

Chapter CLXXIII.

GENERAL ELECTION CASES, 1931 TO 1933.

1. Cases in the Seventy-second Congress. Sections 186-189.

186. The Illinois election case of Kunz v. Granata in the Seventy-second Congress.

Failure of a candidate to receive a number of votes equal to the number of "straight" tickets cast in an election was held to constitute such conclusive evidence of fraud as to warrant a recount of the vote.

An officer legally designated to take testimony in a contested election case performs such duty as the representative of the Congress.

Authority conferred by a statute "To require the production of papers" was construed to confer Authority to require the production of ballots, in an election held under the Australian ballot system.

On March 11, 1932,¹ Mr. John H. Kerr, of North Carolina, from the Committee on Elections No. 3, submitted the report of the majority in the case of Kunz v. Granata, of Illinois.

The official returns gave Peter C. Granata 16,565 votes and Stanley H. Kunz 15,394, a majority of 1,171 for the sitting Member.

A contest having been filed, a notary public was appointed commissioner to take evidence for the contestant, pursuant to the provisions of the Federal statute.²

In response to a subpoena duces tecum, issued by this commissioner, the board of election commissioners produced the ballots and after a recount, beginning September 11, 1931, and closing October 10, 1931, submitted through the commissioner a return showing that Peter C. Granata had received 15,057 votes and Stanley H. Kunz had received 16,345, a majority for the contestant of 1,288 votes.

The action of the commissioner in ordering a recount of the ballots and the revised returns reported are justified and approved by the majority in the following language:

We call the attention of the House to sections 10 and 11 of the city election act, a portion of the general election law of Illinois, under which law this election was held, in order that it may understand the method pursued in the counting and preservation of the ballots cast for contestant and contestee. The contestant was entitled to every "*straight ticket*" cast in this election; it was not a straight ticket unless his name was thereon unmolested along *with the other Democratic candi-*

¹First session Seventy-second Congress, House Report No. 778.

²U. S. Code, section 206, p. 13.

dates. The fact that the contestant did not receive the straight-ticket vote in many of the precincts is conclusive evidence of fraud or gross irregularity and mistakes, this could only be corrected by resort to the ballot boxes and a recount of the vote; when this was done and the straight-ticket vote given contestant which he had received, he overcame the contestee's apparent majority of 1,171 votes and defeated the contestee by a majority of 1,288 votes.

The minority views dissent from this conclusion and refer to the recount as "alleged," "pretended," and "unauthorized," and assert that the recount should have been made by a committee of the Congress. In refutation of this contention the majority declare that the notary public designated as commissioner to take testimony in the case and under whose direction the recount was made was an officer of and the representative of the Congress for that purpose. In support of this position, the majority cite the following decision:¹

Any one of the officers designated by Congress to take the depositions of such witnesses (whether he is appointed by the United States, such as a judge of a Federal court, or a register in bankruptcy, or by the State, such as a judge of one of its courts of record, a mayor or recorder of a city, or a notary public) performs this function, not under any authority derived from the State, but solely under the authority conferred upon him by Congress and in a matter concerning the Government of the United States.

It is further urged by the minority that the statute relied on by the contestant in procuring a recount, although providing for the production of "papers" by the officer or commissioner, does not authorize such commissioner to requisition "ballots." The minority quote the following excerpt from the statute² in confirmation of this view:

The officer (notary public in this case) shall have the power to require the production of papers.
* * * All papers thus produced, and all certified or sworn copies of official papers, shall be transmitted by the officer, with the testimony of the witnesses, to the clerk of the House of Representatives.

The minority views contend that—

There have been various decisions on the question as to whether papers used in this statute included ballots. In the contested election case of *Rinaker v. Downing*, the contestee procured an injunction in the Illinois court restraining the county clerk from opening the ballot boxes in response to a subpoena by a notary public. This is discussed in *Two Hinds' Precedents*, paragraph 1070. An able opinion of the attorney general of the State of Illinois held that ballots could not be produced under this statute.

The majority, however, hold:

We, the undersigned members of the committee, are of the opinion that "ballots" are papers pertaining to an election; in the instant case the election was held under the Australian ballot law in the State of Illinois.

The majority, therefore, submit a resolution seating the contestant as follows:

Resolved, That Peter C. Granata was not elected as Representative in the Seventy-second Congress from the eighth congressional district in the State of Illinois, and is not entitled to the seat as such Representative; and

Resolved, That Stanley H. Kunz was elected a Representative in the Seventy-second Congress from the eighth congressional district in the State of Illinois, and is entitled to his seat as such Representative.

¹ 134 U. S. 372.

² U. S. Code, Sec. 219, p. 14.

The report was debated at length in the House on April 8.¹ At the conclusion of the debate Mr. Ed. H. Campbell, of Iowa, offered the following motion to recommit:

Resolved, That the contested-election case of Stanley H. Kunz *v.* Peter C. Granata be recommitted to the Committee on Elections No. 3, with instructions either to recount such part of the vote for Representative in the Seventy-second Congress from the eighth congressional district of Illinois as they shall deem fairly in dispute, or to permit the parties to this contest, under such rules as the committee may prescribe, to recount such vote, and to take any action in the premises, by way of resolution or resolutions, to be reported to the House or otherwise, as they may deem necessary and proper.

The question being taken on agreeing to the motion to recommit, and the yeas and nays being ordered, the yeas were 178, nays 186, and the motion was rejected.

Whereupon, Mr. Charles L. Gifford, of Massachusetts, offered a substitute for the pending resolution as follows:

Resolved, That Peter C. Granata was elected a Representative to the Seventy-second Congress of the eighth congressional district of the State of Illinois.

On this question, on a yea-and-nay vote, there were 170 yeas and 189 nays, and the substitute was defeated.

The question recurring on the original resolution reported by the majority, on demand of Mr. Harry A. Estep, of Pennsylvania, it was divided and the clerk read the first part, as follows:

Resolved, That Peter C. Granata was not elected as Representative in the Seventy-second Congress from the eighth congressional district in the State of Illinois and is not entitled to the seat as such Representative; and—

The section was agreed to, yeas 190, nays 163.

The clerk then read the second section, which was agreed to by a viva voce vote, and Mr. Kunz appeared and took the oath.

187. The Pennsylvania election case of Kent *v.* Coyle, in the Seventy-second Congress.

Where no proof was adduced to support in any substantial way the allegations made in the notice of contest, the committee recommended confirmation of the right of the sitting Member to his seat.

Neither Congress nor its committees is bound by act of a State judge in a contested election case.

A committee of the House in passing on an election contest expressed disapproval of the course of the contestant in applying to local courts when Congress was in session.

On May 7, 1932,² Mr. J. Bayard Clark, of North Carolina, from the Committee on Elections No. 1, submitted the unanimous report of that committee in the Pennsylvania case of Kent. *v.* Coyle.

¹ First session, Seventy-second Congress, Record, p. 7490.

² First session, Seventy-second Congress, House Report No. 1264.

In this case the point at issue was chiefly confined to a question of fact involving the integrity of the count by local election officials of the votes cast in six election districts in one county. Certain citizens of these districts filed petitions with the county court alleging fraud in the computation of the returns and asked for a recount. In compliance with these petitions, under an act of 1927 of the Pennsylvania Legislature, the county court appointed a recount board and supervised a recount of the ballots, with the result that the amended returns showed a loss of 5 votes for the contestant and a gain of 13 votes for the contestee.

The contestant also took testimony before a notary public which related principally to the contract for printing the ballots and the manner in which the ballots were distributed, and charged undue delay on the part of the court in ordering the recount.

The report, however, recites that:

Considering the dates on which the petitions were verified, the committee could see no just grounds for complaint.

The report expresses disapproval of the action of the contestant in filing his action with the local authorities instead of bringing it directly to the House, and says:

The committee does not approve the manner in which the congressional vote was investigated, or placing in the record of this contest so much unnecessary data, including a tedious and argumentative opinion of the court as to who is entitled to the seat. But neither the committee nor Congress is bound in a matter of this kind by any act of a judge of a State court, whether within or beyond statutory authority.

The committee does not concede any right of a party to an election contest to take proof in any manner other than that fixed by Congress, but feels that contestant is not in a position to raise that point in this contest, for the following reasons:

In the first place the petitions were undoubtedly filed with contestant's consent and approval, by his supporters, and in the interest of his cause. Having filed notice of contest and taken testimony, he elected to go into the State court for a recount of ballots at a time when Congress was in session and this committee functioning.

In summarizing the contest, the committee conclude:

The committee felt that considering all the testimony relating to the election districts therein, no proof was offered tending to support in any substantial way the allegations made in the notice of contestant.

In accordance with these conclusions the committee reported the following resolution:

Resolved, That Everett Kent was not elected a Representative to the Seventy-second Congress from the thirtieth congressional district of the State of Pennsylvania, and is not entitled to a seat therein.

Resolved, That William R. Coyle was a duly elected Representative to the Seventy-second Congress from the thirtieth district of the State of Pennsylvania, and is entitled to retain his seat therein.

The report was called up in the House on May 24,¹ and the resolution confirming the sitting Member in his seat was agreed to without debate or division.

¹Record, p. 11055.

188. The Senate election case of Heflin v. Bankhead, of Alabama, in the Seventy-second Congress.

Instance of a contest inaugurated in the Senate by a petition sent to the desk by the contestant and read by the Clerk.

Form of resolution authorizing the Committee on Privileges and Elections to hear and determine a contested-election case and certify its conclusions to the Senate.

Instance wherein the committee rejected the majority report of its subcommittee and adopted the minority views.

On February 24, 1931,¹ in the Senate, Mr. J. Thomas Heflin, of Alabama, sent to the Clerk's desk a petition which was read by the Clerk as follows:

To the Senate of the United States:

Comes now J. Thomas Heflin and files this his contest for a seat in the United States Senate as Senator from the State of Alabama and contests the seat claimed by John H. Bankhead for the term beginning March 4, 1931, and as grounds for this contest shows to this honorable body that heretofore your petitioner, having been defrauded of the right to run in the regular Democratic primary held in the State of Alabama on the 12th day of August, 1930, the said John H. Bankhead was nominated in a primary known as the regular Democratic primary and held on the 12th day of August, 1930, and that said primary was reeking with fraud and corruption and that this fact was known to the said John H. Bankhead, and that as a result of said primary the said John H. Bankhead was known as the regular Democratic candidate for United States Senator from Alabama for said term, and that the said J. Thomas Heflin was nominated at a State convention held at Montgomery, in the State of Alabama, the 1st day of September, 1930, known as the Jeffersonian convention, and was known as the independent Democratic candidate on the Jeffersonian ticket. There were no other nominees on any ticket in the said State of Alabama as candidates for United States Senator from Alabama for said term.

That there are in the said State 67 counties, divided into about 1,400 election precincts, beats, or divisions; that the election for said office was held on the 4th day of November, 1930; that by the laws of the said State of Alabama the votes cast in the said various beats or precincts are canvassed and counted by the beat or precinct election officials in the respective beats or precincts in which the votes are cast; that said various election beat or precinct officials certify the results thereof to the various county canvassing boards composed in each county of the sheriff, judge of probate, and clerk of the circuit court, which board is authorized to receive such results in the counties in which the various beats or precincts are situated; that within brief interval thereafter the county boards of canvassers scrutinized such returns and in accordance with the laws of the State of Alabama an abstract of the various returns is made and certified to the secretary of the State.

That as a result of the canvass of the returns as certified to the secretary of state of Alabama it was declared that the said John H. Bankhead was shown by the returns to have received 150,985 votes for the said office of United States Senator at said election, and that the said J. Thomas Heflin had received a total of 100,969 votes for said office, the difference thus giving the said Bankhead an apparent plurality of 50,016 votes, and the said Bankhead claims his election on the basis of said apparent plurality and will probably present his claim upon the first convening of the Senate on or after March 4, 1931.

The petition then recited, in detail, matters relating to the primary and election on which the petitioner based his contest, and concluded:

Said contestant therefore comes to your honorable body with the sincere and profound belief that upon a fair and lawful recount of the ballots legally cast, and upon a complete audit of the

¹Third session, seventy-first Congress, Record, p. 5834.

poll list of voters participating in said election, together with a full and accurate survey of the ballots rejected, and on the elimination of fraudulent returns and results he will be shown to be the duly and lawfully elected United States Senator from the State of Alabama; and for that purpose and for all the purposes of truth and justice he therefore prays that your honorable body will make a full and complete examination into the situation and will so decide.

J. THOS. HEFLIN, *Contestant*.

The petition was authenticated by the following jurat:

DISTRICT OF COLUMBIA, ss.:

J. Thomas Heflin, being first duly sworn, upon oath deposes and says that he is the contestant named in the foregoing matter; that he has read the foregoing statement and knows the contents thereof; that the matters and things as therein set forth are true except as to those matters stated on information and belief, and as to those matters he believes it to be true.

J. THOS. HEFLIN.

Subscribed and sworn to before me this the 24th day of February, 1931.
[seal.]

CHARLES F. PACE,

Notary Public, District of Columbia.

My commission expires February 12, 1936.

The petition was referred to the Committee on Privileges and Elections which, on February 28,¹ submitted a resolution authorizing the committee to hear and determine the contest and certify its conclusions to the Senate. The Committee to Audit and Control the Contingent Expenses of the Senate to which the resolution was referred reported it back after brief consideration and it was agreed to without amendment as follows:

Whereas on the 24th day of February, 1931, the Senate referred to the Committee on Privileges and Elections the pending contest between J. Thomas Heflin and John H. Bankhead involving the question whether the said Heflin or the said Bankhead, or either of them, is entitled to membership in the United States Senate as a Senator from the State of Alabama: Now, therefore, be it

Resolved, That the Committee on Privileges and Elections is hereby authorized to hear and determine said contest and to take such evidence as it may deem proper in order to determine the questions involved, and certify its conclusions to the Senate.

Said committee is authorized by itself or by any subcommittee to investigate the questions aforesaid, and shall have authority to act by or through such agents or representatives as it may see fit to designate.

Said committee or any subcommittee thereof shall have power to issue subpoenas and require the production of all papers, books, documents, or other evidence pertinent to said investigation, and said committee or any subcommittee thereof may sit during the sessions of the Senate and during any recess of the Senate or of the Congress, and to hold its Sessions at such places as it may deem proper.

It shall have authority to employ clerks and other necessary assistance and to employ stenographers at a cost not to exceed 25 cents per 100 words, and to cause to be taken and recorded all evidence received by the committee, and to have said evidence printed for the information of the Senate.

The Sergeant at Arms of the Senate and his deputies and assistants are hereby required to attend the Said Committee on Privileges and Elections or any subcommittee thereof, and to execute its directions.

The chairman of the committee and each and every member thereof is hereby empowered to administer oaths and generally have such powers and perform such duties as are necessary or incident to the exercise of the powers and duties imposed by this resolution.

¹Record, p. 6462.

Said committee shall report to the Senate at the earliest practicable date.

The cost of investigations and proceedings in pursuance of the foregoing to be paid out of the contingent fund of the Senate and not to exceed \$25,000 in addition to any unexpended balance of the sum previously appropriated in Senate Resolution 467.

Pursuant to this resolution, the Committee on Privileges and Elections referred the contest to a subcommittee which held extended hearings and impounded and counted the ballots. At the conclusion of the recount the majority of the subcommittee reported to the committee that the primary was illegal and the election chargeable with fraud, and recommended that the Senate be advised that in the judgment of the subcommittee there was no election. The committee, however, rejected the report of the majority and adopted the view's of the minority, holding that the contestee, John H. Bankhead, was duly elected a Senator from the State of Alabama, and was entitled to his seat.

188a. A party committee authorized under the State code to fix the qualification of candidates, may exclude candidates failing to meet such qualifications and the failure of the committee to fix similar qualifications for voters does not affect the legality of the primary for which such qualifications were established.

In the absence of Federal legislation on the subject, the legality of State primaries is governed by the State statutes and general principles of law as declared in judicial decisions.

Laches on the part of the contestant in attempting to prevent, by injunction or otherwise, the placing of the contestee's name on the ballot was held to waive any irregularity connected with the primary.

Voters are not required to determine the legal eligibility of candidates to a place on the ballot and an election otherwise valid will not be held invalid because the certificate of nomination of the successful candidate is defective through the omission of some detail.

Objections to irregularities in the nomination of a candidate for office must be made prior to the election, and come too late thereafter.

In the meantime,¹ when the Senate convened for the first session of the Seventy-second Congress, and Senators elect were requested to present themselves at the Vice President's desk to take the oath of office, Mr. Samuel M. Shortridge, of California, as chairman of the Committee on Privileges and Elections, informed the Senate that a contest was pending between J. Thomas Heflin and John H. Bankhead as to which was entitled to membership in the Senate as a Senator from the State of Alabama.

Mr. Shortridge added:

I have made this statement, Mr. President, in justice to the committee, and particularly the subcommittee, and to the end that all rights of the parties involved are not to be prejudiced by the proceedings further to be taken this day.

Whereupon, the oath of office was administered to Mr. Bankhead.

¹First session Seventy-second Congress, Record, p. 3.

On April 18, 1932,¹ Mr. Walter F. George, of Georgia, and Mr. Sam G. Bratton, of New Mexico, from the Committee on Privileges and Elections, presented the majority report of the committee. The report first discussed the contention of the minority that the primary in which the contestee was nominated was illegal for the reason that a resolution of the State Democratic Committee, calling the primary, fixed as one of the qualifications for candidates a test of party loyalty in the preceding presidential election but did not fix this test for voters. The majority report points out that this issue had been disposed of by a decision of the Supreme Court of Alabama, and relates that:

After the resolution of the committee in question a bill was filed by a taxpayer in an equity court of Alabama seeking to enjoin the payment of public money for holding the primary on the ground that the action of the committee in fixing qualifications for voters which differed from those fixed for candidates destroyed the legality of the primary. The lower court and the Supreme Court declined to take jurisdiction of this bill on the ground that it did not present matter within the equitable cognizance of the court²

In confirmation of this decision the report also cites the case of *Lett v. Ennis*,³ decided by the same Court, in which M. F. Lett sought to become a candidate for a county office on the Republican ticket but declined to comply with a resolution of the Republican county committee requiring all candidates to state under oath how they voted in the general election of 1928. The county chairman refusing to certify his name unless he complied with this requirement of the committee, Lett instituted mandamus proceedings to compel certification.

On appeal, the Supreme Court of Alabama said in part:

We, therefore, conclude that the committee acted well within its authority, as expressly recognized by section 672 of the code, in prescribing the test oath of party loyalty, and that its action is not subject to the criticism that it was arbitrary or unreasonable.

As to the further question raised in the case relative to the right of the committee to fix differing qualifications for candidates and voters, the court said:

It is further suggested that under section 612 of the code the qualification of the voter is automatically fixed the same as the candidate, and that the resolution in question is violative thereof. But that section is not in any manner here involved, and a consideration of this insistence as to its proper construction is unnecessary. Petitioner seeks relief as a candidate and not otherwise. Any matter affecting those not candidates would in no wise alter petitioner's status. We have concluded the standard of qualification for the candidate is properly and legally fixed by the resolution, and petitioner's argument would but result in an enlargement, by alteration of law, of the qualifications of those not candidates. With this he is not concerned and is therefore in no position to question, as it would not affect the requirements of the resolution as to himself. His rights are to be determined by the fixed standard as to candidates, and the only statutory provision applicable thereto is section 672 of the code.

The majority report makes this application:

It is apparent that the contestant's situation with reference to the resolution of the Democratic committee is identical with that of Lett to the resolution of the Republican committee. The ruling of the supreme court of the State expressly deciding that Lett, being properly excluded by

¹ Senate Report No. 568.

² *Wilkinson v. Henry*, 211 Ala. 254.

³ 221 Ala. 432.

reason of his failure to qualify under the rule of the committee, could not be heard to raise the question as to the qualifications fixed for voters, is necessarily a determination by the highest judicial authority of the State of Alabama that the contestant in this case being, as a candidate, disqualified by the resolution of the Democratic committee, passed under its legal powers, is not in a position to raise the question as to the legality of the action of the committee in fixing qualifications for voters. Having been properly excluded from the primary, he was not concerned with its legality, or with the rights which it accorded to or withheld from voters in that primary.

The report then calls attention to the absence of Federal legislation affecting primaries and the consequent necessity of determining all questions relating to State primaries in the light of the statutes and court decisions of such States.

In this connection the report says:

It may be well to direct attention at this point to the fact that whatever the powers of the Congress, since the adoption of the seventeenth amendment, may be to regulate primaries in which nominations for the United States Senate are made, that there is no congressional legislation attempting to exercise this power at this time.

No intention has been shown by any Federal legislation, since the original corrupt practices act was declared invalid in the Newberry case, to exercise jurisdiction over State primaries. The legality of the Alabama primary in question must, therefore, be determined in the light of the Alabama statutes and general principles of law as declared in judicial decisions.

The report also stresses the failure of the contestant to make an effort to prevent the certification of contestee's name as the party candidate for United States Senator or to prevent the placing of this name on the ticket to be voted in the general election. It relates that:

On the contrary, he organized, or took part in the organization of, a separate political party known as the Jeffersonian, or Independent Party, and accepted the nomination of its convention or mass meeting for the office of United States Senator, and elected to submit his claim to the voters of the State of Alabama.

The contestant took no steps, by injunction or otherwise, to keep contestee's name off the ballot, as such nominee, to be voted on in the general election. He was content to submit the issue between himself and the contestee to the people. The action of the people, in the general election, in choosing contestee, cures any irregularity or illegality in the primary which selected contestee as the Democratic candidate.

The majority therefore conclude:

We are clear in our opinion that the exclusion of the contestant as a candidate from the Democratic primary, by the Democratic committee, was an act entirely within the power of the committee, and that the contestant being properly excluded from the primary can not be heard to raise the question as to the legality of the action of the committee in fixing the qualifications for voters in the primary in which he could not take part as a candidate.

We are likewise clear to the point that the contestant failing to take any timely action to prevent the name of the contestee from being certified or placed on the ballot as the Democratic nominee, can not, after his defeat at the polls in the general election, raise the question as to the legality of contestee's name on the ballot.

In support of the doctrine that unless objection is made to nominations, any irregularities may be considered as waived, the report cites the rule ¹:

Objections relating to nominations must be timely made; otherwise they may be regarded as waived. It is too late to make them after the nominee's name has been placed on the ballot and he has been elected to office; his election can not be impeached on the ground that statutory

¹20 Corpus Juris, p. 132.

requirements regarding nominations were not complied with in his case, or that his nomination was procured by unlawful means.

It also quotes the general rule as laid down in the authorities ¹:

The general rule in determining the effect of irregularities in the conduct of elections on the result thereof is applicable when an attempt is made to contest an election by reason of some irregularity in the nomination of candidates. It is the duty of courts to uphold the law by sustaining elections thereunder that have resulted in a full and fair expression of the public will, and from the current of authority the following may be stated as the approved rule: All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election, all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void. Voters finding the ticket or the names of candidates on the official ballot are not required to determine whether they are entitled to a place thereon, but may safely rely on the action of the officer of the law and on the presumption that they have performed their duty. And so an election in which the voters have fully, fairly, and honestly expressed their will is not invalid because the certificate of nomination of the successful candidate is defective through the omission of some detail. Nor is the title of the successful candidate affected by a subsequent decision holding the law under which the nominations were made invalid.

The report then quotes from the decision in the case of *Territory v. Kanealii*,² in which the doctrine is thus summarized:

The American authorities are almost unanimous in holding that objections to irregularities in the nomination of a person for office must be taken prior to the election, and that thereafter it is too late.

188b. An investigation disclosing no evidences of bribery, the failure of a candidate to comply with a State statute in the itemization of expenditures in a primary, was held to be a matter for the consideration of the State authorities in determining whether his name should be placed on the ballot and whether, after election, a certificate of election should be issued, and not pertinent to the determination of an election contest in the Senate.

Although compilation of lists of registered voters was required by State law, the mere absence of names of voters from these lists was not considered sufficient grounds for holding such voters unqualified or their votes illegal.

Failure to comply with the law in one precinct does not necessarily disqualify the vote cast in another precinct in the same election.

A recount disclosing a decisive majority for the sitting member, the Senate confirmed his title to his seat.

In reviewing the decisions the report deduces:

The basic principle upon which the foregoing authorities are grounded, and which is patently and fundamentally sound, is that the will of the people must prevail and can not be set aside by reason of technical objections relating to the way the candidates' name got on the ticket. Since

¹ Ruling Case Law, Vol. 9, sec. 161, p. 1172.

² 17 Hawaii 243.

the people had the right to choose, and did choose, between the two candidates, the method by which the candidates were presented for their choice is swept away by the action of the people.

The report thus takes up the charge of excessive expenditure of money.

We deem it important that there has been no finding, and could have been none from the evidence, that there was any excessive expenditure of money in the primary by Mr. Bankhead, or any conduct on his part in connection therewith that is subject to criticism.

We agree with the finding of the majority that no violation of the corrupt practices act of the State of Alabama, or of the United States, in the expenditure of money in excess of the amount allowed, has been shown.

The report of Mr. Bankhead of his expenditures, under the Alabama statute, has been criticized in that it is said that he did not comply with the statute in the proper itemization of some of his expenditures. This was a matter for the consideration of the State authorities in determining whether his name should go upon the ballot, and whether, after his election, a certificate of election should have been issued to him.

The subcommittee had reported that a large number of illegal votes were cast in the election and indicated that the conclusion that they were illegal was drawn from the fact that they were cast by voters who were not registered, and whose names did not appear on the list of qualified voters compiled by the probate judges of the several counties as required by State law.

The majority report dissents from this conclusion and holds:

No evidence has been offered to show that any of these persons were in fact not qualified voters. The chairman definitely assumes that they are all illegal voters merely because the name under which they voted as written on the poll list does not correspond with a similar name on the qualified list for that precinct.

The mere fact that the names of the voters casting these ballots were not found on the qualified list is not a sufficient basis for adjudicating them to be illegal votes.

It is our view that all of these ballots should be treated as legal until there is something more to show that they were cast by persons who were not qualified voters.

The report also takes issue with the proposition advanced by the minority to the effect that failure to comply with the law in isolated instances invalidated the election throughout the State. The report adds:

Nor does it follow, if the law was not fully complied with in any precinct in the State, that the vote cast at all the precincts, or at any of them, must be discarded.

In conclusion the majority announce:

Our conclusion and recommendation is that the contestee was duly elected a Senator from the State of Alabama in the election of November 4, 1930, and is entitled to his seat.

The case was debated at length in the Senate on April 21,¹ 22, 23, 25, 26, 27, and 28. On April 26,² in the course of debate, Mr. Park Trammell, of Florida, offered this motion:

Mr. President, I move that the contestant, former Senator J. Thomas Heflin, be permitted to address the Senate for not exceeding two hours in the pending contest.

¹ Record, pp. 8579, 8673, 8765, 8865, 8918, 9020, 9110.

² Record, p. 8872.

Mr. Joseph T. Robinson, of Arkansas, raised a question of order against the motion:

In support of the motion Mr. Trammell cited precedents and referred to the following instances in which contestants had been permitted to address the Senate in their own behalf:

At the opening of this Congress, December 1, 1851,¹² the credentials of Stephen R. Mallory, of Florida, were read, and Mr. Mallory took the oath prescribed by law and took his seat in the Senate. Mr. D. L. Yulee contested his seat. The select committee having the case in charge reported (August 21, 1852) that Mr. Mallory was duly elected and entitled to the seat; and on August 27, the Senate, by a vote of 23 to 21, agreed to consider this report. The same day the Senate refused to grant leave to Mr. Yulee "to be heard in person at the bar of the Senate"; yeas 17, nays 29; but, when the resolution was amended, granting the contestant the leave to be heard "for two hours," it was agreed to by a vote of yeas 31, nays 21. Mr. Yulee then appeared at the bar of the Senate and was heard. The resolution reported by the select committee declaring Mr. Mallory duly elected was agreed to; yeas 41, nays 0.

¹²First session, Thirty-second Congress, Senate Journal, pp. 6, 622, 625, 648-650; Dec. 1, 1851, Aug. 21, 23, 27, 1852.

On February 25, 1892,¹ the Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested seat in the Senate from the State of Idaho. Mr. William H. Claggett, the contestant, was given permission to occupy the floor and was given the right to speak not exceeding two hours. The next day the limitation as to the time allowed the contestant, William H. Claggett, was withdrawn. Mr. Claggett occupied the floor part of two days in his own defense.

Mr. George W. Norris, of Nebraska, supported the point of order and in response to the citation of precedents said:

Since I have been a Member of the Senate I have never known in a contest case anyone who was not a Member of the Senate to be allowed to address the Senate on the controversy, except in the case of Mr. Vare. By unanimous consent he was permitted to speak. I thought at the time it was a bad precedent. It is true that I had the right to object, and did not; but the reason why I did not object was because I had been quite active in the matter—I was the author of the resolution that excluded him and I did not feel that I ought to put myself in the attitude of making an objection. Mr. Vare also held a certificate of election from the governor of his State. He was permitted to speak by unanimous consent.

Mr. Bratton and Mr. Borah argued that while contestants had been permitted to debate their own cases in the instances referred to, a point of order had not been made in any case and the question was now being raised for the first time.

The Vice President² ruled:

The Chair has examined the record of the two cases cited by the Senator from Florida, Mr. Trammell, and finds that the point of order was not raised in either of them. There is no rule of the Senate on the subject; and, therefore, the Chair submits to the Senate the question as to whether or not the motion of the Senator from Florida is in order.

Thereupon, Mr. Robinson withdrew the point of order, and the question recurring on the motion of the Senator from Florida, and the yeas having been ordered, there were 33 yeas and 31 nays, and the motion was agreed to.

¹First session Fifty-second Congress, Journal, pp. 125, 127, 130.

²Charles Curtis, of Kansas, Vice President.

On the following day,¹ pursuant to the order, Mr. Heflin was addressing the Senate and had consumed the major portion of the two hours allotted to him, when Mr. Norris proposed:

Mr. President, I ask unanimous consent that the limitation of two hours be dispensed with, and that Mr. Heflin be allowed to conclude his remarks.

There was no objection and Mr. Heflin concluded his remarks. All debate having been concluded, the question was taken on substituting for the pending resolution the following proposed by Mr. Daniel O. Hastings of Delaware:

Strike out all after the word "*Resolved*" in the pending resolution, and insert in lieu thereof the following:

That it is the sense of the Senate that there was no legal election for United States Senator in Alabama in 1930, and that the seat now held by John H. Bankhead is hereby declared vacant.

The substitute was rejected, yeas 19, nays 63, and the resolution reported by the majority committee was then agreed to, yeas 64, nays 18, as follows:

Resolved, That John H. Bankhead is hereby declared to be a duly elected Senator of the United States from the State of Alabama for the term of six years, commencing on the 4th day of March, 1931, and is entitled to a seat as such.

189. The Oklahoma election case of O'Connor v. Disney, in the Seventy-second Congress.

Affirmation of the doctrine that official returns are presumed to be correct until shown to be otherwise.

Affirmation of the rule that the burden of proof in contested-election cases rests with the contestant.

In order to justify a recount of the ballots in a contested-election case, evidence must be produced to indicate reasonable grounds for belief both that the returns are incorrect and that a recount would change the result.

The returns from a recount are neither conclusive nor persuasive unless the ballots have been so effectually safeguarded as to preclude opportunity for tampering.

Judicial decision holding that where ballot boxes have been exposed to molestation the returns of the judges are better evidence of the result of the election than the ballots.

On May 11, 1932,² Mr. Joseph A. Gavagan, of New York, from the Committee on Elections No. 2, reported on the contested-election case of O'Connor v. Disney. The official returns gave the sitting Member a majority of 240 votes. The contestant charged that election officials in two counties of the district had through "mistake, error, misconstruction of the law and fraud" failed to count 607 votes which had been cast for him in Ottawa County, and 155 which should have been counted for him in Tulsa County.

Following the filing of the contest, depositions of numerous witnesses were taken before a county judge designated by the contestee and a notary public designated by the contestee, sitting as magistrates pursuant to the laws of the State of Oklahoma.

¹ Record, p. 8918.

² First session Seventy-second Congress, House Report No. 1288.

After reviewing the evidence thus adduced, the committee reduced the issue to two questions, first, whether there had been fraudulent errors which changed the result, and second, whether the ballots had been properly safeguarded.

The basis adopted by the committee for the consideration of these questions is thus set forth:

In the consideration of the evidence in the whole case, your committee has been guided by the following postulates deemed established by law and the rules and precedents of the House of Representatives:

“I. The official returns are prima facie evidence of the regularity and correctness of official action.

“II. The burden of coming forward with evidence to meet or resist the presumption of regularity rests with the contestant.

“III. That to entitle a contestant in an election case to an examination of the ballots, he must establish (a) that some fraud, mistake, or error has been practiced or committed whereby the result of the election was incorrect, and a recount would produce a result contrary to the official returns; (b) that the ballots since the election have been so rigorously preserved that there has been no reasonable opportunity for tampering with them.”

As to the first question, relating to the possibility of mistake or misconstruction of the law, the committee decided:

The testimony conclusively established that the precinct boards were duly and properly instructed as to the election law of the State of Oklahoma; as to the manner and method of counting ballots and especially, split ballots; that in some instances questions arose when a counter would pick up a split ballot, and thereupon the judge of the board would consult the law and properly instruct the counters and watchers as to the principles governing the counting of the ballots. The evidence on this point is so overwhelming that the majority of your committee is convinced that all ballots were properly and duly counted, and that the contestant has wholly failed to establish the burden of proof of any mistake in the method of counting of the ballots.

With regard to the second question, pertaining to preservation and protection of the ballots, the majority of the committee concluded:

The evidence as to the lack of care and preservation of the ballots and ballot boxes for a period of nine days is so clear and undisputed that one is impelled to the inference that the ballots were in fact tampered with or that there existed a grave possibility of having been tampered with.

In corroboration of this conclusion, it was developed by the testimony that money had been proffered and accepted in furtherance of a plan to alter the ballots while thus exposed in order to change returns from the vote cast for a county candidate on the same ballot with the contestant and contestee.

In discussing the inferences to be drawn from neglect to safeguard the ballots, the committee quote the following excerpt from an opinion¹ rendered by the Supreme Court of New York:

They (the returns) may be impeached for fraud or mistake, but in attempting to remedy one evil we should be cautious not to open the door to another and far greater evil. After the election it is known just how many votes are required to change the result. The ballots themselves can not be identified. They have no earmark. Everything depends upon keeping the ballot boxes secure. * * * Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere possibility of security is proved, but the fact must

¹People v. Livingston, 79 New York 279.

be shown with reasonable certainty. If the boxes have been rigorously preserved the ballots are the best and highest evidence; but if not, they are not only the weakest, but the most dangerous evidence. * * * Where ballots in an envelope sealed with the village seal are put by the village clerk in an unlocked desk, containing also the village seal, and situated in a room exposed to the public, and the envelope is partly torn by some unknown person while it remained in such desk, the ballots are not better evidence of the result of the election than the returns of the judges.

In summing up the case the majority of the committee draw the conclusion that—

In the opinion of the majority of your committee the record in this case is barren of any competent proof tending to show or establish fraud, mistake, or error, in either the counting of the ballots cast or the official returns of the vote

The majority also express the opinion that—

said record is sterile of proof of the safeguarding of the ballots after the said election, but contrarywise, is pregnant with positive evidence that said ballots were, for a 9-day period subsequent to said election, available, accessible, and perhaps subjected to public interference or private tampering; that the proof of such accessibility is so compelling as to give rise to a reasonable presumption that the sanctity of said ballots was indeed violated, the true result of the election falsified, and the will of the electorate defeated, thwarted, or destroyed.

Having thus determined the two issues on which the contest turned, the majority of the committee recommended:

Consequently, the majority of your committee believes that a recount of ballots cast in the said election would destroy the will of the electorate, defeat the true result of said election, and visit grave injustice on the duly elected Representative from said district.

We therefore submit the following resolution:

Resolved, That Wesley E. Disney was elected a Representative in the Seventy-second Congress from the first congressional district in the State of Oklahoma, and is entitled to a seat as such Representative."

Three members of the committee filed minority views dissenting from certain findings of fact but concurring in the recommendation that the contestee be confirmed in his seat.

The report was called up in the House by Mr. Gavagan, on May 24, 1932.¹ After debate the resolution reported by the committee was agreed to without a record vote.

¹Record, p. 11050.