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IN THE SENATE OF THE UNITED STATES.

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FEBRUARY 2, 1892.—Ordered to be printed.

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

**REPORT:**

The Committee on Privileges and Elections, to whom was committed the investigation of the contest inaugurated by Mr. William H. Clagett, involving the right of Mr. Fred. T. Dubois to a seat in the Senate as Senator from the State of Idaho for the full term commencing March 4, 1891, and to which seat he was admitted on his prima facie case on the 8th day of December, 1891, having had the same under consideration, beg leave to submit the following report:

**STATEMENT OF FACTS.**

There is in this case really no material controversy in regard to the facts. The questions involved are of law, arising out of the construction of various constitutional and statutory provisions and their applicability to these facts. The sitting member, Mr. Dubois, and the contestant, Mr. Clagett, each claims to have been duly elected a United States Senator by the legislature of the State of Idaho for the full term above mentioned. Mr. Dubois claims to have been thus elected on Thursday, the 18th day of December, 1890; while Mr. Clagett claims to have been thus elected on Wednesday, the 11th day of February, 1891.

Inasmuch as each claimant claims to have been elected for precisely the same term, and as it is conceded that the election under which Mr. Dubois claims to have been elected was prior in time it follows that, if it shall be held he was duly elected, that is the end of the contest and he is entitled to retain his seat. Upon the other hand, should it be determined that Mr. Dubois was not duly elected, then, and only then, will it become necessary to inquire into the legality of the election of Mr. Clagett.

For the purpose of determining as to the validity of the election of Mr. Dubois, in so far as the facts are involved, it is only necessary to consider the record of the proceedings of the first twelve days of the first session of the legislature of the State of Idaho, commencing Monday, December 8, A. D. 1890. This record, together with accompanying affidavits, supplying an alleged omission in such record on one particular point, and the truthfulness of the allegation as to such omission, and of its proper correction by the affidavits referred to, are not denied by the contestant, disclose the following facts in reference to the organization of the legislature and the election of Mr. Dubois:

Before proceeding, however, to a statement of the facts thus disclosed and admitted, it may be said that the State of Idaho was ad-

mitted into the Union by act of Congress dated July 3, 1890. This act refers to and adopts the constitution which the people of the late Territory of Idaho had adopted prior to that time. The fourteenth section of article 21 of such constitution contains the following provision:

Within ten days after the organization of the legislature both houses of the legislature shall then and there proceed to elect, as provided by law, two Senators of the United States for the State of Idaho. At said election the two persons who shall receive the majority of all the votes cast by said senators and representatives shall be elected as such United States Senators, and shall be so declared by the presiding officer of the said joint session. The presiding officers of the senate and house shall issue a certificate to each of said Senators, certifying his election, which certificate shall also be signed by the governor and attested by the secretary of state.

The act of Congress admitting the State into the Union, including the recitals, reads in part as follows:

Whereas the people of the Territory of Idaho did, on the 4th day of July, 1889, by a convention of delegates called and assembled for that purpose, form for themselves a constitution, which constitution was ratified and adopted by the people of said Territory at an election held therefor on the first Tuesday of November, 1889, which constitution is republican in form and is in conformity with the Constitution of the United States; and

Whereas said convention and the people of said Territory have asked the admission of said Territory into the Union of States on an equal footing with the original States in all respects whatever: Therefore,

*Be it enacted, etc.,* That the State of Idaho is hereby declared to be a State of the United States of America, and is hereby declared to be admitted into the Union on an equal footing with the original States in all respects whatever; and that the constitution which the people of Idaho have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed.

Section 20 of said act admitting the State reads as follows:

SEC. 20. That the legislature of the said State may elect two Senators of the United States, as provided by the constitution of the said State; and the Senators and Representatives of said State shall be entitled to seats in Congress and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States.

#### THE REVISED STATUTES PROVIDING THE TIME AND MANNER OF ELECTING UNITED STATES SENATORS.

Sections 14, 15, 16, 17, 18, and 19 of the Revised Statutes of the United States, relating to the time and manner of the election of United States Senators, the same being a reenactment of the act of July 25, A. D. 1866, are for the convenience of the Senate here inserted. They read as follows:

SEC. 14. The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.

SEC. 15. Such election shall be conducted in the following manner: Each house shall openly, by a *viva voce* vote of each member present, name one person for Senator in Congress from such State, and the name of the person so voted for who receives a majority of the whole number of votes cast in each house shall be entered on the journal of that house by the clerk or secretary thereof; or, if either house fails to give such majority to either person on that day, the fact shall be entered on the journal. At 12 o'clock meridian of the day following that on which proceedings are required to take place as aforesaid, the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person has received a majority of all the votes in each house, he shall be declared duly elected Senator. But if the same person has not received a majority of the votes in each house, or if either house has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose, by a *viva voce* vote of each member present, a person for Senator, and the person who receives the majority of all the votes of the joint assembly—a majority of all the members elected both houses being present and voting—shall be declared duly elected. If no per-

son receives such majority on the first day, the joint assembly shall meet at 12 o'clock meridian of each succeeding day during the session of the legislature, and shall take at least one vote until a Senator is elected.

SEC. 16. Whenever on the meeting of the legislature of any State a vacancy exists in the representation of such State in the Senate, the legislature shall proceed on the second Tuesday after meeting and organization to elect a person to fill such vacancy, in the manner prescribed in the preceding section for the election of a Senator for the full term.

SEC. 17. Whenever during the session of the legislature of any State a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy.

SEC. 18. It shall be the duty of the executive of the State from which any Senator has been chosen to certify his election, under the seal of the State, to the President of the Senate of the United States.

SEC. 19. The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State.

#### ORGANIZATION OF THE LEGISLATURE.

On Monday, December 8, A. D. 1890, the first legislature of the State of Idaho met pursuant to the proclamation of the governor as required by section 14, article 21 of the constitution of the State.

#### ORGANIZATION OF THE HOUSE.

The house met at 12 o'clock meridian on Monday, December 8, A. D. 1890, in the hall of the house of representatives, in the capital of the State at Boise City. Neither the State constitution nor any statute made any provision for officers of the house. The house, therefore, was possessed of the inherent and exclusive power, not only of electing its own officers, but also of determining the number and kind of officers to be elected.

On the first day of the session, namely, Monday, December 8, 1890, the house of representatives, a quorum of members being present, elected a speaker and principal officers. The house was called to order on that day by Hon. H. J. Burkhart, speaker of the house of representatives of the fifteenth legislative assembly of the late Territory of Idaho at the hour of 12 o'clock m., whereupon Charles H. Reed, chief clerk of the house of representatives of the fifteenth session of the legislative assembly of the late Territory of Idaho, acting as the chief clerk of the house, with the consent of all, there being no protest, then read the proclamation of the governor of Idaho convening the State legislature on that date.

The certificate of the secretary of state was then read, certifying the names of the different persons elected members of the house of representatives of the first session of the legislature of the State of Idaho. The roll of members, as they appeared upon such certificate of the secretary of state, was then called. All being present, the oath of office was administered to the members of the house, respectively, by Hon. John T. Morgan, associate justice of the supreme court of Idaho. After prayer by Rev. L. W. Gowan, the election of a speaker having been declared in order, Mr. Emery, of Custer County, placed in nomination Mr. Frank A. Fenn, of Idaho County; Mr. Jones, of Boise County, placed in nomination Mr. Ballentine, of Ada County. A ballot was taken, which resulted as follows:

Mr. Fenn received 29 votes; Mr. Ballentine, 5; Mr. Emery, 1; Mr. Steunenberg, 1. Mr. Frank A. Fenn, having received a majority of all the votes cast, was declared duly elected speaker of the house, and was conducted to the chair by a committee consisting of Messrs. Price, Arm-

strong, and Cameron, appointed for that purpose by the temporary chairman. The committee presented Mr. Fenn, who was introduced to the house by Mr. Burkhart, the temporary presiding officer, as speaker of the house.

The oath of office was then administered to the speaker by Judge Morgan, associate justice of the supreme court of the State of Idaho; whereupon the house proceeded to the election of a chief clerk. Mr. Charles H. Reed, who had been acting as temporary chief clerk, was, on a ballot being taken, elected, and declared duly elected by the speaker chief clerk of the house for the ensuing session. A recess was then, on motion of Representative Armstrong, taken for one hour.

The recess having expired, the house was called to order at 2 o'clock p. m., December 8, Mr. Speaker in the chair and a quorum present, whereupon Mr. John Hunter was elected sergeant-at-arms; Miss Carry Sweet, assistant chief clerk; Mr. J. W. Jackson, doorkeeper. An enrolling clerk, an assistant enrolling clerk, an engrossing clerk, and an assistant engrossing clerk were also each duly elected, and all the above-named officers were declared, respectively, to have been duly elected on that date, December 8, A. D. 1890. A page and a messenger were also elected, after all which, on motion of Mr. Hawkins, the house adjourned until 10 o'clock a. m., December 9, 1890, the record of proceedings in the house journal being signed as follows:

F. A. Fenn, speaker; attest, Charles H. Reed, chief clerk.

No action was taken on that day, December 8, in the house looking to the possible election of any other officers on any future day; whether the house would elect any other officers during the session was uncertain. At 10 o'clock on the morning of Tuesday, December 9, 1890, the house of representatives reassembled, Mr. Speaker in the chair. Immediately after the journal was read, and which was then approved, a chaplain was elected. No other officer was chosen on December 9, 1890.

#### ORGANIZATION OF THE SENATE.

The senate of the State of Idaho also met at 12 o'clock meridian, Monday, December 8, A. D. 1890, in the senate chamber of the capitol of the State at Boise City. The State constitution of Idaho provides that the lieutenant-governor of the State shall be the presiding officer of the senate. The lieutenant-governor was Norman B. Willey, and at the hour and on the day just named, the members-elect of the senate being assembled in the senate chamber of the capitol at Boise City, a quorum being present, were called to order by Lieutenant-Governor Norman B. Willey, acting in virtue of a provision in the State constitution in the capacity of presiding officer of the senate.

After prayer by the Rev. Mr. Scidmore, Senator Gunn moved that M. C. Athey be elected secretary of the senate *pro tempore*, which motion, as will appear hereafter, prevailed. Mr. Athey was duly elected and so declared to be by the presiding officer, and he immediately entered upon the duties of his office. The president of the senate then read the proclamation of the governor, convening the legislature of the State of Idaho, at Boise City, on the 8th day of December, A. D. 1890. The president of the senate then called the roll of members as certified by the secretary of state, and a quorum, 16 in all—the whole number constituting the senate of the State of Idaho being 18—answered to their names. The oath of office was then administered to the senators-elect by Mr. Justice Sullivan, chief justice of the supreme court of the State of Idaho.

Senator Gray then moved that the senate adjourn until 2:30 o'clock p. m. of the same day. This motion was carried, and the president of the senate declared the senate adjourned until 2:30 o'clock Monday, December 8, 1890. At 2:30 o'clock p. m. of the same day the senate met pursuant to adjournment, Norman B. Willey, the lieutenant-governor, presiding. The roll was called, which disclosed the fact that all the senators were present.

Senator Gray moved that the rules of the legislative council of the fifteenth session of the late Territory be adopted, as far as consistent, for the regulation of the senate until the report of the committee on rules be adopted; which motion was put by the presiding officer, and by him declared carried.

Motions were then made for the purpose of determining the selection of seats of the several senators.

Senator Finch moved that in drawing for seats names be placed in a hat and the first name drawn would take seat No. 1 and so on.

Senator Gunn moved to amend this motion by adding that the senators retain the seats then occupied by them, which latter motion prevailed.

The senate then adjourned.

These acts on the part of the Senate constitute, in the judgment of your committee, an organization on the part of that body sufficient to enable it to exercise every function of a State senate, legislative and otherwise, including that of electing a Senator of the United States. These acts constituted an organization, in the judgment of your committee, within the meaning of that term as employed in section 14 of the Revised Statutes. Whatever else may have been done by the Senate, thus organized on Monday, December 8, 1890, either on that date or at any subsequent time, could not, in the opinion of your committee, invalidate such organization.

What further did occur, we will inquire, on Monday, December 8, or subsequently, on which contestant rests his contention that there was no such organization on Monday as is contemplated by the statute. Simply this: Senator Brigham, on Monday, December 8, after the members had been sworn, a chief clerk elected and entered upon his duties, and rules adopted, moved that the president appoint a committee of three on organization, to designate and determine the number and order of officers to be filled by the senate. This motion was carried, and the president of the senate appointed Senators Brigham, Gunn, and Jewell such committee.

Senator Shoup also moved, on Monday, that a committee of five be appointed by the chair to report rules for the government of the senate, which motion was carried. This was *prior* to the adoption of the motion of Senator Gray that the rules of the legislative council of the fifteenth session be adopted as hereinbefore recited. Subsequent to this the president, in accordance with Senator Shoup's motion, appointed as a committee on rules of government of the senate, Senators Shoup, Weiler, Langrische, and Branstetter.

But surely these acts, so far from proving or tending to prove that there was not already, prior to and at the time they occurred, a perfect and complete temporary organization of the senate; such as would have enabled it to censure or expel a member, pass a bill, or do any other act required of it by the laws of its being, that it could rightfully do after the permanent organization had been effected, conclusively, as it seems to your committee, prove the very reverse. Why the ne-

cessity of adopting the rules of a late Territorial council if it were not understood that the senate was *organized* and in a condition to transact business? Why adopt rules "for the *regulation* of the senate" if there were no *organized senate* in existence—no senate to regulate. And, again, can an unorganized senate adopt rules, appoint important committees, etc.?

The appointment of the committee on organization clearly had reference to a *permanent* organization. This is made plain by what occurred on Tuesday, December 9. On that date the journal shows the *senate* met pursuant to adjournment at 10 o'clock a. m. It was the *senate*—an *organized body* that met, not the *members* of the senate in their unorganized capacity.

The senate, says the *journal*, was opened by prayer by Rev. Mr. Gowan. Roll called; all present. The committee appointed on Monday reported a list of offices to be filled by the senate, which report was adopted. This list included president *pro tempore* of the senate and secretary of the senate *pro tempore*, each of whom had been duly installed on Monday. These several offices were then filled by election. M. C. Athey, who had been elected and installed on Monday as secretary *pro tempore* of the senate, was elected as secretary of the senate.

All this conclusively shows, in the judgment of your committee, that the senate itself understood there had been a *temporary organization* of the senate on Monday, and it was the *permanent* organization that was being effected on Tuesday, December 9. This view is fully confirmed by the character of the notices which passed between the two houses on Tuesday, December 9, as each of these recites that the house "has *permanently organized*."

The question as to the effect in determining the date of organization which these notices should have, from the fact they were not transmitted until Tuesday, will be further considered later on in this report.

The only constitutional office of the senate is that of president. Upon the senate in like manner, as in the case of the house, devolves the power not only of choosing all its other officers, but of determining what officers were to be chosen. Each house, therefore, it will be observed, had, by constitutional provision as to the president of the senate, and by election as to the other officers named, a duly elected and acting (and without any protest from any source) presiding officer and chief clerk of each house on Monday, December 8, 1890; the house having duly elected on that date eleven of its officers—all but chaplain, who was elected on Tuesday, December 9—while the senate had on that date (Monday, December 8) its duly elected and qualified presiding officer, and also a duly elected and acting secretary *pro tempore*.

The senate reassembled at 10 o'clock a. m. on Tuesday, December 9, 1890, and, as appears from the record, elected certain other officers, all of whom were elected before the adjournment at 12 o'clock meridian of December 9.

#### OMISSION IN JOURNAL.

In this connection attention is attracted to an evident omission in the journal of the proceedings of the senate of December 8, 1890.

The record of the proceedings of the senate of the State of Idaho of December 8, A. D. 1890, recites as follows:

After prayer by the Rev. Scidmore, Mr. Gunn moved that M. C. Athey be elected secretary of the senate *pro tempore*.

This record, it is true, does not recite the fact that the motion was carried or that Mr. Athey was either elected or declared elected secre-

tary of the senate *pro tempore*. It does appear, however, from such record that M. C. Athey acted as secretary *pro tempore* of the senate on that day without objection from any source, and the proceedings of the senate for that day, Monday, December 8, A. D. 1890, are in the journal certified as follows:

N. B. Willey, president of the senate. Attest: M. C. Athey, secretary *pro tem*.

The journal therefore clearly shows upon its face that M. C. Athey acted as secretary *pro tempore* of the senate on the 8th day of December, 1890. He was on that day, as appears from the record of the proceedings, *de facto* if not *de jure* secretary of the senate *pro tempore*, and therefore comes within the rule laid down in the case of *Bank vs. Dandridge* (12 Wheaton, 64), by the Supreme Court of the United States, and which is recognized in both England and America as settled law, namely:

It (the law) will presume that a man acting in a public office has been rightly appointed.

But as a matter of fact Mr. M. C. Athey was formally elected secretary *pro tempore* on Monday, December 8, A. D. 1890, in pursuance of the motion made by Mr. Gunn, as recited in the record, and he then immediately entered upon his duties as such secretary *pro tempore*; and the record of the proceedings of the session of the senate of that day is shown to be clearly defective in omitting to recite that the motion of Mr. Gunn that Mr. M. C. Athey be elected secretary *pro tempore* of the senate was adopted by the senate. This is made clearly apparent by the affidavits of James Gunn, the author of the motion; M. C. Athey, the secretary *pro tempore*; by H. C. Branstetter, a senator, representing Ada County in said senate; and by J. M. Wells, a member of the senate of the State of Idaho, representing the counties of Kootenai and Latah. These affidavits are as follows:

STATE OF IDAHO, *County of Alturas, ss:*

James Gunn, being first duly sworn, on his oath doth say: I am the duly elected and qualified senator for Alturas County in the senate of the State of Idaho. As such senator I was in my seat in the Senate of the State of Idaho on the first day of the last session of the said senate, the same being the eighth day of December, A. D., 1890. As such senator I made a motion that M. C. Athey be elected secretary of said senate *pro tem*. The said motion was duly seconded, and by the president of the senate put to the senate, and the same was carried unanimously. Whereupon the said M. C. Athey did immediately enter upon and perform all the duties of secretary of the senate from that time henceforward, until he was, by vote of the senate, made the permanent secretary of the senate. That immediately upon the election of the said secretary, as aforesaid, the senate proceeded to the regular business of the session. Further deponent said not.

JAMES GUNN.

Subscribed and sworn to before me, this twenty-eighth day of September, in the year of our Lord 1891.

[SEAL.]

W. H. WATT,  
Notary Public.

STATE OF IDAHO, *County of Ada, ss:*

M. C. Athey, of the city of Boise, county and State aforesaid, being duly sworn, on his oath says: that he is the identical M. C. Athey who was elected secretary *pro tem* of the senate of the legislature of the State of Idaho, on the eighth day of December, A. D. 1890, and permanent secretary of said senate, on the ninth day of December, A. D. 1890. That the motion, made by Mr. Gunn, in the first day's proceedings of said senate, which reads as follows: "Mr. Gunn moved that M. C. Athey be elected secretary of the senate *pro tem*," upon being seconded by Senator ———, was stated to the senate by Lieutenant-Governor Norman B. Willey, president of the senate, and a vote taken thereon. M. C. Athey, having received a majority of all the votes cast, was then and there declared elected secretary *pro tem* of the senate by its president. That in writing up the senate roll of the first day's proceedings the fact of Senator

Gunn's motion for the election of M. C. Athey as secretary *pro tem.* of the senate having been *put* and *carried* in the senate and so announced by its president, was omitted from the record. Affiant further saith not.

M. C. ATHEY.

Subscribed and sworn to before me, this 29th day of August, A. D. 1891.  
[SEAL.]

A. J. PINKHAM,  
Secretary of State.

STATE OF IDAHO, *County of Ada, ss:*

H. Clay Branstetter, residing at Boise City, in the county and State aforesaid, being duly sworn, on his oath saith that on the eighth day of December, A. D. 1890, he was a senator, representing Ada County, State of Idaho, in the senate of the legislature; that he has carefully read the affidavit of M. C. Athey, hereto attached, and that the statements therein made, relating to his election as secretary *pro tem.* of the senate on said eighth day of December, A. D. 1890, and the omission in the senate journal of the same date, as stated by him are true. Affiant further saith not.

H. C. BRANSTETTER.

Subscribed and sworn to before me this 28th day of October, A. D. 1891.  
[SEAL.]

A. J. PINKHAM,  
Secretary of State.

STATE OF IDAHO, *County of Kootenai, ss:*

James M. Wells, of the county and State aforesaid, being duly sworn, on his oath saith: That he was a member of the senate of the State of Idaho at its first session, representing the counties of Kootenai and Latah, which convened at Boise City, the capital of said State, on December the 8th, A. D. 1890; that after the senate was called to order by Lieutenant-Governor Norman B. Willey, president of the senate, on the day and date above named, prayer was offered by Rev. Skidmore, when Senator James Gunn, of Alturas County, entered the following motion: "Mr. Gunn moved that M. C. Athey be elected secretary of the senate *pro tem.*;" that said motion, having received a second, was stated to the senate by its president, and a vote taken thereon, and the result duly announced by the president of the senate that M. C. Athey had been duly elected secretary *pro tem.* of the senate; whereupon M. C. Athey took his seat and assumed the discharge of his duties as secretary *pro tem.* Affiant further saith not.

J. M. WELLS.

Subscribed and sworn to before me this 19 day of October, A. D. 1891.  
[SEAL.]

W. H. PLUMMER,  
Farmington, Wash.

It is therefore conclusively shown to your committee that Mr. M. C. Athey was formally and regularly elected to the office of secretary *pro tempore* of the senate of the State of Idaho on Monday, December 8, A. D. 1890. These affidavits, it will be observed, do not contradict the journal. While the journal as it stands does not expressly prove the formal election of Mr. Athey, it does not disprove it; nor is there anything in it from which a presumption can be indulged in that no such formal election took place, or which in any manner tends to overcome the counter presumption in its favor raised by the fact that Mr. Athey acted as secretary *pro tempore*, which fact clearly appears by the printed journal.

These affidavits do not contradict the journal, but simply supply an apparent omission in the same. Certainly the presumption is violent that *some* disposition was made of the motion of Mr. Gunn to the effect that M. C. Athey be elected secretary of the senate *pro tempore*. The record of the proceedings of the senate of that date fails to disclose that *any* disposition was made of it; but as the journal shows he acted as such this fact raises a conclusive presumption not only that Mr. Gunn's motion was adopted, but also that Mr. Athey was then and there duly elected. It is, therefore, in the opinion of your committee, although unnecessary to constitute a sufficient record in this case, clearly regular to permit this evident omission to be supplied by evidence *abunde* the record.



To hold that the failure of the secretary *pro tempore* to record the fact of his own election could vitiate the election of a Senator of the United States would border very closely on an absurdity. If there is any rule which would compel a judicial tribunal to refuse to permit such a correction in a record—and your committee believe there is not—there most certainly is none which would compel the Senate of the United States, in the exercise of its rightful jurisdiction of judging of the election of its members, to close its eyes to the very truth of a case when clearly demonstrated by indisputable evidence other than that of the record itself and in harmonious connection with it. That no such rule is recognized in judicial tribunals is apparent from the rule in the following cases:

In *Green vs. Weller* (3 Miss., 650), the supreme court of Mississippi said:

In England the journals of the lords and commons, which are kept as memorials of their proceedings, may be proved by an examined copy. But the courts do not judicially notice them, and they do not import absolute verity, and are not conclusive of the facts stated in them, except in the case of a judgment rendered by the house of lords, as a judicial tribunal, upon appeal (1 Phill. Ev., 406).<sup>4</sup> In this country the same rule prevails, and such documents are not noticed judicially by the courts, but must be proved.

In *Taymouth v. Kochler* (35 Mich., 22), the supreme court of Michigan said:

The township clerk is, by statute, made the clerk of the board of highway commissioners, and required, under their direction, to record their proceedings. It has, however, frequently been held that, while parol evidence can not be admitted to *contradict* the record, yet it might be introduced to show the facts omitted to be stated; that the rights of creditors, or third persons, can not be prejudiced by the neglect of the clerk to perform his duty in this respect.

In Ohio the clerk of the county commissioners was required, by law, to record certain official proceedings. In *King v. Kenney* (4 Ohio, 79), the supreme court of Ohio said:

The omission was in the clerk of the commissioners. It would seem unreasonable that such ministerial nonfeasance should render the whole proceeding nugatory. To authorize this construction, for such omission, would require precedents and authorities. But in fact they are the other way.

In the case of *Bigelow v. Amboy* (1 Dutcher, 297), the court said:

Nor can the right of the creditor to recover depend upon the regularity with which the minutes of the city council are kept, nor whether they are kept at all. It is expressly proved by the city clerk that a resolution, substantially the same as that shown to the clerk of the plaintiffs, was passed by the council. Whether the resolution furnished to the mayor was copied from the minutes, or furnished to him before the minutes were recorded, or whether they were recorded at all, is a matter which can not prejudice the claim of the creditor.

In the case of *Marbury v. Madison* (1 Cranch, 137), the court said:

When all the requirements have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the mere labor of inserting it in a book kept for that purpose may not have been performed.

#### THE CONTESTANT CONCEDES THIS POINT.

But the contestant, Mr. Clagett, has abandoned this contention and now makes no point on this omission in the record in his supplemental brief filed in this case. Mr. Clagett also in this paper abandons the point which was really the only one originally urged against the election of Mr. Dubois at the time of his election, namely, that he, Mr. Dubois, was not elected because his alleged election was had before the

two Senators elected to existing vacancies had drawn for terms. We quote from Mr. Clagett's brief the following on these two points:

(1) I make no point on the omission of the senate journal to say that Mr. Athey was elected secretary *pro tempore* on Monday, December 8. I had personal knowledge that he was so elected, and, although the journal does not show the fact, in my brief (p. 22) I so state. Affidavits to prove an expressly admitted fact are, to say the least, unnecessary.

(2) Neither do I urge that Mr. Dubois was not elected because his alleged election was had before the two senators elected to fill existing vacancies had drawn for terms. I was for a short period inclined to this opinion, but on full consideration abandoned it, and it is not mentioned in my brief. Had the legislature waited until after the two senators had drawn for terms, it would have avoided the undignified and indecent haste which characterized the election in December. It would also have spared the political perfidy involved in the open repudiation of the instructions given to the members in the platforms of both political parties to so act as to assure as near as possible equal representation in the Senate to the two great sections of the State. Although undignified and indecent, the course taken was not for *this* reason illegal.

While your committee would be unwilling to hold that a formal election is indispensable to an organization where it is clearly shown that a certain person had acted in the capacity of secretary *pro tempore* with the consent of the senate and without objection from any source, and who as such had certified to the record of the proceedings, still in the case under consideration your committee are fully satisfied from the evidence presented not only that Mr. Gunn moved that Mr. Athey be elected secretary *pro tempore* of the senate, but that such motion was put by the presiding officer and carried, and, further, that Mr. Athey was on that date duly elected as such and so declared to be, and in pursuance of such election then and there, Monday, December 8, 1890, entered upon the duties of his office.

WAS THE LEGISLATURE OF THE STATE OF IDAHO IN VIEW OF THE FOREGOING FACTS, ORGANIZED ON MONDAY, DECEMBER 8, A. D. 1890, WITHIN THE MEANING OF THE TERM "ORGANIZATION," AS EMPLOYED IN SECTION 14 OF THE REVISED STATUTES?

It is virtually conceded by the contestant and admitted by all that if the legislature of the State of Idaho were organized on Monday, December 8, A. D. 1890, within the meaning of the term "organization" as used in the fourteenth section of the Revised Statutes of the United States relating to the time and manner of electing United States Senators, then Mr. Dubois was duly elected Senator for the State of Idaho for the term for which he claims to have been elected.

The contention on the part of Mr. Clagett, however, is, in so far as this question is concerned, that there was no such organization of the legislature as is contemplated by the statute until Tuesday, December 9, A. D. 1890. It is conceded by the contestant, or, if not the fact is clearly shown by the record, that there was at least a *complete* temporary organization of the legislature of the State of Idaho on Monday, December 8, 1890. The question therefore arises, what is necessary to be done to constitute an organization of a legislature within the meaning of the term organization as used in the statutes? Inasmuch as Congress has provided that the election shall be held, or at least the first steps preliminary to an election shall be taken, on the second Tuesday after the meeting and organization of the legislature, without indicating in the remotest manner what shall be the character of such organization—whether it is to be a permanent organization with all the officers of every grade elected and installed which the legislature may determine necessary for its convenience in the transaction of business, as contradistinguished from a temporary organization, such as will

enable the respective bodies to exercise fully all legislative functions, enact laws, censure or expel a member, and the like—is it not competent for the legislature to elect on the second Tuesday after such temporary organization?

In other words, does not such an organization as last described meet the requirements of the Revised Statutes as to organization? Your committee are of the opinion that it does. If the term "organization" as used in the Revised Statutes must be construed to mean only such an organization as exists after every officer is elected that either house may see proper to elect, or may be necessary to elect, for the mere convenience of the body, then it would seem to be quite unsafe to regard the legislature as organized within the meaning of the statute, so long as there existed the remotest possibility of electing any additional officers of any grade or character during the progress of the session. In other words, if that is the character of organization intended by Congress, then it would seem to be most difficult indeed to draw the line or define the exact date when the organization of the two houses is complete within the meaning of the law.

Your committee are of the opinion that whenever each house has progressed *so far* in the election of such officers, respectively, as will enable it and the two houses together to transact business, exercise legislative functions, enact laws, and make and keep a record of such business, that then there has been such an organization of the two houses as is contemplated by the statute. When *that* has been done, in so far as the election of officers of the two houses is concerned which will enable them respectively to exercise the functions for which they have been brought into existence, and which will enable them to make, keep, and certify a record of the same, then, it seems to your committee, although much less than this may, and by some members of your committee is, deemed to be sufficient, the requirement of the statute as to the organization necessary from which *time* shall date in the election of a United States Senator, is clearly and fully met.

In other words a legislature is, in the judgment of your committee organized within the meaning of section 14 of the Revised Statutes relating to the time and manner of electing United States Senators when each house has a presiding officer, authorized to ascertain and declare its will, and a method of recording its action satisfactory to and recognized by itself, subject of course to any constitutional provision, State or Federal, or existing statute on the subject.

In defining the term "organization" as used in section 14 of the Revised Statutes, which with subsequent sections is a reënactment of the act of July 25, A. D. 1866, the purpose of Congress in enacting the same should not be lost sight of; and such construction should be given as will best effectuate such purpose.

The intention of Congress, as is plainly evident from a consideration of the whole act, was to place it out of the power of a majority of either house to prevent a majority of the two houses acting together in joint assembly from electing a United States Senator, in a case where there had been such an organization of the legislature as will enable it to exercise the ordinary functions of a legislative body, such as enacting laws and making record thereof. This being so, is not the conclusion irresistible that whatever is a sufficient organization to enable a legislature to do the latter should be sufficient to enable it to elect a United States Senator?

Any other construction would place it in the power of each house to organize so as to enable the legislature to sit its entire session of forty,

sixty, or one hundred days, as the case may be, enact laws, and perform every function of its being, save and except only that of electing a United States Senator, and then adjourn, and yet would place it in the power of a *factious* majority in *either* house, the dilatory and obstructive action of which as a *minority* of a whole legislature in respect of proceeding with the necessary preliminary steps toward the election of a United States Senator is the *very* thing above all others the legislation was aimed at, to absolutely prevent the election of a Senator by refusing to make that *permanent* organization which the contestant insists is necessary before the legislature can elect a Senator.

Such a construction would, in the judgment of your committee, while there is nothing in the phraseology of the statute to warrant, much less compel it, and much to the contrary, would be absolutely and fatally destructive of the statute defining the time and manner of electing United States Senators.

It must be conceded not only that it is one of the important duties of the legislature of a State, but one among the most exalted, if indeed not the very highest duty incumbent on it, to choose Senators at the time and in the manner provided by law. It is a duty impressed by the National Constitution, and in its exercise or nonexercise is involved the very existence of that machinery absolutely essential to the full and perfect exercise of the functions of the National Government.

Therefore the great purposes in the Congress in enacting the law of 1866 was to remove every obstruction that might by factious opposition be thrown in the way of an election of Senator and to facilitate the exercise on the part of the legislatures of the several States of this high constitutional duty, and to the end that States might not go unrepresented in the Senate of the United States. That such was the purpose is manifest from the character of speeches made in the Senate by such eminent Senators as Lyman Trumbull, Reverdy Johnson, and others when the bill which finally became the act of July 25, 1866, regulating the election of United States Senators, was under consideration in the Senate. On July 11, 1866, when this bill was the pending measure in the Senate of the United States, Senator Trumbull, the member of the committee who reported the bill, said:

We think the public interest is not subserved by leaving a State unrepresented; the intention of the Constitution is that it should be represented, and it is for the public good that we should have a law that will produce uniformity in these elections and secure representation.

While Senator Reverdy Johnson, also a member of the committee, said:

The Government of the United States can not go on without a representation in the Senate of the United States. The Constitution assumes that every State in the Union will elect Senators; and the Constitution, in its spirit, is obligatory upon every State to make such an election. The only way, as I think, to compel the State to perform that constitutional obligation is to stop the wheels of the government of the State until that higher duty is performed. It is infinitely a higher duty upon the part of the States and the members of the legislatures of the several States to elect Senators of the United States, the Government of the United States being important to all the States, than it is to go on with their ordinary legislation.

IT IS CONCEDED BY CONTESTANT'S COUNSEL THAT THE LEGISLATURE WAS SUFFICIENTLY ORGANIZED MONDAY, DECEMBER 8, 1890, TO ENABLE IT TO ENACT LAWS THAT WOULD BE VALID.

Counsel for contestant, Mr. Shellabarger, conceded on the hearing that the temporary organization effected on Monday, December 8, was sufficient to enable the legislature to enact laws, and that such laws

would have been valid; while the contestant, Mr. Clagett, virtually, if we do not misinterpret his language, concedes the same thing when, in the printed brief last filed with the committee (p. 5), he says:

Nor have I ever held that a State legislature is not organized within the meaning of section 14 until both houses have supplied themselves with *all* the officers and assistants which they may choose to provide for themselves during the session, nor even with *all* [the italics are Mr. Clagett's] official force which the laws of the State may provide where such provision is made by State law.

If the concession of Mr. Shellabarger be well founded, as your committee have no doubt, it is clear that, in the absence of the statute of 1866 or the provisions of the Revised Statutes, the legislature could at that moment—December 8, 1890—in its discretion, have proceeded to the election of a United States Senator, and such election would have been valid.

It therefore follows, if the argument of the contestant be sound, that a legislature sufficiently organized for all purposes of legislation and also sufficiently organized for the election of a United States Senator, in the absence of this statute of 1866, is without power to make such election solely by the operation of the statute, which was intended not only to facilitate it, but to compel it.

It appears clearly to your committee that one of two things must be true—either it must be held that whenever a sufficient number of officers of each house of a legislative assembly under the law as it stood as applicable to the State of Idaho when the first legislature of that State convened, are elected to enable each of such houses to exercise fully all legislative functions, or otherwise that no such organization as is contemplated by the statute relating to the time and manner of the election of United States Senators is consummated until *all* of the officers of every grade are elected by each of such houses which each house may in its judgment determine to elect.

Your committee are of the opinion that the true line should be drawn at the date when each house has elected such officers and they have entered upon their duty as will enable the houses, respectively, to exercise their full functions as legislative bodies, and make, preserve, and certify a record thereof. In the case under consideration it is true the two houses did not notify each other, respectively, that the permanent organization was complete until Tuesday, December 9, but this fact raises no implication whatever that a perfect *temporary* organization did not take place as a matter of fact the day before, and the fact that the notice of organization was not given until Tuesday can not alter the fact that the organization was had on Monday.

The statute requires that the vote for Senator be taken on the second Tuesday after the meeting and organization of the legislature and not on the second Tuesday after the exchange of *notices* of the organization of the two houses; besides, in the case we are considering, the notices exchanged on Tuesday, December 9, related to the *permanent* organization of the two houses, and this fact is recited in the notices themselves, the notice from the senate reading:

I am instructed to inform your honorable body that the senate has *permanently* organized by the election of the following officers. \* \* \*

While the notice from the house reads:

I am instructed to inform your honorable body that the house of representatives has *permanently* organized, etc.

And it is submitted that the very fact that the notices exchanged on Tuesday recited that the organization referred to was a *permanent*

organization clearly implied, or if there was no such implication there was certainly nothing to negative the fact that a temporary organization had existed before such permanent organization had taken place.

#### PRECEDENTS.

In the case of the election of Wright and Howell to the Senate of the United States from the State of Iowa in 1870, the senate of Iowa met on Monday, January 10, 1870. On that day a few temporary officers were chosen, but the senators were not sworn. On Tuesday, January 11, 1870, the senators were sworn and the permanent officers were all elected; thereupon, as the journal of the senate of that day recites:

Senator Tuttle moved that a committee of three be appointed to inform the house that the senate is now organized and ready to proceed to business, which was agreed to; and the president appointed as such committee, Senators Tuttle, Beardsley, and Fellows.

Messrs. Wright and Howell were chosen United States Senators Tuesday, January 18, 1870, one week and one day after the temporary organization. This was a case, therefore, in which the senate met on Monday, and notified the house of its organization on Tuesday and a senator was elected on the next Tuesday thereafter, which is a precisely parallel case to that of the election of Mr. Dubois.

Again, in 1872, the senate of Iowa met Monday, January 8. A few temporary officers were chosen on that day, but the senators were not sworn. On Tuesday, January 9, the senators were sworn and all the permanent officers were chosen. The following proceeding, as shown by the journal, was then had:

Senator McNutt moved that a committee of two be appointed to inform the house that the senate was organized and ready for business, which motion prevailed, and Senators McNutt and Boomer were appointed such committee.

The house of representatives met January 8, 1872; some temporary officers were chosen, but the representatives were not sworn. On Tuesday, January 9, the journal shows the following proceeding was had:

On motion of Mr. Irish, Messrs. Campbell and Hewitt were appointed a committee to wait upon the senate and notify them that the house was organized and ready to proceed to business.

William B. Allison was elected United States Senator Tuesday, January 16, 1872, and in joint convention was duly declared elected Wednesday, January 17, 1872, another case parallel with that of the election of Mr. Dubois.

The same thing occurred in the Iowa legislature January 14, 1878.

#### OATH NOT NECESSARY.

But objection is made by the contestant that no oath of office was administered either to the secretary *pro tempore* of the Senate or to the chief clerk of the House of Representatives on Monday, December 8, 1890. But, in the judgment of your committee, no oath of office was then required, either by the Constitution of the United States, by the constitution of Idaho, or by any statute, Federal or State. It is provided in the Federal Constitution that *certain* State officers shall be bound by oath or affirmation to support the Constitution. Article 6 of the Federal Constitution contains the following provision:

The Senators and Representatives before mentioned, and the *members* of the several State legislatures, and all *executive* and *judicial* officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution.

While this clause of the Constitution of the United States requires members of the State legislatures to be sworn to support the Constitution of the United States, it does not require them to be sworn to support the State constitution, nor is there in it any requirement whatever that any *officers* of either house of the State legislature shall be sworn at all. It is only "*executive and judicial officers*" who are required to take the oath, and the officers of a State senate and house of representatives are neither executive nor judicial officers, they are ministerial officers. There is therefore no power vested in Congress, express or implied, which authorizes that body to prescribe an oath of office for the *officers* of either house of a State legislature. The act of Congress of June 1, 1789, third section, provides as follows:

And the members of the several State legislatures and all *executive and judicial officers* of the several States, who shall be chosen or appointed after the said first day of August, shall, before they proceed to execute the duties of their respective offices, take the foregoing oath or affirmation.

This was simply making operative as to the *members* of the State legislatures and *executive and judicial officers* of the States, the provision of the Federal Constitution on that subject, and therefore was clearly valid; but Congress, having no power under the Constitution, to embrace within its scope *officers* of the respective houses of the State legislature as such, who are not *executive or judicial officers*, did not include in the legislation such officers of the respective houses in the class who should be bound by oath or affirmation to support the Constitution of the United States. Each house, therefore, of the legislature of Idaho having the power to make its own rules, possessed the exclusive power and right to determine whether its officers shall or shall not be sworn.

Your committee are therefore of the opinion that neither by the Constitution of the United States nor the constitution of the State of Idaho, nor by any statute, was the secretary *pro tempore* of the senate or the chief clerk of the house of representatives required to be sworn in order to make good the organization of these respective bodies or of the legislature, within the meaning of the term "organization" as used in the Revised Statutes. The lieutenant-governor presided in the senate; he had already been sworn into office. The speaker of the house of representatives was sworn in on Monday, December 8, 1890.

The only tribunal to determine whether the secretary *pro tempore* of the senate should or should not be sworn was the senate itself, and until the senate was organized it could not possibly pass upon the question, and the same is true of the house of representatives of the State of Idaho. If, after organization had been completed, either or both of the houses had determined, by rule or otherwise, that the respective officers of their houses should be sworn, this fact could not possibly vitiate an organization. It is a fact, therefore, as your committee find, that all the offices of each house created in accordance with the State constitution were duly filled on Monday, December 8, 1890, and these, moreover, were all the offices that were necessary or in any manner required to enable the legislature and each house thereof to exercise its and their appropriate functions.

Some other and additional officers doubtless were necessary to enable this to be done with greater celerity, ease, and dignity; but these were not essential to the full exercise of every legislative function, nor were they necessary to an organization such as is contemplated by the statute.

**THE TERRITORIAL STATUTE NOT APPLICABLE, BESIDES IT IS MERELY DIRECTORY.**

It is suggested by the contestant, Mr. Clagett, that an old Territorial statute of the late Territory of Idaho requiring officers of the respective houses of the legislature of the late Territory to be sworn is still in force and applicable to the officers of the respective houses of the legislature of the State of Idaho. It is a matter of very grave doubt, in the first place, whether the statute referred to can be held to be in force and applicable to the officers of the legislature of a State. Your committee believe it can not be, for the reason that the offices of clerks of a Territorial legislative council and house are different offices from those of secretary *pro tempore* of a State senate and of chief clerk of a State house of representatives, and therefore the Territorial statute does not apply.

Inasmuch as each house of the State legislature has the right to determine as to its own organization, as to the number and kind of organs it shall have to represent its action, record its decrees, and aid in the transaction of its business, and as it is conceded there is no constitutional requirement, either Federal or State, such a statute, if applicable at all, must be regarded as merely directory; and your committee are clearly of the opinion that a failure of compliance with its provisions would in no manner affect the validity of an otherwise valid organization.

**THE LIEUTENANT-GOVERNOR, PRESIDENT OF THE SENATE, SPEAKER OF THE HOUSE, SECRETARY OF THE SENATE AND CHIEF CLERK OF THE HOUSE ALL CERTIFIED THAT TUESDAY, DECEMBER 16, WAS THE SECOND TUESDAY AFTER THE ORGANIZATION.**

That the leading officers, respectively, of the two houses of the Idaho legislature were of the opinion that the legislature of that State was duly organized on Monday, December 8th, A. D. 1890, is made clearly apparent by the certificate of such officers accompanying and constituting a part of the credentials, respectively, of Messrs. Shoup, McConnell, and Dubois. This certificate is dated Boise City, Idaho, December 19, 1890, and recites in terms that Tuesday, the 16th day of December, 1890, was "the second Tuesday after the meeting and organization of the legislature," and on the day following, Wednesday, at noon, December 17, 1890, both houses in joint assembly met and proceeded to vote for a United States Senator for the State of Idaho, and the same person not receiving a majority of the votes cast, said joint assembly adjourned and reconvened on Thursday, the 18th day of December, A. D. 1890, at noon and proceeded to ballot for a United States Senator. \* \* \* and then and there Fred T. Dubois received a majority of all the votes of the joint assembly and was thereupon, by the presiding officer of the joint assembly, declared duly elected a Senator of the United States for the State of Idaho for the term to begin March 4, 1891. This certificate is signed as follows:

Norman B. Willey, president of the senate; F. A. Fenn, speaker of the house of representatives; Charles H. Reed, chief clerk of the house of representatives; M. C. Athey secretary of the senate.

**THE CONTESTANT, CLAGETT, CONCEDES THE CASE TO MR. DUBOIS BY HIS DEFINITION OF THE TERM "ORGANIZATION."**

But the contestant, Mr. Clagett, it seems to us, concedes the case to the sitting member when, in his supplementary brief, page 5, he says:

(5) Nor have I ever held that a State legislature is not organized within the meaning of section 14 until both houses have supplied themselves with *all* the officers and



assistants which they may choose to provide for themselves during the session, nor even with *all* the official force which the laws of the State may provide where such provision is made by State law.

And then states his position to be as follows:

I affirm that the word "*organized*," as used in this section 14, and as applied to a legislative body, is used to signify that the entire body had come into the condition where it was authorized and enabled to proceed according to *settled parliamentary usage* in enacting laws; and when it was endowed with the *necessary* official force provided by the laws of the State for the transaction of the legislative business.

While your committee do not deem it necessary to concede and do not concede that the foregoing definition is in all its essentials a proper one of the term "*organization*," as used in the statutes, they submit that what was done by the two houses of the legislature of the State of Idaho, on Monday, December 8, A. D. 1890, brings the case within this definition. Each house had a presiding officer; each house had a recording officer; each house, in other words, was so organized as to authorize and enable the legislature to proceed according to parliamentary usage, and as such to perform the functions for which it was brought into existence.

Either house as then organized, and the two houses as then organized, had full power to legislate—to enact laws. Either house could have expelled a member, or performed any other function rightfully attaching to a legislative body.

What is organization [says Coleridge] but the connection of parts in and for a whole, so that each part is at once end and means \* \* \* to furnish with organs; to endow with the capacity for the functions of life.

If it be true, as claimed by the contestant, that a legislature is not organized within the meaning of the term organization as used in the Revised Statutes, where each house has a presiding officer and a recording officer *de facto*, if not *de jure*, and if it is further true as conceded by him, and as your committee agree that it is not necessary to an organization of a legislature within the meaning of that term as used in the Revised Statutes, that *all* the officers which the senate and house may deem proper to elect for convenience and the expedition of business, shall have been elected, then we repeat *where* is it, and *when* is it the line must be drawn between the two extremes, when the full requirement of the statute is met, and the organization is consummated within the meaning of the statute?

#### PRECEDENTS IN ORGANIZATION OF THE NATIONAL HOUSE OF REPRESENTATIVES.

The power of the house of representatives of the State of Idaho under the constitution of that State, and also the power of the senate of the State of Idaho under such constitution, save and except as to its presiding officer, is identical with the power of the House of Representatives of the United States under the Federal Constitution. The provisions of the Federal Constitution, and the only provisions bearing upon the question as to when the Senate or House of Representatives of the United States is organized, are as follows:

The House of Representatives shall be composed of members chosen every second year by the people of the several States. The House of Representatives shall choose their Speaker and other officers. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years. The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided. The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President of the United States. Each House shall

keep a journal of its proceeding. The Senators and Representatives before mentioned, and the members of the State legislatures, and all the executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution.

As the constitution of the State of Idaho does not expressly create any office for either house, except the office of presiding officer of the senate, so the Federal Constitution does not expressly create any office for either House of Congress, except the office of President of the Senate. It does not indicate what officers the respective Houses shall choose, save and excepting that the House of Representatives shall choose "their Speaker and other officers."

It is nowhere prescribed in the Constitution of the United States, except in the case of the presiding officer of the Senate, what officers shall be chosen by each House, except that the House shall have a Speaker; neither is there any limitation of the power of each House, respectively, to elect just such officers, and as many of them as each House may see fit, save and except in the case of the presiding officer of the Senate, which is created by the Constitution, and the Speaker of the House, whom the Constitution requires shall be elected by the House.

The only provisions of the constitution of Idaho bearing upon the question when the senate or house of representatives of that State is organized are the following:

The legislative power of the State shall be vested in a senate and house of representatives (Art. 3, Sec. 1). Each house when assembled shall choose its own officers (Art. 3, Sec. 9). The lieutenant-governor shall be president of the senate (Art. 4, Sec. 13). Each house shall keep a journal of its proceedings (Art. 3, Sec. 13). All bills and joint resolutions passed shall be signed by the presiding officers of the respective houses (Art. 3, Sec. 21). The members of the legislature shall, before they enter upon the duties of their respective offices, take or subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the constitution of the State of Idaho, and that I will faithfully discharge the duties of senator (or representative, as the case may be) according to the best of my ability (Art. 3, Sec. 25). In case of the absence or disqualification of the lieutenant-governor, from any cause which applies to the governor, or when he shall hold the office of governor, then the president *pro tempore* of the senate shall perform the duties of the lieutenant-governor until the vacancy is filled or the disability removed (Art. 4, Sec. 13).

Thus it will be seen the provisions of the constitution of Idaho, in so far as they relate to the officers of the two houses of the legislature are identical with those of the Federal Constitution relating to the officers of the Senate and House of Representatives of the United States. In each case the presiding officer of the senate is designated by the constitution. In the case of the constitution of Idaho the lieutenant-governor shall be the president of the senate, while under the Federal Constitution the Vice-President of the United States shall be President of the Senate.

Under the State constitution, "each house, when assembled, shall choose its own officers;" while under the Federal Constitution it is prescribed that "the House of Representatives shall choose their Speaker and other officers." In the case of the two Houses of Congress, therefore, the only officers prescribed or designated are (1) the President of the Senate, and (2) in the case of the House, a Speaker; while under the constitution of the State of Idaho, the presiding officer of the senate is the only officer named in the constitution. As to all other officers in both cases, namely, in the House of Congress and in the two houses of the legislature of the State of Idaho, the question as to the number and character of officers to be selected by the respective houses is felt entirely to the discretion of the houses themselves, except it may be very properly said, there is an implied power that each house shall elect

a chief clerk or other similar officer, whose duty it shall be to keep a record of the proceedings of the house.

In this view of the case it becomes interesting to inquire what officers the Senate and House of Representatives of the United States have decided to be essential to the organization of those bodies. It appears from the record of the fifty-one Houses of Representatives which have assembled since the organization of the Government eleven declared themselves organized and ready for the transaction of legislative business before the election of any officer other than Speaker, while twenty others were ready for the transaction of business and so declared themselves before the election of any officers except Speaker and Clerk. One House declared itself organized before any officers had been elected except Speaker, Clerk, and Sergeant-at-Arms.

Only nineteen Houses of Representatives out of fifty-one have elected all their officers before announcing themselves organized and ready to proceed to business. The Senate has at different times for periods aggregating thirty-two days transacted its ordinary business with the office of Secretary vacant. On not less, therefore, than eleven different occasions has the House of Representatives of the United States decided, and in this decision the Senate and the President have acquiesced, that it is an organized House when a quorum of the Representatives have assembled, taken the oath of office, and chosen a presiding officer.

The case under consideration, it will be conceded, is infinitely stronger. Inasmuch as in the senate of the State there was a presiding officer *de jure*, duly installed and exercising his functions, and also a secretary, *pro tempore*, while in the house there were not only duly elected a speaker and a chief clerk, each of whom entered on the duties of his respective office on that date, but all the other officers of the house that ever were elected during the whole session, save and except a chaplain, were elected on December 8. The House of Representatives has decided in at least thirty-three cases that it is an organized House when a quorum of the Representatives have assembled, taken the oath of office, and chosen presiding and reporting officers. Each and every one of these decisions must be held to be an authority in opposition to the contention that the election of *all* the officers of each branch of a legislature is essential to the organization of such legislature within the meaning of section 14 of the Revised Statutes.

Your committee, however, do not by any means base their decision in this case solely or at all on the House precedents, but rather upon the construction your committee place upon the provisions of the statute as an original proposition now before the Senate for the first time for its decision.

**THE IDEA THAT THE LEGISLATURE WAS NOT ORGANIZED ON MONDAY, DECEMBER 8, A. D. 1890, AN AFTERTHOUGHT.**

So far as appears from the journals of either senate, house, or joint assembly no protest based on the ground that the legislature was not organized on Monday, December 8, 1890, or that the organization did not occur until Tuesday, December 9, was ever made by anyone, nor was that question ever suggested by anyone opposed to the election of Mr. Dubois, or anyone else, until long after December 18, 1890, the date when he claims to have been elected. Not until February 6, A. D. 1891, was the question ever mooted, so far as appears from any record in the journal of either house of the legislature of the State of Idaho, that the organization of the legislature had not taken place until Tuesday, December 9, 1890.

Prior to that date, however, on January 10, 1891, a protest against

the election of Mr. Fred T. Dubois was presented to the Senate of the United States and on that date referred to the Committee on Privileges and Elections. This protest was signed by twenty-three members of the legislature of the State of Idaho. It contains no date, nor is there any evidence in the record tending to show the date when this protest was signed. It is fair to presume, therefore, that the same was signed at or about the time or shortly before the time when the same was presented to the Senate.

This protest contains the first intimation, so far as appears from any evidence submitted to your committee, except as hereinafter stated, that the date of the organization of the legislature was questioned, or in which it was claimed that the organization did not take place on Monday, December 8, A. D. 1890, as had up to that date been assumed by the *whole legislature*, and which fact had been certified to twice, on two different dates, by the governor and secretary of state, and also once by the speaker and chief clerk of the house and the secretary *pro tempore* of the senate. And even this protest virtually concedes the organization of the house of representatives on Monday, December 8, but insists that the senate did not organize on that date and claims it was not organized until Tuesday, the 9th day of December, 1890.

Nor was this protest, it will be observed, the action of the legislature or of either house thereof, nor was it ever made a part of the record proceedings of the legislature or either house thereof; and not until February 6, A. D. 1891, just fifty days after the date on which Mr. Dubois claims to have been elected, was the question ever raised by either house to the effect that the legislature of the State had not been organized on Monday, December 8, and then the question was only incidentally raised in a preamble and resolution adopted by the senate on that date—the recital in the preamble being to the effect that the legislature was organized on Tuesday, December 9, 1890.

Various other matters were recited in the preamble to the resolution, such as that the State constitution and the admission act required that *two* United States Senators should be elected within ten days after the organization of the legislature; that such legislature had, on the 16th day of December, 1890, voted for a United States Senator in the two houses, acting separately, and thereafter, as provided by law, met in joint assembly on December 18, and within ten days after its organization elected, in the manner provided by law, the honorables George L. Shoup and William J. McConnell United States Senators, and thereupon immediately proceeded to vote for Hon. Fred T. Dubois for the term beginning March 4, 1891, *in advance of the drawing for terms by the two Senators elected in advance of the time fixed by law*, and without first voting in the two houses, acting separately, and against the protest of the members of the joint assembly, the preamble finally concluding as follows: "After full consideration of the facts, it is the opinion of the legislature that if the alleged election of said Hon. Fred T. Dubois is not void, there is at least grave doubt as to its validity," after which followed the resolution, which is as follows:

*Resolved by the senate (the house of representatives concurring):* That at the hour of 12 o'clock meridian of the first legislative day after the passage of this resolution the legislature will proceed to elect a United States Senator to succeed Hon. William J. McConnell, for the term beginning March 4, 1891, and that such election shall be conducted in all respects in the manner provided in section 15 of the Revised Statutes of the United States.

Then followed five days subsequently, February 11, A. D. 1891, the voting for and alleged election of the contestant, Mr. Clagett.

It is very plain to your committee that even at this time no reliance

whatever was placed upon the question *now* urged as the one on which main reliance is placed, namely: That the legislature was not organized on Monday, December 8, as claimed by Mr. Dubois.

The real ground of this protest evidently was that the legislature had no right to elect a *third* Senator until after the drawing had taken place between Senators Shoup and McConnell.

It is true John S. Gray, a member of the senate of the State legislature of Idaho, in an *ex parte* affidavit made on the 19th day of February, A. D. 1891, and attached to the memorial of Mr. William H. Claggett, the contestant, states that he, on December 18, 1890, when the joint assembly met, opposed the resolution offered by Senator Gunn to go into the election of the third Senator at that time, and urged several objections, among others, as he states, that the legislature was not organized until December 9, 1890; but the record of the proceedings of the joint assembly of that date filed with your committee by Mr. Claggett, the contestant, fails to disclose any opposition, either on the part of Senator Gray or any other member *upon such grounds*. The following is the full record of the proceedings of this joint assembly, as appears from the journal filed with your committee:

#### JOINT SESSION.

The joint session of the two houses was called to order by the lieutenant-governor, the president of the senate.

The roll of the senate then called by the secretary of the senate.

All present.

The chief clerk then called the roll of the house.

All present.

The chief clerk of the house read from the journal of the house of yesterday that portion relating to the joint assembly; which was approved.

Senator Gunn offered the following resolution:

*Resolved, by the joint assembly of the senate and house of representatives of the legislature of the State of Idaho, That we proceed to elect two United States Senators to fill vacancies, and that after such elections we immediately proceed to elect one United States Senator to fill vacancy occurring March the 4th, 1891."*

Senator Gray then offered the following amendment:

I move to amend the resolution to read as follows: "That we do now proceed to elect one Senator from North Idaho, and then proceed to elect one Senator from South Idaho, to fill vacancies now existing."

Senator Gunn raised the point of order that the amendment was not in order; which was sustained by the chair.

Senator Gray then withdrew his amendment, and offered the following as a substitute for the original resolution:

I move that the resolution read as follows: "That we proceed to elect two Senators to fill the vacancies now existing."

The question being on the adoption of the substitute, the ayes and nays were called for and taken, with the following result:

#### SENATE ROLL CALL.

Ayes—Branstetter, De Lamar, Dempsey, Finch, Gray, Jewell, Langrische, White; total, 8.

Nays—Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells, Wing; total, 10.

#### HOUSE ROLL CALL.

Ayes—Armstrong, Ballentine, Cameron, Casey, Dryden, Emory, Hanley, Hawkins, Irwin, Jones, Martin, Porter, Scofield, Smith, W. H. Smith, B. H. Sperry, Steunenberg; total, 17.

Nays—Briggs, Caldwell, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, King, Lyons, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Suydam, and Swanger; total, 19.

Total ayes in all, 25.

Total nays in all, 29.

And so the substitute was rejected.

The question recurring on the original resolution, the ayes and nays were taken, with the following result:

## IDAHO SENATORIAL CONTEST.

## ROLL CALL OF SENATE.

Ayes—Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells, Wing; total, 10.

Nays—Branstetter, De Lamar, Dempsey, Finch, Gray, Jewell, Langrische, White; total, 8.

## ROLL CALL OF HOUSE.

Ayes—Briggs, Caldwell, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, King, Lyons, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Suydam, Swanger; total, 19.

Nays—Armstrong, Ballentine, Cameron, Casey, Dryden, Emery, Hanley, Hawkins, Irwin, Jones, Martin, Porter, Scofield, Smith, W. H., Smith, B. H., Sperry, Steunenberg; total, 17.

Total ayes in all, 29.

Total nays in all, 25.

And so the resolution was adopted.

The president directed that the joint assembly proceed to the election of a United States Senator to fill an existing vacancy by a *viva voce* vote of each member present.

The rolls of the respective houses were then called, with the following result:

Total number of votes, 54; of which George L. Shoup received 31, William H. Claggett received 12, Alexander E. Mayhew received 10, W. J. McConnell received 1.

Those voting for George L. Shoup were: Messrs. Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, and Wells, of the senators; and Messrs. Briggs, Caldwell, Emery, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, King, Lyon, Martin, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Smith W. A., Suydam, and Swanger, of the house—31.

Those voting for William H. Claggett were: Messrs. De Lamar, Finch, Gray, and Langrische, of the senate; and Messrs. Armstrong, Cameron, Casey, Hanley, Hawkins, Porter, Scofield, and Sperry, of the house—12.

Those voting for Alexander E. Mayhew were: Messrs. Branstetter, Dempsey, Jewell, and White, of the senate; and Messrs. Ballentine, Dryden, Irwin, Jones, Smith B. H., and Steunenberg, of the house—10.

Mr. Emery moved to adjourn for William H. McConnell.

George L. Shoup, having received a majority of all the votes cast, was declared duly elected United States Senator.

Mr. Emery moved to adjourn, upon which the yeas and nays were called and taken, with the following result:

## ROLL CALL OF SENATE.

Ayes—Branstetter, De Lamar, Dempsey, Finch, Gray, Jewell, Langrische, White; total, 8.

Nays—Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells, Wing; total, 10.

## ROLL CALL OF HOUSE.

Ayes—Armstrong, Ballentine, Cameron, Casey, Dryden, Emery, Hanley, Hawkins, Jones, King, Porter, Scofield, Smith, W. H., Smith, B. H., and Steunenberg; total, 15.

Nays—Briggs, Caldwell, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, Lyons, Martin, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Sperry, Suydam, Swanger, Mr. Speaker; total, 20.

Ayes in all, 23.

Nays in all, 30.

And so the motion to adjourn was lost.

The joint assembly then proceeded to the election of a United States Senator to fill the other existing vacancy.

## SECOND BALLOT.

The rolls of the respective houses were then called with the following results:

Total number of votes cast, 54; of which W. J. McConnell received 29, Wm. H. Claggett received 15, and Geo. Ainslie received 10.

Those voting for W. J. McConnell were: Messrs. Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells, and Wing, of the senate; and Messrs. Briggs, Caldwell, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, Lyon, Martin, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Suydam, and Swanger, of the house—29.

Those voting for W. H. Claggett were: Messrs. De Lamar, Finch, Gray, Langrische,

of the senate; and Messrs. Armstrong, Cameron, Casey, Emery, Hanley, Hawkins, King, Porter, Scofield, Smith, W. H., and Sperry, of the house—15.

Those voting for Mr. Ainslie were: Messrs. Branstetter, Dempsey, Jewell, and White, of the senate; and Messrs. Ballentine, Dryden, Irwin, Jones, Smith, B. H., and Steunenberg, of the house—10.

Mr. McConnell having received a majority of all the votes cast was declared duly elected United States Senator.

Senator Gray moved to adjourn, upon which the ayes and nays were called for and taken, with the following result:

#### ROLL CALL OF SENATE.

**Ayes**—Branstetter, De Lamar, Dempsey, Finch, Gray, Jewell, Langrische, White, and Wing; total, 9.

**Nays**: Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells; total, 9.

#### HOUSE ROLL CALL.

**Ayes**—Armstrong, Ballentine, Cameron, Casey, Dryden, Emery, Hanley, Hawkins, Irvine, Jones, Porter, Scofield, Smith, W. H., Smith, B. H., Sperry, Steunenberg; total, 16.

**Nays**—Briggs, Caldwell, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, King, Lyons, Martin, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Suydam, and Swanger; total, 20.

Total of all ayes, 25.

Total of all nays, 29.

And so the motion to adjourn was lost.

The joint assembly then proceeded to the election of a United States Senator, whose term should begin March 1, 1891.

By request of Senator Gray his objection to the election of a third United States Senator is entered on the journal.

#### THIRD BALLOT.

The rolls of the respective houses were called with the following result:

Total number of votes cast, 54; of which Fred T. Dubois received 32, Wm. H. Claggett received 12, and John Haley received 10.

Those voting for Mr. Dubois were: Messrs. Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells, and Wing, of the Senate; and Messrs. Briggs, Caldwell, Casey, Ethel, Fenn, Fredrickson, Goodnight, Green, Hixon, King, Lyons, Martin, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Sperry, Suydam, and Swanger of the house—32.

Those voting for Wm. H. Claggett were: Messrs. De Lamar, Finch, Gray, and Langrische, of the Senate; and Messrs. Armstrong, Cameron, Emery, Hanley, Hawkins, Porter, Scofield, Smith, W. H., of the house—12.

Those voting for Mr. Haley were: Messrs. Branstetter, Dempsey, Jewell, and White, of the Senate; and Messrs. Ballentine, Dryden, Irwin, Jones, Smith, B. H., and Steunenberg of the house—10.

Mr. Dubois, having received a majority of all the votes cast, was declared duly elected United States Senator for the term commencing March 1, 1891.

On motion of Mr. Wells the joint assembly dissolved.

#### HOUSE IN SESSION.

Mr. Speaker in chair.

On motion of Mr. Green the house adjourned.

F. A. FENN,  
*Speaker.*

Attest:

CHAS. H. REED, *Chief Clerk.*

It will be seen from this record that the only protest against the resolution of Senator Gunn, made by Senator Gray, was first, he moved to amend the resolution by providing that the joint convention should then proceed to elect one Senator from North Idaho, and then proceed to elect one Senator from South Idaho to fill vacancies then existing. This amendment was ruled out of order by the chair and was there-

upon withdrawn by Senator Gray, who then offered as a substitute the following:

That we proceed to elect two senators to fill vacancies now existing.

This substitute was rejected—25 ayes, 29 noes. Senator Gunn's resolution was then adopted. This seems to be the only protest offered to the resolution of Senator Gunn by Senator Gray, and no other protest or objection seems to have been made by any other member of the joint assembly.

**THE GOVERNOR OF THE STATE OF IDAHO CERTIFIED TWICE UNDER HIS HAND AND THE GREAT SEAL OF STATE THAT MR. DUBOIS WAS DULY ELECTED SENATOR THURSDAY, DECEMBER 18, A. D. 1890, AND THAT THE PRECEDING TUESDAY WAS THE SECOND TUESDAY AFTER THE ORGANIZATION OF THE LEGISLATURE.**

But the governor of the State of Idaho, Hon. Norman B. Willey, although he on the 14th day of February, 1891, signed the credentials of the contestant certifying to his election as Senator from the State of Idaho for the full term commencing March 4, 1891, had previously to that, first on the 19th day of December, 1890, in connection with the speaker of the house, and the chief clerks, respectively, of each house certified that the election of Mr. Dubois for the same term had taken place on Thursday, the 18th day of December, A. D. 1890, and that the preceding Tuesday was the *second Tuesday after the meeting and organization of the legislature*, and also had on the 23d day of December, 1890, certified over his own signature, as follows:

That at a joint session of the senate and house of representatives of said State, duly convened and held at Boise City, Idaho, the capital of said State, on the 18th day of December, 1890, a majority of the members of the senate and house of representatives being present and voting, Fred T. Dubois received a majority of all the votes cast at said joint session for Senator for the State of Idaho for the full term, commencing March 4, A. D. 1891, and was *duly elected and so declared elected* as said Senator for said term by the presiding officers of said joint session as provided by law.

Given under my hand and the seal of the State of Idaho the day and year first above written.

NORMAN B. WILLEY,  
Governor.

By the governor:  
A. J. PINKHAM,  
*Secretary of State.*

**THERE WAS A VOTE IN THE SEPARATE HOUSES ON THE SECOND TUESDAY AFTER THE ORGANIZATION OF THE LEGISLATURE.**

Some objection is made that a vote was not taken in the houses separately prior to the convening of the joint assembly. This is incorrect. The record filed with your committee shows that senate concurrent resolution No. 3 was adopted by both houses. This resolution was as follows, having been offered by Mr. Gunn in the senate:

*Resolved by the Senate (the House concurring),* That the senate and house of representatives proceed to elect, as provided by law, United States Senators at the hour of 12 o'clock m., on Tuesday, the 16th day of December, 1890;

Which was on that date, December 12, on motion of Mr. Gunn, referred to the committee on judiciary, of which Senator Gray was chairman. On the following day, December 13, 1890, Senator Gray, from the committee on judiciary, submitted the following report:



SENATE CHAMBER, *December 13, 1890.*

Mr. PRESIDENT: The judiciary committee, to whom was referred senate concurrent resolution No. 3, that the senate and house of representatives proceed to elect, as provided by law, United States Senators at the hour of 12 o'clock m., on Tuesday, December 16, 1890, have had the same under consideration, and respectfully report the same back with the recommendation that it do pass.

GRAY, *Chairman.*

The resolution was then, December 13, 1890, taken up, considered, and on motion of Senator Gunn adopted, and, so far as the record shows, without any opposition. It was sent to the house on December 16, and at 11:30 o'clock a. m. the same came up for consideration. Mr. Steuenberg moved that the rules be suspended and the resolution read a third time and placed on its final passage. On this motion 35 votes were cast in the affirmative, the votes of all the members constituting the house of representatives, save and except one, Representative Mills, who was noted absent.

So the rules were suspended, the resolution was read a third time, and the question being, "Shall the resolution pass?" the ayes and noes were taken, with the following result: Ayes 35, being the votes of all the members present, and all the members constituting the house of representatives except one; noes, 0.

The hour of 12 o'clock meridian then having arrived on December 16, 1890, the speaker announced as the next business in order the balloting for United States Senators, and directed the clerk to call the roll. The following is the journal proceedings of the house of that date:

The roll being called, thirty-five votes were cast, of which

Wm. H. Clagett received 6.

Fred T. Dubois received 13.

Edward A. Stevenson received 6.

Wm. J. McConnell received 5.

Geo. L. Shoup received 5.

The members voting for Mr. Clagett were: Messrs. Armstrong, Cameron, Hanley, Porter, Scofield, and Sperry—6.

Those voting for Mr. Dubois were: Messrs. Briggs, Caldwell, Ethel, Frederickson, Goodnight, Hixon, King, Lyon, Merrell, Monroe, Price, Ramsey, and Mr. Speaker—13.

Those voting for Mr. Stevenson were: Messrs. Ballentine, Dryden, Irwin, Jones, Smith, B. H., and Steuenberg—6.

Those voting for Mr. McConnell were: Messrs. Casey, Green, Hawkins, Martin, and Scattaboe—5; and

Those voting for Mr. Shoup were: Messrs. Emery, Porter, Pyeatt, Smith, W. H., and Swanger—5.

Mr. Mills being absent.

And so the speaker announced that the house of representatives has failed to give a majority of the whole number of votes cast to any person.

On motion of Mr. Emery, the house took a recess until 2:30 o'clock p. m.

On motion of Mr. Caldwell, the house adjourned.

F. A. FENN, *Speaker.*

Attest:

CHAS. H. REED, *Chief Clerk.*

The record discloses the following proceedings of the separate vote in the senate on December 16 at 12 o'clock meridian, the time fixed by the foregoing resolution:

NINTH DAY.

SENATE CHAMBER,  
*Boisé, Dec. 16, 1890.*

The senate met at 11:30 o'clock a. m., pursuant to adjournment.

Mr. President in the chair.

Prayer by the chaplain.

Roll called.

All present except Mr. De Lamar, who was excused.

Journal of yesterday was read, corrected, and approved.

\* \* \* \* \*

At 12 o'clock meridian the president announced the business before the senate to be the consideration of the subject contained in senate concurrent resolution No. 3, to wit, the election of United States Senators.

After the reading of that portion of the United States Revised Statutes relating thereto, the senate proceeded to vote for United States Senator. Upon calling the roll, the vote stood as follows:

Those who voted for Fred T. Dubois were Messrs. Rogers, Smith, Underwood, and Weiler—4.

Those who voted for George L. Shoup were Messrs. Gray, McPherson, and James M. Shoup—3.

Those who voted for W. J. McConnell were Messrs. Brigham, Gunn, Wells, and Wing—4.

Those who voted for Wm. H. Clagett were Messrs. Finch and Langrische—2.

Those who voted for Mr. Ed. A. Stevenson were Messrs. Branstetter, Dempay, Jewell, and White—4.

Whole number of votes cast, 17. Necessary to a choice, 9.

The president announced that not a majority of all the senators elected having voted for United States Senator, therefore there has been no election.

Mr. Gunn moved that the senate do now proceed to elect a second United States Senator to fill the existing vacancy.

Mr. Weiler moved that the senate take a recess until 2 o'clock p. m.

Which motion prevailed.

Senate resumed its session at 2 o'clock p. m.

Mr. President in the chair.

Roll called.

All present except Messrs. De Lamar and Weiler.

\* \* \* \* \*

#### MESSAGE FROM THE HOUSE.

OFFICE OF CHIEF CLERK OF HOUSE OF REPRESENTATIVES,  
Boisé City, Dec. 16, 1890.

MR. PRESIDENT: I am instructed to inform your honorable body that the house of representatives has had under consideration and has passed senate concurrent resolution No. 3, requiring the senate and house of representatives to proceed to elect United States Senators as provided by law, which are herewith transmitted.

CHARLES H. REED, *Chief Clerk.*

At 4:30 o'clock p. m., on motion of Mr. Gunn, the senate adjourned until 10 o'clock a. m. to-morrow.

N. B. WILLEY,  
*President of the Senate.*

Attest:

M. C. ATHEY, *Secretary.*

It will be observed, therefore, that a separate vote for United States Senators was taken in each house of the legislature of Idaho separately on Tuesday, December 16, 1890, at 12 o'clock, meridian. Mr. Clagett, Mr. Dubois, Mr. Shoup, and Mr. McConnell each receiving votes in each house, the voting being in pursuance of senate resolution No. 3, aforesaid, which provided not for the election of a Senator or Senators for any given or specified term, but which provided simply for the election of United States Senators *as provided by law.*

No person having received a majority of all the votes cast in both houses, or in fact in either house, the two houses, as provided in the Revised Statutes, met in joint assembly in the hall of the house of representatives on December 17, 1890, at 12 o'clock meridian, and were called to order by the lieutenant-governor, acting in his official capacity as the president of the senate. The roll of the senate was then called by the secretary of the senate, all the senators being present. The chief clerk then called the roll of the house, all the members being present except Mr. Mills, who had been excused. The president then read from the Revised Statutes of the United States that portion relating to the

election of United States Senators. The further proceedings of the joint assembly, as appears from the journal, were as follows:

The secretary of the senate read from the journal that portion of the proceedings of yesterday relating to the ballot taken for United States Senators, and the chief clerk of the house read from the journal of the house yesterday that portion relating to the ballot for United States Senators.

It appearing therefrom that the same person has not received a majority of all the votes in each house, the president directed that the joint assembly proceed to choose, by a *viva voce* vote of each member present, a Senator.

The rolls of the respective houses were then called with the following result:

Total number of votes cast were 53, of which William J. McConnell received 9, William H. Clagett received 8, Geo. L. Shoup received 9, Fred T. Dubois received 17, Alexander E. Mayhew received 3, Edward A. Stevenson received 7.

Those voting for Mr. McConnell were Messrs. Brigham, De Lamar, Gunn, Wells, and Wing, of the senate; and Messrs. Casey, Green, Martin, and Scattaboe, of the house—9.

Those voting for Mr. Clagett were Messrs. Finch, and Langrishe, of the senate; and Messrs. Armstrong, Cameron, Hanley, Porter, Scofield, and Sperry, of the house—8.

Those voting for Mr. Shoup were Messrs. Gray, McPherson, and Shoup, of the senate; and Messrs. Emery, Hawkins, Pyeatt, W. H. Smith, Suydam, Swanger, of the house—9.

Those voting for Mr. Dubois were Messrs. Rodgers, Smith, Underwood, and Weiler, of the senate; and Messrs. Briggs, Caldwell, Ethel, Frederickson, Goodnight, Hixson, King, Lyon, Merrill, Monroe, Price, Ramsey, and Mr. Speaker—17.

Those voting for Mr. Stevenson were: Messrs. Branstetter, Dempsey, Jewell, and White, of the senate, and Messrs. Irwin, Jones, and B. H. Smith, of the house—7.

And those voting for Mr. Mayhew were: Messrs. Ballentine, Dryden, and Stunnenberg, of the house—3.

Absent: Mr. Mills, of the house.

No person having received a majority of all the votes cast, Mr. Wells moved that a second vote be taken; which motion prevailed.

#### SECOND BALLOT.

The rolls of the respective houses were then called, with the following result: Total number of votes cast, 53; of which William J. McConnell received 5, Fred T. Dubois received 17, William H. Clagett received 8, Geo. L. Shoup received 13, Alexander E. Mayhew received 5, and Edward A. Stevenson received 5.

Those who voted for Mr. McConnell were: Mr. Brigham of the senate, and Messrs. Casey, Green, Martin, and Scattaboe, of the house—5.

Those who voted for Mr. Dubois were: Messrs. Rodgers, Smith, Underwood, and Weiler, of the senate, and Messrs. Briggs, Caldwell, Ethel, Frederickson, Goodnight, Hixson, King, Lyon, Merrell, Monroe, Price, Ramsey, and Mr. Speaker, of the house—17.

Those voting for Mr. Clagett were: Messrs. Finch and Langrishe, of the senate, and Messrs. Armstrong, Cameron, Hanley, Porter, Scofield, and Sperry, of the house—8.

Those voting for Mr. Shoup were: Messrs. De Lamar, Gray, Gunn, McPherson, Shoup, Wells, and Wing, of the senate, and Messrs. Emery, Hawkins, Pyeatt, W. H. Smith, Suydam, Swanger, of the house—13.

Those voting for Mr. Mayhew were: Messrs. Ballentine, Dryden, Irwin, Jones, and Stunnenberg, of the house—5.

Those voting for Mr. Stevenson were: Messrs. Branstetter, Dempsey, Jewell, and White, of the senate, and Mr. B. H. Smith, of the house—5.

No person having received a majority of all the votes cast, the president declared there was no election.

On motion of Mr. Gray, of the senate, the joint assembly adjourned.

\* \* \* \* \*

Two ballots having been taken without an election, the joint assembly of the two houses adjourned, and met again in joint assembly in the hall of the house of representatives the next day, Thursday, December 18, 1890, at 12 o'clock meridian, and proceeded to elect, and did elect, three United States Senators—Messrs. Shoup, McConnell, and Dubois. The proceedings of such joint convention are set out *supra*.

But conceding, for the argument, that no action was taken on the second Tuesday after the organization of the Idaho legislature by a vote separately in the two houses in regard to the third Senator who

was to be elected, then such omission could in no wise affect the validity of the election of Mr. Dubois in the joint assembly if in all other respects there was a compliance with the provisions of the statute. This is made clear by the express words of the statute of July 25, 1866, now section 15 of the Revised Statutes, relating to the duty of the joint assembly, which reads as follows:

But if the same person has not received a majority of the votes in each House, or if either House has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose \* \* \* etc.

This precise question was presented and decided in the case of *Hart vs. Gilbert* in the Forty-first Congress. Senator Trumbull submitted the report of the committee, which was agreed to. The following is an abstract from this report:

The only ground for the other objection arises from the fact that the legislature failed to take action, on the "second Tuesday after its organization," in regard to the third Senator who was to be elected; but it took action on the subject of electing Senators, and actually voted, though unsuccessfully, on that day for persons to fill the two existing vacancies.

The object of the act of Congress was to insure the election of Senators by the proper legislature, and to fix a time when proceedings for that purpose should be commenced and continued till the elections were effected.

The legislature by which the sitting members was elected was the one chosen next preceding the term which would commence on the 4th of March, 1863, and was, therefore, the proper legislature to elect. "The second Tuesday after the meeting and organization of the legislature" was the time prescribed by the act of Congress for initiating the election of Senators, and that was the time when the legislature proceeded to that business. There being three Senators to elect, it took action on that day only in reference to two of them. Did its failure to take action on that day, and the two subsequent days (which were occupied in electing the first two Senators), in reference to the third Senator, render his election, in all other respects regular, invalid? The committee think not.

The language of the law is: "In case no person shall receive such majority on the first day, the joint assembly shall meet at 12 o'clock meridian of each succeeding day during the session of the legislature, and take at least one vote till a Senator shall be elected." No formal adjournment from day to day by vote of the joint assembly was necessary, but it was the duty of the members of each house to meet, in joint assembly, at noon of each day and vote at least once, till all the Senators whom the legislature had the right to elect were chosen. This is exactly what the legislature did.

In no view which the committee can take would the petitioner be entitled to a seat in the Senate; for if the election of the sitting Senator was irregular, that of the petitioner, by the same legislature at a subsequent session, was equally so.

Again the same question is substantially decided by the Senate in the case of the election of J. W. Flanagan and M. C. Hamilton as United States Senators from the State of Texas. That State was admitted to representation in Congress March 30, 1870. On the 22d day of February, 1870, without any previous authority from Congress, the legislature of the State elected Mr. Flanagan United States Senator for the term ending March 3, 1875, and also at the same time elected M. C. Hamilton United States Senator for *two* terms, namely, the term ending March 3, 1871, and the term ending March 3, 1877. Senator Stewart, of Nevada, submitted the report of the committee, declaring Mr. Hamilton legally elected for the term ending March 3, 1877, and he was admitted without debate or division.

THE ELECTION OF MR. DUBOIS WAS WITHIN THE TIME FIXED BY THE ACT OF ADMISSION AND THE STATE CONSTITUTION, PROVIDED THESE PROVISIONS SHOULD BE HELD APPLICABLE TO HIS CASE.

While your committee are clearly of the opinion that the election of Mr. Dubois was valid under the provisions of the Revised Statutes, it

is proper that the fact should be stated that in the event it should be held (and upon this point your committee being divided express no opinion) that an election of a Senator for the full term commencing March 4, A. D. 1891, could have been legally had under the provisions of the constitution of the State of Idaho, and of the act of Congress admitting that State into the Union, then your committee agree that Mr. Dubois's election is also valid under those provisions. These constitutional and statutory provisions changed the law as to the *time* within which at least the first two Senators from the State of Idaho could be elected from the second Tuesday *after* the meeting and organization of the legislature, as provided in the Revised Statutes, to within ten days after its organization.

The legislature met and organized, as found by your committee, on Monday, December 8, while contestant claims the organization was not effected until Tuesday, December 9; so, in any event, inasmuch as the election of Mr. Dubois took place on Tuesday, December 18, it was *within ten days after the organization of the legislature*, and therefore valid, under the provisions of the State constitution and those of the act of Congress admitting the State in the Union provided they should be made applicable, as some members of your committee believe they should be, to this election.

WHEN THE ORGANIZATION TAKES PLACE ON A TUESDAY, WHEN SHOULD THE VOTING IN SEPARATE HOUSES TAKE PLACE?

In this case the claim has been made upon the part of the sitting member, Mr. Dubois, that in the event it should be held that the organization contemplated by section 14 of the Revised Statutes means necessarily a *permanent* organization, which in this case it is conceded did not take place until Tuesday, December 9, although consummated prior to 12 o'clock meridian of that day, that still the next Tuesday following would be, within the meaning of the fourteenth section of the Revised Statutes, the second Tuesday after the meeting and organization of the legislature.

While under the view taken of this case by the committee it is not necessary to decide this question, your committee are clearly of the opinion that this contention upon the part of Mr. Dubois is not well founded. It is the opinion of your committee that in the computation of time in respect of the provisions of this statute the first day, that is, the day of organization, must in the count be excluded; consequently, where the organization takes place on a Tuesday, the second Tuesday after the meeting and organization provided in the statute would be two weeks from that date.

IMMATERIAL ISSUES.

An immaterial issue was raised in the hearing before your committee, and both parties were permitted to argue it, involving the good faith of Mr. Dubois and others in connection with certain resolutions in each of the State platforms of the two political parties in the State of Idaho in the campaign preceding the election of the first legislature of the State of Idaho, and under and in pursuance of which it is claimed that one Senator should have been chosen from northern Idaho and another from southern Idaho, the State being thus geographically divided. This, however, being a wholly immaterial matter, one which can have no possible bearing upon the legal and constitu-

tional questions involved, and which can properly have no influence whatever in determining the legality of the election of either the sitting member or the contestant, your committee do not feel called upon to express any opinion whatever on the issue thus presented.

Counsel for Mr. Dubois has also argued in his printed brief at some length that even conceding Mr. Dubois was not legally elected, and that therefore there existed a vacancy on February 11, 1891, the date when the contestant, Mr. Clagett, claims to have been elected, that the alleged election of the latter, for sundry reasons suggested, was not legal. But as your committee find that Mr. Dubois *was* legally elected December 18, 1890, for the same term for which Mr. Clagett claims to have been elected February 11, 1891, it follows there was no vacancy on the latter date and it is unnecessary, therefore, to consider the questions involved in the alleged election of Mr. Clagett.

#### THE CONCLUSION.

In conclusion it is now conceded on all sides, and of this there can be no question, that it was not only the *right* but the *duty* of the legislature of the State of Idaho which convened Monday December 8, A. D. 1890, to elect not only two Senators for the two then-existing vacancies, but also a third Senator for the full term commencing March 4, A. D., 1891, as it was then certainly known to the legislature that there would be a vacancy for such term, and it was also known that such term would commence before another legislature of the State would be convened. Senators Shoup and McConnell were, as all concede, duly elected to fill the two then-existing vacancies, while in the judgment of your committee Mr. Fred T. Dubois was at the same time, on December 18, A. D. 1890, duly and legally elected Senator for the full term commencing March 4, A. D. 1891.

It was a legal certainty from the moment of the election of Messrs. Shoup and McConnell that the term of one or the other of these Senators would expire March 4, 1891. It was at that time a legal certainty that the three classes of Senators whose terms were to expire March 4, 1891, 1893, and 1895, respectively, were required by the Federal Constitution to be equal in number as nearly as possible, and it was a legal certainty that when Senators Shoup and McConnell were sworn as Senators the classes of Senators whose terms were to expire March 4, 1893, and March 4, 1895, respectively, contained each 29 Senators, while the class of Senators whose terms were to expire March 4, 1891, contained only 28. It was therefore a legal certainty that one of the two Idaho Senators was a member of the latter class, and that, too, not by virtue of any act of the Senate, but by the operation of the Constitution itself. The function of the Senate of the United States was not to determine whether *one* of the two terms expired March 4, 1891, but to determine *which* one of the two terms expired on that day.

Your committee hold, both on construction and precedent, that the first legislature of the State of Idaho was organized on Monday, December 8, A. D. 1890, within the meaning of the term "organization," as used in the constitution of the State of Idaho, in the act of admission, and in the Revised Statutes. The election of Mr. Dubois took place on Thursday, the 18th day of December, A. D. 1890.

Tuesday, the 16th day of December, A. D. 1890, was, in the judgment of your committee, the second Tuesday after the meeting and organization of the legislature of the State of Idaho. On that date a separate vote for Senator was taken *viva voce* in each house of the legislature as provided by the Revised Statutes. There being no election, the two

houses met in joint assembly on Wednesday, the 17th day of December, A. D. 1890, at 12 o'clock meridian in pursuance of the Revised Statutes, and took two ballots for United States Senator.

There being no election the joint assembly again reconvened at 12 o'clock meridian Thursday, December 18, A. D. 1890, all the members of the two houses save one being present and voting, at which time Mr. Fred T. Dubois received the *viva voce* votes of 10 senators, the whole number of senators constituting the senate of the State of Idaho being 18. He received 22 votes from as many members of the house of representatives, the whole number of members constituting the house being 36, making in all 32 votes that were cast for the sitting member, Mr. Dubois, the whole number of members of the legislature of the State of Idaho being 54.

Your committee therefore report back the following resolutions and recommend their adoption:

#### RESOLUTIONS.

*Resolved*, That Fred T. Dubois is entitled to retain the seat he now holds as Senator from the State of Idaho for the full term commencing March 4, 1891.

*Resolved*, That William H. Clagett is not entitled to be admitted to a seat in the Senate from the State of Idaho for the term commencing March 4, A. D. 1891.

H. M. TELLER,  
*Chairman.*

GEO. F. HOAR.

JOHN H. MITCHELL.

WM. E. CHANDLER.

ANTHONY HIGGINS.

JAMES L. PUGH.

DAVID TURPIE.