

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 18, 1896.—Ordered to be printed.

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

REPORT:

[To accompany S. Res. 133.]

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

STATEMENT OF FACTS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROCEEDINGS OF THE LEGISLATURE.

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

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

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

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

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

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

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

AFFIDAVIT OF SAMUEL ALRICHS.

STATE OF DELAWARE,

Newcastle County, ss:

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

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

SAMUEL ALRICHS.

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

[SEAL.]

EDWARD J. COOK, *Notary Public.*

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

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

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

THE VITAL QUESTION.

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

PROPOSITIONS INVOLVED.

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

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

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

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

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

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

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

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

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

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

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

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

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

LEGAL PROPOSITIONS.

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

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

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

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

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

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

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

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

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

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

PROVISIONS OF THE DELAWARE CONSTITUTION.

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

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

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

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

Section 14, of Article III, is as follows:

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

Section 12, Article II, provides as follows:

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

Section 5 of Article III:

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

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

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

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

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

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

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

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

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

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

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

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

And in Article III, section 4, that—

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

Article III, section 11, provides as follows:

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

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

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

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

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

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

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

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

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

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

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

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

