can alter or add to the law. The two Houses together cannot make a law. It requires separate action and executive approval, and the meeting of members in joint meeting is for a specific purpose, and no other—to elect officers, not make laws. The consequences possible from admitting the right to select by a plurality vote furnish a conclusive argument against it. If two members vote for one person and every other member by himself for different individuals, the person having two votes would have a plurality. Can it be that in such a case he would be Senator? This is, indeed, an extreme case; but such cases test the propriety of legal doctrine, and many equally unjust, but less extreme, may easily be offered.

Believing, therefore, that Hon. John P. Stockton is not elected Senator from New Jersey, we respectfully pray that the Senate of the United States may so decide, and declare his seat vacant.

MEMBERS OF THE SENATE.

W. W. WARE,
Cape May County.
PROVIDENCE LUDLAM,
Cumberland County.
JOSEPH L. REEVES,
Gloucester County.
GEORGE D. HORNER,
Ocean County.

MEMBERS OF THE ASSEMBLY.

GEORGE M. WRIGHT,
Bergen County.
JAMES M. SCOVEL,
Senator from Camden County.
B. BUCKLEY,
Senator from Passaic.
R. M. ACTON,
Senator from Salem.
P. C. BRINCK,
Camden County.
THOMAS BEESLEY,
Cape May County.
JAMES D. CLEAVER,
Essex County.
JOHN H. LANDELL,
Essex County.
RUFUS F. HARRISON,
Essex County.
J. B. J. ROBISON,
Essex County.
A. M. P. V. H. DICKESON,
2d Legislative District, Salem County.
WILLIAM CALLAHAN,
1st Legislative District, Salem County.
JAMES H. NIXON,
2d District, Cumberland County.
ROBERT MORE,
1st District, Cumberland County.
JOHN F. BODINE,
3d District, Camden County.
C. C. LATHROP,
2d District, Burlington County.
GARRET VAN WAGONER,
2d District, Passaic County.
N. S. ABBOTT,
1st District, Gloucester County.
SIMON LAKE,
Atlantic County.
SAMUEL FISHER,
3d District, Mercer County.
A. B. GREEN,
1st District, Mercer County.
RYNEER A. STAATS,
3d District, Somerset County.
JACOB BIRDSALL,
Ocean County.
WILLIAM D. WILSON,
2d District, Gloucester County.
HENRY J. IRICK,
4th District, Burlington County.
J. W. HEULINGS,
3d District, Burlington County.
J. W. NICHOLSON,
2d District, Camden County.
I. D. BLAUVELT,
3d District, Passaic County.
L. D. JARRARD,
1st District, Middlesex County.
SAMUEL STOCKTON,
1st District, Burlington County.
THOMAS B. PEDDIE,
Essex County.
C. A. LIGHTHIPE,
Essex County.
JOHN BATES,
2d District, Morris County.
JOSEPH T. CROWELL,
2d District, Union County.

Mr CLARK. I suppose the question before the Senate is upon the resolution submitted by the committee:

Resolved, That John P. Stockton was duly elected and is entitled to his seat as a Senator from the State of New Jersey, for the term of six years from the 4th day of March, 1865.

The PRESIDING OFFICER, (Mr. ANTHONY in the chair.) That is the question.

Mr. CLARK. I move to amend the resolution by inserting the word "not" before the word "duly," and also before the word "entitled;" so that it will read:

Resolved, That John P. Stockton was not duly elected and is not entitled to his seat as a Senator from the State of New Jersey, for the term of six years from the 4th day of March, 1865.

The PRESIDING OFFICER. The question will be upon that amendment.

Mr. CLARK. Mr. President, it will be understood by the offering of this amendment, I think, that I did not concur in the report of the Committee on the Judiciary. After a full examination of the case, of the law, and the facts and the usages of the Legislature of the

State of New Jersey, and of other bodies similarly constituted, I could not bring my mind to the conclusion that the Senator from New Jersey now holding the seat was entitled to it, or that he was duly elected. I differed from the majority of the committee upon this point. Mr. Stockton was elected in a joint convention of the two Houses. After that joint convention had assembled, it undertook to say, in the absence of any law or rule prescribed by competent authority to that effect, that a less number of the convention than a majority, to wit, a plurality, should entitle the person receiving such plurality to an election. There were in that convention eighty-one persons present. Upon casting their votes for Senator, it was found that Mr. Stockton received 40 votes, and Mr. Ten Eyck and other persons 41; so that Mr. Stockton did not have a majority of the convention; and the question now submitted to the Senate, and the one upon which I think the whole matter must turn, is, whether that joint convention, sitting and acting as it did as a joint assembly, had the power and authority to say that a person not receiving a majority of the votes was entitled to a seat in this Senate.

I maintain this as my first proposition: that under the Constitution of the United States, the constitution of New Jersey, and the laws of New Jersey, where the constitution and the laws prescribe no different rules, a majority was necessary to constitute a valid election. In the absence of a law prescribed by the Legislature of New Jersey, or some authority, if there was any other authority competent to do it, I say a majority would be required to entitle the Senator holding the seat to remain in it, because it is the law of corporations aggregate, and it is the parliamentary law of the land, that when a deliberative body or assembly like that undertakes to act, it acts by a majority, and only by a majority, unless it has the power to prescribe for itself a different rule, or some other authority having such power has done it. There is no pretense that the Legislature of New Jersey or any other authority but this joint convention so assembled ever undertook to say that a plurality should elect; but the joint convention did. I do not undertake to deny that it was competent for the Legislature of New Jersey, organized and acting in its proper manner and sphere, to say that a plurality might elect. I do not deny that a plurality of a Legislature, when the majority so determine, can elect a Senator. I concede that, but I say that here nobody having competent authority undertook to prescribe that a plurality should elect. The Legislature of New Jersey did prescribe that the election of Senator should be by joint convention. I will read that law. It is the first section of a law of the State of New Jersey, passed April 10, 1846:

"SEC. 1. Senators of the United States on the part of this State shall be appointed by the Senate and General Assembly of this State in joint meeting assembled: and in case a vacancy shall happen by death or otherwise, at any time during the sitting of the Legislature, then, and in such case, the vacancy or vacancies so happening, shall be filled, during such sittings, by the Senate and Assembly of this State; and if a vacancy or vacancies, by the death of either or both of the said Senators, or otherwise howsoever, shall happen during the recess of the Legislature, then the Governor of the State, or in case of his death, absence, or other disqualification, the person administering the government for the time being, may make a temporary appointment or appointments, until the next meeting of the Legislature, which shall then fill such vacancy or vacancies."

Now, as I understand it, that is the only law of the State of New Jersey prescribing that a Senator shall be appointed by joint meeting or in any way regulating the election; and Senators will observe that this law is entirely silent as to whether a plurality shall elect, or a majority shall be necessary, and leaves it entirely to stand upon the common law of the land and the usage of the people of New Jersey. Then, I maintain, that the Legislature being silent on that point, the number necessary for the appointment of a Senator would be the number necessarily required by the common law and the parliamentary law, to wit, a majority; and so the Legislature and the people of New Jersey understood it, for never, up to this time, in the whole history of the Government, did they even undertake to appoint a Senator by anything less than a majority of the joint meeting. It is something entirely new and novel. More than that, they did not ask the Senate and the General Assembly of that Legislature, sitting in the regularly organized way as two branches, to pass a law authorizing a plurality to elect; but when they had got in convention, by a majority of the Senate, and without a majority of the House, they undertake to determine that a plurality should elect. The papers in the case show that upon the vote as to whether a plurality should elect, only thirty members of the House voted in the affirmative. There are sixty members in the House of Assembly; thirty voted in the affirmative, and thirty in the negative; so that there was no majority in the House of Assembly in favor of that proposition. In the Senate there were ten votes against it and eleven for it. So it was carried by one vote in the joint convention. forty-one voting in favor of the proposition and forty against it, and this for the first time in the history of New Jersey or of its legislation.

Mr. WADE. Or any other State.

Mr. CLARK. Or, as is said by the Senator from Ohio, any other State. I think that is entirely true. I do not know that you can find in the history of debates or in the range of contested elections any case like this, where the two branches of the Legislature, in joint assembly, undertook to prescribe a rule or a law that a majority should elect. I then assert the proposition with which I started, that the Legislature of New Jersey being silent on that subject, no competent authority having prescribed the rule, it was necessary that there should be a majority of the votes of that joint convention to entitle the Senator from New Jersey to hold his seat; and that I think the records show he did not get.

The General Assembly of the State of New Jersey is composed of sixty members; the Senate is composed of twenty-one members, making in the aggregate eighty-one members. The Constitution of the United States prescribes that Senators shall be chosen by the Legislatures of the States. I am not now going to contend that it is not competent for the Legislature to act in joint convention in electing a Senator. That matter has been too long settled by practice, in my judgment, to be disturbed. Many of the States elect in that way, and the Senators when so elected have been accorded their seats. It is not necessary for my purpose in this case that I should take that position. I do not know that I could successfully defend it, if I were to take it. I admit for the purposes of this case that it is competent for the Legislature of New Jersey to prescribe by a law, as it did, that the Senators of that State should be appointed by a joint meeting; but the Legislature when it had gone thus far was entirely silent. It did not say whether that appointment was to be by a majority or by a plurality; and I maintain the proposition that in that silence, the Legislature saying nothing on the subject, the two Houses in the proper way saying nothing by law on that subject, it was necessary that there should be a majority of the votes to elect the Senator. That is the first proposition that I maintain.

I then hold to the proposition that there being no such action by the Legislature, acting in its regular organized way, it was not competent for the two Houses in a joint meeting, acting together, to enact a law or prescribe such a rule. The Constitution says that the time, the place, and the manner of electing Senators and Representatives shall be determined by the Legislature. Now, so far as the time, the place, and the election in a joint meeting was concerned, the Legislature of New Jersey had prescribed the manner, but they were entirely silent upon the subject of the number necessary to constitute an election.

Mr. BUCKALEW. Was not the mode of election a part of the "manner?"

Mr. CLARK. That is the point. I say it is a part of the manner, and being a part of the manner it was competent for the Legislature in its regular organized way, and in no other way, to regulate it, and it was not competent for the Legislature, in a joint meeting only for the purpose of electing an officer, to regulate as they undertook to do. That is the very point. I hold it to be a part of the manner, and the Legislature having regulated the manner so far as to say it should be in joint meeting, left the other part to the law of the country that a majority should be required to elect.

But the case does not rest exactly there. It will be found that when that joint meeting, as I said before, came to vote upon this proposition, it did not command a majority of the two Houses as they were constituted. Only thirty Representatives could be found to vote in favor of it; just one half; so that it did not command the assent of the House of Assembly.

It is said, Mr. President, and I think the report of the committee goes upon this ground, that a body like a joint assembly of the two Houses of a Legislature may prescribe rules of action. I do not undertake to deny that they may prescribe rules of action, but what rules of action? Rules of action which shall direct their proceedings as to how the business shall be done. But in this present case this is not a rule of action; it is a resolution which determines the result of their action. It undertakes to say, not how the vote shall be cast, but what shall be the result if a person gets so many votes, which I say it was not competent for the meeting acting jointly to do, but that should have been done by the Legislature acting and sitting in the ordinary way as a Legislature, each House by itself.

I do not undertake to find fault with what is stated in the report, in one of its sentences, to wit, "that it was competent for a plurality to elect, if a law to that effect had been prescribed by competent authority." But the difficulty is that there was no such law. I desire to ask Senators this question: suppose the New Jersey law of April 10, 1846, which says, "that Senators of the United States, on the part of this State, shall be appointed by the Senate and General Assembly of this State in joint meeting assembled," had also said, "and a majority of the votes of such meeting shall be necessary to a choice;" would it have been competent for the joint convention to overrule it? Will anybody contend that it would have been? Would it have been competent for that joint convention after having got together, to overrule the law and say, "Senators shall not be appointed by a majority vote of the joint convention?" And yet if they were the Legislature, as contended, why not? If they can say, in the absence of any particular law, when the whole matter rests in the common law and the parliamentary law, that a plurality shall be sufficient to elect, why could they not have said it, even if the Legislature had declared that a majority should be required? The only difference in the cases is that here a majority was required by the common law and the parliamentary law, and in the case supposed it would have been required by the statute law; but if the joint meeting be the Legislature, it could have overruled it in the one case as well as in the other. This is the point: that when the Legislature was silent upon this matter, it left the election to be regulated by the common law of the land, as the State of New Jersey had practiced it, and the joint meeting had no more right to overrule the common law of the land in that particular than it had to overrule the statute law.

Now, Mr. President, I say there was no law authorizing a plurality to elect; the joint meeting was not competent to make a law for that purpose; and Mr. Stockton did not receive a majority of the votes of the joint meeting. I think he did not get a majority of the Senate; he did not get a majority of the House; nor did he get a majority of the joint meeting; and yet here, under the pretense that they could prescribe the rule of election in that joint meeting, he comes in with his credentials and pa-

dertakes to hold his seat, and asks the Senate to say that he is entitled to the seat.

But, Mr. President, it is said that he is entitled to hold his seat because nobody objected at the time, because when this vote was cast and he was declared to be elected everybody acquiesced. How acquiesced? By their silence? To whom could they protest? To the Senate who would judge upon his election; and the very first moment, the very first day, he entered here with his credentials, the men who did not vote for him appeared here and remonstrated and protested against his holding his seat; and this is the acquiescence on their part which is to conclude them! Here is their remonstrance before you, presented by the Senator from Pennsylvania [Mr. COWAN] on the first day of the session, the very earliest moment they could present it; and yet it is said that by their acquiescence these remonstrants are not entitled to be heard, and the honorable member is entitled to hold his seat! I do not so understand it.

The point is a narrow one. I do not propose to take up the time of the Senate. I have stated to the Senate and the Senators the considerations which induced me to differ from the other members of the committee in this report; they are to me controlling considerations. I think nothing else enters into this question but the mere question of the power of the Legislature of New Jersey and the people of New Jersey as to whether the sitting member has been rightfully elected and is entitled to hold his seat here. I hold that he has not been elected, and therefore I have moved the amendment to the resolution of the committee; and on that question I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. FESSENDEN. Mr. President, I do not know whether on a question of this sort we shall be considered as acting as in Committee of the Whole in the first place, and afterwards in the Senate.

Mr. TRUMBULL. One vote settles it.

The PRESIDING OFFICER, (Mr. ANTHONY in the chair.) One vote is all that is necessary to decide the question.

Mr. FESSENDEN. Then, before the vote is taken, I wish to express my opinion upon it, because upon a question of this kind I think opinions should be decidedly expressed, one way or the other.

I confess that from the view I took of the case originally, I was exceedingly surprised, more so, I will say, than I ever was before at a judicial decision in my life, at the opinion to which the Committee on the Judiciary arrived in relation to this matter; for, in addition to lying in a very narrow compass, it struck me that the question was a very simple one and a very clear one. I may be wrong; but my opinion is so entirely fixed that I never have been able to perceive, and I have been unable to find in the report of the committee, anything that has in the slightest degree shaken my opinion.

It is a judicial question; and if I know anything of myself, I believe I am capable, in deciding the question of the right of a Senator to his seat, to lay aside every consideration except that which belongs to the mere question of legal right. I do not propose to go over any very particular space in laying before the Senate what I think upon the subject. The question in regard to Senators comes under this clause of the Constitution:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote."

I did not have the pleasure of hearing the remarks made by the honorable Senator from New Hampshire who has just taken his seat, as I was out of the Senate, and perhaps I may simply repeat what he has said. It will be noticed that the Senators are to be chosen by "the Legislature," not by the legislators; not by the members of the Legislature, but by "the Legislature." That is the language of the clause. It is manifest, therefore, that it may be well to consider what the relation is in which the Legislature stands to the Government in reference merely to the election of Senators. I have always held, and hold now, that the Legislature, in the election of a United States Senator, is merely the agent of the Constitution of the United States to perform a certain act. It is the designation of a body, a body recognized as a constituent part of the government of each State; the Constitution selects that body of men to perform certain acts in connection with the Government of the United States. The body thus selected is, therefore, in the performance of that act, but the mere agent of the Constitution of the United States to perform it. It is, therefore, under the control of no other power. No provision in the constitution of New Jersey providing the mode in which a Senator shall be elected or the course that shall be taken, or the rules of the proceeding, or anything of that kind would bind in any way the Legislature which is to perform the act. No provision of law of a previous Legislature would in any manner bind the Legislature which is to perform that act. It is independent of everything except the Constitution of the United States. The constitution of a State cannot bind it. The State constitution prescribes who shall compose the Legislature; but that body, or those bodies thus composing the Legislature of the State, being the agent appointed by the Constitution of the United States to perform an act, is not under the slightest obligation to regard any of the provisions in the State constitution on the subject, because the State constitution has nothing to do with it, or any previous provisions of State law in reference to it. But while it is thus independent and may disregard those provisions, being the mere agent of the Constitution of the United States, still it must necessarily act as a Legislature in the performance of that duty, because, as I said before, the power is not committed to the Legislature individually or collectively, but committed to "the Legislature" of the State; and therefore, being committed to the Legislature of the State, the Legislature, in carrying out this provision of the Constitution, must act as a Legislature; that is, there must be a legislative act.

That being laid down as a principle, which it strikes me cannot be refuted, the next inquiry is, which is the Legislature to elect? The answer is a very obvious one: it is the Legislature in existence at the time that the vacancy occurs; and if that Legislature fails to elect, it goes necessarily, under the Constitution, to the next Legislature, and the place in the mean time may be filled by appointment; and when the next Legislature meets it makes the election in the same way; it has the same power over it. That being the case, the question arises, how shall this duty be performed? I remember that once in a discussion here, I think upon the case of the Senator from Iowa, (Mr. Harlan,) or in the case of the Senator from Illinois, the present chairman of the Committee on the Judiciary, [Mr. TRUMBULL,] Mr. Toombs, of Georgia, laid it down that all that was requisite was that a majority of the members of both branches, not each branch acting separately, but a majority of the whole should act on this subject; no matter when they acted, or where they acted, or how they acted they might meet at a tavern at any time they saw fit, and if there was a majority of both branches present and they voted for a certain man, that would be a good election. I suppose we are hardly prepared to go that length, because, as I said before, it is not the men composing the body acting as individuals, but "the Legislature," that is to elect, and the election must therefore be a legislative act.

How is that carried out? I believe the true system to be that there must be concurrent action, that each body (if there are two bodies of the Legislature, as there were in this case) must select the same man, but the practice has been otherwise, and I suppose the practice is defensible in many cases. We elect in the way I have supposed to be correct in Maine, we elect in that way in Massachusetts, and in some other States. In other States the two Houses form a convention and the convention elects, and that is a legitimate mode. But how must that convention be formed? That convention cannot be formed by a provision in the constitution of the State. The Legislature itself which is to make the election must act upon the individual case. The Legislature must therefore vote to go into convention for that purpose. Whatever is done in relation to the election of a Senator must be done as a consequence of legislative action, otherwise it is no election by "the Legislature." They vote to form a convention for the purpose of choosing a Senator, and when they meet in convention that choice may be made. If there is legislative action previously, a vote by the Senate and a vote by the House of Representatives to meet in convention at a particular time in order to choose a Senator, that is sufficient. When they meet what can they do? They can choose a Senator, because there has been legislative action which authorizes them to choose a Senator in that form. But how? Every lawyer will admit that the parliamentary rule and the rule of the common law with regard to corporations is fixed and settled, that unless otherwise provided by the constitution of the body itself or by the power that constituted it, elections must be by a majority—a majority of a quorum, if a quorum is fixed by law. That is the universally received, acknowledged, admitted rule of the common law and parliamentary law, that the election must be by a majority unless otherwise determined by competent authority. The Legislature, when it votes to go into a convention of the two branches, acting as a Legislature, may provide the mode of election. If it desires to change the ordinary and received law upon the subject it may provide how the election shall be made. It may say that a plurality shall elect if it pleases. It may make any provision that it pleases in reference to the mode in which the election shall be conducted, but it must be done by the Legislature. The common law, the ordinary law as applied to elections by a convention thus framed, must be changed by the body that gives it authority, or it cannot be changed at all.

What I say is, if the Senate will pardon me for repeating, that there must be legislative action governing the whole, because the power which the convention has is limited from the very nature of the case. Remember that it is "the Legislature" which is to choose the Senator; and the Legislature say "We will meet in convention to choose a Senator." The Legislature may go further if it sees fit, and by legislative act declare that that choice may be made by a plurality, or that choice may be made by a hand vote, or in any way it pleases; but it must be the body which gives the power that is to settle the mode of doing it, if that mode is to be different from the ordinary, received, acknowledged law and parliamentary law of proceeding of all bodies, whatever they may be.

Now, what are the facts in this case? There was no provision whatever made by the Legislature of the State of New Jersey as to the mode in which the Senator should be chosen. The legislative action which authorized the convention was perfectly silent upon that subject. What, then, had the Legislature a right to conclude? Was it not this, and this only, that when it authorized a body other than itself, though constituted of the same members, a convention to choose a Senator, that body must proceed in the choice of a Senator, according to the universally received parliamentary and common law upon the subject of election? Had not the Legislature a right to suppose and to insist that in discharging the power thus conferred upon it by the Legislature—which Legislature was to choose—the course of proceedings of the convention should be precisely that and only that which is received by law everywhere, unless otherwise ordered, and which is provided as the mode of proceed-

ing in all cases of election by all bodies, corporate or otherwise.

But how was it in this case? In this case the two bodies of the Legislature met in convention; when so met, the convention, without any legislative act, without any such authority conferred upon them, without anything done on the subject by the Legislature which formed the body, undertook to say that they would change the received, acknowledged, parliamentary law and common law in their mode of proceeding, and instead of acting according to that law, and being governed by that law as the Legislature must have intended it should be, would elect in a total different manner from that prescribed by that law, namely, by a plurality vote, for which they had no legislative sanction, for which there was no authority but their own will. Senators will admit that if they could do it in that way, they could do it in any other way; they could do it by putting the names into a box and drawing them out; they could select any mode that they chose and make an election in that way, contrary to what the law was, and ought always to be.

This is the simple statement of the case; there is nothing else in it that I can perceive from beginning to end. The question is simply whether when "the Legislature" is the body to choose and the Legislature has delegated that power to a convention of the members of the two Houses, without authorizing that convention, by any authority given to it from themselves by any legislative act, to change the ordinary, legal, parliamentary mode of proceeding always recognized, that convention thus got together may adopt any course of proceeding that they see fit to do, and which was necessarily legislative in its character, because it was changing the law? That being the simple question, I do not see any way in which the necessary result can be avoided, namely, that Mr. Stockton, the claimant of this seat, was not elected legally, because he did not receive a majority of the votes of either House of the Legislature, and as the case stands he was elected merely by a plurality of the convention, not receiving a majority of the votes either of the Senate or of the House of Representatives of the Legislature of New Jersey.

But if I understand the report, the answer is made that the convention had been previously in the habit of passing rules in reference to their proceedings in joint meeting. So far as those rules related to the election of State officers, they have nothing in the world to do with this question. There is no connection whatever between the subjects. They might make such rules as they saw fit in regard to the elections of State officers. It is said, however, and I do not know but that the fact is so, that they had been in the habit of making rules in regard to the election of United States Senators. Suppose they had; if they made rules beforehand and acted upon them, those rules, although they may have been acceded to and not questioned, were not necessarily legal. It so happened, however, that previous to this election their rules had invariably required that in order to make an election one person should receive a majority of the votes of the members elected to the Legislature, or a majority of the members present, a quorum being present. An election made in either of these ways would of course be legal, no matter what rule they had. If they had made no rule whatever, but had simply gone on to make an election, and an individual had received a majority of the votes of all the members present, those members being a quorum of the whole body, he would be elected. If their rules required a vote of a majority of the members elected to the Legislature, and any one individual received that vote, he would have been elected as a matter of course, there being a majority of a quorum present. Nobody would think of disputing the right of the member so chosen. But because they made and acted upon a rule which was consistent with parliamentary law and consistent entirely with the common law in relation to such matters, it does not follow that they are authorized to make a rule which overturns parliamentary law, overturns the common law, for that could not be done without legislative sanction; that is, without the action of the two bodies separately legislating.

The practice is of no sort of consequence and cannot be used as an argument for proceeding in a wrong direction. A practice which results in a thing perfectly legal and proper cannot be pleaded as a precedent for a thing that is illegal and improper. A practice which is consistent with a power that exists cannot be pleaded as a precedent for the exercise of a power that does not exist and that has never been granted. This is the first time in the history of New Jersey that an attempt has been made to elect by a minority, by a plurality of votes. There is no precedent of the kind either in that State or in any other in the election of United States Senators. I think, therefore, this answer does not hold; and I revert to the original principle which I laid down, that the election must be by the Legislature; that if the Legislature delegates that power to a convention, the convention must proceed according to the ordinary rules of parliamentary proceeding, or of common law proceedings in the case of corporations, election by a majority. That is always the rule unless it is otherwise specially provided. If the convention undertakes to vary from that and make a new rule, it assumes a legislative function which is not committed to it in any manner or to any extent. That is the simple principle upon which I put the case, and to my mind it is clear.

Mr. STOCKTON. I desire to ask the Senator from Maine a question before he takes his seat. I do not know whether I clearly apprehend him; but I wish to know whether he takes the position that the joint meeting had not the power to decide how the Senator should be elected.

Mr. FESSENDEN. I take that position most decidedly and thoroughly, that it has not the power to decide how a Senator shall be elected if it varies from the ordinary received mode. It may make its own rules on mere minor details as to matters of form; it may choose its presiding officer, or anything of that sort. But I hold that it cannot undertake to change the parliamentary law or the common law, because that is a matter that only the Legislature can do. Any change in the ordinary modes of proceeding, such as are recognized by the law, must be by the Legislature itself, because it is the Legislature, and not the convention, that chooses the Senator.

Mr. STOCKTON. Mr. President, I propose to read a few sentences from the language used by Mr. FESSENDEN in the debate in the Senate on Harlan's case:

"The convention being formed"—

In this case the Senator admits that the joint meeting was legally formed—

"The convention being formed, (and you may suppose it formed under the act, or in contravention of it,) it remains to inquire what were the incidents of the convention itself. A convention has certain legal incidents. It has the power to adjourn, if it is legally formed. It has the power to decide what shall constitute a quorum, if there is no overruling constitutional provision on that point. It has the power to organize. It has the power to decide who shall preside over it. It has a power of perpetuation unless its existence is terminated by a superior power at a certain time. Then this convention being assembled, whether under the statute or not, on coming together had these incidents: the power of deciding how the Senator should be elected."—*Congressional Globe, Thirty-Fourth Congress, third session*, p. 294.

Mr. FESSENDEN. Within the limits of the law, of course.

Mr. STOCKTON. I did not rise to say anything on this subject at present; but let me say, as I am on the floor, that the Constitution of the United States, which might have declared that a plurality could elect, took all the power it was capable of conveying and conveyed it all to the State Legislatures. The Senator from Maine is accurate in saying that the Legislature is created by the Constitution of the United States the body to elect Senators; but the State constitution is to define of what the Legislature consists. This question had been raised before the formation of the constitution of New Jersey in 1846; and to put it beyond dispute, the report of the committee of the constitutional convention was amended so as to make the constitution of our State declare the joint meeting to be the Legislature. The constitution of New Jersey for that express purpose not only declares it a Legislature when sitting separately, but declares it to be a Legislature when in joint meeting assembled. All the power that the Constitution of the United States had over the subject of the election of United States Senators it gave to the Legislature; it is admitted that the State constitution alone could declare what the Legislature was; it has so declared, and yet it is now said that that Legislature is incapable of saying how the Senators shall be elected; they may elect, but they are incapable of saying how the election shall be made. That is the argument.

Mr. President, I deny that the gentleman from Maine states the parliamentary law correctly. By the parliamentary law the natural rule in a deliberative body is undoubtedly that the majority shall govern, unless some previous agreement or rule of the body permits a smaller number to cast the vote, or requires a larger number; and in that case Mr. Cushing declares that it is by virtue of the major vote that the act is done. The King cannot authorize a private man to create a corporation, but a private man may name the corporators, and it becomes a corporation by virtue of the grant of the King. In the same way the vote here was the vote of a majority, and it is a misnomer to call it anything else; and the whole of this case has been misconceived by the gentlemen on the other side on this ground. It was the power of the majority vote which made the election.

Shall I stop, Mr. President, to refer to precedents? It is said that no such thing has ever been done in New Jersey. From the earliest times we have claimed the right in New Jersey, and exercised it, of dropping a candidate. Is not that a power similar to permitting by a majority vote a plurality vote to elect? Senators are not always elected in New Jersey, or in any other State, I presume, in precisely the same way. There is no argument against the validity of this election in the fact that the rule by which it was made is rarely resorted to. It is very seldom that a state of things can arise where a majority will agree beforehand to make a rule the result of the adoption of which is clearly manifested. It is rarely the case that individuals will be willing to vote for that rule when they will not vote directly for the candidate whom it will elect. Senators may not be able to account for it; they may think it a singular state of things; and so it is; but my political party were in power at the time; we had a majority of five in our Legislature. My predecessor, Mr. Ten Eyck, upon this floor, and his friends, supposed that they could elect him by adopting the plurality rule, because nine gentlemen belonging to the Democratic party refused to go into caucus and vote for me. It was impossible for Mr. Ten Eyck, my predecessor, to be reëlected in any other way but by the plurality rule; and he and his friends originated the idea, and upon the major vote adopting the plurality rule eight or ten Republicans voted for it. You will find that that rule was adopted by a majority of one. When they saw some of those nine Democrats falling in, they got up and withdrew their votes in favor of the plurality rule; but it was a movement of the gentlemen opposed to my election. No one doubted at the time that it was a legal election. The protest purports to have been signed five days afterward; I suppose it is a matter of no importance when it was signed. I can only say I never heard of it for months afterward; and some of the names upon it were not signed to that paper a month before Congress met.

Mr. President, I say that the election was adopted by the body *sub silentio* after the vote was cast, by every rule of parliamentary law. Why did not they continue the election? They

had agreed to go into joint meeting unanimously. For what purpose? The purpose of electing a United States Senator. Why did they adjourn? Why did they not go on with the election? There was but one ballot; the declaration was made by the President that John P. Stockton was elected Senator. It was received in silence. They proceeded to other business and then adjourned. I ask whether any Senator can say that those gentlemen did not consider themselves bound by the result? They were bound to it by every rule, both of law and of honor.

Mr. President, as I have unexpectedly taken the floor at this time, permit me to say that I am glad that the Senate has at last proceeded to the consideration of this case. Since I have been in Washington the position I have occupied has been very unexpected and very unpleasant to me. It is a very unpleasant thing to have any one believe that a gentleman would claim a seat to which he was not clearly entitled. I am satisfied that no gentleman upon this floor can doubt the sincerity of my belief that my election was as valid as any election that ever took place of a Senator in any State. The opinion of so many distinguished gentlemen of the Judiciary Committee would at least support me in that. I had hoped when the report of the committee came in that that would be regarded as closing the matter, but it seems not; it seems that it must be further investigated, and investigated by this body. This looks to me a little like what we lawyers sometimes call appealing from the court to the jury on a question of law. Sir, almost on entering the Senate Chamber I heard a beautiful eulogy upon the Committee on the Judiciary from the distinguished Senator from Wisconsin, [Mr. DOOLITTLE.] I was glad and proud to know that such men were my judges, and I was glad and proud to know that five out of the seven members of that committee were my party opponents. I presented a printed argument; three pamphlets have been written and printed on the other side and presented to that committee. They gave the whole subject a most laborious examination and they have made a report which I thought, as I said before, would have been satisfactory to the Senate.

But, Mr. President, when I alluded to the fact that the constitution of New Jersey was peculiar in one respect, that it made the Legislature when in joint meeting the Legislature, I thought some one upon the other side seemed to think that I was mistaken as to that fact. Permit me to refer to the constitution of New Jersey on that point. The fourth article, section one, clause one, provides that "the legislative power shall be vested in a Senate and General Assembly." Article four, section one, clause three: "The two Houses shall meet separately on the second Tuesday in January next after the said day of election." The constitution also provides for the meeting of the two Houses not separately, but in joint meeting. Article seven, section two, clause two: "Judges of the court of common pleas shall be appointed by the Senate and General Assembly in joint meeting." Clause three: "The State Treasurer shall be appointed by the Senate and General Assembly in joint meeting." By article five, clause two, in certain cases the Governor shall be chosen "by the vote of a majority of the members of both Houses in joint meeting." But the question recurs, when in joint meeting, are the two Houses still the Legislature?

Article four, section five, clause one, provides "that no member of the Senate or General Assembly shall, during the time for which he was elected, be nominated or appointed by the Governor or by the Legislature, in joint meeting, to any civil office," &c. Article five, clause twelve, provides for a vacancy occurring during the recess of the Legislature "in any office which is to be filled by the Governor and Senate, or by the Legislature in joint meeting." The journal of the constitutional convention of New Jersey shows that the clause cited from article four, when originally reported by the committee, did not contain the words "Legislature in joint meeting," but simply said "during the time for which he was elected or appointed." It was amended in the Committee of the Whole by inserting after "appointed" the words "by the Governor and Senate, or by the Legislature." On motion of Mr. Ewing, (page 150 of the Constitutional Convention Journal,) the amendment was amended by striking out "Legislature" and inserting "joint meeting." Afterward, on motion of Chief Justice Hornblower, one of the ablest jurists we have ever had in our State, (on page 151 of the Constitutional Convention Journal,) it was again amended by inserting before "joint meeting" the words "Legislature in." The very object, I say, of this amendment was to conclude this question which has been raised in reference to the constitutions of some of the States.

Now, gentlemen say that it requires an act of legislation to fix the mode of election. Then it requires the concurrence of the Governor. No law can be passed in New Jersey without the concurrence of the Governor. He has a veto power. Can he veto the prescription of "manner" for the appointment of a Senator? Whatever else is required, surely it cannot be legislation.

Now, Mr. President, the Constitution of the United States does not require legislation. It uses the word regulation; Congress may regulate. In the Continental Congress many of their acts, all of their acts, I believe, were passed by resolution. Certainly it does not require legislation, or else the States which have never passed any act on the subject have never elected Senators. Seventeen States of this Union have never passed any act on the subject. If it requires legislation, how do you hold your seats? There has been no legislation in your States at all.

The Constitution of the United States gave the power of election to the Legislature. The constitution of New Jersey says the joint meeting is the Legislature. If that be not true, then by the statute read by the distinguished Senator from New Hampshire, the prescription was made—a prescription was made as ample by law in the State of New Jersey as ever has been in seventeen States. The time, place, and manner of election are to be prescribed. What is "manner?" The manner is in joint meeting, and that is full compliance with the "manner." Does he mean to say that the number of voices necessary to a choice is necessarily a portion of the "manner?" The distinguished Senator from Maine did not say so in Harlan's case. He said it might be prescribed; and therefore he admitted, and the argument admits now, that the number of voices need not necessarily be prescribed by statutes. The full prescription of "manner" is complied with when the Legislature says the election shall be in joint meeting. Some of the States say it shall require a majority of all elected, some say it shall require only a majority of a quorum; and seventeen States like New Jersey are silent; therefore those States have never made any prescription of "manner," and their Senators are not entitled to seats on this floor according to the argument. I think the conclusion is plain, that it is no necessary part of the prescription of "manner" that the number of voices necessary to an election shall be prescribed by the Legislature in advance. That being so, what becomes of the argument that the joint meeting cannot do it?

Mr. President, it is all a fallacy. By parliamentary law, the joint meeting of the Legislature of the State of New Jersey have a right to take the sense of their own body, and the Senate of the United States has no right to deny it to them and no power to interfere with them. It is by parliamentary law that every body properly constituted has a right, a natural right, to take according to their own rules the sease of their body, the same right that you have to make your plurality rule which you did make in this Senate, for you say in your rules that committees shall be appointed in the Senate by a major vote. If so, why may not a plurality elect a United States Senator when the majority of the electing body so declare? If gentlemen will read Cushing, if they will study up a little on parliamentary law, we shall not have such mistakes as these made. The question is simply, Mr. President, whether that body had a right to determine how they would take the sense of the body; and when they took their sense it was not a plurality who voted for me, and it was not a majority; but it was the whole body. If a majority of this Senate vote to turn me out from my seat, is it the majority that do it? No, it is the Senate of the United States that does it. The Senate of the United States is a unit by parliamentary law, and the Legislature of New Jersey is a unit. How they express their voice they determine for themselves. They express their voice according to the rules of parliamentary law where they adopt none of their own; and by parliamentary law and by the constitution they have a right to adopt such rules as they please. The rules must not be absurd. There is no such allegation in this case, for under the same clause of the Constitution of the United States members of Congress are chosen by the people by a plurality rule in almost every State in the United States. The plurality rule is the law of election in the State of New Jersey and in almost all the other States. In some of the New England States, perhaps in New Hampshire, and I think in Maine, the majority rule prevailed in the election of members of Congress at one time, but it was changed by the constitution of Maine; the constitution was altered for the purpose. You will find a very interesting examination in several of our legal works and books on parliamentary law, into the history of how the different portions of this country adopted different rules in their general elections; but by the law of New Jersey, from the earliest times, all our local elections have been governed by the plurality rule.

Mr. President, much has been said about no Senator ever having been elected in this way before, in New Jersey or anywhere else, and it has been alleged that this was contrary to the custom in New Jersey. I have before me a copy of the minutes and proceedings of the joint meeting of the Legislature of New Jersey, from October 31, 1788. Under the Articles of Confederation, before the adoption of the Constitution of the United States, Delegates to Congress were elected by joint meeting in New Jersey, and the joint meeting made its own rules. This custom of having elections in joint meeting and of the joint meeting laying its own rules existed in New Jersey before the formation of the Constitution of the United States. The joint meeting appears to have had no rules, or at least the journals do not set out any until the year 1794, when it adopted for the first time rules for its own government. Before that time, when there were no rules of the joint meeting, let me refer to an election which took place November 23, 1790:

"The meeting proceed to the election of a Senator to represent this State in the Congress of the United States for supplying the vacancy of Governor Paterson; the persons in nomination being Philemon Dickinson, Abraham Clark, and Jonathan Dayton, Esqs."

The vote being taken, it appeared that Mr. Dickinson had 19 votes, Mr. Clark 16, and Mr. Dayton 14; and then the record proceeds to say:

"Whereby it appears there were not a majority of the meeting for either of the persons in nomination.

"On motion,

"*Resolved*, That the meeting will proceed to vote for the two highest in number of votes."

Do I not hear Senators say, "That is a gag law?" Here the joint meeting said to those gentlemen who had voted for Mr. Dayton, "You must drop him and vote for one of these other two candidates." Is that not a power as extensive, as arbitrary, as the power of a majority to say that a plurality may be permitted to elect? If it be necessary that the individual voice of each member of the body should be expressed, and that he should name the individual to be chosen, is he not as effectually deprived of that voice when he is told that he must vote for one of two men who have received the highest number of votes as he is when it is said that the choice of a plurality

shall prevail? It is nothing in the world but undertaking to say beforehand how the sense of the body shall be made known. It is not the individual elector who elects; it is the Legislature as a body, and therefore it matters not what their individual sentiments are, whether they love a man or hate him; whether they desire him or not. What it is necessary for them to do is, that when they speak out as one body the voice that does speak according to parliamentary usage shall say what is their choice.

But, Mr. President, in 1794 an incident happened of a peculiar character. It appeared on the 12th of November, 1794, that there was some mistake in the ballots cast in the election of secretary of state:

"It appeared that one more ballot had been given in the whole number of ballots than members present in the joint meeting. On the question, whether the election on that account be considered as void, it was carried in the negative. On the question whether the joint meeting will investigate the mistake by again taking the ballots, it was carried in the affirmative."

On the 20th of November, 1794, the joint meeting adopted the first rules and orders that were ever adopted in the State of New Jersey for the government of the joint meeting of the Legislature, and that was done because of the mistake which had been made a few days before and which there was no rule to provide for. The Senate makes rules for itself; the Assembly makes rules for itself; but neither the rules of the Senate nor the rules of the Assembly can govern the joint meeting, because the joint meeting is neither the Senate nor the Assembly. If there are no rules, there will be anarchy; and when anarchy was threatened by the happening of a mistake which there were no rules to correct, the wisdom of those who composed that Legislature induced them to adopt rules, and those rules are the rules which are referred to in the report of the committee, which were adopted in 1794. From that time on there never has been a joint meeting in the State of New Jersey that has not adopted rules for its own government.

Upon this point, in order that I may be distinctly apprehended, I beg leave to admit most clearly and emphatically, because it is a fact, that I have found no resolution declaring specifically the number of votes which should be required as necessary to a choice until 1851. There were resolutions in reference to everything else, but nothing in regard to the number of voices necessary to constitute an election. What, then, was the number of voices necessary? Necessarily, by parliamentary law, a deliberative body is controlled by the majority where there is no other rule prescribed. In 1851, however, the Legislature of New Jersey established a precedent which, according to the gentleman's own argument, must cover the case. In 1851 the Legislature of New Jersey being called upon to elect a Senator, the joint meeting when it first assembled passed a resolution declaring that it should require a majority of all the members elected to the two Houses of the Legislature to elect a Senator in Congress. Under that resolution various ballots were had, and the joint meeting adjourned on several occasions, not being able to elect a Senator. Finally, a gentleman proposed a resolution rescinding that rule and declaring that a majority of those voting should be sufficient to elect. That resolution was adopted, and a gentlemen was declared elected on the same vote which he had had for, perhaps, eighteen or twenty ballots before. He was elected, receiving 39 votes, while I had 40 votes, and yet he took his seat in the Senate unquestioned, and remained here until he resigned.

Now, Mr. President, as a matter of precedent, if gentlemen be right that the whole point in this case is that the joint meeting had not the power to adopt a rule of this character, the case to which I have just referred is a direct precedent against them, because the rule originally adopted there required more than a majority of a quorum, and therefore that was a rule which they could not adopt according to the gentlemen's argument, not being the natural rule; and then they rescinded that rule simply by a major vote, and adopted one permitting a majority of those voting to elect, thereby having a rule which was as much at variance from the principle that "the Legislature" must be a majority of all those elected as the rule adopted in my case. If "the Legislature" must choose by a majority of all those elected to it, all the State laws which permitted a majority of a quorum to elect are unconstitutional. If a majority of the Legislature is required, if they must vote as individuals, a majority of a quorum of the body, according to the argument of these gentlemen, does not fulfill the requisition. According to my argument it does, for a majority of a quorum of this Senate is, as I say, the Senate; it matters not who the individuals are, or how they vote, or how many are here, if the number is a quorum it is the voice of the whole Senate.

Mr. CLARK. Will the Senator permit me to interrupt him? I do not understand that anybody on this side has contended that a majority of all the members elected is required, whether they are present or not. We contend for the common law and the parliamentary law, that a majority of those present is required.

Mr. STOCKTON. I did not understand the gentleman, nor did I understand any gentleman on that side of the House, to take that position; but I alluded to the fact that both in my case and in the case of the Senator elected in New Jersey in 1851, the first rule adopted was a rule requiring a majority of all the members elected, and I desired to show that if a majority of a quorum was sufficient, and it was also admitted that that first rule could be adopted, then it had to be admitted that the latter rule could be adopted, for one is as much a violation of the principle laid down as the other.

But, Mr. President, I have occupied the time of the Senate much longer than I intended. I rose simply to call the attention of the distinguished Senator from Maine to the view to which he held in Harlan's case, and which I must say led me to believe that the weight of his great name and talents would be given in favor of the legality of this election. I suppose I must have misapprehended either the view he takes now or the one he took in Harlan's case; but it does seem to me that if that gentleman will read this argument carefully again he will see that the two positions are inconsistent.

Mr. CLARK. I want to inquire of the Senator from New Jersey, before he sits down, whether he has cited all those passages from the constitution of New Jersey which refer to the Legislature in joint convention, or which declare the joint meeting to be the Legislature. I understood him to say that the constitution declared the joint meeting to be the Legislature.

Mr. STOCKTON. Yes, sir.

Mr. CLARK. Will he be kind enough to refer me to that passage?

Mr. STOCKTON. The constitution of New Jersey speaks of "the Legislature in joint meeting."

Mr. CLARK. Exactly; but I want to know of him if that is the only passage.

Mr. STOCKTON. There are two, but I will refer the gentleman also to the Constitutional Convention Record, page 150:

"Mr. Ewing moved to amend the amendment by striking out 'Legislature' and inserting 'joint meeting.'" * * * * "Mr. Hornblower moved to amend by inserting before 'joint meeting' the words 'Legislature in.'"

Mr. CLARK. I understood that when the Senator referred to it before. I simply inquire if there are any other passages than those which he has read which declare that the joint meeting is the Legislature?

Mr. STOCKTON. I know of none other.

Mr. JOHNSON. Please read from the journal of the constitutional convention.

Mr. STOCKTON. This is the journal, page 150:

"Mr. Ewing moved to amend the amendment by striking out 'Legislature' and inserting 'joint meeting.'"

This was on the consideration of the clauses to which I referred the Senate in our constitution. I cite this to show that these distinguished men used these very words for the purpose of avoiding the difficulty which is now made here.

Mr. JOHNSON. The Senator will permit me to ask how the constitution itself reads.

Mr. STOCKTON. I will turn to it. Article four, section five, clause one:

"No member of the Senate or General Assembly shall, during the time for which he was elected, be nominated or appointed by the Governor, or by the Legislature in joint meeting to any civil office under the authority of this State, which shall have been created or the emoluments whereof shall have been increased during such time."

This was the clause under consideration when the amendment was moved.

Mr. JOHNSON. Is that the only clause on that point?

Mr. STOCKTON. No, sir; there is another one; clause twelve of article five:

"When a vacancy happens during the recess of the Legislature in any office which is to be filled by the Governor and Senate, or by the Legislature in joint meeting, the Governor shall fill such vacancy."

The constitution does not expressly declare in so many words that the Legislature when in joint meeting is the Legislature; but it speaks of it in these clauses as "the Legislature in joint meeting." Now, I refer to the journal of the constitutional convention to show that the clause as first reported was "Legislature," that then "Legislature" was stricken out and "joint meeting" inserted, and then on motion of one of our ablest jurists the two were joined together; the clause was made to read as it now stands, "by the Legislature in joint meeting." That amendment was made to the clause in which the power to elect officers is regulated by the constitution.

Mr. HENDERSON. I should like the Senator to state precisely the question before the convention if he can, from the proceedings which he has read. At the time this amendment was offered and voted upon, what was the clause of the constitution then pending?

Mr. STOCKTON. It was one of the two clauses which I have just read.

Mr. HENDERSON. Does not the proceeding itself show the clause in precise words that was then pending? Please read it from the proceedings.

Mr. STOCKTON. The proceedings do not show with a great deal of detail, because this is the report of a committee to the constitutional convention and not engaged in making various amendments. I will hand the book to the Senator and he can examine it for himself. It would require too much time for me to trace the history of it now.

Mr. CLARK. I wish to inquire of the Senator from New Jersey whether the constitution of New Jersey provides for a joint meeting of the Legislature for anything but the election of officers?

Mr. STOCKTON. I do not know that it does. I am not aware that it does.

Mr. JOHNSON. Mr. President, having concurred in the report of the Judiciary Committee on the question now before the Senate, having done so without any doubt that the conclusion to which the committee came was correct, I think it my duty to state very briefly the reasons which led me to that opinion.

The conclusion of the report, as the Senate will have seen, places the validity of the election on the ground that it was in pursuance of a rule established by the joint meeting by which the election was held. The report, however, also says that it might be rested upon the fact that by the constitution of New Jersey the Legislature of the State when in joint meeting was considered as the Legislature of New Jersey; that is to say, the joint meeting composed of the members of both Houses was to be considered as the Legislature of New Jersey. Now, a word upon the first point before I proceed to examine the second.

The honorable member from Maine is right in

saying that under the Constitution of the United States, in the clause relating to the subject, (the third clause of the first article,) the Legislatures of the States are to choose Senators; and added that the authority of the Legislatures of the States to choose Senators is one which can neither be enlarged nor modified by any State constitution. He says, and says correctly, that the Constitution assumes as the proper agency by which the election of United States Senators is to be effected, the Legislature of the State; but we all know that the Constitution of the United States does not say, does not pretend to say, how the Legislature of a State shall be organized. What is the Legislature of a State? It leaves that to be settled by their own constitution and their own laws; over that the Constitution of the United States gives to no department of this Government the slightest jurisdiction; it on the contrary assumes that its own continuance in existence is to be effected, as far as the election of Senator is concerned, by a body to be found in the States vested with legislative power. What legislative power it is to have, how extensive it is to be, or how restricted it is to be, how it is to be chosen, the Constitution is entirely silent, and was necessarily silent about, the sole purpose being to bring into existence a General Government to exercise certain delegated powers. It left to the people of each State to establish for itself its own constitution, and in that constitution to say what department of its government should be vested with legislative authority. It does not provide, and could not have provided, (for if it had, it would not have been adopted by the people,) that the Legislature of a State is to consist of two bodies. The Senate, who are familiar with the proceedings of the Convention itself by which the Constitution was adopted, and who are familiar with the proceedings of the conventions by which the early constitutions of the States were adopted, are not to be told that it was a matter of serious doubt with the men of that day whether there should not be but one body instead of two bodies to whom the legislative department of the Government was to be devolved. What I mean to say is that there is nothing in the Constitution of the United States which prescribes to the States the manner in which they shall elect their Legislature, or the powers which they shall devolve upon the Legislatures so chosen.

Mr. BUCKALEW. The Senator will remember that in Pennsylvania there was but a single legislative body at that time; there was no Senate.

Mr. JOHNSON. I was aware of that, and that was the preferred mode, I think, by Dr. Franklin; and, to repeat, there were very serious doubts whether that was not the best mode. That being the case, it depends upon the people of New Jersey, and upon no other people, to prescribe what shall be the powers of the Legislatures of New Jersey. It depends upon them to say how the Legislature is to be appointed; how they are to act when appointed; what they are to do when they act under their appointment. In other words, the whole powers of that department of the government are made to depend exclusively upon the people of the State as the will of the people of the State may be expressed in its State constitution. Then, I suppose it would be clear—neither the honorable member from New Hampshire nor the honorable member from Maine would doubt that proposition—that if the Legislature of New Jersey at the period when this election was held had consisted of one body by the constitution of the State, that body could have declared whether a plurality or a majority should be required in the election.

Mr. FESSENDEN. Undoubtedly, if it was the Legislature.

Mr. JOHNSON. There could be no doubt about that. I took it for granted that the honorable member would admit that, because he has admitted that, although it is constituted of two bodies, it is in the power of the two Senator may be elected by less than a majority. Now, what have they done? They have divided the legislative department of the government into two bodies, a Senate and a House; but they have done something else. They have provided that the Senate and the House in the election of officers shall meet in joint convention, and when assembled in joint convention, are to be considered as the Legislature. Now let me stop there; that is the only difficulty, provided the honorable member's objection rests upon that; because in so many words it says that the Legislature in joint convention assembled shall be considered the Legislature; that is, the men in joint convention shall be, within the meaning of the constitution of the State of New Jersey, for the purposes——

Mr. CLARK. If the Senator will allow me, I understand it to be this: that the appointments are to be made by the Legislature in joint convention.

Mr. JOHNSON. Certainly. Then it is a Legislature in joint convention.

Mr. CLARK. As far as it goes.

Mr. JOHNSON. So I understand. How far does it go? It goes to the election of officers. The honorable member seems to suppose because it provides only for the election of State officers that it has no application to the case immediately before us; but that, as I think, is a great misapprehension. In its application to State officers, its effect is—and I suppose the honorable member will admit it—to clothe the body so assembled with the power to do in that collective body what they could severally do in their separate bodies by a concurrent vote.

Mr. CLARK. I do not admit that.

Mr. JOHNSON. They have always done it.

Mr. CLARK. It may have always been done wrong.

Mr. JOHNSON. If we mean to commence at the beginning of the world and reform it, that is quite another matter; but I suppose what has been done since the constitution was adopted up to the time when this election was held is pretty persuasive evidence of what the people of New Jersey intended by the constitution, and that is all we want to ascertain. If meeting in joint convention for the election of their State officers, there being no law to prevent it and no constitutional provision to prevent it, they could provide that they might be elected by a plurality vote, why is it that when they come into joint convention legally they shall not have the same powers?

The next question is, were they brought together in joint convention legally? That depends, first, upon the inquiry, is there any law which brings them together; and secondly upon the other inquiry, had the Legislature the authority to pass such a law? There is a law, and what is it:

"Senators of the United States on the part of this State shall be appointed by the Senate and General Assembly of this State in joint meeting assembled."

It is not necessary to read the whole law.

Mr. FESSENDEN. I should like to ask the Senator a question right there. Would not the Legislature of New Jersey have the power by a joint resolution on concurrent act to elect a Senator, and where a Senator was elected in pursuance of that joint resolution, would he not have been legally elected, notwithstanding that law of the State?

Mr. JOHNSON. I do not know that. I am not prepared to say yes or no to that question. That is not the point before the Senate just now.

Mr. FESSENDEN. Why then does the Senator cite that law?

Mr. JOHNSON. For the purpose of showing that they were brought properly into convention; that is all. The use I shall make of it my friend will find by and by, if he will only stop his inquiries until I can get to that point.

Mr. FESSENDEN. I did not know that the Senator objected to inquiries, and of course I shall make no more.

Mr. JOHNSON. I never object to any inquiry the honorable member puts; but he somewhat would be the proper period of propounding it. He is sometimes rather in a hurry, like some other of my friends. [Laughter.] Now, the law of 1846 provides that—

"Senators of the United States on the part of this State shall be appointed by the Senate and General Assembly of this State in joint meeting assembled."

Had they authority to pass that law, is the next inquiry. I do not understand that that is doubted, and it could not well be doubted without unsettling the whole practice of the Government. I think there are some sixteen or seventeen States in which the Senators are elected in joint convention, and nobody has ever in the past called in qestion the validity of such an election; and I do not understand that either my friend from New Hampshire or my friend from Maine does it in this instance.

If they had the authority to call them together in joint convention, what were they when they got into convention? The Legislature is made to consist by the constitution of two branches, and the law says that those two branches, instead of acting concurrently in the election of Senators from New Jersey, shall meet in joint convention. What for, and in what capacity? To elect Senators is the purpose. In what capacity? As the Legislature, for they could not give the authority to anybody else. The constitution provides that Senators shall be elected by the Legislature, and the Legislature, in the exercise of what I understand to be the admitted power, passes a law which says that they shall go into joint meeting and there elect. Elect how? Elect as a Legislature, so that they are in the joint convention as a Legislature, just as they are in such a convention as a Legislature by force of the constitution in the election of State officers. There is not a word to be found in that law which provides that they are to act separately when they get into joint convention. There is not a word which declares the number of votes which are to be necessary to the election; and the result may be, and the result often is—and that proves, as I think, that I am right and my friend from Maine is wrong—that a Senator is elected without getting perhaps a single vote from one of the branches that constitutes the Legislature and authorized to act concurrently in the joint business of that department of the government. That might have been the case here.

The General Assembly of New Jersey consisted of sixty members, and the Senate of twenty-one. Suppose Mr. Stockton, or anybody else, had received a majority of the whole eighty-one—forty-two—and that every one of the votes cast for him had been cast by members of the House, while every one of the votes of the Senate had been cast against him, would he not have been elected? Certainly he would be elected; but he is not the choice of the Legislature in one sense, if my friends are right. If the legislative choice is to be made known by concurrent action and can only be so made known, then the concurrent assent is necessary. If it may be made known by the joint action, without reference to the authority conveyed to each body by its own constitution, then it can only be that a choice of that description is a choice by the Legislature; and if you come to the conclusion that the choice made in that way is a choice by the Legislature, it is only because the two bodies when in joint convention assembled constitute the Legislature. Why should it not be so? What has the Senate of the United States to do with it? What has the Constitution of the United States to do with it? What have the people of the United States to do with it? We are the representatives of our own States. The Constitution denies to itself the authority to interfere with that right. It says that the election of the Senators of the several States shall be a matter exclusively within the authority of the Legislatures of the several States. How the Legislature is to act, when they are to be considered as a Legislature, whether in acting in the particular instance they are to be esteemed as

and laws of the particular State, and it would be monstrous if it were otherwise. But what is it to us? Why should we interfere and tell the people of New Jersey that they shall not elect in any manner that their Legislature thinks proper to elect? I agree with my friend from Maine, that the Legislature is selected by the Constitution of the United States, but being selected, the powers which it is to exercise, the time when it is to exert them, the place where the election is to be held, and the manner in which the election is to be conducted, all depend exclusively upon the constitution and laws of the State.

Now, what is the fact? My friend from Maine says, and I wonder that he did not see that that begged the whole question, that these precedents have nothing to do with the question, provided they are all against the law. That is assuming the very thing in dispute. All the members of the Committee on the Judiciary, except my friend from New Hampshire, thought that the election was properly held, and they relied upon the precedents; and my friend from Maine undertakes to avoid the application of the precedents by saying that the proposition is so plain against the precedents, the precedents should have no weight. If it be so plain, there is an end of the dispute; but I wonder that my friend from Maine had not seen that the fact that precedent after precedent had been established, if they were established, was evidence at least that in the opinion of New Jersey the opinion which he entertains now is not so plain.

Mr. FESSENDEN. I suppose the Senator does not mean to misrepresent me.

Mr. JOHNSON. Certainly not.

Mr. FESSENDEN. And yet the Senator has informed us that he does not desire to be interrupted.

Mr. JOHNSON. That depends upon whether I am able to answer it. [Laughter.]

Mr. FESSENDEN. I stated that those precedents that were relied upon had nothing to do with this case, because the rules relied upon as precedents were according to the common law and parliamentary law.

Mr. JOHNSON. So I understood. But the precedents go to show that in the opinion of the Legislature of New Jersey, when they were meeting in joint convention, they could establish rules without the authority of the Legislature acting concurrently. Now, what have they done? As far back as 1794 New Jersey prescribed the rules for the government of the joint meeting, and they adopted fifteen rules. One was:

"That the election of State officers during the present session be *viva voce*"—

They had a right to do that, I suppose. At least I have not heard that denied—

"unless when otherwise ordered; and that all officers be put in nomination at least one day before their election."

I suppose they had the authority to do that, and yet there is no rule for it unless this rule be law.

"2. That the chairman shall not be entitled to vote, except in case of a tie, and then to have a casting vote."

Had they authority to do that? The other rules do not so particularly relate to the question before us. In 1851 the following additional rule was adopted:

"*Resolved*, That no person shall be elected to any office, at any joint meeting during the present session, unless there be a majority of all the members elected personally present, and agreeing thereto."

They had the authority to pass that, I presume. Why did they pass it? Why was it necessary in 1851 by rule to provide that no person should be elected to any office at any such joint meeting unless he received a majority of all the votes? Because in the absence of such a rule, there might be another rule by which he might be elected without a majority; and for the purpose, therefore, of excluding the authority to elect by less than the majority, they passed a positive rule providing that a majority should be required. The power exerted was legislative; the subject to which the power addressed itself was a subject for the legislative department of the Government; and if they had therefore in the exercise of the power over that subject the authority to provide that a majority should be required, why, in the name of common sense, is it that they had not the authority to say that less than a majority should be sufficient? They went on under that rule, and in 1855, when the new constitution was adopted, they reaffirmed the fifteen rules adopted as far back as 1794, but added the following:

"That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared duly elected."

The same observations that I made in relation to the rule established in 1851 are applicable to this. But let me read from the report of the committee:

"The joint meeting of 1861 adopted the rules of the preceding joint convention for its own government among which were the following."

They adopted the rules themselves at each meeting:

"1. That the election of State officers during the present session be *viva voce*, unless when otherwise ordered.

"15. That in all questions the chairman of the joint meeting be called upon to vote in his turn, as one of the representatives in the Senate or Assembly, but that he have no casting vote as chairman."

Changing the original rule in that respect, which gave him no authority to vote at all except to throw a casting vote in the result of a tie.

"16. That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared duly elected."

They went on under these rules until 1865, when Mr. Stockton was elected, and at the first meeting in 1865, before a ballot was cast, they adopted the rules of the preceding joint meeting except the sixteenth, which required a majority, in lieu of which the following was adopted:

"*Resolved*, That no candidate shall be declared elected unless upon receiving a majority of votes of all the members elected to both Houses of the Legislature."

Why was that passed?

Mr. FESSENDEN. Will the Senator allow me to ask him a question right there?

Mr. JOHNSON. Certainly.

Mr. FESSENDEN. Suppose after the adoption of that rule, there was a quorum present, that is, a majority of the whole convention present, and a vote had been taken and a certain person had received a majority of all the votes cast, the votes cast amounting to more than a quorum?

Mr. JOHNSON. He would not have been elected under this rule.

Mr. FESSENDEN. I ask you, would he not have been elected?

Mr. JOHNSON. No, not under this rule.

Mr. FESSENDEN. But suppose he had presented himself here with that state of facts?

Mr. JOHNSON. No, I should say not, unquestionably.

Mr. FESSENDEN. There is no question he would have been legally elected.

Mr. JOHNSON. That depends on the Legislature. My honorable friend seems to be rather usurping the function of the Legislature. The Legislature say he shall not be elected unless he has a majority of all the votes of all the members, and the case supposed by the honorable member is the case of a man presenting himself here and claiming to be elected although he has not received a majority of all the votes of all the members.

Mr. FESSENDEN. I am speaking of the Legislature; but I am supposing that after the convention had adopted the rule the Senator has read, a person had received a majority of the votes of those present, being more than a quorum, the Legislature having passed no rule on the subject.

Mr. JOHNSON. I understand what you mean very well. I think you are clearly in error. But what I was about to say was this: the original resolution was "that all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be elected." The substitute rule was "that no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both Houses of the Legislature." Nobody has questioned the validity of that rule, as far as I know; nor did anybody ever question the validity of the original rule of 1861, as far as I am advised; nor did anybody question the validity of the rule on the same subject adopted either in 1794 or in 1851. If the rules adopted at these several periods were right and valid, why were they valid? Only because it was a subject over which the joint meeting had jurisdiction. The possession of jurisdiction, and the manner of regulating that jurisdiction, are entirely distinct inquiries. Give the power to the joint meeting to prescribe rules, and then the rules prescribed, be they wise or be they unwise, are the laws for that joint meeting, and they are laws for the joint meeting only because of the other proposition that it is a subject submitted to the joint meeting by the very constitution of the body.

But let me inquire for a moment whether the ground upon which the Committee on the Judiciary place the question more decidedly is open to any serious objection. What is it?

"Your committee prefer placing the authority of the joint meeting to prescribe the plurality rule on the broader ground that, in the absence of any law, either of Congress or the State on the subject, a joint meeting of the two Houses of a Legislature, duly assembled, and vested with authority to elect a United States Senator, has a right to prescribe that a plurality may elect, on the principle that the adoption of such a rule by a majority vote in the first instance makes the act, subsequently done in pursuance of such majority vote, its own."

Is not the principle right as applicable to all elections? What is the principle, to repeat it in my own language? That where a body acting collectively or acting concurrently is clothed with the authority to elect, and have the right, therefore, to require that a majority of the whole shall be necessary or a majority of both branches shall be necessary, it is in their power to say that less than a majority of the whole shall be sufficient whether acting collectively or acting conjointly. I suppose nobody will doubt that. Then, as is conceded by both my friends who have spoken against the conclusion to which the committee came, that it was competent for the Legislature of New Jersey by a law to provide that an election of a United States Senator should be made by a plurality of votes, why is it not competent for the Legislature when meeting in convention to adopt the same rule? My friends say no, for he who receives less than the vote of a majority is not, within the meaning of the Constitution, the choice of the Legislature. That is begging the whole question. Why is he not the choice of the Legislature? If the Legislature by law so provides, the honorable members admit that a party receiving only a plurality would be elected; and why would he be elected in that case? Only because such an election is within the very term of the constitutional provision which says that Senators shall be "chosen by the Legislatures thereof." Now, in the case supposed, acting either concurrently or conjointly, they chose, in the first place, in order to effect the object submitted to them exclusively, to provide that when they go into the election, he who receives a plurality shall be considered as elected; but he is not in point of fact, as indicated by the mere vote, chosen by a majority of the Legislature. He is a majority candidate and a majority Senator; but in the sense of the Constitution, is he not the majority candidate and the majority Senator? If he is, as he certainly is, why is it? Only because they have said, speaking properly in their legislative capacity, that he who is elected in that way is the choice of the Legislature.

Well, now, what has been done? Honorable members seem to suppose that the difficulty is to be found in the words of the Constitution as they are found in the third section and in the fourth section of the first article. I have read the third section; now what says the fourth?

"The times, places, and manner of holding elections for Senators and Representatives shall be pre-

the Congress may at any time by law make or alter such regulation except as to the place of choosing Senators."

Congress has not legislated either as to the time or as to the manner; then the State is to do it under the very authority devolved upon it to decide for herself at what time and in what manner and at what place her Senators are to be elected. That is left to the State. What has the State done in this case? They have decided by the act of April 10, 1846, and the validity of that law is not called in question, that Senators shall be appointed by the Senate and General Assembly of the State in joint meeting assembled. That is all it says. How they are to act when they get into joint meeting, in what manner they are to vote, whether *viva voce* or by ballot, whether nominations are to be made orally or not in advance, and if in advance, how long in advance, that legislation is silent. Now, what is the result? My friends who differ with me on this subject seem to suppose that it is a common-law principle applicable to all bodies of this description, that in the absence of some legislation changing the rule, a majority must act. That in one sense is true; but how is the majority to act in order to change the rule? It is to act by providing for a different rule; and if they do provide for a different rule, and that different rule is complied with in the particular election, then the Legislature have complied with the provision of the Constitution which gives to the Legislature the authority to prescribe the manner in the absence of any prescription of manner on the part of the Congress of the United States.

The Legislature prescribed no manner; Congress prescribed no manner. What does the word "manner" mean? What is its proper acceptation? The election is to be held at such time and at such place and in such manner as the Legislature may direct. What is the meaning of the term "manner" as here used? What does it involve and include? Does it include the mode of voting? I suppose it does. But who is to decide that? The Legislature has made no provision. Cannot the joint meeting decide it? I suppose that will be admitted, for there is nobody else to decide. The whole duty would be arrested if there was not attached to the joint meeting an authority to regulate the mode in which the voting should proceed.

Mr. CONNESS. Will the Senator permit me an instant?

Mr. JOHNSON. With pleasure.

Mr. CONNESS. I did not mean to say anything on this subject and desire to vote; but on the question discussed by the Senator just at this time, what is meant by the term "manner," I have understood it to be elucidated by the different Legislatures who have provided different manners or modes of election. Some elect by the bodies voting separately, others provide that the election must be by joint convention, and as I understand the word "manner" it means that the Legislature is not to be confined to either mode of election by the separate Houses or the mode of joint convention; and thus the experience under that provision is that some States provide for the election according to one mode and some according to the other. I understand the word "manner" as going to that and no further. I will listen, of course, to what the Senator says.

Mr. JOHNSON. The honorable member is right in saying it goes to that extent; but it does not stop there, as I think the honorable member will see in a moment. They get together in joint meeting. Now, he says that the term "manner," as it is used in the Constitution, was intended to give to the Legislature merely the authority to decide whether the election should be made by the concurrent vote of the two branches, where there are two branches, or by a joint vote. There, he says, perhaps it is to stop. Can that be true? I was about to illustrate what I think will satisfy the honorable member that he is wrong in supposing that the authority conveyed to the Legislature terminates there. They get into joint meeting; cannot they establish rules of proceeding? Who doubts that? Can anybody doubt that unless they are inconsistent with some positive statute. Can they not establish rules of proceeding, and if they can where is the limit? Can they not prescribe that the election shall be *viva voce* or by ballot? Can they not prescribe that no ballot for any man shall be counted unless he is antecedently nominated? Who can doubt that? Nobody, as I think.

Mr. FESSENDEN. I doubt it very much.

Mr. JOHNSON. You do?

Mr. FESSENDEN. Suppose they say that no man shall be elected by a majority unless he has been antecedently nominated; a vote is taken, two thirds of the votes are thrown for a person not nominated; is he not elected?

Mr. JOHNSON. No; unquestionably not, unless you mean to take upon yourself the whole administration of this power conferred on the State exclusively. I would ask the honorable member if Congress, by legislation, cannot provide that no man should be elected unless he was first nominated. I suppose he will not deny that; and if he will not deny that, what is the difference between the cases? The honorable member says there is a difference between the two; a difference in what?

Mr. FESSENDEN. We cannot tell the Legislature whom they shall elect.

Mr. JOHNSON. Yes we can. Why cannot Congress by law prescribe that the mode of electing Senators should be by nomination before balloting? It is done by almost every deliberative body in the world. Congress is clothed, as it is, with regulating the manner; why cannot they regulate that manner as well as any other manner? The honorable member appears to suppose that whoever gets numerically a majority, is necessarily chosen. That is for the Legislature to decide; nobody else; and if the Legislature by law establish a different regulation, that regulation is binding upon this body unless it be true that we have a right to do that which is secured only to Congress, to interfere with the manner of electing Senators.

Mr. FESSENDEN. The Senator will let me ask him another question. Would a rule that the chairman, being a member of the Legislature, should have no vote be binding?

Mr. JOHNSON. Certainly, if Congress could make the same rule.

Mr. FESSENDEN. Congress could not make the same rule.

Mr. JOHNSON. Why not?

Mr. FESSENDEN. Because they cannot deprive any member of the Legislature of the right he has to vote.

Mr. JOHNSON. If that be so, the question of the honorable member does not apply to such regulations as Congress could make. Now, does the honorable member mean to say seriously—I beg pardon, for I know he always speaks seriously—that Congress could not by regulation prescribe everything that has been done by regulation in New Jersey? Could not they say that a plurality should be sufficient under certain circumstances? Certainly. If they could then, in the absence of regulation on the part of Congress, in whom is the power to regulate vested?

Mr. FESSENDEN. In the Legislature.

Mr. JOHNSON. "The Legislature." Now, what is the Legislature? Both branches. Both branches have not regulated as to this point; but they have regulated so far as to say that the Senators of that State are to be elected in joint meeting. Could not they have said that a plurality vote should be sufficient? And if they thought proper only to interfere with reference to the time and the place, saying nothing about the manner, the inference, in my judgment, is irresistible that they intended to leave to the body in joint meeting the whole authority of regulating the manner of holding the election; and that, as the Senate have seen, was the view taken by New Jersey in re-

The question, Mr. President, is a purely legal one in relation to which I am sure no party feeling will operate, for every Senator is too honorable a man to let considerations of that description interfere; but it is a question involving as, I think, a very serious principle, one which touches us all, not the Senator from New Jersey alone; it is a matter of little or no moment to him whether he remains a member of this body or not; he has a home in New Jersey where he is honored and beloved. The principle is an important one. I consider this as a very serious interference, and if my friends who take a different view will permit me to say so, a very unconstitutional attempt to interfere with the rights of the States. It may come home to them or to those who may succeed them in the future. The Constitution of the United States leaves it to the Legislature, and the Legislature is to decide for itself in what manner the election is to be held.

I have, Mr. President, I believe, presented to the Senate all the observations that it is necessary to submit, and more than I intended, because of the interruptions to which I have been subjected.

Mr. HOWE. Mr. President——

Mr. SUMNER. If the Senator will give way, I will move that the Senate proceed to the consideration of executive business.

The motion was agreed to; and after some time spent in executive session the doors were reopened, and the Senate adjourned.

HOUSE OF REPRESENTATIVES.

THURSDAY, *March* 22, 1866.

The House met at twelve o'clock m. Prayer by the Chaplain, Rev. C. B. BOYNTON.

The Journal of yesterday was read.

CORRECTION OF THE JOURNAL.

Mr. SMITH. I desire to have the Journal corrected. It states that my resolution in reference to national cemeteries was referred to the Committee on Appropriations. It was referred to the Committee on Military Affairs.

The SPEAKER. The correction will be made.

LEAVE OF ABSENCE.

Mr. LOAN. I ask leave of absence for my colleague, Mr. BLOW, for three weeks.

Leave was granted.

Mr. BERGEN. I ask leave of absence for my colleagues, Messrs. TABER and GOODYEAR, for one week.

Leave was granted.

UNION PACIFIC RAILROAD.

Mr. KASSON, by unanimous consent, presented a memorial of the General Assembly of Iowa for Government aid to the extension in Iowa of the Iowa branch of the Union Pacific railroad; which was referred to the Committee on the Pacific Railroad, and ordered to be printed.

PORT OF DELIVERY AT COUNCIL BLUFFS.

Mr. KASSON, by unanimous consent, introduced a bill to establish a port of delivery at Council Bluffs; which was read a first and second time, and referred to the Committee on Commerce.

Mr. KASSON moved to reconsider the vote by which the bill was referred; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

MESSAGE FROM THE SENATE.

A message from the Senate, by Mr. FORNEY, its Secretary, announced that the Senate had passed a bill (S. No. 192) entitled "An act for the relief of Goldsmith Brothers, of the cities of San Francisco, California, and Portland, Oregon, brokers;" in which the concurrence of the House was requested.

WINNEBAGO INDIANS.

Mr. WINDOM, by unanimous consent, introduced a bill for the benefit of certain half-breeds and mixed bloods of the Winnebago tribe of Indians; which was read a first and